

Dated: May 10, 2013.

Thomas M. Harrigan,
Deputy Administrator.

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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 5

[Docket No. TTB-2012-0001; T.D. TTB-113;
Re: Notice No. 126]

RIN 1513-AB91

Standards of Identity for Pisco and Cognac

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This final rule amends the Alcohol and Tobacco Tax and Trade Bureau regulations setting forth the standards of identity for distilled spirits to include Pisco as a type of brandy that must be manufactured in accordance with the laws and regulations of either Peru or Chile, as appropriate, governing the manufacture of those products. This final rule also removes “Pisco brandy” from the list of examples of geographical designations in the distilled spirits standards of identity, and it includes a technical correction to remove “Cognac” from the same list of examples. These changes provide greater clarity in distilled spirits labeling.

DATES: *Effective Date:* This final rule is effective July 15, 2013.

FOR FURTHER INFORMATION CONTACT: Karen Welch, Alcohol and Tobacco Tax and Trade Bureau, Regulations and Rulings Division; telephone 202-453-1039, ext. 046; email ITD@ttb.gov.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), codified in the United States Code at 27 U.S.C. 205(e), authorizes the Secretary of the Treasury (Secretary) to prescribe regulations relating to the packaging, marking, branding, labeling, and size and fill of containers of alcohol beverages that will prohibit consumer deception and provide the consumer with adequate information as to the identity and quality of the product. Section 105(e) of the FAA Act also generally requires bottlers and importers

of alcohol beverages to obtain certificates of label approval prior to bottling or importing alcohol beverages for sale in interstate commerce. Regulations implementing those provisions of section 105(e) as they relate to distilled spirits are set forth in part 5 of title 27 of the Code of Federal Regulations (27 CFR part 5). The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120-01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in the administration and enforcement of this law.

Certificates of Label Approval

TTB's regulations prohibit the release of bottled distilled spirits from customs custody for consumption unless an approved Certificate of Label Approval (COLA) covering the product has been deposited with the appropriate Customs officer at the port of entry. See 27 CFR 5.51. The TTB regulations also generally prohibit the bottling or removal from a plant of distilled spirits unless the proprietor possesses a COLA covering the labels on the bottle. See 27 CFR 5.55.

Classes and Types of Spirits

The TTB labeling regulations require that the class and type of distilled spirits appear on the product's brand label. See 27 CFR 5.32(a)(2) and 5.35. Those regulations provide that the class and type must be stated in conformity with § 5.22 of the TTB regulations (27 CFR 5.22) if defined therein. Otherwise, the product must be designated in accordance with trade and consumer understanding thereof, or, if no such understanding exists, by a distinctive or fanciful name, and in either case (with limited exceptions), followed by a truthful and adequate statement of composition (see 27 CFR 5.35).

Section 5.22 establishes standards of identity for distilled spirits products and categorizes these products according to various classes and types. As used in § 5.22, the term “class” refers to a general category of spirits, such as “whisky” or “brandy.” Currently, there are 12 different classes of distilled spirits recognized in § 5.22, including whisky, rum, and brandy. The term “type” refers to a subcategory within a class of spirits. For example, “Cognac” is a type of brandy, and “Canadian whisky” is a type of whisky.

Brandy and Pisco

Brandy is Class 4 in the standards of identity, where it is defined in § 5.22(d) as “an alcoholic distillate from the fermented juice, mash, or wine of fruit, or from the residue thereof, produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to the product, and bottled at not less than 80° proof.” “Pisco” is a term recognized by both the governments of Peru and Chile as a designation for a distilled spirits product made from grapes. Generally, Pisco is classified as brandy under the terms of TTB's current labeling regulations. However, Pisco is not currently listed as a type of brandy in Class 4. Rather, “Pisco brandy” has been included in Class 11, at § 5.22(k)(3), as an example of a geographical name that is not a name for a distinctive type of distilled spirits, and that has not become generic.

International Agreements

Pursuant to the United States-Peru Trade Promotion Agreement, the United States recognized Pisco Perú as a distinctive product of Peru (Article 2.12(2) of the Agreement). Accordingly, the United States agreed not to permit the sale of any product as Pisco Perú unless it has been manufactured in Peru in accordance with the laws and regulations of Peru governing Pisco.

In addition, pursuant to the United States-Chile Free Trade Agreement, the United States recognized Pisco Chileno (Chilean Pisco) as a distinctive product of Chile (Article 3.15(2) of the Agreement). Accordingly, the United States agreed not to permit the sale of any product as Pisco Chileno (Chilean Pisco) unless it has been manufactured in Chile in accordance with the laws and regulations of Chile governing the manufacture of Pisco.

In like manner, Peru and Chile agreed, respectively, to recognize Bourbon Whiskey and Tennessee Whiskey (which is defined in both Agreements as a straight Bourbon Whiskey authorized to be produced only in the State of Tennessee), as distinctive products of the United States, and not to permit the sale of any product as Bourbon Whiskey or Tennessee Whiskey unless it has been manufactured in the United States in accordance with the laws and regulations of the United States governing the manufacture of Bourbon Whiskey and Tennessee Whiskey. (TTB notes that there are alternative spellings for the same term—“whisky” in the TTB regulations in 27 CFR part 5 and “whiskey” in the Agreements with Peru and Chile.)

Pisco Production

“The Oxford Companion to Wine” (Jancis Robinson, ed., Oxford University Press, 2d ed., 2001, p. 536) reports that Spanish colonists began producing aguardiente (grape spirits) in both Peru and Chile in the sixteenth century, and it describes such spirits as being produced near the town of Pisco, Peru. Further, “The Oxford Companion to Wine” says “‘Pisco’ is an aromatic brandy made in Peru, Chile, and Bolivia, mainly from Muscatel (muscat) grapes.” According to “Alexis Lichine’s Encyclopedia of Wines and Spirits” (Alexis Lichine, ed., 5th ed., Alfred A. Knopf, Inc., 1987), “Pisco brandy” is brandy distilled from Muscat wine in Peru, Chile, Argentina, and Bolivia. Peru and Chile have promulgated standards for the production of Pisco.

Notice of Proposed Rulemaking

On March 27, 2012, TTB published Notice No. 126 in the **Federal Register** (77 FR 18146) proposing to amend § 5.22 to clarify the status of Pisco under the standards of identity. Specifically, TTB proposed amending § 5.22(d), which lays out the standard of identity for brandy. In Notice No. 126, TTB stated that it believes that Pisco generally meets the U.S. standard for brandy and should be classified as a type of brandy. TTB also asserted that evidence suggests that the generally recognized geographical limits of the Pisco-producing areas do not extend beyond the boundaries of Chile and Peru. The wine and spirits authorities cited above indicate that Pisco production is not associated with any areas outside of South America.

As stated in Notice No. 126, COLAs naming “Pisco” as the brand name or fanciful name of a distilled spirits product are almost exclusively for products from Chile and Peru. TTB could not locate any COLAs naming “Pisco” as the brand name or fanciful name for any products from Argentina, or from any other country in South America other than Peru, Chile, and Bolivia. COLAs for products from Bolivia that name “Pisco” as the brand name or fanciful name also use the term “Singani.” “The Oxford Companion to Wine” defines “Singani” as an “aromatic grape-based spirit rather like pisco in that it is high in terpenes and made under a strictly controlled regime, principally from Muscat of Alexandria grapes” that is a specialty of Bolivia (Robinson, p. 638). Bolivia maintains standards for Singani production in Bolivia, but does not have standards for Pisco production.

In Notice No. 126, TTB specifically proposed to amend the standard of identity in § 5.22(d) to add Pisco as a type of brandy that is manufactured in Peru or Chile in compliance with the laws of the country of production regulating the manufacture of Pisco. The proposed amendment would also recognize the phrases “Pisco Perú” (with or without the diacritic mark, i.e., “Pisco Perú” or “Pisco Peru”), “Pisco Chileno,” and “Chilean Pisco,” as equivalent class and type names of the product, to reflect the provisions of the trade agreements. TTB clarified that if Pisco is recognized as a type of brandy, persons who distribute it in the United States will be entitled to label the product according to its type designation “Pisco” without the term “brandy” on the label, in the same way that a product labeled with the type designation “Cognac” is not required to also bear the class designation “brandy.”

TTB noted that the Peruvian standard allows products designated as Pisco to have an alcohol content ranging from 38 to 48 percent alcohol by volume, and the Chilean standard allows products designated as Pisco to have an alcohol content as low as 30 percent alcohol by volume. TTB further clarified that since the standard proposed in Notice No. 126 would identify Pisco as a type of brandy, and the U.S. standard requires that brandy must be bottled at not less than 40 percent alcohol by volume, or 80° proof, any “Pisco” imported into the United States would have to conform to this minimum bottling proof requirement. A product that is bottled at below 40 percent alcohol by volume would fall outside the class and type designation. TTB stated that under the proposed regulations, depending on the way that such a product is manufactured, it could be labeled as a “diluted Pisco” or as a distilled spirits specialty product bearing a statement of composition.

Finally, TTB proposed to remove both “Pisco brandy” and “Cognac” from § 5.22(k)(3), where they are listed as examples of geographical names that are not names for distinctive types of distilled spirits, and that have not become generic. TTB proposed this amendment for two reasons. First, Pisco will appear in new § 5.22(d)(9), where it will be a type of brandy defined as grape brandy manufactured in Peru or Chile in accordance with the laws and regulations of the country of manufacture governing the manufacture of Pisco. Second, Cognac currently appears in § 5.22(d)(2), where it is a type of brandy defined as “grape brandy distilled in the Cognac region of France,

which is entitled to be so designated by the laws and regulations of the French Government.” The inclusion of “Cognac” in the list of examples of geographical names that are not names for distinctive types of distilled spirits, and that have not become generic, in § 5.22(k)(3) is duplicative and confusing. Accordingly, TTB proposed to remove the reference to Cognac in § 5.22(k)(3) as a technical correction to the regulations.

Effect on Currently Approved Labels

In Notice No. 126, TTB stated that the proposed change to the regulations would revoke by operation of regulation any COLAs that specify “Pisco” as the class and type or, brand name, or fanciful name of distilled spirits products that are not products of Peru or Chile. TTB also noted that it had searched its COLA database, and believes that this rulemaking will affect only a small number of labels.

Comments Received and TTB Response

TTB received eleven comments in response to Notice No. 126. All comments appear on “Regulations.gov,” the Federal Rulemaking portal, at <http://www.regulations.gov>, in Docket No. TTB–2012–0001. The Distilled Spirits Council of the United States (DISCUS) (Comment 5) wrote “in strong support of the proposed amendments.” Another commenter identifying his organization as Campo de Encanto Pisco (Comment 4) wrote that Pisco’s “history, tradition and current resurgence in the U.S. should be respected and its status as a unique category of distillate should be labeled and promoted accordingly.” The Regulatory Council to Guarantee the Origin and Quality of Pisco, which is a non-profit organization subject to the laws and courts of the Republic of Peru and which represents the beneficiaries of the Pisco denomination of origin submitted an informative comment (Comment 7) detailing the Pisco production process. The comment did not state a position on TTB’s proposal. TTB did not receive any comments concerning any COLAs that would be revoked by operation of regulation were the proposed rule to be adopted as a final rule.

Comments Concerning Aging in Wood/Oak Containers

One individual’s comment (Comment 2) stated, “[t]he technical premise for this proposed rule, at least in the case of Peruvian Pisco, is erroneous. Pisco is a distilled spirit, NOT a brandy because it is not stored in wood casks.” [Emphasis in original.] Another commenter, Chile’s Agricultural and

Livestock Service (SAG), (Comment 11) also argued that classifying Pisco as a type of brandy "is not appropriate because it does not take into account international definitions such as the OIV [(International Organization of Vine and Wine)]," which define Pisco as a "spirit product" and provide that brandy must be aged in oak containers.

TTB Response

TTB disagrees with the two commenters who assert that Pisco is not a brandy because it might not be aged or stored in wood/oak containers. TTB and its predecessor agencies have long considered Pisco to be a brandy, as evidenced by its listing in § 5.22(k)(3) as "Pisco brandy" since 1936. The relevant definition is the definition of brandy in § 5.22(d), rather than definitions of brandy in other jurisdictions, and this regulation does not specify that brandy must be stored or aged in oak containers. TTB notes that § 5.22(d)(1) generally provides that grape brandy that has been stored in oak containers for less than two years must be labeled with the word "immature," but also lists several types of brandy (specifically neutral brandy, pomace brandy, marc brandy, and grappa, as well as any fruit brandy that is not derived from grapes) that are exempt from this requirement. To recognize that Peruvian and Chilean Pisco production practices do not generally require that Pisco be stored or aged in oak containers, in the final rule text, TTB is amending § 5.22(d)(1) to clarify that Pisco not stored in oak containers for at least 2 years is also exempt from any requirement that it be labeled with the word "immature."

Comments Concerning the 40 Percent ABV Requirement

Six commenters expressed concerns about the proposed 40 percent alcohol by volume minimum alcohol content for Pisco. One individual commenter (Comment 1) stated, "To ensure that the integrity of the Pisco brandy * * * is not compromised, the requirement . . . [for] Pisco brandy to be consumed in the United States [should] not require 40% alcohol by volume." Another individual (Comment 3) stated that, "TTB should reconsider the classification of Pisco as a brandy so that the regulation recognizes all Piscos that are manufactured in compliance with the laws" of their respective countries of origin. A third individual (Comment 6) proposed that TTB adopt an exception for Pisco to the requirement that brandy be bottled at not less than 40 percent alcohol by volume. The commenter also argued that requiring Pisco bottled at less than 40 percent alcohol by volume

to be labeled differently would confuse consumers.

The Pisco Producers Association of Chile (Comment 9), the Directorate-General for International Economic Relations of Chile's Ministry of Foreign Affairs (Comment 10), and Chile's Agricultural and Livestock Service (SAG) (Comment 11) also expressed concerns about the proposed 40 percent alcohol by volume minimum alcohol content for Pisco. These commenters pointed out that Chilean law permits production of Pisco with an alcohol content by volume of as low as 30 percent, and requested that TTB take this into consideration.

TTB Response

TTB notes that the U.S. standards of identity for distilled spirits require that all of the major classes of distilled spirits (neutral spirits (including vodka), whisky, gin, brandy, rum, and tequila) be bottled at not less than 80° proof (which is equivalent to 40 percent alcohol by volume). TTB believes it is appropriate to apply this 80° proof standard to like products of foreign countries so that the same standard applies to domestic producers and foreign producers. There is precedent for applying this 80° proof standard to distinctive products of other countries. The standard of identity for Tequila in § 5.22(g), which states that "Tequila is a distinctive product of Mexico, manufactured in Mexico in compliance with the laws of Mexico regulating the manufacture of Tequila for consumption in that country," applies the 80° proof minimum despite the fact that Mexican regulations allow Tequila to be bottled at 35 percent alcohol by volume (70° proof).

As noted above, products that are manufactured in Peru or Chile in accordance with the laws and regulations governing the manufacture of Pisco in those countries and that contain less than 40 percent alcohol by volume could be imported into the United States labeled as a "diluted Pisco" or as distilled spirits specialty products bearing a statement of composition. This is not a new requirement; under TTB's current practice and that of its predecessor agencies, "Pisco" products imported into the United States from Chile or Peru containing less than 40 percent alcohol by volume must be labeled as "diluted Pisco" or as a distilled spirits specialty product bearing a statement of composition. This final rule does not change that requirement. Finally, TTB believes that maintaining this consistent and long-standing 80° proof minimum for the major classes of distilled spirits

would prevent consumer confusion rather than create it.

Comment From the Government of Peru

The Government of Peru submitted a comment concerning several different issues (Comment 8). The comment included a history of the name "Pisco" and a description of the production process for Peruvian Pisco. The Government of Peru also suggested that the current regulations prevent the import and trade of products with the name "Pisco" that "do not come from the place of origin of 'Pisco' (Peru)." Second, the Government of Peru requests that we confirm its understanding that 27 CFR 5.51 and 5.55, which require a COLA before imported and domestic products are removed from bond, will apply to "imported and domestic commercialization".

Finally, the Government of Peru argued that Pisco produced in Peru is very different from other grape or wine brandies, and proposed that TTB, instead of creating one type designation in Class 4 for "Pisco" that would include both Peruvian and Chilean Pisco, create a Class 4 type designation for Peruvian Pisco to include the terms "Pisco Peru" and "Pisco". The Government of Peru, in its comment, leaves to the consideration of United States authorities what standard of identity should be created for the "grape/wine brandy" manufactured in Chile.

TTB Response

TTB believes that evidence suggests that the generally recognized geographical limits of the Pisco-producing areas do not extend beyond the boundaries of Peru and Chile. TTB believes this rulemaking is necessary to prevent confusion on this issue. Furthermore, TTB confirms that the standard of identity for Pisco will apply to the universe of distilled spirits removed either from U.S. Customs custody or from the bonded premises of a domestic distilled spirits plant.

TTB considered the alternate proposal from the Government of Peru, and found that it would give rise to several unintended consequences. Currently, pursuant to § 5.22(k)(3), TTB allows the terms "Pisco" and "Pisco brandy" to be used on labels for products manufactured in either Peru or Chile. If TTB amended its regulations to remove "Pisco brandy" from § 5.22(k)(3) and provide type designations for "Pisco Perú" and "Pisco Chileno (Chilean Pisco)" but not a type designation for "Pisco," all of the existing COLAs using "Pisco" or "Pisco brandy" as the class

and type designation—estimated at approximately 100 COLAs— would be revoked by operation of regulation. The existing COLAs using “Pisco” or “Pisco brandy” would not fit into either the “Pisco Perú” or the “Pisco Chileno (Chilean Pisco)” type designation, and these COLAs would not comply with TTB’s regulations without the broader, overall type designation for “Pisco.” TTB does not believe that such a disruption to the trade is warranted. TTB also notes that consumers will easily be able to identify the country of origin of any Pisco product because under 27 CFR 5.32(b)(2), imported distilled spirits product labels must include the country of origin.

Clarification of the Regulatory Language

DISCUS, in response to Notice No. 127, which proposed a standard of identity for Cachaça, questioned the wording of that proposed standard of identity. In Notice No. 127, TTB proposed to define Cachaça as “a type of rum that is a distinctive product of Brazil, manufactured in Brazil in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country” (emphasis added). DISCUS commented that the highlighted language could inadvertently cause confusion as to whether a product that is produced in full conformity with Brazil’s regulations governing the manufacture of Cachaça for consumption in Brazil and bottled at less than 40 percent alcohol by volume could be labeled and sold in the United States as “Cachaça.” DISCUS also noted that deleting this language would be consistent with TTB Notice No. 126, Standards of Identity for Pisco and Cognac.

TTB believes that including the phrase “for consumption in that country” is appropriate for both Cachaça and Pisco because the wording clarifies that the laws of the country of manufacture cannot provide standards that are different for products being exported than for products to be consumed within the country of manufacture. TTB inadvertently omitted this phrase in its proposed standard of identity for Pisco in Notice No. 126, and believes, for clarity, that the phrase should be included in the final rule text. However, such a requirement does not override the current practice, described above, that “Pisco” products imported into the United States from Chile or Peru containing less than 40 percent alcohol by volume must be labeled as “diluted Pisco” or as a distilled spirits specialty product bearing a statement of composition.

TTB Finding

After careful review of the comments discussed above, and after consideration of the obligations incurred in the international agreements, TTB has determined that it is appropriate to adopt the proposed regulatory amendments contained in Notice No. 126, with the two modifications (the clarification that Pisco need not be aged in oak containers, and the addition of the phrases “for consumption in the country of manufacture” and “for consumption in that country,”) as discussed above. TTB notes that these regulatory changes will revoke by operation of regulation any COLAs that specify “Pisco” as the class and type or, brand name, or fanciful name of distilled spirits products that are not products of Peru or Chile.

Regulatory Flexibility Act

Pursuant to the requirements of the Regulatory Flexibility Act (5 U.S.C. chapter 6), TTB certifies that this final rule will not have a significant economic impact on a substantial number of small entities. These amendments clarify the status of Pisco under the standards of identity for distilled spirits and do not impose, or otherwise cause, a significant increase in reporting, recordkeeping, or other compliance burdens on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 12866

This final rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, it requires no regulatory assessment.

Drafting Information

Karen E. Welch of the Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, drafted this document.

List of Subjects in 27 CFR Part 5

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Liquors, and Packaging and containers.

Amendment to the Regulations

For the reasons discussed in the preamble, TTB amends 27 CFR part 5 as follows:

PART 5—LABELING AND ADVERTISING OF DISTILLED SPIRITS

■ 1. The authority citation for part 5 continues to read as follows:

Authority: 26 U.S.C. 5301, 7805, 27 U.S.C. 205.

■ 2. Section 5.22 is amended by:

■ a. In paragraph (d) introductory text, removing the words “paragraphs (d)(1) through (8)” and adding, in their place, the words “paragraphs (d)(1) through (9)”;

■ b. In paragraph (d)(1), in the third sentence, revising the parenthetical phrase to read “(other than neutral brandy, pomace brandy, marc brandy, grappa brandy, Pisco, Pisco Perú, or Pisco Chileno)”;

■ c. In paragraph (k)(3), by removing the words “Cognac,” and “Pisco brandy,;” and

■ d. Adding new paragraph (d)(9) to read as follows:

§ 5.22 The standards of identity.

* * * * *

(d) * * *

(9) “Pisco” is grape brandy manufactured in Peru or Chile in accordance with the laws and regulations of the country of manufacture governing the manufacture of Pisco for consumption in the country of manufacture.

(i) “Pisco Perú” (or “Pisco Peru”) is Pisco manufactured in Peru in accordance with the laws and regulations of Peru governing the manufacture of Pisco for consumption in that country.

(ii) “Pisco Chileno” (or “Chilean Pisco”) is Pisco manufactured in Chile in accordance with the laws and regulations of Chile governing the manufacture of Pisco for consumption in that country.

* * * * *

Signed: February 7, 2013.

John J. Manfreda,
Administrator.

Approved: March 5, 2013.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0375]

Safety Zone; Milwaukee Harbor, Milwaukee, WI

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone for the 2013 Pridefest