

## PART 226—LEASING OF OSAGE RESERVATION LANDS FOR OIL AND GAS MINING

■ 9. The authority citation for part 226 is revised to read as follows:

**Authority:** Sec. 3, 34 Stat. 543; secs. 1, 2, 45 Stat. 1478; sec. 3, 52 Stat. 1034, 1035; sec. 2(a), 92 Stat. 1660; and Sec. 701, Pub. L. 114–74, 129 Stat. 599.

### § 226.42 [Amended]

■ 10. In § 226.42, remove “\$891” and add in its place “\$906”.

### § 226.43 [Amended]

■ 11. In § 226.43:

■ a. Remove “\$89” each time it appears and add in each place “\$90” wherever it appears in this section.

■ b. In paragraph (e), remove “\$178” and add in its place “\$181”.

■ c. In paragraph (f), remove “\$356” and add in its place “\$362”.

■ d. In paragraph (g), remove “\$891” and add in its place “\$906”.

## PART 227—LEASING OF CERTAIN LANDS IN WIND RIVER INDIAN RESERVATION, WYOMING, FOR OIL AND GAS MINING

■ 12. The authority citation for part 227 is revised to read as follows:

**Authority:** Sec. 1, 39 Stat. 519; and Sec. 701, Pub. L. 114–74, 129 Stat. 599, unless otherwise noted.

### § 227.24 [Amended]

■ 13. In § 227.24, remove “\$1,250” and add in its place “\$1,270”.

## PART 243—REINDEER IN ALASKA

■ 14. The authority citation for part 243 is revised to read as follows:

**Authority:** Sec. 12, 50 Stat. 902; 25 U.S.C. 500K; and Sec. 701, Pub. L. 114–74, 129 Stat. 599.

### § 243.8 [Amended]

■ 15. In § 243.8(a) introductory text, remove “\$5,893” and add in its place “\$5,989”.

## PART 249—OFF-RESERVATION TREATY FISHING

■ 16. The authority citation for part 249 is revised to read as follows:

**Authority:** 25 U.S.C. 2, and 9; 5 U.S.C. 301; and Sec. 701, Pub. L. 114–74, 129 Stat. 599, unless otherwise noted.

### § 249.6 [Amended]

■ 17. In § 249.6(b), remove “\$1,250” and add in its place “\$1,270”.

Dated: January 11, 2017.

**Lawrence S. Roberts,**

*Principal Deputy Assistant Secretary—Indian Affairs.*

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## DEPARTMENT OF THE TREASURY

### Alcohol and Tobacco Tax and Trade Bureau

#### 27 CFR Parts 24 and 27

[Docket No. TTB–2016–0014; T.D. TTB–147; Re: Notice No. 168]

RIN 1513–AC31

### Implementation of Statutory Amendments Requiring the Modification of the Definition of Hard Cider

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

**ACTION:** Temporary rule; Treasury decision; cross reference to notice of proposed rulemaking.

**SUMMARY:** This temporary rule amends the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations to implement changes made to the definition of “hard cider” in the Internal Revenue Code of 1986 by the Protecting Americans from Tax Hikes Act of 2015. The modified definition broadens the range of wines eligible for the hard cider tax rate. TTB is amending its regulations to reflect the modified definition of hard cider effective for products removed on or after January 1, 2017, and to set forth new labeling requirements to identify products to which the hard cider tax rate applies. The new labeling requirements include both a one-year transitional rule and a new labeling requirement that takes effect for products removed on or after January 1, 2018. TTB is also soliciting comments from all interested parties on these amendments through a notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**.

**DATES:** This temporary rule is effective January 23, 2017.

**FOR FURTHER INFORMATION CONTACT:** Kara Fontaine, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; telephone (202) 453–1039 ext. 103.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *Protecting Americans From Tax Hikes Act of 2015*

On December 18, 2015, the President signed into law the Consolidated Appropriations Act, 2016 (Pub. L. 114–113). Division Q of this Act is titled the Protecting Americans from Tax Hikes Act of 2015 (PATH Act). Section 335(a) of the PATH Act amends the Internal Revenue Code of 1986 (IRC) at 26 U.S.C. 5041 by modifying the definition of hard cider for excise tax classification purposes. Pursuant to section 335(b) of the PATH Act, the amended definition of hard cider applies to such products removed on or after January 1, 2017. The PATH Act does not change the tax rate applicable to wine eligible for the hard cider tax rate; rather, it broadens the range of products to which the hard cider tax rate applies. Among other things, the range of products to which the hard cider tax rate applies will include certain sparkling and carbonated products and certain products that are subject to the requirements of the Federal Alcohol Administration Act (FAA Act).

### *TTB Authority*

The Alcohol and Tobacco Tax and Trade Bureau (TTB) of the Department of the Treasury administers chapter 51 of the IRC, which sets forth the Federal excise taxes on wine and related provisions, including provisions addressing the production and marking of wine (see 26 U.S.C. chapter 51). Section 5041 of the IRC (26 U.S.C. 5041) imposes six excise tax rates, including the hard cider tax rate, on wines. These tax rates are associated with six tax classes that correspond to section 5041(b) subparagraphs (1) through (6), as follows:

- Section 5041(b)(1) imposes a tax of \$1.07 per wine gallon<sup>1</sup> on still wines containing not more than 14 percent alcohol by volume.

- Section 5041(b)(2) imposes a tax of \$1.57 per wine gallon on still wines containing more than 14 percent and not exceeding 21 percent of alcohol by volume.

- Section 5041(b)(3) imposes a tax of \$3.15 per wine gallon on still wines containing more than 21 percent and not exceeding 24 percent of alcohol by volume.

- Section 5041(b)(4) imposes a tax of \$3.40 per wine gallon on champagne and other sparkling wines.

<sup>1</sup> The TTB regulations in 27 CFR 24.10 define the term “wine gallon” as “a United States gallon of liquid measure equivalent to the volume of 231 cubic inches.”

- Section 5041(b)(5) imposes a tax of \$3.30 per wine gallon on artificially carbonated wines.

- Section 5041(b)(6) imposes a tax of \$0.226 per wine gallon on hard cider.

With regard to the hard cider tax class, prior to the effective date of the hard cider provisions of the PATH Act, section 5041(b)(6) defines the term “hard cider” as a still wine derived primarily from apples or apple concentrate and water, containing no other fruit product, and containing at least one-half of 1 percent and less than 7 percent alcohol by volume. Under section 5041(a), a “still wine” is a wine containing not more than 0.392 gram of carbon dioxide per 100 milliliters of wine, with tolerances “as may be reasonably necessary in good commercial practice” as prescribed by regulation.

Section 5041(c) allows a credit of up to 90 cents per wine gallon for small domestic wine producers on the first 100,000 gallons of wine taxed at one of the three still wine tax rates or at the artificially carbonated wine tax rate removed for consumption or sale during a calendar year, under certain prescribed circumstances. The law allows a credit of up to 5.6 cents per wine gallon for small domestic producers on wine that is taxed at the hard cider tax rate. Section 5041(c) does not provide a credit against taxes imposed under section 5041(b)(4) on wine that is taxed at the champagne or other sparkling wine tax rate.

The tax on wine is determined at the time of removal (generally, removal from a bonded wine premises or release from customs custody) for consumption or sale (26 U.S.C. 5041(a)). Wine so removed must be in containers bearing marks and labels evidencing compliance with the IRC as the Secretary of the Treasury may by regulations prescribe (26 U.S.C. 5368(b)). Proprietors of bonded wine premises and importers must keep records, in such a form, and containing such information, as the Secretary may by regulations prescribe (26 U.S.C. 5367 and 26 U.S.C. 5555). Section 7805 of the IRC (26 U.S.C. 7805) provides the Secretary with authority to issue regulations to carry out the provisions of the IRC.

In addition to the IRC requirements, wine is subject to the requirements of the FAA Act. As defined by the FAA Act, the term “wine” includes apple and pear wine containing at least 7 percent alcohol by volume (27 U.S.C. 211(a)(6)). Section 105(e) of the FAA Act, codified at 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine to, among other things, prohibit

consumer deception and the use of misleading statements on labels and to ensure that the labels provide the consumer with adequate information as to the identity and quality of the product. The FAA Act generally requires bottlers and importers to obtain a TTB certificate of label approval (COLA) prior to bottling wine or removing bottled wine from customs custody for sale in interstate or foreign commerce. Section 103 of the FAA Act, codified at 27 U.S.C. 203, also requires that producers, blenders, wholesalers, and importers of wine that contains at least 7 percent alcohol by volume obtain a “basic permit” to engage in such businesses. The Alcoholic Beverage Labeling Act of 1988 (ABLA) requires a health warning statement to appear on containers of all alcoholic beverages, including wine, containing at least one-half of one percent alcohol by volume (27 U.S.C. 214 and 215).

TTB administers chapter 51 of the IRC and the FAA Act, and their implementing regulations, 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, dated December 10, 2013 (superseding Treasury Order 120-01, dated January 24, 2003), to the TTB Administrator to perform the functions and duties in the administration and enforcement of these laws. Regulations that implement the provisions of the IRC, as they relate to wine, include regulations in part 24 (27 CFR part 24) for domestic wine and part 27 (27 CFR part 27) for imported wine. Regulations that implement the provisions of FAA Act, as they relate to wine, include regulations in parts 1 and 4 (27 CFR parts 1 and 4). Regulations that implement the provisions of ABLA are in part 16 (27 CFR part 16).

## II. History of the Regulatory Definition of Hard Cider for Tax Purposes

The Taxpayer Relief Act of 1997 (TRA), Public Law 105-34, enacted on August 5, 1997, added the tax class for wine called “hard cider” in 26 U.S.C. 5041(b)(6), as shown above. The definition of wine eligible for the “hard cider” tax classification, as enacted by the TRA, was clarified (to specify that “hard cider” is a “still wine”) by the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105-206. This clarification was effective October 1, 1997, the same effective date as the hard cider provisions of the TRA.

On August 21, 1998, pursuant to the TRA, the Bureau of Alcohol, Tobacco, and Firearms (ATF), TTB’s predecessor agency, published a temporary rule in

the **Federal Register** (T.D. ATF-398, 63 FR 44779) amending part 24 of the TTB regulations to add a definition of wine that was eligible for the new hard cider excise tax rate found in 26 U.S.C. 5041(b)(6). ATF also issued a concurrent notice of proposed rulemaking (Notice No. 859, 63 FR 44819) inviting comments on the temporary rule.

The portion of the temporary rule related to cider generated comments on the proposed definition of cider and the labeling rules. In particular, many commenters expressed concern that the labeling rules for hard cider in T.D. ATF-398 did not allow for the appropriate designation of their products. The temporary rule would have changed both the IRC and the FAA Act labeling rules to require use of the term “hard cider” on products that are taxable as hard cider, and prohibit use of that term on any other wine. In response to the comments ATF received regarding T.D. ATF-398, ATF published T.D. ATF-418 (64 FR 51896) on September 27, 1999, postponing the labeling compliance date for the rules in T.D. ATF-398. At the same time, ATF published Notice No. 881 (64 FR 51933) to solicit comments on alternative labeling rules. ATF subsequently published T.D. ATF-430 (65 FR 57734) on September 26, 2000, postponing the labeling compliance date until January 31, 2001.

ATF finalized this temporary rule on November 26, 2001, with the publication of T.D. ATF-470 (66 FR 58938). ATF defined the term “hard cider” in 27 CFR 24.10 as a still wine derived primarily from apples or apple concentrate and water (apple juice, or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration, must represent more than 50 percent of the volume of the finished product); containing no other fruit product nor any artificial product which imparts a fruit flavor other than apple; containing at least one-half of 1 percent and less than 7 percent alcohol by volume; having the taste, aroma, and characteristics generally attributed to hard cider, and sold or offered for sale as hard cider and not as a substitute for any other alcohol product.

The regulatory definition clarified the statutory definition in two respects. First, in the preamble of T.D. ATF-398, ATF explained that it interpreted the statutory phrase, “derived primarily from apples or apple concentrate and water,” to mean that apple juice or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration must represent more than 50 percent of the

volume of the finished product. (The term “brix” in this text refers to the quantity of dissolved solids expressed as grams of sucrose in 100 grams of solution at 60 degrees Fahrenheit. For example, one degree Brix is 1 gram of sucrose in 100 grams of solution and represents the strength of the solution as percentage by mass.)

Second, ATF interpreted the statutory phrase “containing no other fruit product” to mean “containing no other fruit product nor any artificial product which imparts a fruit flavor other than apple.” As explained in the preamble of T.D. ATF-470, this interpretation is based on the legislative history of the TRA, which states:

Once fermented, eligible hard cider may not be altered by the addition of other fruit juices, flavor, or other ingredient that alters the flavor that results from the fermentation process. Thus, for example, cider fermented from apples, but which has raspberry flavor added to it prior to bottling and marketing to the public, will not be eligible for the 22.6 cents-per gallon tax rate.<sup>2</sup>

ATF “[d]id not believe it was Congress’s intent to provide a tax incentive for use of artificial ingredients in preference to real ones.” See 66 FR 58941.

The preamble to T.D. ATF-470 also explained that the regulatory definition does not preclude the use of flavors such as honey or spices, noting that “[f]lavoring materials will only affect the tax classification of hard cider if they are derived from or impart the flavor of a fruit other than apple.” See 66 FR 58941. This position is also reflected in current public guidance in the form of an FAQ on the TTB Web site. Specifically, FAQ CID24 states that, because the IRC provides that the hard cider tax rate under section 5041(b)(6) is not available to wines that contain a fruit product other than apple, a cider containing either natural or artificial fruit flavors (other than apple flavors) is not eligible for the hard cider tax rate of 22.6¢ per gallon. Instead, a fruit-flavored cider would be taxed at the appropriate wine excise tax rate. (See [https://www.ttb.gov/faqs/alcohol\\_faqs.shtml?Cider#Cider](https://www.ttb.gov/faqs/alcohol_faqs.shtml?Cider#Cider).)

In the preamble to T.D. ATF-470, ATF also addressed the prohibition on “other fruit products” with regard to authorized wine treating materials that are derived from fruits other than apple, such as tannin or citric acid. The preamble explained that the final rule did not restrict the use of approved wine treating materials derived from fruit in cider, stating that it would be

impractical to make a distinction between fruit-derived wine treating materials and the same materials derived from other sources, unless there were other circumstances that indicated the producer was using these materials as flavorings. One of those circumstances would be the labeling of the product as being “flavored” with a fruit other than apple.

ATF noted that, when used as directed in 27 CFR part 24 for natural wines, authorized wine treating materials would not impart a fruit flavor to wine. However, ATF also noted that some ciders are made under approved formulas rather than under the rules for production of natural wine in subparts F and L of part 24, and that for formula wines<sup>3</sup>, the use of wine treating materials may be approved at a level beyond the level authorized in part 24 for stabilizing or adjusting the acidity of a natural wine. ATF further noted that while the final rule did not place limits on the use of wine treating materials derived from fruits other than apple in a formula wine eligible for the hard cider tax rate, a formula wine may not contain such treating materials in amounts sufficient to impart a fruit flavor other than apple and still be taxed as hard cider. For example, if a cider contained more citric acid than the amount allowed under subpart L of part 24 for the production of natural wine,<sup>4</sup> and was labeled as “citrus flavored,” the product would be classified for tax purposes as a still wine under 14 percent alcohol by volume rather than hard cider.

Finally, ATF recognized that the term “hard cider” had broader meaning in the industry and among consumers than the definition given in the regulations. As a result, ATF stated that it would allow the use of the term “hard cider” on labels of products that do not belong to the hard cider tax class, as long as other information on the label allows for the identification of the appropriate tax class.

### III. PATH Act’s Modification of the IRC Definition of Hard Cider for Tax Purposes

The PATH Act amendments to section 5041 of the IRC change the definition of

<sup>3</sup> The TTB regulations at 27 CFR 24.10 define the term “formula wine” as special natural wine, agricultural wine, and other than standard wine (except for distilling material and vinegar stock) produced on bonded wine premises under an approved formula.

<sup>4</sup> Natural wine, under 26 U.S.C. 5381, is the product of the juice or must of sound, ripe grapes or other sound, ripe fruit, made with such cellar treatment as may be authorized under section 5382 of the IRC (26 U.S.C. 5382) and containing not more than 21 percent by weight of total solids.

“hard cider,” allowing a broader range of products to be eligible for the hard cider tax rate. TTB notes that the PATH Act did not amend the FAA Act, although the definition of hard cider under the PATH Act now includes products to which the FAA Act requirements apply.

Under the PATH Act, effective January 1, 2017, section 5041 of the IRC, Imposition and rate of tax, contains a new paragraph (g), which defines the term “hard cider” as a wine.

Under the PATH Act, effective January 1, 2017, section 5041 of the IRC, Imposition and rate of tax, contains a new paragraph (g), which defines the term “hard cider” as a wine derived primarily from apples or pears, or from apple juice concentrate or pear concentrate and water, which contains no fruit product or fruit flavoring other than apple or pear. Also, under the revised definition, hard cider cannot contain “more than 0.64 gram of carbon dioxide per hundred milliliters of wine, except that the Secretary may by regulations prescribe such tolerances to this limitation as may be reasonably necessary in good commercial practice.” In addition, the revised definition states that the alcohol content of hard cider may range between at least 0.5 percent and less than 8.5 percent alcohol by volume.

The specific changes concerning the hard cider tax rate resulting from the PATH Act are discussed individually below.

#### *Increase in Authorized Amount of Carbon Dioxide*

As noted above, prior to the effective date of the hard cider provisions of the PATH Act, to be eligible for the “hard cider” tax rate under the IRC, wine must be, among other things, a “still wine,” that is, a wine containing not more than 0.392 gram of carbon dioxide per 100 milliliters. The modified definition of hard cider allows wine that is eligible for the hard cider tax rate to contain no more than 0.64 gram of carbon dioxide per 100 milliliters of wine. Prior to the effective date of the hard cider provisions of the PATH Act, wine with a carbon dioxide content greater than 0.392 gram of carbon dioxide per 100 milliliters of wine is an “effervescent wine” and is taxed as either “sparkling wine” or as “artificially carbonated wine” depending on the source of the carbon dioxide. Sparkling wine is an effervescent wine for which the carbon dioxide has resulted solely from the secondary fermentation of the wine within a closed container. Artificially carbonated wine is a wine made effervescent by the injection of carbon

<sup>2</sup> See General Explanation of Tax Legislation Enacted in 1997, published by the Joint Committee on Taxation (JCS-23-97).

dioxide. See § 24.10. Sparkling wine and artificially carbonated wine have no maximum level of carbon dioxide.

The definition of hard cider, as modified by the PATH Act, includes certain effervescent wines that contain more than 0.392 gram but no more than 0.64 gram of carbon dioxide per 100 milliliters of wine. This means that, under the modified definition, certain wines that would previously have fallen within the tax classes applicable to sparkling wine or artificially carbonated wine will be eligible for the hard cider tax rate.

#### *Use of Pears and Pear Concentrate in Addition to Apples and Apple Concentrate*

Prior to the effective date of the hard cider provisions of the PATH Act, the statutory definition of wine eligible for the hard cider tax rate requires that wine be derived primarily from apples or apple concentrate and water in order to be eligible for that tax rate. The modified definition under the PATH Act provides that wine eligible for the hard cider tax rate must be derived primarily from apples or pears or from apple juice concentrate or pear juice concentrate and water.

According to its legislative history,<sup>5</sup> this amendment was to “expand the hard cider definition to include pears, or pear juice concentrate and water, in addition to apples and apple juice concentrate and water.” TTB believes that the amendment to the definition of hard cider was not intended to prevent the use of apples and pears together. In keeping with the current definition of hard cider found in part 24 which provides, in part, “\* \* \* (apple juice, or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration, must represent more than 50 percent of the volume of the finished product) \* \* \*,” TTB is interpreting the modified definition to mean that apple juice, pear juice, a combination of apple juice and pear juice, or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration, must represent more than 50 percent of the volume of the finished product. In other words, if apple juice and pear juice (or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration) together represent more than 50 percent of the volume of the finished product, this requirement is met.

#### *Fruit Products and Fruit Flavoring*

Prior to the effective date of the hard cider provisions of the PATH Act, the statutory definition of hard cider provides that no fruit product other than apple and apple concentrate may be used in wine eligible for the hard cider tax rate. As described above, the current regulatory definition of hard cider for tax purposes states that, among other things, hard cider must contain “no other fruit product nor any artificial product which imparts a fruit flavor other than apple.” Pursuant to the PATH Act, the modified definition of hard cider prohibits the use of any “fruit product or fruit flavoring other than apple or pear.”

With the exception of the inclusion of pear, the prohibition against other fruit products or fruit flavorings is similar to the current statutory and regulatory text, except that it is even clearer than the prior law that wines eligible for the “hard cider” tax rate may not contain either “fruit products” (that is, ingredients derived from fruit) or “fruit flavoring” (regardless of its source) other than apple or pear. This is consistent (aside from the inclusion of pear) with TTB’s current policy with regard to fruit flavors. Accordingly, it is TTB’s interpretation that wine is not eligible for the hard cider tax rate if it contains any fruit flavoring that imparts the flavor of a fruit other than apple or pear. The term “fruit flavoring” includes a natural fruit flavor, an artificial fruit flavor, and a natural flavor that artificially imparts the flavor of a fruit that is not contained in that flavor.

#### *Increase in Allowed Alcohol Content*

Prior to the effective date of the hard cider provisions of the PATH Act, wine is not eligible for the hard cider tax rate unless it contains less than 7 percent alcohol by volume. However, the definition of hard cider as modified by the PATH Act increases the allowable alcohol content to less than (not equal to) 8.5 percent alcohol by volume. The increase in the allowed alcohol content allows a broader range of products to be eligible for the hard cider tax rate, including products that are subject to the FAA Act labeling and permit requirements, which apply to wines that contain at least 7 percent alcohol by volume. The PATH Act did not amend the FAA Act, and this rule does not amend TTB’s FAA Act permit or labeling requirements in 27 CFR parts 1 and 4, respectively.

#### **IV. Description of Regulatory Changes Regarding Tax Classification and Operations**

##### *New Regulations Setting Forth Eligibility Criteria for the Hard Cider Tax Rate*

As a result of the PATH Act amendments to the definition of hard cider, TTB is amending its regulations in part 24 by adding a new Subpart P—Eligibility for the Hard Cider Tax Rate. New subpart P consists of two new sections, 27 CFR 24.331 and 24.332. Section 24.331 sets forth the statutory criteria for eligibility for the hard cider tax rate for wines removed on or after January 1, 2017, while § 24.332 elaborates on those criteria. Consistent with the TTB interpretation of the statutory text discussed above, § 24.332(a) provides that wine will be considered to be derived primarily from apples or pears, or from apple juice concentrate or pear juice concentrate and water, if the apple juice, pear juice, or combination of apple and pear juice, or the equivalent amount of concentrate of apple and/or pear juice reconstituted to the original brix of the juice prior to concentration, or any combination thereof, represents more than 50 percent of the volume of the finished product. Further, § 24.332(b)(1) provides that wine is not eligible for the hard cider tax rate if it contains any fruit product other than apple or pear. Consistent with current policy, § 24.332(b)(1) makes clear that a fruit product is any material derived or made from any fruit or part of a fruit, including but not limited to concentrates, extracts, juices, powders, or wine spirits, of any fruit or part of a fruit.

New § 24.332(b)(2) provides that an authorized wine treating material set forth in § 24.246 that is derived from a fruit other than apple or pear may be used in the production of wine eligible for the hard cider tax rate if it is used for a purpose other than flavoring and it is either used in accordance with the wine treating materials provisions of § 24.246 (if used in a natural wine), or used in amounts insufficient to impart a fruit flavor other than apple or pear (if used in a special natural wine or other than standard wine). Any written or pictorial reference to a material derived from a fruit other than apple or pear (other than the inclusion of a wine treating material in an ingredient labeling statement) in the labeling or advertising of a wine will be treated as evidence that the wine treating material was added for the purpose of flavoring the wine.

Further, new § 24.332(c) prohibits the use, in wine eligible for the hard cider tax rate, of any fruit flavoring that

<sup>5</sup> See JCX-144-15, “Technical Explanation of the Protecting Americans From Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Committee Print 114-40).”

imparts the flavor of a fruit other than apple or pear. For purposes of this section, a flavoring that imparts the flavor of a fruit other than apple or pear includes a natural fruit flavor, an artificial fruit flavor, and a natural flavor that artificially imparts the flavor of a fruit that is not contained in that flavor.

The preamble to T.D. ATF-470 provided that honey or spices would not disqualify an apple wine from the hard cider tax rate; however, language to that effect did not appear in any regulatory text. TTB is now incorporating such language in the new § 24.332(c) to make this position more easily accessible to industry members and the public. TTB has also received questions about the use of pumpkin flavors in cider. While pumpkins are botanically classified as fruit, they are treated as “vegetables” for several other purposes.<sup>6</sup> It has been TTB’s position that pumpkins are not “fruit” for purposes of part 24. Instead, wines made from pumpkins are classified as wines made from “other agricultural products” under 26 U.S.C. 5387 and 27 CFR 24.204. See, e.g., TTB Ruling 2016-2. Accordingly, in new § 24.332(c), TTB clarifies that the use of spices, honey, hops, or pumpkins as a flavoring will not make a wine ineligible for the hard cider tax rate.

New § 24.332(c) also provides that any written or pictorial reference to a fruit flavor other than apple or pear in the labeling or advertising of a wine that contains a flavoring will be treated as evidence that the wine contains a flavoring that imparts a fruit flavor other than apple or pear and thus the wine will not be eligible for the hard cider tax rate.

The new definition in § 24.332, differing from the current definition of hard cider in § 24.10, does not require that hard cider have the taste, aroma, and characteristics generally attributed to hard cider. Nor does it require hard cider to be sold or offered for sale as hard cider. With regard to the reference to “taste, aroma, and characteristics generally attributed to hard cider,” these aspects of the definition have been removed because under the PATH Act, wine that is eligible for the hard cider tax rate may contain pear, which TTB believes is not a characteristic generally attributed to hard cider. With regard to the reference to hard cider having to be “sold or offered for sale as hard cider,” this aspect has been removed because a wine that meets the criteria of the hard cider tax class and is produced from just

pears may be sold as “perry,” “pear wine,” or “hard perry.”

#### *Definitional Changes To Implement the PATH Act*

The IRC at section 5041(a) provides that “[s]till wines shall include those wines containing not more than 0.392 gram of carbon dioxide per hundred milliliters \* \* \*.” Because wine classified as hard cider will no longer necessarily be a “still wine” after the PATH Act amendments take effect, and because hard ciders that are defined as “still wine” under section 5041(a) are not taxed as “still wine” under section 5041(b), TTB is adding a definition of “still hard cider” to § 24.10, and excluding “hard cider” from the definition of “still wine” in that section. As amended, part 24 will use the term “still wine” to refer to wine containing not more than 0.392 gram of carbon dioxide per 100 milliliters of wine that falls within one of the three tax classes applicable to still wine set forth at section 5041(b)(1), (b)(2), or (b)(3). The term “still hard cider,” when used in the regulations, is used to denote wine that is eligible for the hard cider tax rate at section 5041(b)(6) and that contains not more than 0.392 gram of carbon dioxide per 100 milliliters.

Similarly, TTB is adding definitions of “artificially carbonated hard cider” and “sparkling hard cider” to describe wine that is eligible for the hard cider tax rate at section 5041(b)(6); that contains more than 0.392 but not more than 0.64 gram of carbon dioxide per 100 milliliters; and that is made effervescent either by artificial injection of carbon dioxide or solely by secondary fermentation within a closed container. Under this temporary rule, TTB is also excluding wine that is eligible for the hard cider tax rate from the definitions of “artificially carbonated wine,” and “sparkling wine or champagne” set forth in § 24.10.

As a result of these definitional changes, there is no need to amend the regulations in 27 CFR 24.278(a), which provide that “champagne and other sparkling wine” are not eligible for the tax credit for certain small producers. This regulation is based on 26 U.S.C. 5041(c)(1), which disqualifies “wine described in subsection (b)(4)” from eligibility for the small producer credit. Wine described in section 5041(b)(4) is wine that is taxable at the rate prescribed for “champagne and other sparkling wines.” This temporary rule specifies that the term “sparkling wine” does not include hard cider that derives its effervescence solely from the secondary fermentation in a closed container (and contains no more than

0.64 gram of carbon dioxide per 100 milliliters of wine); thus, this wine is not precluded from eligibility for the small domestic producers credit described in § 24.278.

These definitional changes also provide that wine that is eligible for the lower hard cider tax rate at section 5041(b)(6) is not subject to the higher tax rates for “still wine,” “sparkling wine,” or “artificially carbonated wine” at section 5041(b)(1)–(b)(5).

TTB is incorporating the terms “artificially carbonated hard cider,” “artificially carbonated wine,” “sparkling hard cider” and “sparkling wine” in the definition of “effervescent wine” to make it clear that, when used in the regulations, “effervescent wine” includes all four terms. The new definition for the existing term “hard cider” cross-references the new definitions of “artificially carbonated hard cider,” “sparkling hard cider,” and “still hard cider,” and cites the new eligibility requirements set forth in § 24.331. TTB is removing the current eligibility criteria included in the definition of “Hard cider” at § 24.10 that interprets the law as it exists prior to the effective date of the hard cider provisions of the PATH Act.

In addition to amending the definition of “artificially carbonated wine” to exclude wine eligible for the hard cider tax rate, TTB is replacing the reference in that definition to wine “artificially charged with carbon dioxide” with the phrase “artificially injected with carbon dioxide.” This change is not intended to substantively change the provision, but rather to be consistent with the description of wine carbonated by the injection of carbon dioxide used in 27 CFR 24.190. TTB also is amending a cross-reference to the FAA Act that appears in the definition of “cider” in § 24.10 to make clear that 27 CFR 4.21(e)(5) provides information regarding the labeling of wine that may be designated as “cider” under the FAA Act.

#### *Tolerance and Recordkeeping Requirements for Artificially Carbonated Hard Cider and Sparkling Hard Cider*

While there is no maximum allowed carbon dioxide level for wine falling within the sparkling wine and artificially carbonated wine tax classes, under the modified definition of hard cider, wine is not eligible for the hard cider tax rate if it contains more than 0.64 gram of carbon dioxide per 100 milliliters. As amended by the PATH Act, section 5041(g)(1) authorizes TTB to prescribe through regulation “such tolerances to this limitation as may be

<sup>6</sup> For example, the United States Department of Agriculture’s National Nutrient Database for Standard Reference currently lists pumpkin in its “Vegetables and Vegetable Product” food group.

reasonably necessary in good commercial practice.” Current TTB regulations applicable to still wine with added carbon dioxide, at 27 CFR 24.245, prescribe a tolerance of not more than 0.009 gram per 100 milliliters where the amount of carbon dioxide in excess of 0.392 gram per 100 milliliters is due to mechanical variations that cannot be completely controlled under good commercial practice. In this temporary rule, TTB sets forth a new section, 27 CFR 24.251, and extends the same 0.009 gram per 100 milliliters tolerance to artificially carbonated hard cider and sparkling hard cider where the amount of carbon dioxide in excess of 0.64 gram per 100 milliliters is due to mechanical variations or secondary fermentation variations that cannot be completely controlled under good commercial practice. This tolerance will not be allowed where it is found that the proprietor continuously or intentionally exceeds 0.64 gram of carbon dioxide per 100 milliliters of artificially carbonated hard cider or sparkling hard cider or where the variation results from the use of methods or equipment determined by the appropriate TTB officer not to be in accordance with good commercial practice.

Apple or pear wine that has in excess of 0.64 gram of carbon dioxide per 100 milliliters (unless covered by the allowed tolerance) will be classified and taxed at the applicable “sparkling wine” or “artificially carbonated wine” rate, see section 5041(b)(4) and (b)(5). Accordingly, TTB is amending 27 CFR 24.255(a) to specify that proprietors of a bonded wine premises or a taxpaid wine bottling house premises are responsible for the correct determination of the amount of carbon dioxide in artificially carbonated hard cider or sparkling hard cider. TTB is also amending § 24.302 to require that the amount of carbon dioxide in artificially carbonated hard cider or sparkling hard cider be included in the effervescent wine record, which is required to be kept by proprietors who produce or receive effervescent wine in bond.

#### Conforming Amendments

Other amendments maintain the existing treatment of still wine and effervescent wine, and apply certain requirements currently applicable to still wine to “still hard cider” and certain requirements currently applicable to artificially carbonated wine and sparkling wine to “artificially carbonated hard cider” and “sparkling hard cider,” respectively. These include amendments to 27 CFR 24.190, 24.191, 24.192, and 24.193 in subpart G (Production of Effervescent Wine); 27

CFR 24.225 and 24.234 in subpart K (Spirits); § 24.246 in subpart L (Storage, Treatment and Finishing of Wine); 27 CFR 24.266 in subpart M (Losses of Wine); §§ 24.290 and 24.291 in subpart N (Removal, Return and Receipt of Wine); 27 CFR 24.301, 24.302, 24.306, 24.308, and 24.319 in subpart O (Records and Reports).

Along with conforming amendments to § 24.245, TTB also is removing a reference to “authorized test procedures” for determining the amount of carbon dioxide in still wine to which carbon dioxide has been added. Section 24.245 currently states that “[t]he proprietor shall determine the amount of carbon dioxide added to wine using authorized test procedures.” TTB’s predecessor agency, ATF, published several authorized test procedures from 1971 to 1983. These are ATF Procedure 73–1 (authorizing the enzymatic method, the manometric method, and the volumetric method), ATF Procedure 77–2 (authorizing the infrared spectrophotometer method), and ATF Procedure 83–2 (authorizing the use of an automated thermal conductivity analyzer). Although TTB still views these methods as valid, TTB currently uses the enzymatic<sup>7</sup> and titrimetric<sup>8</sup> method to determine the carbon dioxide levels in wine.

It is TTB’s current policy that producers may use any method that has been formally validated (*e.g.*, that underwent a multi-laboratory performance evaluation) or that is otherwise scientifically valid to determine the carbon dioxide levels in wine. (A scientifically valid method is, among other things, accurate, precise, and specific for its intended purpose, and it has results that are consistently reliable, accurate, and reproducible.) Accordingly, TTB is removing the language in § 24.245 that requires proprietors to use “authorized” test procedures, and is revoking ATF Procedure 73–1, ATF Procedure 77–2, and ATF Procedure 83–2.

Finally, TTB is dividing the current text of 27 CFR 24.270, Determination of Tax, into paragraphs (a) and (b), and adding a new paragraph (c) to list the tax rates imposed on wine by 26 U.S.C. 5041(b). With respect to the hard cider tax rate at section 5041(b)(6), TTB is referencing the eligibility requirements set forth in new § 24.331. Also, TTB is incorporating in § 24.270(a) language from the definition of “wine” in § 24.10,

<sup>7</sup> AOAC Official Method of Analysis 964.09 (17th Ed). See also [https://www.itb.gov/ssd/pdf/list\\_of\\_beverage\\_methods.pdf](https://www.itb.gov/ssd/pdf/list_of_beverage_methods.pdf).

<sup>8</sup> AOAC Official Method of Analysis 988.07 (17th Ed). See also [https://www.itb.gov/ssd/pdf/list\\_of\\_beverage\\_methods.pdf](https://www.itb.gov/ssd/pdf/list_of_beverage_methods.pdf).

which explains that a product containing less than one-half of one percent alcohol by volume is not taxable as wine.

#### V. Labeling of Wine Eligible for the Hard Cider Tax Rate

As noted above, TTB administers the labeling requirements of both the IRC and the FAA Act. TTB bases its labeling requirements in part 24 on section 5368(b) of the IRC, which gives the Secretary of the Treasury general authority to issue labeling regulations that require evidence of compliance with tax provisions.

##### *Labeling Requirements Prior to the Effective Date of Hard Cider Provisions of the PATH Act*

Current § 24.257 sets forth the requirements for labeling containers of wine, including wine eligible for the hard cider tax rate, for purposes of the IRC. In general, § 24.257 provides that proprietors must label each bottle or other container of beverage wine prior to removal for consumption or sale, and the label must show: (1) The name and address of the wine premises where the wine is bottled or packed, (2) the brand name, if it is different from the name shown in the name and address statement; (3) the alcohol content of the wine; (4) the kind of wine; and (5) the net contents of the container.

Current § 24.257 provides that conformity with TTB’s FAA Act labeling regulations found in part 4 of the TTB regulations is sufficient to identify the appropriate tax class. With regard to alcohol content, § 24.257(a)(3) provides that a label must state the alcohol content as percent by volume or in accordance with part 4.<sup>9</sup>

Current § 24.257(a)(4) also sets out parameters for how the kind of wine should be presented on a label.<sup>10</sup> Wine that contains at least 7 percent alcohol by volume and requires label approval under the FAA Act must be labeled with

<sup>9</sup> Thus, for wines with less than 7 percent alcohol by volume, a numerical statement of the percentage of alcohol by volume must appear on the label. 27 CFR 4.32(b)(3) and 4.36 require alcohol content statements on labels. TTB notes that pursuant to § 4.36, in the case of fruit wine containing at least 7 percent but no more than 14 percent or less of alcohol by volume, the alcohol content need not be stated if the type designation “table wine” or “light wine” (without a numerical statement of alcohol content) appears on the brand label. Because “hard cider” is currently defined in part 24 as wine containing less than 7 percent alcohol by volume, “table wine” and “light wine” designations have been sufficient to identify FAA Act wine as ineligible for the hard cider tax rate.

<sup>10</sup> TTB notes that 27 CFR 24.259 requires each container larger than 4 liters or each case used to remove wine for consumption or sale to be durably marked with the kind of wine, stated in accordance with § 24.257.

the “kind” of wine in accordance with part 4.<sup>11</sup> See § 24.257(a)(4)(i).

For wine that contains less than 7 percent alcohol by volume or is the subject of a certificate of exemption from the COLA requirements in part 4, a statement of composition is required to be on the label in order to adequately identify the wine. See § 24.257(a)(4)(ii) and (iii).

The regulations in § 24.257(a)(4)(iv) provide that the statement of composition must include enough information to identify the tax class when viewed with the alcohol content. There are several components to this requirement.

- First, the wine should be identified by the word “wine,” “mead,” “cider,” or “perry,” as applicable.
- Second, if the wine contains more than 0.392 gram of carbon dioxide per 100 milliliters, the word “sparkling” or “carbonated,” as applicable, must be included in the statement of composition.
- Third, if the statement of composition leaves doubt as to the tax class of the wine, the wine must be marked with an appropriate tax class statement (such as the statement “tax class 5041(b)(1) IRC”).

Section 24.257(a)(4)(iv) provides examples of labels that would or would not leave doubt as to the tax class of the wines. For example, a still wine labeled as “raspberry hard cider” and “9 percent alcohol by volume” is adequately marked to designate the tax class specified in section 5041(b)(1), which is the tax class for “still wines containing not more than 14 percent of alcohol by volume.” That information is sufficient because the wine is clearly not eligible for the hard cider tax rate under current law on two different grounds—it contains raspberries or raspberry flavor, and it is 9 percent alcohol by volume. This example also illustrates that the terms “cider” and “hard cider,” by themselves, do not indicate that a wine is eligible for the hard cider tax rate. Thus, the regulations provide the example of a still wine marked “cider” or “hard cider” and “6 percent alcohol by volume.” Under current regulations, that wine is adequately marked if it is eligible for the hard cider tax rate, but if it is not eligible for the hard cider tax rate, it is

not adequately marked to identify its tax class as falling under section 5041(b)(1), so the tax class must be shown.

As mentioned earlier in this preamble, the current regulations were issued after ATF received comments in opposition to T.D. ATF–398, which would have required use of the term “hard cider” on products eligible for the hard cider tax rate, and prohibited use of the “hard cider” designation on products not eligible for the hard cider tax rate, including all wines subject to the FAA Act. Accordingly, ATF solicited comments on and adopted an alternative proposal, that allowed use of the term “hard cider” on products over 7 percent alcohol by volume.

For products under 7 percent alcohol by volume, ATF wanted to differentiate between ciders that are eligible for the hard cider tax rate and those that are taxable as still wine containing not more than 14 percent alcohol by volume. Some producers have marketed eligible products as “draft cider,” “fermented cider” or “apple cider” and did not wish to use the term “hard cider” on labels. Some producers marketed mixed-fruit ciders or low-alcohol ciders that were otherwise excluded from the current definition of hard cider under the name “hard cider” and did not wish to rename their products. Accordingly, ATF proposed, where the words on the label leave doubt as to the tax class, that cider makers must include a reference to the tax class by section of the law. ATF noted that this wording was similar to the wording of 27 CFR 25.242, on marking nontaxable cereal beverages. ATF requested industry and consumer comments on these proposals.

In general, the commenters supported ATF’s proposal to allow more flexibility in naming hard cider and related products. ATF also noted that it had requested suggestions for other ways of identifying the tax class, but received no suggestions. As a result, the final rule allowed the use of the term “hard cider” on labels of products that do not belong to the hard cider tax class, as long as other information on the label allows for the identification of the appropriate tax class.

#### *Need for Revised Labeling Requirements To Implement the PATH Act for the Hard Cider Tax Class*

As previously noted, current regulations require wines to be labeled with the “kind” of wine, and provide that wines that are not subject to FAA Act labeling requirements must be labeled with a statement of composition that, when viewed with the alcohol content, includes enough information to identify the tax class. Under the

statutory definition of “hard cider” as it stood prior to the effective date of the hard cider provisions of the PATH Act, this flexibility makes sense. Among other things, any wine eligible for the “hard cider” tax rate under current law must be a still wine, and must have less than 7 percent alcohol by volume. Thus, wines subject to the labeling requirements of the FAA Act are, by definition, ineligible for the hard cider tax rate if removed prior to January 1, 2017. Similarly, sparkling wines and carbonated wines are, by definition, ineligible for the hard cider tax rate.

Under the definition of hard cider set forth in the PATH Act, wine taxed at the hard cider tax rate may contain a higher alcohol content (less than 8.5 percent instead of less than 7 percent alcohol by volume) and may be effervescent (containing not more than 0.64 gram of carbon dioxide per 100 milliliters of wine). Under the modified definition, wine may also contain pears in addition to or in place of apples. This affects how the product must be labeled to provide sufficient information to identify the appropriate tax class.

For example, under the modified definition of hard cider, wines that are subject to the FAA Act labeling regulations may be taxed at the hard cider tax rate. The current regulations in § 24.257 do not require wines labeled in accordance with the FAA Act to include enough information to identify the tax class. Such a requirement was not necessary when the definition of hard cider excluded any wines containing 7 percent or more alcohol by volume. Because some (but not all) apple or pear wines subject to the FAA Act labeling regulations may be taxed at the hard cider tax rate under the IRC as modified by the PATH Act, it is now necessary to include language in § 24.257 to require wines (including hard cider) labeled in accordance with the FAA Act labeling regulations to also include enough information to identify the tax class. A designation such as “apple table wine” for a wine subject to the FAA Act will no longer suffice to identify whether the wine is eligible for the hard cider tax rate, because it will not identify whether the wine has less than 8.5 percent alcohol by volume.

Similarly, the hard cider tax class is no longer restricted to still wines. Under current regulations, a “sparkling” or “carbonated” wine statement suffices to indicate that the wine was not eligible for the hard cider tax rate. Under the standards as modified by the PATH Act, some, but not all, sparkling and carbonated apple and/or pear wines may be eligible for the hard cider tax rate. Thus, knowing that an apple and/

<sup>11</sup> Under 27 CFR part 4, wine that requires label approval must be labeled “sparkling” or “carbonated,” if applicable, see §§ 4.32(a)(2) (requiring the class, type or other designation on wine labels), 4.34 and 4.22 (requiring a truthful and adequate statement of composition if the wine is not defined in 27 CFR 4.21), and 4.21 (setting forth standards of identity for wine and requiring the words “sparkling” or “carbonated” when applicable).

or pear wine is sparkling or carbonated does not resolve the question of whether it is eligible for the hard cider rate, and such wines are unlikely to be labeled with the exact level of carbon dioxide per 100 milliliters of wine.

Finally, the use of terms such as “apple” or “pear” wine, or “cider,” “hard cider,” or “perry” may suggest the hard cider tax class, but do not necessarily indicate that the product is eligible for such a classification. Furthermore, a statement of composition such as “apple cider with natural flavors” or “honey pear wine” does not necessarily indicate the tax class.

## VI. Description of Regulatory Changes Regarding Labeling

Accordingly, TTB is amending its regulations in parts 24 and 27 to require the statement “Tax class 5041(b)(6)” on the container of any wine for which the hard cider tax rate is claimed. TTB recognizes that industry members who currently produce or import hard cider will need time to comply with such a requirement, and TTB is therefore providing a one-year grace period before the requirement goes into effect.

### *Amendments to Part 24*

As mentioned above, TTB is amending § 24.257 to impose a new labeling requirement for wines eligible for the hard cider tax rate.

As amended by this temporary rule, § 24.257(a)(4) is reorganized. Section 24.257(a)(4)(i) addresses wines that require label approval under the FAA Act. Consistent with current regulations, § 24.257(a)(4)(i)(A), which takes effect for wines removed on or after January 1, 2017, provides that if a wine contains 7 percent or more alcohol by volume and must have label approval under part 4, the required designation of the wine is the class, type or other designation provided in part 4. Section 24.257(a)(4)(i)(B) provides specific labeling rules for those products taxed at the “hard cider” tax rate. Section 24.257(a)(4)(i)(B)(1) provides, as part of a transitional rule for “hard cider” removed on or after January 1, 2017 and prior to January 1, 2018, that such wines may include the statement “Tax class 5041(b)(6)” on the label to adequately identify the appropriate tax class. For products removed from wine premises on or after January 1, 2018, that are taxed at the “hard cider” tax rate, the designation must also include the statement “Tax class 5041(b)(6).” This statement may appear anywhere on the label.

With regard to wines, including hard cider, that do not require label approval,

§ 24.257(a)(4)(ii) includes both a rule that takes effect for all wines removed on or after January 1, 2017 and additional labeling rules for hard cider that take effect for products removed on or after January 1, 2018.

The general rule for wine that does not require label approval (either because it is covered by a certificate of exemption from label approval or because it contains less than 7 percent alcohol by volume) is provided in new § 24.257(a)(4)(ii)(A). This kind of wine must bear a designation that includes enough information (when viewed with the alcohol content statement) to identify the tax class under section 5041. The wine must be identified by the term “wine” (or a word that signifies a type of wine, such as “cider,” “perry,” or “mead,” as applicable). If the wine contains more than 0.392 gram of carbon dioxide per 100 milliliters, the word “sparkling” or “carbonated,” as applicable, must be included in the designation.

Section 24.257(a)(4)(ii)(A)(1) provides additional labeling rules effective for “hard cider” removed from wine premises on or after January 1, 2017. These rules provide that the designation for such products must be consistent with a hard cider tax classification. For example, the designations “hard cider,” “hard perry,” “apple wine,” “pear wine,” “apple cider,” “apple perry,” “apple pear wine,” “cider,” and “perry” are consistent with a hard cider tax classification. The designation “blueberry cider” is not consistent with a hard cider tax classification, because it indicates that the product contains either blueberries or blueberry flavors, which are not authorized for use in wine that is eligible for the hard cider tax class. If the hard cider contains more than 0.392 gram of carbon dioxide per 100 milliliters, the word “sparkling” or “carbonated,” as applicable, must be on the label.

Section 24.257(a)(4)(ii)(A)(2) provides a transitional rule for wines removed on or after January 1, 2017 and prior to January 1, 2018. For these wines, a label will not be deemed out of compliance with § 24.257(a)(4)(ii)(A) solely because the label does not provide enough information to identify whether the wine is eligible for a “hard cider” tax classification. On an optional basis, wines eligible for the “hard cider” tax class may include the statement “Tax class 5041(b)(6)” on the label to adequately indicate the appropriate tax class.

Section 24.257(a)(4)(ii)(A)(3) provides additional labeling rules effective for “hard cider” removed from wine premises on or after January 1, 2018.

The regulations provide that the label must also include the statement “Tax class 5041(b)(6).”

Finally, TTB modified and moved the existing cross-reference to the FDA labeling rules applicable to wines containing less than 7 percent alcohol by volume to § 24.257(a)(4)(ii)(B). Similarly, the existing cross-reference to the health warning statement requirements found in part 16 was modified and moved to § 24.257(a)(6).

### *Amendments to Part 27*

The amendments to the definition of “hard cider” in the PATH Act apply to imported wine as well as to wine produced in the United States. Accordingly, TTB is amending part 27, which applies to imported wine, by adding a new definition of “hard cider” to section 27.11. Consistent with the definition in part 24, the term “hard cider” is defined for imported wines as a wine that meets the eligibility requirements set forth in § 24.331 for the hard cider tax rate set forth in § 24.270.

The labeling regulations for imported wine in 27 CFR 27.59 are also amended by redesignating the existing regulation as § 27.59(a) and adding a new § 27.59(b). The new regulation provides that the container of any imported wine eligible for the “hard cider” tax classification set forth in § 24.270 of this chapter must be labeled in accordance with the requirements applicable to wine containers removed from wine premises under § 24.257(a)(4) of this chapter. The regulation also provides a cross-reference to § 24.331 for the eligibility requirements for the hard cider tax rate. Thus, this temporary rule provides that the labeling requirements for imported hard cider are the same as the labeling requirements for hard cider produced in the United States.

## Regulatory Analysis and Notices

### *Public Participation*

To submit comments on the regulatory provisions contained in this temporary rule, including the labeling provisions and any alternatives to requiring “Tax Class 5041(b)(6)” on the label, please refer to the notice of proposed rulemaking on this subject published in the “Proposed Rules” section of this issue of the **Federal Register**.

### *Executive Order 12866*

Certain TTB regulations issued under the IRC, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required.



### Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), TTB certifies that this temporary rule will not have a significant economic impact on a substantial number of small entities. The temporary rule will not impose, or otherwise cause, a significant increase in reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

The temporary rule implements certain changes made to the Internal Revenue Code of 1986 by the Protecting Americans from Tax Hikes Act of 2015 (see Pub. L. 114–113, Division Q, section 335). These statutory changes broaden the definition of hard cider, which means that more products will be eligible for the lower rate of tax applicable to hard cider. However, to ensure that labels and records adequately reflect the correct tax class of hard cider products, the temporary rule includes provisions that will require certain labeling changes, and will require producers of artificially carbonated hard cider and sparkling hard cider to test for carbon dioxide levels and keep records of those tests. These requirements flow directly from the new statutory criteria for eligibility for the hard cider tax rate. Accordingly, any increased burden associated with establishing eligibility for the hard cider tax rate flows directly from the statutory changes that prescribe the criteria for eligibility. The temporary rule provides industry members with a one-year transition period to make the required labeling changes, thus reducing the burden on industry members.

Pursuant to section 7805(f) of the IRC (26 U.S.C. 7805(f)), TTB will submit the temporary regulations to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of the temporary regulations on small businesses.

### Paperwork Reduction Act

Nine of the regulatory sections addressed in this temporary rule contain collections of information that have been previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned control numbers 1513–0009, 1513–0088, 1513–0092, and 1513–0115. Those sections are 27 CFR 24.255, 24.257, 24.266, 24.291, 24.301, 24.302, 24.306, 24.308, and 24.319. No changes are being made to the existing approved information collections.

In this temporary rule, TTB is proposing two new recordkeeping

requirements, and TTB has received OMB approval for these two requirements under two new OMB control numbers. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The first new recordkeeping requirement is contained in new paragraphs (a)(4)(i)(B)(2) and (a)(4)(ii)(A)(3) of § 24.257 and paragraph (b) of § 27.59. Specifically, the new information collection will require that industry members who remove wine to which the hard cider tax rate applies place a specific statement, “Tax class 5041(b)(6),” on containers of such wine, in order to adequately identify the applicable tax rate. Under § 24.257(a)(4)(i)(B)(2) and (a)(4)(ii)(A)(3) and § 27.59, this new requirement is imposed on such wine removed on or after January 1, 2018. TTB has determined that this statement is necessary for the enforcement of the Internal Revenue Code, and it is the simplest and clearest way to identify these products without any confusion with other tax classes of wine and without requiring any other changes to statements that industry members may be using or wish to use to identify their products. The delayed effective date provides sufficient time for affected industry members to bring their labels into compliance with the new requirement.

In 2015, 457 domestic manufacturers removed wine that was eligible for the hard cider tax class from their premises. TTB estimates that in addition to those industry members who removed wine eligible for the hard cider tax rate from their premises in 2015, potentially 20 percent more (or 91 manufacturers for a total of 548) may be interested in removing such wine from their premises given the new provisions applicable in 2017. Additionally, in 2015, according to U.S. Customs and Border Protection entry data, TTB determined that 191 importers obtained release from customs custody of products that were identified as cider under the Harmonized Tariff Schedule of the United States (HTSUS). TTB estimates that in addition to those importers who removed cider from customs custody in 2015, another 20 percent (or 38 importers for a total of 229 importers) will be interested in importing products that fall under that HTSUS code starting in 2017. Accordingly, TTB estimates that there are approximately 777 industry members (manufacturers and importers combined) who will be required to comply with this marking requirement. TTB estimates that each industry

member will have a one-time burden of one hour to come into compliance with this information collection, but that the continued compliance burden will be negligible. Therefore, TTB estimates that 777 respondents will respond an average of once per year to this information collection, for a total estimate annual burden of 777 hours.

*Estimated number of respondents:* 777.

*Estimated average total annual burden hours:* 777.

The second new recordkeeping requirement is contained in new paragraph (k) of § 24.302. Specifically, the new recordkeeping requirement will require proprietors who produce artificially carbonated hard cider and sparkling hard cider to maintain a record of the amount of carbon dioxide contained in the wine. This new requirement is imposed on such wine removed on or after January 1, 2017. TTB has determined that this recordkeeping requirement is necessary for demonstrating compliance with the statutory requirement that, to be eligible for the hard cider tax rate, among other things, the wine must contain no more than 0.64 gram of carbon dioxide per 100 milliliters of wine.

Like the tax class statement requirement, TTB estimates that there are 548 domestic manufacturers who must comply with this new recordkeeping requirement. TTB's laboratory estimates that it will take each industry member on average four hours to test the level of carbon dioxide in the wine using either the titrimetric or enzymatic test method. TTB also estimates that it will take an additional 15 minutes to record the level of carbon dioxide in the wine for a total of four hours and 15 minutes to test and record the carbon dioxide for one batch of artificially carbonated hard cider or sparkling hard cider. TTB is also estimating that each industry member will perform this recordkeeping requirement for 25 batches over one year. This equals 106.25 burden hours for each industry member in one year, for a total of 58,225 burden hours.

*Estimated number of respondents:* 548.

*Estimated average total annual burden hours:* 58,225.

As noted above, TTB has submitted these new information collection requirements to the OMB for review. Comments on this new recordkeeping requirement should be sent to OMB at Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503 or by email to

*OIRA\_submissions@omb.eop.gov*. A copy should also be sent to TTB by any of the methods described in the notice of proposed rulemaking related to this temporary rule published elsewhere in this issue of the **Federal Register**. Comments on the information collection should be submitted no later than March 24, 2017. Comments are specifically requested concerning:

- Whether the collection of information submitted to OMB is necessary for the proper performance of the functions of the Alcohol and Tobacco Tax and Trade Bureau, including whether the information will have practical utility;
- The accuracy of the estimated burden associated with the collection of information submitted to OMB; and
- How to enhance the quality, utility, and clarity of the information to be collected.

#### *Inapplicability of Prior Notice and Public Comment and Delayed Effective Date Procedures*

Based on the January 1, 2017, effective date of the PATH Act amendments to section 5041 of the IRC, TTB believes that proper administration and enforcement of those provisions necessitate the immediate adoption of implementing regulations as a temporary rule.

TTB is issuing this temporary rule without prior notice and comment pursuant to authority under section 4(a) of the Administrative Procedure Act, as amended (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and comment when a rule is interpretive or when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.”

The majority of the regulatory provisions contained in this temporary rule are exempt from prior notice and comment because they are interpretive.

TTB finds that it has good cause to dispense with prior notice and comment for the substantive provisions of this rule that set forth labeling requirements, recordkeeping requirements for artificially carbonated hard cider and sparkling hard cider, and a carbon dioxide tolerance for artificially carbonated hard cider and sparkling hard cider. Because this document implements provisions of law that are effective on January 1, 2017, and because immediate guidance is necessary to implement these provisions, it is found to be impracticable to issue this Treasury decision with prior notice and public procedure under 5 U.S.C. 553(b). TTB is

also including in this temporary rule additional labeling rules effective for “hard cider” removed from wine premises on or after January 1, 2018 (see § 24.257(a)(4)(i)(B)(2) and (a)(4)(ii)(A)(3)) and for imported wines removed on or after January 1, 2018 (see § 27.59(b)), to provide certainty to industry members regarding how they will be required to identify the appropriate tax class of their products.

TTB is issuing this temporary rule without a delayed effective date pursuant to authority under section 4(c) of the APA (5 U.S.C. 553(d)). TTB finds good cause under 5 U.S.C. 553(d)(3) to dispense with the effective date limitation in 5 U.S.C. 553(d). A 30-day delayed effective date is impracticable because this temporary rule implements statutory changes that are effective after December 31, 2016. Accordingly, the effective date of this temporary rule is January 1, 2017.

TTB is providing a delayed effective date for the requirement that all wine that qualifies for the hard cider tax rate must be labeled with “Tax class 5041(b)(6)” (see § 24.257(a)(4)(i)(B)(2) and (a)(4)(ii)(A)(3) and § 27.59(b)) in order to provide the industry with sufficient time to make arrangements for compliance. This requirement is effective January 1, 2018.

#### **Drafting Information**

Dana Register and Kara Fontaine of the Regulations and Rulings Division drafted this document with the assistance of other Alcohol and Tobacco Tax and Trade Bureau personnel.

#### **List of Subjects**

##### *27 CFR Part 24*

Administrative practice and procedure, Cider, Claims, Electronic funds transfers, Excise taxes, Exports, Food additives, Fruit juices, Hard Cider, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Research, Scientific equipment, Spices and flavorings, Surety bonds, Vinegar, Warehouses, Wine.

##### *27 CFR Part 27*

Alcohol and alcoholic beverages, Beer, Cosmetics, Customs duties and inspections, Electronic funds transfers, Excise taxes, Imports, Labeling, Liquors, Packaging and containers, Reporting and Recordkeeping requirements, Wine.

#### **Amendments to the Regulations**

For the reasons discussed in the preamble, TTB is amending 27 CFR chapter I, parts 24 and 27 as follows:

#### **PART 24—WINE**

- 1. The authority citation for part 24 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 26 U.S.C. 5001, 5008, 5041, 5042, 5044, 5061, 5062, 5121, 5122–5124, 5173, 5206, 5214, 5215, 5351, 5353, 5354, 5356, 5357, 5361, 5362, 5364–5373, 5381–5388, 5391, 5392, 5511, 5551, 5552, 5661, 5662, 5684, 6065, 6091, 6109, 6301, 6302, 6311, 6651, 6676, 7302, 7342, 7502, 7503, 7606, 7805, 7851; 31 U.S.C. 9301, 9303, 9304, 9306.

- 2. In § 24.10:

- a. The definition of “Artificially carbonated hard cider” is added in alphabetical order;
- b. The definitions of “Artificially carbonated wine”, “Cider”, “Effervescent wine”, and “Hard cider” are revised;
- c. The definition of “Sparkling hard cider” is added in alphabetical order;
- d. The definition of “Sparkling wine or champagne” is revised;
- e. The definition of “Still hard cider” is added in alphabetical order; and
- f. The definition of “Still wine” is revised.

The revisions and additions read as follows:

#### **§ 24.10 Meaning of terms.**

\* \* \* \* \*

*Artificially carbonated hard cider.* Hard cider artificially injected with carbon dioxide and containing more than 0.392 but not more than 0.64 gram of carbon dioxide per 100 milliliters.

*Artificially carbonated wine.* Wine (other than hard cider) artificially injected with carbon dioxide and containing more than 0.392 gram of carbon dioxide per 100 milliliters.

\* \* \* \* \*

*Cider.* See definitions for hard cider and tax exempt cider. For the labeling of wine that may be designated as “cider” under the Federal Alcohol Administration Act, see § 4.21(e)(5) of this chapter.

\* \* \* \* \*

*Effervescent wine.* A wine containing more than 0.392 gram of carbon dioxide per 100 milliliters, including artificially carbonated hard cider, artificially carbonated wine, sparkling hard cider, and sparkling wine.

\* \* \* \* \*

*Hard cider.* A wine that meets the eligibility requirements set forth in § 24.331 for the hard cider tax rate set forth in § 24.270. See the definitions for artificially carbonated hard cider, sparkling hard cider, and still hard cider.

\* \* \* \* \*

*Sparkling hard cider.* Hard cider containing more than 0.392 but not

more than 0.64 gram of carbon dioxide per 100 milliliters of wine, resulting solely from the secondary fermentation of the wine within a closed container.

*Sparkling wine or champagne.* Wine (other than hard cider) containing more than 0.392 gram of carbon dioxide per 100 milliliters of wine resulting solely from the secondary fermentation of the wine within a closed container.

\* \* \* \* \*

*Still hard cider.* A hard cider containing not more than 0.392 gram of carbon dioxide per 100 milliliters.

*Still wine.* Wine (other than hard cider) containing not more than 0.392 gram of carbon dioxide per 100 milliliters.

\* \* \* \* \*

■ 3. Section 24.190 is revised to read as follows:

**§ 24.190 General.**

(a) Effervescent wine may be made on bonded wine premises. Where the effervescence results from fermentation of the wine within a closed container, the wine is classified and taxed as sparkling wine or as hard cider, as applicable. In such wine, the use of carbon dioxide, nitrogen gas, or a combination of both, is permitted to maintain counterpressure during transfer and bottling. Wine carbonated by injection of carbon dioxide is classified and taxed as artificially carbonated wine or as hard cider, as applicable. (For wine to be classified and taxed at the hard cider tax rate, it must meet the requirements set forth in § 24.331, including the limitation of not more than 0.64 gram of carbon dioxide per 100 milliliters.)

(b) Effervescent wine and any wine used as a base in the production of effervescent wine may not have an alcohol content in excess of 14 percent by volume. However, wine containing more than 14 percent alcohol by volume may be used in preparing a dosage for finishing effervescent wine.

(Sec. 201, Pub. L. 85–859, 72 Stat. 1383, as amended (26 U.S.C. 5382))

■ 4. Section 24.191 is revised to read as follows:

**§ 24.191 Segregation of operations.**

Where more than one process of producing effervescent wine is used, the appropriate TTB officer may require the portion of the premises used for the production and storage of wine made by each process (bottle fermenting, bulk fermenting, or injecting carbon dioxide) to be segregated as provided by § 24.27.

(Sec. 201, Pub. L. 85–859, 72 Stat. 1381, as amended (26 U.S.C. 5365))

**§ 24.192 [Amended]**

■ 5. Section 24.192 is amended by:

■ a. Adding the words “or still hard cider” after the words “still wine” in the first sentence;

■ b. Removing the words “sparkling wine or artificially carbonated wine” wherever they appear in the first six sentences of the section and adding, in their place, the words “effervescent wine”;

■ c. Removing the word “which” in the sixth sentence and adding, in its place, the word “that”; and

■ d. Adding the words “or sparkling hard cider” after the words “sparkling wine” in the last sentence.

**§ 24.193 [Amended]**

■ 6. Section 24.193 is amended by:

■ a. Adding the words “or still hard cider” after the words “still wine” in the section heading;

■ b. Removing the words “Sparkling wine or artificially carbonated wine” and adding, in their place, the words “Effervescent wine”; and

■ c. Adding the words “or still hard cider” after the words “still wine”.

**§ 24.225 [Amended]**

■ 7. Section 24.225 is amended by adding the words “or natural still hard cider” after the words “still wine”.

**§ 24.234 [Amended]**

■ 8. Section 24.234 is amended by removing the words “sparkling wine, artificially carbonated wine” and adding, in their place, the words “effervescent wine”.

■ 9. Section 24.245 is revised to read as follows:

**§ 24.245 Use of carbon dioxide in still wine and still hard cider.**

(a) *Use of carbon dioxide.* The addition of carbon dioxide to (and retention of carbon dioxide in) still wine and still hard cider is permitted if at the time of removal for consumption or sale, the still wine or still hard cider does not contain more than 0.392 gram of carbon dioxide per 100 milliliters of wine.

(b) *Tolerance limit.* A tolerance of not more than 0.009 gram per 100 milliliters to the maximum limitation of carbon dioxide in still wine and still hard cider will be allowed where the amount of carbon dioxide in excess of 0.392 gram per 100 milliliters is due to mechanical variations that cannot be completely controlled under good commercial practice. A tolerance will not be allowed where it is found by the appropriate TTB officer that the proprietor continuously or intentionally exceeds 0.392 gram of carbon dioxide per 100

milliliters of wine or where the variation results from the use of methods or equipment determined by the appropriate TTB officer to be not in accordance with good commercial practice.

(c) *Penalties.* Penalties are provided in 26 U.S.C. 5662 for any person who, whether by manner of packaging or advertising or by any other form of representation, misrepresents any still wine or still hard cider to be effervescent wine or a substitute for effervescent wine.

(d) *Records.* Records for the use of carbon dioxide in still wine must be maintained in accordance with § 24.319 of this section.

(Sec. 201, Pub. L. 85–859, 72 Stat. 1331, as amended, 1381, as amended, 1407, as amended (26 U.S.C. 5041, 5367, 5662))

**§ 24.246 [Amended]**

■ 10. Section 24.246 is amended by removing the words “sparkling wines” from the description of the use of ammonium phosphate in the “Materials and use column” of the table, and adding, in their place, the words “sparkling wine or sparkling hard cider”.

■ 11. Section 24.251 is added immediately after § 24.250 to read as follows:

**§ 24.251 Tolerance for artificially carbonated hard cider and sparkling hard cider.**

(a) *Tolerance.* A tolerance of not more than 0.009 gram per 100 milliliters to the maximum limitation of carbon dioxide in artificially carbonated hard cider and sparkling hard cider will be allowed where the amount of carbon dioxide in excess of 0.64 gram per 100 milliliters is due to mechanical variations or secondary fermentation variations that cannot be completely controlled under good commercial practice. A tolerance will not be allowed where it is found by the appropriate TTB officer that the proprietor continuously or intentionally exceeds 0.64 gram of carbon dioxide per 100 milliliters of artificially carbonated hard cider or sparkling hard cider or where the variation results from the use of methods or equipment determined by the appropriate TTB officer to be not in accordance with good commercial practice. (See Subpart P of this part for the definition of hard cider for purposes of determining eligibility for the hard cider tax rate.)

(b) *Records.* See § 24.302 of this chapter for recordkeeping requirements.

(Sec. 335, Pub. L. 114–113, 129 Stat. 3109, as amended (26 U.S.C. 5041))

**§ 24.255 [Amended]**

■ 12. In § 24.255(a), the first sentence is revised by adding, after the word “removed”, the words “as well as for the correct determination of carbon dioxide in artificially carbonated hard cider and in sparkling hard cider”, and the Office of Management and Budget control number reference is revised by removing the numbers “1512–0298 and 1512–0503” and adding, in their place, the numbers “1513–0115 and 1513–0092”.

■ 13. Section 24.257 is amended by:

■ a. Revising paragraph (a)(4);

■ b. Adding paragraph (a)(6); and

■ c. Revising the Office of Management and Budget control number reference.

The revisions and addition read as follows:

**§ 24.257 Labeling wine containers.**

(a) \* \* \*

(4) An appropriate designation of the kind of wine, as follows:

(i) *Wines that require label approval—*

(A) *General.* If the wine contains 7 percent or more alcohol by volume and must have label approval under 27 CFR part 4, the designation is the class, type, or other designation required by that part.

(B) *Labeling rules for wines eligible for the “hard cider” tax class—(1) Transitional rule for “hard cider” removed on or after January 1, 2017 and prior to January 1, 2018.* On an optional basis, wines that are taxed at the “hard cider” tax rate may include the statement “Tax class 5041(b)(6)” on the label to adequately indicate the appropriate tax class.

(2) *Additional labeling rules effective for “hard cider” removed from wine premises on or after January 1, 2018.* For wines removed from wine premises on or after January 1, 2018 that are taxed at the “hard cider” tax rate, the label must also include the statement “Tax class 5041(b)(6).” This statement may appear anywhere on the label.

(ii) *Wines that do not require label approval—(A) Adequate designation.* If the wine is not subject to label approval under 27 CFR part 4 because it either is covered by a certificate of exemption from label approval or contains less than 7 percent alcohol by volume, its label must bear a designation that includes enough information (when viewed with the alcohol content statement) to identify the tax class under 26 U.S.C. 5041. The wine must be identified by the term “wine” (or a word that signifies a type of wine, such as “cider,” “perry,” or “mead,” as applicable). If the wine contains more than 0.392 gram of carbon dioxide per

100 milliliters, the word “sparkling” or “carbonated,” as applicable, must be included in the designation.

(1) *Additional labeling rules effective for wines eligible for the “hard cider” tax class.* For wines removed from wine premises on or after January 1, 2017, that are taxed at the “hard cider” tax rate, the designation must be consistent with a hard cider tax class. For example, the designations “hard cider,” “hard perry,” “apple wine,” “pear wine,” “apple cider,” “apple perry,” “apple pear wine,” “cider” and “perry” are consistent with the hard cider tax class. The designation “blueberry cider” is not consistent with the hard cider tax class, because it indicates that the product contains either blueberries or blueberry flavors, which are not authorized for use in wine that is eligible for the hard cider tax class. If the hard cider contains more than 0.392 gram of carbon dioxide per 100 milliliters, the word “sparkling” or “carbonated,” as applicable, must be on the label.

(2) *Transitional rule for wines removed on or after January 1, 2017 and prior to January 1, 2018.* For wines removed on or after January 1, 2017 and prior to January 1, 2018, a label will not be deemed out of compliance with § 24.257(a)(4)(ii)(A) on the sole ground that the label does not provide enough information to identify whether the wine is eligible for a “hard cider” tax classification. On an optional basis, wines eligible for the “hard cider” tax class may include the statement “Tax class 5041(b)(6)” on the label to adequately indicate the appropriate tax class.

(3) *Additional labeling rules effective for “hard cider” removed from wine premises on or after January 1, 2018.* For wines removed from wine premises on or after January 1, 2018, that are taxed at the “hard cider” tax rate, the label must also include the statement “Tax class 5041(b)(6).” This statement may appear anywhere on the label.

(B) *Cross reference.* For additional labeling rules applicable to wines containing less than 7 percent alcohol by volume, see the food labeling regulations issued by the U.S. Food and Drug Administration.

\* \* \* \* \*

(6) *Cross reference.* For regulations requiring a health warning statement on the container of any alcoholic beverage containing not less than one-half of one percent alcohol by volume, see part 16 of this chapter.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 1513–0115 and 1513–XXXX)

■ 14. Section 24.266 is amended by revising paragraph (b)(2) and the reference to the Office of Management and Budget control number, to read as follows:

**§ 24.266 Inventory losses.**

\* \* \* \* \*

(b) \* \* \*

(2)(i)(A) Where the loss of wine on bonded wine premises during the annual period exceeds three percent of the aggregate volume of wine on-hand at the beginning of the annual period and the volume of wine received in bond during the annual period;

(B) The loss exceeds six percent of the still wine or still hard cider produced by fermentation;

(C) The loss exceeds six percent of the sparkling wine or sparkling hard cider produced by fermentation in bottles;

(D) The loss exceeds three percent of the special natural wine produced under § 24.195 or other wine produced under § 24.218;

(E) The loss exceeds three percent of the artificially carbonated wine or artificially carbonated hard cider produced; or

(F) The loss exceeds three percent of the bulk process sparkling wine or bulk process sparkling hard cider produced.

(ii) The percentage applicable to each tax class of wine will be calculated separately, unless the calculation is impracticable because of the mixture of different tax classes by addition of wine spirits or blending during the annual period, in which case the percentage will be calculated on the aggregate volume. Wine removed immediately after production for use as distilling material and on which the usual racking, clarifying, and filtering losses are not sustained, will not be included in the calculations.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control number 1513–0088)

■ 15. Section 24.270 is revised to read as follows:

**§ 24.270 Determination of tax.**

(a) *General.* The tax on wine is determined at the time of removal from a bonded wine premises for consumption or sale. Section 5041 of 26 U.S.C., imposes an excise tax, at the rates prescribed, on all wine (including imitation, substandard, or artificial wine, and compounds sold as wine, which contain 24 percent or less of alcohol by volume) produced in or imported into the United States. Wine containing more than 24 percent of alcohol by volume is classified as distilled spirits and taxed accordingly.

A wine product containing less than one-half of one percent alcohol by volume is not taxable as wine when removed from the bonded wine premises.

(b) *Tax determined and paid on the volume of wine.* The tax is determined and paid on the volume of wine:

(1) In bottles or other containers filled according to United States measure recorded to the nearest 10th gallon; or,

(2) In bottles or other containers filled according to metric measure, on the volume of wine in United States wine gallons to the nearest 10th gallon; or

(3) In the case of pipeline removals, on the volume of bulk wine removed recorded to the nearest whole gallon, five-tenths gallon being converted to the next full gallon.

(c) *Tax rates imposed on wine.* The following taxes are imposed on wine:

(1) *Tax class 5041(b)(1).* On still wines containing not more than 14 percent alcohol by volume, \$1.07, per wine gallon;

(2) *Tax class 5041(b)(2).* On still wines containing more than 14 percent and not exceeding 21 percent alcohol by volume, \$1.57 per wine gallon;

(3) *Tax class 5041(b)(3).* On still wines containing more than 21 percent and not exceeding 24 percent alcohol by volume, \$3.15 per wine gallon;

(4) *Tax class 5041(b)(4).* On champagne and other sparkling wines, \$3.40 per wine gallon;

(5) *Tax class 5041(b)(5).* On artificially carbonated wines, \$3.30 per wine gallon; and

(6) *Tax class 5041(b)(6).* On hard cider, 22.6 cents per wine gallon. See § 24.331 for the definition of hard cider for purposes of determining eligibility for the hard cider tax class.

(d) *Small domestic producer tax credit.* For eligibility for the small producer tax credit, see §§ 24.278 and 24.279.

(Sec. 201, Pub. L. 85–859, 72 Stat. 1331, and Sec. 335, Pub. L. 114–113, 129 Stat. 3109, as amended (26 U.S.C. 5041))

#### § 24.290 [Amended]

■ 16. Section 24.290(a) is amended by adding the words “or still hard cider” after the words “still wine” in the first sentence.

#### § 24.291 [Amended]

■ 17. Section 24.291 is amended:

■ a. In the first sentence of paragraph (a), by adding the words “or still hard cider” after the words “still wine”; and,

■ b. In the Office of Management and Budget control number reference, by removing the numbers “1512–0058, 1512–0292 and 1512–0298”, and

adding, in their place, the numbers “1513–0009 and 1513–0115”.

#### § 24.301 [Amended]

■ 18. Section 24.301 is amended:

■ a. In the section heading, by adding the words “and bulk still hard cider” after the words “still wine”;

■ b. In the first sentence of the introductory text, by adding the words “or bulk still hard cider” after the words “still wine” each time they appear;

■ c. In the second sentence of the introductory text, by adding the words “or for hard cider” after the words “still wine”;

■ d. In the third sentence of the introductory text, by adding the words “and bulk still hard cider” after the words “still wine”;

■ e. In paragraph (b), by adding the words “or sparkling hard cider” after the words “sparkling wine”; and

■ f. In the Office of Management and Budget control number reference, by removing the number “1512–0298” and adding, in its place, the number “1513–0115”.

■ 19. Section 24.302 is amended by:

■ a. Revising the introductory text and paragraphs (a), (d), (e), (g), (i), and (j);

■ b. Adding paragraph (k); and

■ c. Revising the Office of Management and Budget control number reference.

The revisions and addition read as follows:

#### § 24.302 Effervescent wine record.

A proprietor who produces or receives effervescent wine in bond shall maintain records showing the transaction date and details of production, receipt, storage, removal, and any loss incurred. Records will be maintained for each specific process used (bulk or bottle fermented, injection of carbon dioxide) and by the specific kind of wine, *e.g.*, grape, apple, pear, cherry, hard cider. The record will contain the following:

(a) The volume of still wine or still hard cider filled into bottles or pressurized tanks prior to secondary fermentation or prior to the addition of carbon dioxide;

\* \* \* \* \*

(d) The volume of bottle fermented sparkling wine or bottle fermented sparkling hard cider in process, transferred and received;

(e) The volume returned to still wine or still hard cider;

\* \* \* \* \*

(g) The volume of finished effervescent wine bottled or packed (amount produced);

\* \* \* \* \*

(i) An explanation of any unusual transaction;

(j) If the proprietor is an importer of wine to which the provisions of § 27.140 of this chapter apply, any certification or other records required at the time of release from customs custody under that section; and

(k) The amount of carbon dioxide in artificially carbonated hard cider or sparkling hard cider.

(Sec. 201, Pub. L. 85–859, 72 Stat. 1381, as amended (26 U.S.C. 5367))

(Approved by the Office of Management and Budget under control number 1513–0115 and 1513–XXXX)

#### § 24.306 [Amended]

■ 20. Section 24.306 is amended by adding in the words “and bulk still hard cider” after the words “still wine” in the last sentence, and, in the Office of Management and Budget control number reference, by removing the number “1512–0298” and adding, in its place, the number “1513–0115”.

#### § 24.308 [Amended]

■ 21. Section 24.308 is amended by adding the words “or bottle fermented sparkling hard cider” after the words “bottle fermented sparkling wine” in the last sentence of paragraph (a), and, in the Office of Management and Budget control number reference, by removing the number “1512–0298” and adding, in its place, the number “1513–0115”.

#### § 24.319 [Amended]

■ 22. Section 24.319 is amended by adding the words “or still hard cider” after the words “still wine”, and, in the Office of Management and Budget control number reference, by removing the number “1512–0298” and adding, in its place, the number “1513–0115”.

■ 23. Subpart P, consisting of §§ 24.331 and 24.332, is added to read as follows:

#### Subpart P—Eligibility for the Hard Cider Tax Rate

##### § 24.331 Wine eligible for the hard cider tax rate.

A wine removed on or after January 1, 2017 is eligible for the hard cider tax rate listed in § 24.270 if:

(a) It contains no more than 0.64 gram of carbon dioxide per 100 milliliters of wine;

(b) It is derived primarily from apples or pears, or from apple juice concentrate or pear juice concentrate and water, as described in § 24.332(a);

(c) It contains no fruit product or fruit flavoring other than apple or pear, as described in § 24.332(b) and (c); and

(d) It contains at least one-half of 1 percent and less than 8.5 percent alcohol by volume.

(Sec. 335, Pub. L. 114–113, 129 Stat. 3109, as amended (26 U.S.C. 5041))

#### § 24.332 Hard cider materials.

This section pertains to wine that is eligible for the hard cider tax rate as set out in § 24.331.

(a) *Apples and pears.* Wine will be considered to be derived primarily from apples or pears, or from apple juice concentrate or pear juice concentrate and water, if the apple juice, pear juice, or combination of apple and pear juice, or the equivalent amount of concentrate of apple and/or pear juice reconstituted to the original brix of the juice prior to concentration, or any combination thereof, represents more than 50 percent of the volume of the finished product.

(b) *Fruit products.* (1) Wine is not eligible for the hard cider tax rate if it contains any fruit product other than apple or pear. A fruit product is any material derived or made from any fruit or part of a fruit, including but not limited to, concentrates, extracts, juices, powders, or wine spirits.

(2) Notwithstanding the provisions of § 24.332(b)(1), an authorized wine treating material set forth in § 24.246 that is derived from a fruit other than apple or pear may be used in the production of wine otherwise eligible for the hard cider tax rate if it is used for a purpose other than flavoring and it is either used in accordance with the wine treating materials provisions of § 24.246 (if used in a natural wine), or used in amounts insufficient to impart a fruit flavor other than apple or pear (if used in a special natural wine or other than standard wine). In determining whether the use of wine treating materials derived from a fruit other than apple or pear is for a purpose other than flavoring, TTB will consider such factors as the labeling and advertising of the product. Any written or pictorial reference to a material derived from a fruit other than apple or pear (other than the inclusion of a wine treating material in an ingredient labeling statement) in the labeling or advertising of a wine will be treated as evidence that the wine treating material was added for the purpose of flavoring the wine.

(c) *Flavorings.* Wine is not eligible for the hard cider tax rate if it contains any fruit flavoring other than apple or pear. For purposes of this section, a fruit flavoring other than apple or pear is any flavoring that imparts the flavor of a fruit other than apple or pear and includes a natural fruit flavor, an artificial fruit flavor, and a natural flavor that artificially imparts the flavor of a fruit that is not contained in that flavor. In determining whether the use of a flavoring imparts the flavor of a fruit

other than apple or pear, TTB will consider such factors as the labeling and advertising of the product. Any written or pictorial reference to a fruit flavor other than apple or pear in the labeling or advertising of a wine that contains a flavoring will be treated as evidence that the wine contains a flavoring that imparts a fruit flavor other than apple or pear and thus the wine is not eligible for the hard cider tax rate. The use of spices, honey, hops, or pumpkins as a flavoring will not make a wine ineligible for the hard cider tax rate.

(Sec. 335, Pub. L. 114–113, 129 Stat. 3109, as amended (26 U.S.C. 5041))

#### PART 27—IMPORTATION OF DISTILLED SPIRITS, WINES, AND BEER

■ 24. The authority citation for part 27 continues to read as follows:

**Authority:** 5 U.S.C. 552(a), 19 U.S.C. 81c, 1202; 26 U.S.C. 5001, 5007, 5008, 5010, 5041, 5051, 5054, 5061, 5121, 5122–5124, 5201, 5205, 5207, 5232, 5273, 5301, 5313, 5382, 5555, 6109, 7805.

■ 25. Section 27.11 is amended by adding the definition of “Hard cider” in alphabetical order to read as follows:

#### § 27.11 Meaning of terms.

\* \* \* \* \*

*Hard cider.* A wine that meets the eligibility requirements set forth in § 24.331 for the hard cider tax rate set forth in § 24.270.

\* \* \* \* \*

■ 26. Section 27.59 is revised by:

- a. Designating the current paragraph as paragraph (a);
- b. Adding a paragraph heading to newly designated paragraph (a);
- c. Adding paragraph (b); and
- d. Adding an Office of Management and Budget control number reference.

The designation and additions read as follows:

#### § 27.59 Wines.

(a) *General.* \* \* \*

(b) *Hard cider.* The container of any wine eligible for the “hard cider” tax class set forth in § 24.270 of this chapter must be labeled in accordance with the requirements applicable to wine containers removed from wine premises under § 24.257(a)(4) of this chapter. (See § 24.331 of this chapter for the eligibility requirements for the hard cider tax rate).

(Approved by the Office of Management and Budget under control number 1513–XXXX)

Signed: December 7, 2016.

**John J. Manfreda,**  
*Administrator.*

Approved: January 4, 2017.

**Timothy E. Skud,**  
*Deputy Assistant Secretary (Tax, Trade and Tariff Policy).*

[FR Doc. 2017–00333 Filed 1–19–17; 8:45 am]

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## DEPARTMENT OF LABOR

### Office of the Secretary

#### 29 CFR Part 70

#### RIN 1290–AA30

### Revision of FOIA Regulations

**AGENCY:** Office of the Secretary, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Department of Labor’s regulations under the Freedom of Information Act (“FOIA”). The regulations have been revised to update and streamline the language of several procedural provisions and to incorporate changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016. Additionally, the regulations have been updated to incorporate changes in the agency’s administrative structure.

**DATES:** This final rule is effective January 23, 2017.

**FOR FURTHER INFORMATION CONTACT:** Ramona Branch Oliver, Director, Office of Information Services, 202–693–5391 (this is not a toll free number) or 1–877–889–5627 (TTY). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8839.

**SUPPLEMENTARY INFORMATION:** On August 17, 2016, the Department of Labor published a Notice of Proposed Rule Making (NPRM) to revise its existing regulations under the FOIA found at 29 CFR part 70, to update and streamline the language of several procedural provisions and to incorporate changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007, Public Law 110–175, 121 Stat. 2524, and the FOIA Improvement Act of 2016, Public Law 114–185, 130 Stat. 538 (enacted June 30, 2016). The Department invited comments through October 17, 2016.

*Discussion of Comments:* Preparation of the NPRM and this finalization of the