

investigations pursuant to section 19(c) of the Securities Act of 1933 (15 U.S.C. 77s(c)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a-42(b)), and section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-9(b)).

(20) To institute proceedings pursuant to section 12(j) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(j)) with respect to a security based on the issuer's alleged failure to file required periodic reports and, in connection with the institution of such proceedings, issue orders pursuant to section 12(k)(1)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(k)(1)(A)).

(21) With respect to disgorgement funds and Fair Fund plans established in administrative or cease-and-desist proceedings instituted by the Commission pursuant to the Federal securities laws, to:

(i) Grant extensions of time to submit proposed distribution plans to the Commission;

(ii) Appoint tax administrators, pursuant to a Commission-approved omnibus order;

(iii) Publish notice of proposed plans, including plans that omit elements required by § 201.1101 of this chapter (Rule 1101 of the Rules on Fair Fund and Disgorgement Plans);

(iv) Issue orders adopting plans as to which no negative comments have been received;

(v) Approve disbursements to investors in accordance with the plans;

(vi) Approve payment of the fees and expenses of administration; and

(vii) Approve final fund accountings.

* * * * *

By the Commission.

Dated: December 10, 2020.

Vanessa A. Countryman,
Secretary.

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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 4, 5, and 7

[Docket Nos. TTB-2019-0004 and TTB-2019-0005; T.D. TTB-165; Re: Notice Nos. 182, 183, and 184]

RIN 1513-AB56 and 1513-AC45

Addition of New Standards of Fill for Wine and Distilled Spirits; Amendment of Distilled Spirits and Malt Beverage Net Contents Labeling Regulations

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

ACTION: Final rule; Treasury decision.

SUMMARY: This final rule amends the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations that govern wine and distilled spirits containers to add seven new standards of fill for wine and distilled spirits. Although TTB had originally proposed to generally eliminate the standards of fill for wine and distilled spirits, TTB is not adopting that proposal at this time. The amendments described in this final rule will provide bottlers with flexibility by allowing the use of the added container sizes, and will facilitate the movement of goods in domestic and international commerce, while also providing consumers broader purchasing options.

TTB is also amending the labeling regulations for distilled spirits and malt beverages to reflect current policy by specifically stating in the regulations that distilled spirits may be labeled with the equivalent standard United States (U.S.) measure in addition to the mandatory metric measure, and that malt beverages may be labeled with the equivalent metric measure in addition to the mandatory U.S. measure.

DATES: This final rule is effective December 29, 2020.

FOR FURTHER INFORMATION CONTACT: Jennifer Berry, Alcohol and Tobacco Tax and Trade Bureau, Regulations and Rulings Division; telephone 202-453-1039, ext. 275.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers regulations setting forth standards of fill for containers of wine and distilled spirits products distributed within the United States. For wine, the authority to establish these standards is based on section 105(e) of the Federal Alcohol

Administration Act (FAA Act), codified at 27 U.S.C. 205(e), which authorizes the Secretary of the Treasury to prescribe regulations relating to the “packaging, marking, branding, and labeling and size and fill” of alcohol beverage containers “as will prohibit deception of the consumer with respect to such products or the quantity thereof * * *.” For distilled spirits, the authority to establish standards of fill is based on two provisions of law: (1) Section 205(e) of the FAA Act as discussed above, and (2) section 5301(a) of the Internal Revenue Code of 1986 (IRC), codified at 26 U.S.C. 5301(a). Section 5301(a) of the IRC authorizes the Secretary of the Treasury to prescribe regulations “to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits * * *” when the Secretary determines that such action is necessary to protect the revenue. TTB administers these IRC and FAA Act provisions pursuant to section 1111(d) of the Homeland Security Act of 2002, as codified at 6 U.S.C. 531(d). In addition, the Secretary of the Treasury has delegated certain administrative and enforcement authorities to TTB through Treasury Order 120-01.

Current Standards of Fill for Wine

The standards of fill for wine are contained in subpart H of part 4 of the TTB regulations (27 CFR part 4). The term “standard of fill” is used in the TTB regulations and in this document to refer to the authorized amount of liquid in the container, rather than the size or capacity of the container itself. For better readability, however, this document sometimes uses the terms “size” or “container size” and “standards of fill” interchangeably. Within subpart H, paragraph (a) of § 4.72 (27 CFR 4.72(a)) authorizes the use of the following metric standards of fill for containers other than those described in paragraph (b) of that section:

- 3 liters;
- 1.5 liters;
- 1 liter;
- 750 milliliters;
- 500 milliliters;
- 375 milliliters;
- 187 milliliters;
- 100 milliliters; and
- 50 milliliters.

Paragraph (b) of § 4.72 states that wine may be bottled or packed in containers of 4 liters or larger if the containers are filled and labeled in quantities of even liters (4 liters, 5 liters, 6 liters, etc.).

Current Headspace Requirements for Wine

Requirements for headspace, the empty space between the top of the wine and the top of the container, are also contained in subpart H of 27 CFR part 4. Within subpart H, paragraph (a)(3) of § 4.71 (27 CFR 4.71(a)(3)) states that a standard wine container must be made and filled so as to have a headspace not in excess of 6 percent of the total capacity of the container after closure if the net content of the container is 187 milliliters or more and, in the case of all other wine containers, a headspace not in excess of 10 percent of such capacity.

Current Standards of Fill for Distilled Spirits

The standards of fill for distilled spirits are contained in subpart E of part 5 of the TTB regulations (27 CFR part 5). Within subpart E, paragraph (a)(1) of § 5.47a (27 CFR 5.47a(a)(1)) specifies the following metric standards of fill for containers other than those described in paragraph (a)(2) of that section:

- 1.75 liters;
- 1 liter;
- 750 milliliters;
- 500 milliliters (authorized only until June 30, 1989);
- 375 milliliters;
- 200 milliliters;
- 100 milliliters; and
- 50 milliliters.

In the case of distilled spirits in metal containers that have the general shape and design of a can, that have a closure which is an integral part of the container, and that cannot be readily reclosed after opening, paragraph (a)(2) of § 5.47a authorizes the use of the following metric standards of fill:

- 355 milliliters;
- 200 milliliters;
- 100 milliliters; and
- 50 milliliters.

In addition to the metric standards specified above, § 5.47a contains provisions regarding tolerances (discrepancies between actual and stated fill), unreasonable shortages in fill, and distilled spirits bottled or imported before January 1, 1980, and marketed or released from customs custody on or after that date (the date on which the U.S. volumetric standards were replaced by the § 5.47a metric standards, as discussed in more detail below).

Current Headspace Requirements for Distilled Spirits

Requirements for headspace are contained in 27 CFR 5.46(b), which states that a standard liquor bottle of a

capacity of 200 milliliters or more shall be held to be misleading if it has a headspace in excess of 8 percent of the total capacity of the bottle after closure.

Malt Beverages

Unlike wine and distilled spirits, there are no standards of fill prescribed for malt beverages under the FAA Act. However, in the case of malt beverages, § 7.22(a)(4) of the TTB regulations (27 CFR 7.22(a)(4)) requires the display of net contents on the brand label as mandatory label information.

Notices of Proposed Rulemaking

On July 1, 2019, TTB published Notice Nos. 182 and 183 in the **Federal Register** (84 FR 31257 and 84 FR 31264).

Notice No. 182 proposed to eliminate all but a minimum standard of fill for wine containers. The minimum container size was retained to ensure the container would be of sufficient size to accommodate required labeling. The notice also proposed, in response to a petition, to increase the minimum headspace from not in excess of 10 percent of the container's capacity to not in excess of 30 percent for clear containers 100 milliliters or less. Finally, TTB also sought comments on alternatives to eliminating the standards of fill, including authorizing some or all of the petitioned-for sizes that were discussed in the notice, and developing an expedited administrative process for adding new standards in the future.

Notice No. 183 proposed to eliminate all but minimum and maximum standards of fill for distilled spirits. Retaining the minimum was proposed to ensure the container would be of sufficient size to accommodate required labeling, while the maximum maintains the distinction between bottled and bulk products. The FAA Act at 27 U.S.C. 206(c) establishes a bulk distilled spirits container as one having a capacity in excess of one wine gallon, while paragraphs (a) and (b) of section 206 do not permit the retail sale of distilled spirits in bulk containers to consumers.

In Notice No. 183, TTB also proposed to amend the labeling regulations for distilled spirits and malt beverages to reflect current policy by specifically stating that distilled spirits may be labeled with the equivalent standard U.S. measure in addition to the mandatory metric measure, and that malt beverages may be labeled with the equivalent metric measure in addition to the mandatory U.S. measure. Similar labeling is authorized for wine labels in 27 CFR 4.37(b) and has been authorized for distilled spirits and malt beverage labels as a matter of policy, but has not

been explicitly stated in the distilled spirits and malt beverage regulations.

As in Notice No. 182, in Notice No. 183 TTB also sought comments on alternatives to eliminating the standards of fill, including authorizing some or all of the petitioned-for sizes that were discussed in the notice, and developing an expedited administrative process for adding new standards in the future.

In Notice Nos. 182 and 183, TTB provided reasons for proposing the elimination of the standards of fill, including the following:

1. It would address several petitions TTB had received on this issue, would eliminate the need for industry members to petition for additional authorizations if marketplace conditions favor different standards in the future, and would eliminate restrictions on competition and the movement of goods in domestic and international commerce.

2. It would address concerns that the current standards of fill unnecessarily limit manufacturing options and consumer purchasing options, particularly where consumers may seek smaller containers to target a specific amount of consumption.

3. TTB believed that the current and proposed labeling requirements regarding net contents (see 27 CFR 4.32(b)(2) and 4.37, 27 CFR 5.32(b)(3) and 5.38) and those regarding the design and fill of containers (see 27 CFR 4.71 and 27 CFR 5.46) provide consumers with adequate information about container contents, so standards of fill are not necessary to prevent consumer confusion.

4. Limiting standards of fill is no longer necessary to ensure accurate calculation of tax liabilities or to protect the revenue.

5. TTB's current experience with malt beverages, for which there is no Federal standard of fill requirement, shows no disproportionate level of revenue compliance or consumer deception issues related to bottle sizes.

The comment periods for Notice Nos. 182 and 183 originally closed on August 30, 2019, but TTB reopened and extended the comment periods at the request of commenters (see Notice No. 184, 84 FR 39786). The extended comment periods ended October 30, 2019. Because Notice Nos. 182 and 183 proposed similar regulatory amendments and the substance of the comments received were similar, TTB is finalizing the two notices in one final rule.

Comments

TTB received 644 comments in response to Notice No. 182 and 603

comments in response to Notice No. 183, for a total of 1,247 comments. Commenters included producers, wholesale distributors, retailers, trade associations (domestic and foreign), members of Congress, foreign government entities, and members of the public.

TTB also considered 79 comments concerning standards of fill that were submitted in response to Notice No. 176, Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, published in the **Federal Register** (83 FR 60562) on November 26, 2018. When these additional comments are taken into account, TTB reviewed 1,326 comments regarding standard of fill issues as summarized below.

Comments on the Proposed Elimination of the Standards of Fill

Of the 1,326 comments TTB received, 1,251 comments address the proposed elimination of the standards of fill. A total of 110 comments support the proposal—40 comments to Notice No. 182, 40 comments to Notice No. 183, and 30 comments to Notice No. 176. Of the 1,141 comments opposed to eliminating the standards of fill—575 commenters to Notice No. 182, 560 commenters to Notice No. 183, and 6 comments to Notice No. 176—960 are nearly identical form letters, a majority of which are associated with three wholesale distributing companies and their employees.

Commenters supporting the elimination of the standards of fill generally state that the standards are unnecessary, restrictive to producers, and out-of-date. They note that there are no standards of fill for malt beverages or for other consumer products, and state that this does not cause difficulties. They contend that eliminating the standards of fill will result in lower costs for producers, will facilitate international trade, and will provide consumers with more options in beverage alcohol packaging. The American Craft Spirits Association (Notice No. 183, comment 78) states that it surveyed its membership concerning the rulemaking and “found overwhelming support for elimination of the current standards.” It adds that “[i]n order to promote innovation within the industry and competitively enter products into the global marketplace, smaller spirits producers must have maximum flexibility to quickly meet consumer demand as well as diverse regulatory standards.”

Several of the wine commenters who support elimination of the standards of fill cite the fact that they are unable to

use certain can sizes to package wine because they are not among the authorized standard sizes. For example, Senator Charles Schumer (Notice No. 182, comment 12) cites the inability of New York wineries to package their wine in 250 milliliter and 355 milliliter cans as grounds for eliminating the standard of fill regulations. The Senator argues that these sizes are popular single serving sizes that are readily available to producers since they are already mass produced for beer and soda.

Commenters opposing the elimination of the standards of fill cite a number of reasons to retain the standards. The most often cited argument is that the standards of fill prevent consumer confusion. For example, commenters state that eliminating the standards of fill will cause a proliferation of sizes, making it difficult for consumers to compare prices on similar products. The Wine Institute (Notice No. 182, comment 162) states “consumers may not be able to tell the difference between a 750 milliliter wine bottle and a 700 milliliter bottle, which could create an opportunity for producers to reduce costs and taxes while not necessarily reducing their prices. The current federal standards of fill allow consumers to shop by cost comparison without needing to calculate the price per milliliter.”

A handful of commenters cite the European Union’s (EU) experience prior to 1990, when it had no standards of fill for distilled spirits. Drinks Ireland (Notice No. 183, comment 77) states that without standards of fill the market situation was “complex, expensive, and confusing for consumers.” The American Distilled Spirits Association (Notice No. 183, comment 111), citing comments submitted in response to the Bureau of Alcohol, Tobacco and Firearm’s 1987 Advance Notice of Proposed Rulemaking (Notice No. 633, June 24, 1987, 52 FR 23685) on standards of fill, notes that the EU’s lack of standards resulted in “a confusing array of bottle sizes being sold side-by-side on retail shelves creating an environment ripe for consumer confusion.”

A number of commenters state that eliminating the standards of fill is inconsistent with the FAA Act. A letter signed by 52 members of the Congressional Wine Caucus states it would “run directly counter to TTB’s stated mission of prohibiting consumer deception” (Notice No. 182, comment 168). Similar comments include that of the Wine Institute, which comments that eliminating the standards of fill “would lead to the chaotic consumer

marketplace that the FAA Act was intended to prevent.” Six industry associations filing jointly (Notice No. 183, comment 108) state that retaining the standards of fill is consistent with TTB’s statutory authority under the FAA Act to protect consumers.

Opposing comments also argued that eliminating the standards of fill will result in conflicting State requirements. These commenters report that a number of States defer to the Federal standard of fill requirements, so elimination could result in a patchwork of different State rules. The Congressional Wine Caucus states: “38 states defer to the federal standard and if it is eliminated, these states will be forced to enact new container size requirements. This will create serious disruption to business as wineries would have to overhaul their sales, marketing, and compliance models to adjust to 38 varying state regulations.”

No State entity submitted comments to either notice, although TTB did request comments in Notice Nos. 182 and 183 from State regulators on whether the proposal would present regulatory issues at a State level. However, TTB did receive a comment from the National Alcohol Beverage Control Association (NABCA), which represents jurisdictions, including States, which directly control the distribution and sale of beverage alcohol within their borders. NABCA (Notice No. 182, comment 64; Notice No. 183, comment 55) opposes the elimination of the standards of fill and comments that the States currently using the Federal standards will enact new standard of fill requirements that could be different in each State.

Numerous commenters state that a proliferation in sizes will cause harm to distributors and retailers. According to many of these commenters, more sizes will result in additional SKUs, which will increase costs for these industry members. Southern Glazer’s Wine & Spirits (Notice No. 183, comment 66) states that the increase in SKUs “will have cascading economic ramifications throughout the entire value chain—from supplier to wholesaler to retailer to the end consumer. It will require major wholesalers, for example, to invest in elevated inventory levels, enhanced material handling capabilities, and increased storage space.” The California Grocers Association (Notice No. 182, comment 169) states that “Eliminating the regulation on standard wine and spirits sizes will increase our costs,” and provides examples relating to such things as shelf space and inventory.

Opponents also contend that eliminating the standards of fill will

cause an increase in counterfeit and gray market imports that are currently prevented because the standards do not include some common international sizes, most specifically the 700 milliliter size. A large number of commenters state that adulterated products could more easily enter the country, resulting in injury and possibly death to consumers. This concern is expressed by Moët Hennessy USA, Inc. (Notice No. 183, comment 100) in its comment: “* * * we wish to express a serious concern that will be impacted by changes to the existing standards—unauthorized importation of distilled spirits and wine products * * *. Allowing unauthorized imports robs Moët Hennessy USA and other authorized importers of the opportunity to protect against those risks and to ensure that our products are being sold in the intended state and manner. U.S. consumers should never face the risk of injury or death due to untraceable adulterated or counterfeit product brought in by an unauthorized importer.”

Finally, a few commenters argue that malt beverages are different in meaningful ways from wine and distilled spirits, and the fact that there are no standards of fill for malt beverages does not imply that there should not be standards of fill for wine and distilled spirits. These commenters state that because of historical practices consumers have different expectations for malt beverages than they do for wine and spirits. Additionally, Sazerac (Notice No. 183, comment 67) reports that a number of States mandate specific standards of fill for malt beverages, which it argues has driven standardization nationally. Heaven Hill Brands (Notice No. 183, comment 96) notes that in most states malt beverage distributors have the ability to distribute directly. It contends that “[t]his direct distribution by suppliers allows for more flexibility in size due to fewer limitations resulting from a distributor’s management of malt beverage inventory. Distilled spirits, however, must go through the distributor tier and have a much longer shelf life creating long periods of storage.”

Comments Regarding the Addition of Specific Sizes

Both Notice Nos. 182 and 183 stated that TTB was also considering maintaining the standards of fill, but “liberalizing the existing regulatory scheme” by adding certain additional standards of fill. In the respective notices, TTB listed sizes for which it had received a petition as 200, 250, 355, 620, and 700 milliliters and 2.25 liters

for wine, and 700, 720, 900 milliliter and 1.8 liters for distilled spirits. A large number of commenters expressed support for the addition of specific petitioned-for sizes as follows:

Wine—250 milliliter: This size was supported by 51 commenters. Proponents of this size note that some wines are currently being sold in aggregate packages of four 250 milliliter cans, which together equal one liter, an authorized standard of fill. Industry members state that the 250 milliliter is popular with consumers as a single serving size, with some further stating that this size promotes portion control and responsible drinking. In his comment, Senator Schumer states that “a recent wine consumer survey by WICResearch.com concluded that ‘the total wine market will grow in order to satisfy consumer preferences,’ if TTB permitted sales of wine-in-a-can in a single 250 milliliter size, which the survey revealed is the single-serve size most popular with consumers.” Wine Institute notes that 250 milliliter containers are “ideal serving containers for consumption at certain licensed venues such as stadiums, parks and other locations where glass or larger containers are not viable,” and retailers wish to sell them individually in such venues.

Some commenters report that retailers often separate the containers from the aggregate packages, causing trade enforcement issues at the State level. To remedy this, these commenters recommend TTB approve the 250 milliliter size as an authorized standard of fill.

Wine—355 milliliter (12 oz.): This size was supported by 38 commenters. Several cider producers state that since the 355 milliliter (12 oz) can size is standard in the beer industry, their customers want and expect that size, making it critical to their commercial success. These producers note that, in the production of cider, apples often naturally ferment to an alcohol by volume (abv) level just above 7.4%, so producers often take steps to lower the abv below 7% so that the standards of fill regulations will not apply, enabling them to use 355 milliliter containers. They state that sugar levels in apples vary widely depending on climate and other factors, making final alcohol levels difficult to predict. They argue that being able to use the 355 milliliter container size will eliminate this uncertainty.

Wine—200 milliliter: This size was supported by 23 commenters. Several cider industry members state that their customers are seeking products in this size. The Vermont Grape and Wine

Council (Notice No. 182, comment 74) and Presque Isle Wine Cellars (Notice No. 182, comment 37) state that this size is good for ice wine and is the size used in Canada for ice wine. Other commenters note that this size is authorized in Europe, so its approval will facilitate trade.

Other wine sizes: The other container sizes proposed in Notice No. 182—620 milliliter and 700 milliliter—were supported by two comments and one comment, respectively. TTB received no comments specifically addressing the proposed 2.25 liter size. However, TTB received comments proposing additional wine sizes that had not been proposed in Notice No. 182: 20 milliliter, 180 milliliter, 225 milliliter, 255 milliliter, 300 milliliter, 360 milliliter, 473 milliliter (16 oz), 475 milliliter, 550 milliliter, 568 milliliter, 650 milliliter, 720 milliliter, 1.8 liters, and 3.5 liters. Several of these sizes were suggested in Notice No. 176 by cider producers who contend that the sizes are important for their industry’s success. Other proponents state that their proposed sizes are authorized in another country, so approval will facilitate trade.

Distilled spirits—700 milliliter: This size was supported by 18 commenters, who generally state that the 700 milliliter size is popular in other countries, so approval will facilitate trade and allow U.S. consumers more options in imported distilled spirits. However, several other commenters specifically cite the 700 milliliter size as a size that should not be approved. These commenters state that 700 milliliter is too close to the currently approved 750 milliliter size, and also contend that the size is the most popular bottle size worldwide with counterfeiters. Constellation Brands, Inc. (Notice No. 183, comment 107) states that the “existence of both a 750 ml and 700 ml size in the marketplace could lead to consumer confusion and allow for confusing or misleading pricing practices. The addition of a 700 ml size could also enable sales by unauthorized importers.” Moët Hennessy USA, Inc. (Notice No. 183, comment 100) states that the prohibition against the 700 milliliter size has kept many unauthorized spirits imports out. Approval, it believes, “will ‘open the floodgates’ for unauthorized spirits imports into the U.S.” It further states that “unreputable operators * * * refill used spirits bottles with different liquid, causing potential serious risk to consumers.”

Other distilled spirits sizes: Three of the petitioned-for sizes—720 milliliter, 900 milliliter, and 1.8 liters—received

support from three Japanese trade associations and the Japanese National Tax Agency. Several other additional distilled spirits sizes were proposed by commenters that had not been proposed in Notice No. 183: 20 milliliter, 250 milliliter, 350 milliliter, 355 milliliter, 500 milliliter, 1.5 liters, 2 liters, 3 liters, 3.75 liters, and 5 gallons. Five commenters proposed the 1.5 liters size, stating that the size is used in other countries, so its approval will align the standards of fill more closely with the global marketplace. The EU referenced all nine of its authorized sizes (100 milliliter, 200 milliliter, 350 milliliter, 500 milliliter, 700 milliliter, 1 liter, 1.5 liters, 1.75 liters and 2 liters) in its comment. The proponents of these sizes cite their usage in other countries and state that their approval will facilitate trade and offer additional options to U.S. consumers.

Comments Opposing Addition of Any New Sizes

Numerous commenters to both notices opposed the approval of any new sizes, stating that the existing standards of fill already provide a wide variety of package sizes. Some of these commenters are not against the addition of new sizes per se, but rather believe that the current rulemaking did not provide enough opportunity for the public to focus on the petitioned-for sizes. E. & J. Gallo Winery (Notice No. 182, comment 146) states that “[e]ach proposed new standard of fill should be the subject of a separate rulemaking proceeding so that commenters can review each in the context of existing standards of fill and any other proposals under consideration. Among other things, those rulemakings should address whether a proposed new standard of fill should replace an existing standard of fill or whether it should be limited to a particular package type such as cans or Tetra Paks. This type of deliberation is not possible in the current rulemaking.”

Comments on Proposal for an Expedited Approval Process

Both Notice Nos. 182 and 183 proposed the option of instituting an expedited approval process for standards of fill were TTB to continue to approve individual standards. A total of 33 comments from both notices specifically address this proposal.

Only four comments express complete support for an expedited approval process. The U.S. Association of Cider Makers (Notice No. 182, comment 158) supports an expedited process because “the industry and marketplace change faster than the existing proposed

rulemaking process can react, and we believe it is unreasonable to rely on NPRMs to quickly respond to market innovations.” The National Association of Beverage Importers (Notice No. 182, comment 136 and Notice No. 183, comment 105) states that an administrative process would “enable TTB to ‘test the waters’ of multiple sizes.” It could, for example, permit the optional use of a 700 milliliter distilled spirits bottle for a limited period of time to determine how consumers react and the industry implements the introduction of this standard size from the global market.

Thirteen comments express complete opposition to any administrative approval process. These commenters generally state that new sizes should be approved by rulemaking, which will allow for public comments and transparency. Some of them also comment that it is not clear how such a process would work. Sazerac Company, Inc. (Notice No. 182, comment 85) states that “the public should be given a meaningful opportunity to comment on potential changes as this should not be merely an administrative decision. Without sufficiently clear, publically-available standards, these standards could change over time without public input as officials change.” Sazerac also states that it believes comment would be required under the Administrative Procedure Act (APA) because the standards of fill are binding on industry.

An additional 16 comments express support for an expedited process if it includes a public comment period or an opportunity for “open consultation” with all stakeholders before new sizes are approved. Several of these commenters also state that they would like additional information about how an expedited process would work.

Other Comments

No comments were received regarding the Notice No. 182 proposal to increase the minimum headspace for wine containers from not in excess of 10 percent of the container’s capacity to not in excess of 30 percent for clear containers 100 milliliters or less.

Comments on Labeling Distilled Spirits With U.S. Measure and Malt Beverages With Metric Measure

Five comments to Notice No. 183 opposed the proposal to amend the labeling regulations for distilled spirits and malt beverages to specifically provide that distilled spirits may be labeled with the equivalent standard U.S. measure in addition to the mandatory metric measure, and that

malt beverages may be labeled with the equivalent metric measure in addition to the mandatory U.S. measure. Such labeling has been allowed under TTB policy, but it has not been explicitly authorized in the regulations. These commenters state that such dual labeling is unnecessary and will cause “label clutter.” Six comments to Notice No. 182 expressed opposition to allowing U.S. units on wine labels, even though TTB made no proposal on the issue in Notice No. 182, as the wine labeling regulations already state that wine may be labeled with the equivalent U.S. unit in addition to the mandatory metric unit. See 27 CFR 4.37(b).

TTB Analysis

As discussed above, TTB received 110 comments that expressed support for eliminating the standards of fill, asserting that eliminating the standards will provide them with greater flexibility to meet consumer demands and grow their businesses. TTB received 1,141 comments that oppose eliminating the standards of fill (including the 937 nearly identical comments from individuals associated with three industry members). These commenters contended that eliminating the standards of fill would cause consumer confusion and potentially lead to a proliferation of differing State container size requirements that could cause further consumer confusion. Commenters also expressed concern about significant market disruption.

Based upon these comments, particularly those with regard to the potential consumer confusion, TTB believes that the appropriate action at this time is not to eliminate all standards of fill but instead to identify and authorize specific standards of fill from among those sizes that were the subject of notice and comment and for which TTB received sufficient information to make a determination.

TTB notes that, while some commenters expressed support for eliminating of the standards of fill (including Senator Charles Schumer), the comments themselves focused specifically upon ensuring that certain can sizes, such as 250 milliliter and 355 milliliter for wine, were authorized. TTB believes that its authorization of these sizes largely addresses these commenters’ concerns.

Commenters expressed considerable support for most of the sizes TTB included in its proposals. However, few commenters supported authorizing the 620 milliliter, 700 milliliter, and 2.25 liter sizes for wine (which received specific support from 2, 1, and 0 commenters respectively).

The 700 milliliter size for distilled spirits was the only proposed size, for either wine or distilled spirits, for which some expressed opposition. With regard to the 700 milliliter size, TTB received supportive comments from industry members who state that approval of the 700 milliliter size for distilled spirits will facilitate trade for U.S. exporters and importers, because it is commonly used in other countries, and none of the commenters opposed to the 700-milliliter size provided information that would support a finding that the 700-milliliter size will be any more misleading to consumers than the other sizes supported by commenters generally. While some commenters noted that the 700-milliliter size is close to the already authorized 750-milliliter size, as noted above, commenters supported approving the 355-milliliter size for wine, although 375-milliliter is already an authorized size, and no commenters suggested that the closeness in size would lead to confusion. Additionally, although TTB understands the concern that commenters raised with regard to the potential for counterfeit products in the 700-milliliter size, TTB believes it is appropriate to continue to apply enforcement measures to deal with counterfeit products of any size.

In light of this, TTB believes that the addition of most of the petitioned-for sizes will result in many of the same benefits that were intended when it proposed eliminating the standards of fill—providing bottlers with more flexibility, facilitating the movement of goods in domestic and international commerce, and providing additional purchasing options to consumers, but without causing the disruption commenters expressed concerns over regarding the proposed elimination of standards of fill.

U.S.-Japan Trade Agreement

On October 7, 2019, the United States and Japan reached an agreement (the Agreement) on market access for certain agriculture and industrial goods. On December 30, 2019, a **Federal Register** notice (84 FR 72187) was issued to implement the Agreement. As part of the Agreement, the United States reached a side letter agreement with Japan dated October 7, 2019, which addresses issues related to alcohol beverages, including standards of fill (“Side Letter”). See https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Alcoholic_Beverages.pdf. The Side Letter states that the U.S. Department of the Treasury will take final action on Notice Nos. 182 and 183. If the final action does not

address certain sizes—180, 300, 360, 550, 720 milliliters, and 1.8 liters for wine, and 700, 720, 900 milliliters, and 1.8 liters for distilled spirits—then the U.S. Department of the Treasury shall propose new rulemaking to allow for those sizes. The Side Letter took effect with the U.S.-Japan Trade Agreement, which entered into force on January 1, 2020.

In Notice No. 183, TTB referenced the distilled spirits sizes listed in the Side Letter. It described the petitions from three Japanese trade associations and a Japanese government agency for those sizes. These entities submitted comments that supported the elimination of the standards of fill, but further stated that, if the standards are not eliminated, they support the approval of their petitioned-for sizes. These proposed sizes for distilled spirits are discussed in Notice No. 183. Because TTB had not received petitions for the wine sizes listed in the Side Letter, TTB did not reference those sizes for wine in Notice No. 182. Nevertheless, TTB did receive comments from a Japanese trade association and a Japanese government agency proposing the approval of those sizes. The two comments support the elimination of the standards of fill, but requested the approval of the 180, 300, 360, 550, 720 milliliters, and 1.8 liters sizes for wine if the standards of fill for wine are not eliminated.

Administrative Approval Process

TTB requested comments regarding whether it should include in the new regulations an expedited administrative approval process that would replace the requirement for separate rulemaking in order to add new sizes to the standards of fill. This expedited approval process was offered as a quicker and less burdensome way to facilitate the expansion of bottled sizes without creating unnecessary industry burden. However, few commenters supported the process unless it included a public comment period or other means to consult with the industry, similar to the existing rulemaking process. Other commenters expressed support for an administrative approval process provided that TTB establishes criteria for approving additional sizes, and stated that TTB had not identified appropriate criteria for such a procedure. Consequently, TTB believes that an administrative procedure for approving new standards of fill is not appropriate at this time.

TTB Finding

After careful analysis of the comments discussed above, TTB has decided not

to eliminate the standards of fill for wine and distilled spirits. Rather, TTB is adding certain sizes for which TTB had aired petitions in Notice Nos. 182 and 183. Based upon the comments received to those notices, TTB is authorizing the addition of the 200, 250, and 355 milliliters sizes for wine to § 4.72, and the 700, 720, 900 milliliters, and 1.8 liters sizes for distilled spirits to § 5.47a.

At this time, TTB is not adding the 620 milliliters, 700 milliliters, and 2.25 liter wine sizes for which it had aired petitions, because comments received regarding these sizes did not provide sufficient information for TTB to determine that they should be authorized standards of fill. TTB will consider including these sizes and any new petitions for additional sizes in subsequent rulemaking. Moreover, TTB is not adding a 2-milliliter size for distilled spirits that was the subject of a petition because, as discussed in Notice No. 183, TTB believes that a minimum size of 50 milliliters is needed to ensure sufficient space on the container for required labeling.

TTB is adopting the proposal in Notice No. 182 to increase the minimum headspace in wine containers from not in excess of 10 percent of the container's capacity to not in excess of 30 percent for clear containers 100 milliliters or less. TTB is likewise adopting the Notice No. 183 proposal to amend the labeling regulations for distilled spirits and malt beverages to specifically provide that distilled spirits may be labeled with the equivalent standard U.S. measure in addition to the mandatory metric measure, and that malt beverages may be labeled with the equivalent metric measure in addition to the mandatory U.S. measure.

TTB will conduct rulemaking to propose the addition of new standards of fill for wine, including the 180, 300, 360, 550, 720 milliliters, and 1.8 L sizes that Japanese government entities and Japanese industry associations requested during the comment period, and which were included in the Side Letter signed as part of the U.S.-Japan Trade Agreement discussed above.

Regulatory Analysis and Notices

Regulatory Flexibility Act

TTB certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This final rule will provide wine and distilled spirits bottlers and importers with additional flexibility to use new bottle sizes if they so choose. This proposed regulation does not impose any new reporting,

