

Is it Time for Nutrition Facts to Hit the Bottle?: Nutrition Labeling of Alcohol Beverages and the Implications for Consumers and the Industry

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I. INTRODUCTION

Wine tasting rooms are strange worlds unto themselves, filled with visitors who probe their palates and evaluate their senses for the sole pleasure of engaging in convoluted dialogue.¹ Tasting room patrons often couch their sensory perceptions in incomprehensible terms and metaphysical phrases.² Lifeless invertebrate liquids are described as “ponderous” and having “backbone;”³ “green” can be both a flavor and a color;⁴ and yellow fluids wafting of “cat pee” or “grass” are not only safe for consumption, but coveted.⁵

This vocabulary is echoed in dinner parties and fancy restaurants, and perpetuated in the columns of renowned alcohol critics who regularly buttress their tasting notes with new phrases.⁶

¹ BARBARA NOWAK & BEVERLY WICHMAN, *THE EVERYTHING WINE BOOK* 272 (2005) (“A tasting room is just what the name says. It’s a place—a room or a building—that the winery has designated to host visitors, sell their wines, and offer tasting samples. The tasting room may be located at the winery itself [or] on the winery’s property separate from the winery . . .”).

² Even the definition of “tasting” as defined by French Standards Association is rather complex: “an operation consisting of trying, analyzing, and evaluating the organoleptic and more particularly the olfactogustatory characteristics of a product.” EMILE PEYNAUD, *THE TASTE OF WINE, THE ART AND SCIENCE OF WINE APPRECIATION 2* (1996). Peynaud notes that “[t]oo technical a vocabulary and circumlocutions are often primary obstacles to communication.” The irony of this statement is blatant. In trying to explain the overly technical terminology employed in sensory evaluation, Peynaud still manages to use the word “circumlocution.” *Id.* at 1.

³ eRobert Parker, <http://www.erobertparker.com/info/glossary.asp> (“a ponderous wine is a wine that has become heavy and tiring to drink.”); Classic Wine, <http://www.classicwines.co.za/category.aspx?categoryID=87> (“*Backbone* – The wine is well formed, *Firm*, not *Flabby* or insipid.”)

⁴ eRobert Parker, <http://www.erobertparker.com/info/glossary.asp> (“[g]reen wines are wines made from underripe grapes; they lack richness and generosity as well as having a vegetal character.”)

⁵ Linda Murphy, *Here Kitty Kitty, Wine critics love cat pee, but hate wet dog. We explain why*, SAN FRANCISCO CHRONICLE at F1, March 25, 2005. San Francisco Chronicle Wine Editor Linda Murphy describes cat pee as “a pungently ‘perfumed’ mix of herbs, asparagus, green bean and bell pepper.” *Id.* Cat pee is “positive characteristic” that connotes a muskiness that is prevalent in many Marlborough, New Zealand Sauvignon Blancs.” *Id.* One New Zealand winery even went so far as to name one of its Sauvignon Blancs “Cat’s Pee on Gooseberry Bush.” *Id.* See Coopers Creek, http://www.cooperscreek.co.nz/white_wine/info.php?wineid=17&. Don’t confuse cat pee with “cat box” though.

⁶ It is often difficult to even tell that the descriptions in wine magazines and on bottles are referring to wine. Catherine Rabb, *Put your muddle where your mouth is: Murky wine descriptions shouldn’t keep you*

Each notable critic does his or her part in expanding the glossary of terms and phrases consumers employ.⁷ Most recently, one prominent critic wrote a column that could have profound implications on the way connoisseurs and consumers alike talk about alcohol.⁸ However, do not expect to find this critique in the pages of Wine & Spirits or The Beer Advocate.⁹ Readers must look to the pages of the Federal Register for the ultimate alcohol beverage authority: the Alcohol Tobacco Tax and Trade Bureau, better known as the “TTB.”¹⁰ In July of 2007, the TTB published Notice of Proposed Rulemaking Number 73 (“NPR 73”) that if made final, would require all alcohol beverage labels to include a panel that discloses calorie, carbohydrate, fat and protein content.¹¹

from savoring the drink's details, THE CHARLOTTE OBSERVER, September 19, 2007. Rabb suggests there is a method to the madness and describes how to “break the code.” *Id.*

⁷ Alcohol beverage critics have substantial influence on the purchasing behavior of consumers. *See* Eric Asimov, *Decanting Robert Parker*, THE NEW YORK TIMES at F1, March 22, 2006. Asimov chronicles the rise of wine critic Robert Parker, “the writer who has famously been labeled the most influential critic in the world.” *Id.* Asimov asserts “his power is so great, and his taste so monochromatic . . . that some producers around the world feel compelled to customize their wines for his palate.” *Id.* *See* Joey Redner, *Beer Hunter R.I.P.*, ST. PETERSBURG TIMES at 41, September 14, 2007. The late Michael Jackson – a beer critic from London, not the singer from Neverland – is remembered as “single-handedly sav[ing] some styles of beer from oblivion, and unquestionabl[y] [sparking] the resurgence of others. *Id.*

⁸ *See infra* note 10.

⁹ *See* <http://www.wineandspiritsmagazine.com/>. Wine & Spirits magazine is a monthly periodical primarily dedicated to providing reviews of wine and spirit products. *Id.* *See* <http://beeradvocate.com/mag/>. Beer Advocate magazine promotes beer style and culture and provides reviews on beers around the world. *Id.*

¹⁰ TTB is responsible for the administration of the Federal Alcohol Administration Act which governs, among other things, the labeling of wines containing at least 7 percent alcohol by volume, distilled spirits, and malt beverages in interstates and foreign commerce. 27 U.S.C. § 205 (1935). These products (wine, distilled spirits, and malt beverages) are commonly referred to as “alcohol beverages” throughout this comment. TTB fulfills its statutory mandates by “preparing and issuing regulations, rulings, directives, correspondence, and other written materials that guide the regulated industries and TTB operations.” Office of Headquarters Operations, <http://www.ttb.gov/rpd/index.shtml>.

¹¹ Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages, 72 Fed. Reg. 41,860 (proposed July 31, 2007) (to be codified at 27 C.F.R. pts. 4, 5, 7, and 24). In general, NPR 73 proposes that nutrients be disclosed in a “Serving Facts” panel similar to the “Nutrition Facts” panel used on foodstuffs. *Id.* at 41,878; *see infra* Addendum B; *see also* Nutrition Labeling and Education Act of 1990 § 403, 21 U.S.C. § 343 (1990).

The TTB’s proposal for the addition of four pieces of nutritional information on alcohol beverage labels appears outwardly innocuous, especially in light of the fact that most food and beverage products are already required by Federal mandates to disclose similar nutrient information.¹² But when did consumers begin purchasing alcohol beverages in the context of health, diet and nutrition? And more importantly, should they? NPR 73’s historical roots reveal this vociferous policy debate.

Nutrition labeling is not a newcomer to the alcohol beverage labeling policy arena. NPR 73 is in fact the latest proposal to emerge from consumer interest lobbying initiatives that span three decades.¹³ Consumer interest groups, government regulatory bodies, alcohol beverage trade associations, alcohol producers, and consumers, have historically disagreed over the pragmatism and structure of nutrient label proposals.¹⁴ These divergent value systems have long drawn on historical, health, and economic considerations to substantiate their claims.¹⁵ However, the predominant contention among these warring factions has been a matter of statutory import; more specifically, whether current and proposed labeling regulations meet the twin aims of the Federal Alcohol Administration Act (“FAA Act”).¹⁶ The FAA Act provides that the Secretary of

¹² See *infra* notes 84, 85 and accompanying text.

¹³ See *infra* Part II.A-D.

¹⁴ *Id.*

¹⁵ RICHARD MCGOWAN, GOVERNMENT REGULATION OF THE ALCOHOL INDUSTRY: THE SEARCH FOR REVENUE AND THE COMMON GOOD 5 (1997). McGowan advances the idea that the alcohol industry is highly regulated partly because it provokes an emotional response from many facets of society concerned with consumer welfare and partly because it is a revenue raiser for governments. *Id.* TTB’s reasoning for proposing and rescinding prior alcohol labeling rules, as detailed in Part II, hues close to McGowan’s historical, religious, health, and economic factors. MCGOWAN, at 3. Take for example the list of organizations that signed CSPI’s petition for Nutrient labeling. CSPI Petition, <http://www.cspinet.org/booze/031216IngLabelingPetition.pdf>. The list includes medical associations, consumer health organizations, religious institutions, and scholarly organizations. *Id.*

¹⁶ 25 U.S.C. § 205. To make sure that labels conform to these Congressionally-mandated standards, alcohol beverage producers are required to submit labels to the Treasury Department to obtain Certificates of Label Approval (“COLA”) from the Secretary. Alcohol beverage producers are prohibited from

the Treasury is to (1) “prohibit deception of the consumer,” and (2) “provide the consumer with adequate information as to the identity and quality” of alcohol beverage products.¹⁷ As with prior failed rulemakings on this subject, the broad consumer protection provisions of the FAA Act highlight contentious issues in this latest proposed rule and beg numerous questions: What level of information provides consumers with “adequate information?”¹⁸ Will a nutrition facts panel on alcohol beverages deceptively convey that alcohol beverages are nutritious or part of a regular diet?¹⁹ Could alcohol producers influence consumer interpretations?²⁰

In addition to balancing the twin aims of the FAA Act, the TTB’s administrative rulemaking must also conform to the Regulatory Flexibility Act (“RFA”) which requires administrative agencies to design flexible regulatory proposals that minimize the hardship on industries, businesses and individuals.²¹ The RFA thus requires the TTB to consider the utility of its proposed regulations. Appropriate considerations traditionally identified by the TTB for determining a regulation’s utility include whether the costs associated with the regulation are commensurate with the consumer benefits, whether existing regulations already sufficiently convey “adequate information,” and whether international trade will be hindered.²²

labeling their products without prior approval. *Id.* This procedure ensures a uniform enforcement of the labeling provisions of the FAA Act.

¹⁷ 27 U.S.C. § 205(e) (1935) (enumerating unlawful practices with respect to the interstate and foreign sale of alcohol beverages including unfair competition, commercial bribery, consignment sales, and labeling and advertising practices).

¹⁸ *See supra* note 17 and accompanying text

¹⁹ *See supra* note 17 and accompanying text.

²⁰ Cindy Skrzycki, *Alcohol Labeling Proposal Sets Off a Brawl*, WASHINGTON POST at D1, January 22, 2008. Skrzycki identifies a Seagram’s print ad attempting to market the low-carb profile of its liquor by touting “No fat, zero carbs and 97 calories per 1.5-ounce serving.” *Id.* The Seagram’s ad falls just short of expressly stating whiskey is healthy, a dangerously misleading inference that contravenes the FAA Act’s mandate to prevent consumer deception. 27 U.S.C. § 205.

²¹ *See infra* note 164 and accompanying text.

Backed by what the bureau has identified as an upsurge of consumer support, the TTB has evidences a strong desire to see NPR 73 through.²³ This article seeks to examine whether NPR 73’s nutrient labeling panel comports with the statutory mandates of the FAA Act and economically sound regulatory policy delineated under the RFA. Part II of this comment will chronicle the history of the BATF’s rulemaking decisions on the topics of ingredient, nutrient and allergen labeling.²⁴ This historical examination highlights why comprehensive reform in this policy area has traditionally failed.²⁵ Part III will look at today’s regulatory structure for alcohol labeling.²⁶ Part IV will analyze the propriety of NPR 73’s proposed Serving Facts panel in light of the FAA Act, the RFA, and the three decades of failed rulemaking in this policy area.²⁷ Part V will provide a suggested course of action as well as alternative courses of action should the TTB propose a final rule.²⁸ Part VI will conclude the comment.²⁹

II. HISTORICAL ANTECEDENTS

In 1935 President Roosevelt signed the Federal Alcohol Administration Act. The FAA Act was designed by Congress to respond to a resurging alcohol industry that had regained footing

²² See *infra* Part II.

²³ See *infra* Part II.A-D; see also 72 Fed. Reg. 41,860 (noting that concluded in 1993 that there was no consumer interest in having nutrient labeling on alcohol beverages).

²⁴ See *infra* notes 30-127 and accompanying text.

²⁵ *Id.*

²⁶ See *infra* notes 128-148 and accompanying text.

²⁷ See *infra* notes 149-217 and accompanying text.

²⁸ See *infra* notes 218-260 and accompanying text.

²⁹ See *infra* notes 260-266 and accompanying text.

after the repeal of Prohibition.³⁰ The Act gave broad discretion to the Secretary of the Treasury to prescribe regulations for the purposes of protecting consumers and maintaining industry integrity.³¹ Some regulatory and taxation functions were also conveyed to the Bureau of Internal Revenue.³² However, in 1972 all regulatory and taxation functions were conveyed to a newly formed Treasury Department agency, the Bureau of Alcohol, Tobacco and Firearms.³³ In its first year of operation, the BATF received a petition from a fledgling consumer interest organization.³⁴ The BATF then proposed the first comprehensive ingredient labeling reform, thus sparking an impassioned alcohol labeling policy debate that lasted the next three decades.³⁵

A. *Ingredient Labeling*

The 1970's were an era of environmental and consumer protection awareness.³⁶ By 1972, the

³⁰ See *supra* note 16. See About TTB, <http://ttb.gov/about/history.shtml>. Prohibitions effects linger today and have helped shape decades worth of alcohol policymaking. *Id.* After Prohibition and the signing of the Twenty-First Amendment, the federal government relinquished much of its regulatory and supervisory authority to state and local governments. *Id.* Today this relinquishment has resulted in a labyrinthine regulatory framework. MCGOWAN, *supra* note 15, at 5. The FAA Act was carefully designed by Congress to implement the 21st Amendment by establishing a heavily regulated, stable and ethical alcohol beverage industry. *Id.*

³¹ *Id.*

³² *Id.* The Bureau of Internal Revenue (“BIR”) is the predecessor to today’s Internal Revenue Service (“IRS”). *Id.*

³³ *Id.* After enactment of the Homeland Security Act of 2002, the BATF became the law enforcement wing of the United States Department of Justice. *Id.*; see also About BATF, <http://www.BATF.treas.gov/about/mission.htm>. The duties of promulgating regulations and taxing the alcohol industry were handed over to TTB. *Id.*

³⁴ See *infra* note 38.

³⁵ See *supra* Part II.A-D.

³⁶ Labeling of Advertising of Wines, Distilled Spirits and Malt Beverages Request for Public Comment, 70 Fed. Reg. 22,274, 22,276 (proposed Apr. 29, 2005) (to be codified at 27 CFR pts. 4, 5, and 7). Founded in 1971, CSPI has grown to become a nationally recognized public health and consumer interest advocate that often promotes the important of the link between diet and health to the government, industry and public. About CSPI, <http://www.cspinet.org/about/index.html>. In the past, CSPI has lobbied

Center for Science in the Public Interest (“CSPI”) had emerged as a formidable consumer health organization with an eye towards reducing the adverse health effects of alcohol on society.³⁷

CSPI petitioned the BATF in 1972 to impose regulations that would require ingredient labeling on all alcohol beverages.³⁸ The BATF responded to CSPI’s petition in 1974 by soliciting comments on three proposed rules and holding three public hearings.³⁹ After considering oral representations from the hearings and over one thousand written comments, the BATF found that the public interest would not be served with the new regulations and ultimately withdrew its proposals in 1975.⁴⁰ The Bureau cited five specific reasons for its withdrawal: (1) the costs outweighed the benefits,⁴¹ (2) current regulations were sufficient,⁴² (3) ingredient labeling adds

for and won many comprehensive labeling reforms in the name of consumer interest (e.g. nutrition labeling on foodstuffs and warning labels on alcohol beverages). *Id.* Currently CSPI’s objectives are to provide useful information to the public and policymakers and to conduct research on food, alcohol, health, the environment, and other issues related to science and technology. CSPI Mission Statement, <http://www.cspinet.org/about/mission.html>.

³⁷ promoting prevention-oriented policies and

³⁸ 70 Fed. Reg. 22,274.

³⁹ Malt Beverages Labeling and Advertising; Hearing, 39 Fed. Reg. 27,812 (proposed Aug. 1, 1974) (to be codified at 27 CFR pt. 7); Distilled Spirits Labeling and Advertising; Hearing, 40 Fed. Reg. 6354 (proposed Feb. 11, 1975) (to be codified at 27 CFR pt. 5); Wine Labeling and Advertising; Hearing, 40 Fed. Reg. 6349 (proposed Feb. 11, 1975) (to be codified at 27 CFR pt. 4). The proposed rules stated BATF’s intent that each ingredient used in the production of an alcohol beverage be shown on the label unless the ingredient was removed before the final product was packaged. *Id.*

⁴⁰ Ingredient Labeling of Malt Beverages, Distilled Spirits, and Wine, 40 Fed. Reg. 52,613 (Nov. 11, 1975).

⁴¹ *Id.* In their one page reason for withdrawal, BATF articulated that the cost/benefit balancing test indicated the average consumer was borne with excessive cost as a result of the regulation: “[t]he cost of ingredient labeling to the industry, and ultimately to the consumer, would be excessive in relation to the benefit received . . . [w]e do not feel that the benefits to be derived from ingredient labeling are significant enough to warrant imposition of the added costs upon the general consumer.” *Id.* It should be noted that BATF is focusing on the costs to the average consumer not the industry, to determine whether the costs outweigh the benefits.

⁴² *Id.* BATF believed “the content of alcoholic beverages [was] extensively regulated” at the present time because the Bureau already regulated which ingredients could be used in alcohol beverage production. *Id.* The Bureau further indicated it would not approve additional additives unless the FDA approve the additives first. *Id.*

little value and can be misleading,⁴³ (4) ingredient labeling would hinder international trade,⁴⁴ and (5) the average consumer was not in favor of ingredient labeling.⁴⁵ These five considerations served as the foundational tests for determining the efficacy of labeling policies for the next thirty years. Further, they are essential inquiries for examining the propriety of NPR 73.

In 1979, less than four years after withdrawing its original ingredient labeling proposal, the BATF published a newly structured regulation that once again proposed that producers, bottlers and importers be required to disclose ingredients on alcohol beverage labels.⁴⁶ In

⁴³ *Id.* BATF specifically articulated in its reasoning that “the uniqueness of manufacturing processes of alcoholic beverages is such that it makes labeling of their ingredients of little value and, in certain cases, even misleading.” *Id.* Fermentation is defined as the “anaerobic conversion of sugar into carbon dioxide and ethyl alcohol.” Dictionary, <http://dictionary.reference.com/browse/fermentation>. This simple dictionary definition of “fermentation” reveals BATF’s core argument here – that ingredient labeling adds little value to the consumer because alcohol production is a unique process where raw materials, ingredients, or additives are converted, dissipated, or extinguished during the fermentation and filtering processes. With wine for example, sugars found in the grapes are converted to alcohol, thus sugar is not part of the finished product, though it was one of the original ingredients. *Id.* 40 Fed. Reg. 52,613. BATF additionally provided an illustrative example of why ingredient labeling has no value and can be misleading: “the ingredient listing for malt beverages would have [stated it] contain[s] yeast, even though that substance is not present in the finished product. As Brewers yeast is commonly sold as a health product, some consumers might have erroneously been led to think that malt beverages were healthy for that reason.” *Id.*

⁴⁴ *Id.* It was specifically noted by BATF that United States would be the only country *in the world* to require ingredient labeling of alcohol beverages. *Id.* An ingredient labeling regulation would have the effect of thwarting current efforts to increase and facilitate international trade by creating a non-tariff trade barrier. *Id.* Modification to the U.S. labeling policy equally affects foreign producers who of course have to meet the new U.S. labeling regulations in order to import beverages just as national producers have to meet the regulations to sell beverages.

⁴⁵ *Id.* Here, BATF found that ingredient labeling was supported by only a small portion of the public and that the “average consumer” could not be found to be in favor of alcohol beverage labeling. *Id.* History shows that profound weight is placed on consumer interest in proposed regulations because lack of consumer interest is a common thread in BATF’s reasons for rejecting three decades of similar proposals. *See infra* Part II.A-D.

⁴⁶ Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages, 44 Fed. Reg. 6,740 (proposed Feb. 2, 1979) (to be codified at 27 C.F.R. pts. 4, 5 and 7). The structure of the new proposal only required partial ingredient labeling by allowing a producer to list the range of possible essential components with a requirement for the specific listing of all additives remaining. *Id.* The Bureau noted it spent the three years since the last proposal discussing its views with other agencies and felt that its new proposal would create consumer and social benefits. *Id.* Despite noting demand for ingredient labeling from consumers, three-quarters of the 1,800 comments received opposed mandatory ingredient labeling. Labeling and

addition to taking comments, the BATF conducted its own regulatory analysis by examining alternatives to the proposed regulation.⁴⁷ The BATF also hired two private agencies to perform independent consumer interest polls⁴⁸ and cost-benefit studies.⁴⁹ Despite acknowledging uncertainties in the data received from the studies, the BATF published a final rule in 1980 mandating ingredient disclosure on all alcohol beverages.⁵⁰ The victory for consumer interest groups was short-lived. For the next six years, ingredient labeling policy took center stage in a series of events that would place CSPI and the BATF in an embroiled rulemaking and litigation dogfight.

In 1981, before the ingredient labeling amendments became mandatory, President Reagan signed Executive Order 12,291.⁵¹ This order required administrative rulemaking decisions to be

Advertising of Wine, Distilled Spirits and Malt Beverages, 45 Fed. Reg. 40,538 (June 13, 1980) (to be codified at 27 C.F.R. pts. 4, 5 and 7) (“T.D. BATF-66”).

⁴⁷ *Id.* at 40,539. Executive Order 12,044 required BATF to prepare a regulatory analysis for regulations which may have a major economic impact on the general economy. *Id.*; see Exec. Order No. 12,044, 3 C.F.R. 152 (1978). The Bureau’s first step under the provisions of the Order was to develop a list of alternative means of addressing the ingredient labeling issue. 45 Fed. Reg. 40,539. The list included non-regulatory means like public-education programs as well as alternative regulatory rules that impose different burdens on the industry. *Id.*

⁴⁸ The Bureau hired the independent Opinion Research Corporation (“ORC”) to conduct a public opinion poll. *Id.* ORC telephonically surveyed over 2,000 adults. *Id.* The survey results showed inconsistent consumer attitudes towards the proposed regulations and the possible ramifications. *Id.* A majority of drinkers polled (61%) believed that ingredient labeling was at least somewhat necessary. *Id.* However, in another question, 40% said that the government current regulatory program which required safe ingredients was sufficient, while only 36% said they would also like ingredient labeling. *Id.* In another question, 52% of drinkers said they use or currently use ingredient labeling on foodstuffs to compare different brands and would probably or definitely use the ingredient lists on alcohol products. *Id.*

⁴⁹ BATF also enlisted the services of BDM Corporation to perform cost/benefit analysis on the current regulations and the alternatives listed by the Bureau. *Id.* BATF’s summary of the BDM study begins with an ominous statement – “[t]here are important unanswered questions for both costs and benefits which according to BDM can ‘lead to widely different conclusions on the desirability of ingredient labeling.’” *Id.*

⁵⁰ *Id.* In the new rule BATF attempted to ameliorate the cost burden imposed on producers, importers and bottlers by providing a generous exception which effectively allowed every producer to label their products with a notice to consumers that ingredient information would be provided upon request. *Id.*

⁵¹ Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (“E.O. 12,291”).

based on adequate information and cost-benefit analysis so as to lessen the burden of regulations.⁵² After reviewing the requirements of President Reagan’s executive order, the BATF published a proposed rescission⁵³ and ultimately rescinded their final rule by the end of 1981.⁵⁴ The Bureau based the rescission on three conclusions:⁵⁵ (1) the final rule would “result in increased costs to consumers and burdens on industry,”⁵⁶ (2) current statutory and regulatory provisions presently exercised by the Bureau “were, and are, sufficient to protect the consumer,”⁵⁷ and (3) the majority of consumer comments supported rescission, thus signifying that ingredient labeling “would not result in an appreciable benefit to consumers.”⁵⁸

Aggravated by the BATF’s change of heart, CSPI filed suit in 1983 to challenge the

⁵² *Id.* E.O. 12,291 directed each Federal agency to establish a management system for Federal regulation that will improve the quality and lessen the burden of Federal regulation. *Id.* Further, E.O. 12,291 required agencies, within their legal authority, to establish regulatory goals, set regulatory priorities, review existing regulations, and implement new regulations with the goal of maximizing the benefits to society while at the same time imposing the least burden to achieve those benefits. *Id.* The provisions of Executive Order 12,866 (“E.O. 12,866”) have eclipsed the provisions of Executive Order 12,291. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). E.O. 12,866 requires TTB to design regulation in the most cost-effective manner to achieve the regulatory objective. *Id.* The regulations must be tailored to impose the least burden on business and society. *Id.* TTB’s current rulemaking procedures must also adhere to provisions of the Regulatory Flexibility Act which requires administrative agencies to take into account the regulations affects on small business. *See* Part IV.A.

⁵³ Ingredient Labeling of Wine, Distilled Spirits, and Malt Beverages, 46 Fed. Reg. 22,277 (proposed May 4, 1981) (to be codified at 27 C.F.R. pts. 4, 5, and 7).

⁵⁴ Rescission of Ingredient Labeling Regulations for Wine, Distilled Spirits, and Malt Beverages, 46 Fed. Reg. 55,093 (Nov. 6, 1981).

⁵⁵ BATF’s reasons for rescinding the 1980 final rule echo the foundational considerations articulated in the Bureau’s reasons in 1975 for withdrawing the proposed rulemaking for ingredient labeling. *See supra* notes 41-45 and accompanying text.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* 8,068 comments representing 23,352 individuals were received in response to the proposed rescission. *Id.* at 55,094. 4,909 comments, representing 17,138 individuals supported the proposal to rescind the ingredient labeling regulations. *Id.* Of these commenters, 693 were American alcohol beverage industry members or related industries, 144 foreign producers/exporters, six foreign governments, 33 Federal and State officials and organizations, and 4,033 consumers. *Id.* The numbers clearly indicate that the vast majority of support for rescission came from individual consumers evincing a lack of consumer interest.

rescission and ultimately succeeded in setting aside the BATF's rescission.⁵⁹ In accordance with the district court's order, the BATF reinstated the final rule promulgated by the bureau in 1980.⁶⁰ However, two months later a defiant Bureau published a notice stating its intent to reconsider the ingredient labeling issue in light of deficiencies in the reasoning of the rescission pointed out by the district court.⁶¹ Over 1,800 comments were received in response to the notice.⁶² Of 1,840 comments, over 1,500 supported rescission.⁶³ Approximately 1000 of these 1,500 were from individual consumers.⁶⁴ The BATF responded to the lack of consumer interest by promulgating a final rule once again rescinding the final rule from 1980.⁶⁵ This time around, the Bureau

⁵⁹ *Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, 573 F. Supp. 1168 (D.D.C. 1983) (holding that BATF's decision to rescind conflicted with its statutory mandate to adequately inform consumers of the identity and quality of products and further that the Bureau's explanation was not specific enough to constitute a "reasoned explanation"). The Court required BATF to reinstate T.D. BATF-66 within one year from the date of the court's order. *Id.*

⁶⁰ Ingredient Labeling of Wine, Distilled Spirits, and Malt Beverages, 48 Fed. Reg. 10,309 (Mar. 11, 1983).

⁶¹ Ingredient Labeling of Wine, Distilled Spirits, and Malt Beverages, 48 Fed. Reg. 27,782 (proposed June 17, 1983) (to be codified at 27 C.F.R. pts. 4, 5 and 7).

⁶² Ingredient Labeling of Wine, Distilled Spirits, and Malt Beverages, 48 Fed. Reg. 45,549, 45,550 (Oct. 6, 1983) ("T.D. BATF-150")

⁶³ *Id.*

⁶⁴ *Id.* Of the comments supporting rescission 413 were American alcohol beverage industry members or related industry members; sixty-four were foreign industry members; four were foreign governments; one was from a Federal agency and the 1,056 others were from individual commenters *Id.* 303 individuals opposed. *Id.*

⁶⁵ *Id.* at 45,549. To prevent its second rescission from being overturned, BATF laid out a detailed analysis of five individual (and familiar) areas of concern: (1) consumer interest (2) utility (3) costs (4) existing regulations (5) international implications. *Id.* at 45,550-54. On the issue of costs, BATF's analysis found that labeling costs (ie. redesign, equipment modifications, re-investment, etc.), foreign certification of the ingredient list, markups applied through the three-tier distribution channel of alcohol beverages and the costs to the government to enforce the new regulation and advertising would all be passed to the consumers. *Id.* BATF also noted small businesses would bear the greatest impact of the regulation and winemakers would lose the flexibility in price saving derived from large volume runs of the same label. *Id.* On the issue of the sufficiency of existing regulations, BATF distinguished alcohol beverage regulations from FDA regulations. *Id.* Ultimately, BATF believed that the content of alcohol beverages was already extensively regulated by the regulations imposed on production procedures and formulas. *Id.*

presented an exhaustive regulatory analysis to support its decision.⁶⁶ The BATF's reasons for rescission adhered to the basic precepts and considerations it relied on in its prior 1981 decision to rescind the 1975 decision to withdraw.⁶⁷ The Bureau ultimately concluded that (1) there was "no overwhelming desire on the part of consumers generally for comprehensive ingredient labeling,"⁶⁸ and (2) the transformative nature of alcohol products left "serious question[s] as to the usefulness of full ingredient disclosure."⁶⁹

In 1985, "it was *deja vu* all over again."⁷⁰ CSPI once again filed suit to challenge the second rescission and once again emerged victorious with a district court order to vacate it.⁷¹ However, CSPI's victory was brief again. The district court's decision was ultimately reversed

⁶⁶ 48 Fed. Reg. at 45,550-54.

⁶⁷ *See supra* notes 41-45, 56-58 and accompanying text.

⁶⁸ 48 Fed. Reg. 45,555. Though not in itself determinative of the propriety of an ingredient labeling rule, the Bureau specifically observed that there was no grass roots support for the proposed rules. *Id.* BATF noted that, in general, the majority of commenters have in one way or another been "associated or encouraged by one of the two factions in [the] dispute." *Id.*

⁶⁹ *Id.* BATF spent a great deal of time examining whether consumers has a "right to know" the ingredient content of alcohol beverages and whether they could in fact make informed choices based on ingredient disclosures. *Id.* at 45,550. To support its decision, the Bureau cited comments with which it agreed that suggested ingredient labeling had little utility and would be misdescriptive of the end product. *Id.* For example, some wineries may add sugar to their wines while others may not. *Id.* However, under the regulation only the wineries which use sugar as an additive must list it as an ingredient. *Id.* It is very possible that the winery that adds sugar may ferment its wines dry (meaning all sugar is converted to alcohol) while the winery which does not add sugar does not ferment its wines dry. *Id.* Thus, the result would be that the wine with no sugar has sugar on the label and the wine with residual sugar does not. *Id.* Consumers seeing references to yeast and sugar – additives used in the fermentation and distillation processes – would then believe that these additives exist in the end product or provide nutritive properties. *Id.*

⁷⁰ Yogi-isms, <http://www.yogiberra.com/yogi-isms.html>. Yogi Berra is a former Major League Baseball player and manager. He played almost his entire career for the New York Yankees. http://en.wikipedia.org/wiki/Yogi_berra. Berra is famous around the non-baseball world for his pithy comments and witticisms, known as Yogiisms. *Id.*

⁷¹ *Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, No. 84-2079, 1985 WL 9649, at *5-6 (D.D.C. October 30, 1985) (holding that BATF abused the Administrative Procedures Act by once again failing to present a "reasoned explanation" for rescission and that T.D. BATF-150 in fact represented a predetermined mindset to reinstate the previous rescission).

on appeal in *Center for Science in the Public Interest v. Department of the Treasury*.⁷² The Court of Appeals held that the second rescission was the product of reasoned decision making by the Bureau.⁷³ The court's argument noted that the record failed to establish that (1) ingredient disclosure would provide useful information as to the actual contents of alcoholic beverages, or (2) ingredient labeling would aid consumers seeking to avoid allergic reactions.⁷⁴ The court's holding hammered the proverbial nail in the ingredient labeling coffin and put the issue to rest for the nearly two decades. Lobbying efforts temporarily shifted gears to other labeling issues until ingredient labeling re-emerged as a hot topic in 2003.⁷⁵

B. Nutrient Labeling

Though ingredient labeling was not a hot topic until the 1970's, nutrient labeling began to arise as early as the 1950's when malt beverage advertising campaigns increasingly portrayed products as low calorie, low sugar, less fattening, and part of a normal diet.⁷⁶ Alarmed by the frequent use and misleading nature of such advertising, the Internal Revenue Service ("IRS") advised industry members in 1955 to promptly desist use of references to the calorie content of their products.⁷⁷ However, by the 1960's the IRS's Alcohol and Tobacco Tax Division ("ATTD") relaxed its advertising and labeling policies by providing an interim rule allowing

⁷² *Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, 797 F.2d 995, 1004 (D.C. Cir. 1986) (noting that BATF's efforts to explain its turnabout were "hardly exemplary" but sufficient to supply a "reasoned basis" for their decision).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See supra* Part II.D.

⁷⁶ Industry Circular 55-7; http://www.ttb.gov/industry_circulars/archives/1955/55-07.html.

⁷⁷ *Id.* The IRS had begun a consumer survey in 1954 in order to determine whether misleading implications were involved in the use of such themes. *Id.* The IRS ultimately concluded use of such terms did not comply with consumer protection provisions of the FAA Act. *Id.*

statements of “average analysis” to be displayed on labels and in advertising.⁷⁸

In 1976 the BATF promulgated an official rule regarding statements of average analysis for calories, carbohydrates, protein and fat.⁷⁹ The rule stated that caloric and carbohydrate representations on labels *without qualification* (meaning without statements of average analysis) were presumed misleading since they “create the impression that the product has value as a dietary aid.”⁸⁰ Such representations were held to be in direct contravention of the consumer protection provisions of the FAA Act.⁸¹ Though this rule mandated disclosure of calories, carbohydrates, protein and fat, disclosure was only required under the narrow circumstances.⁸² The disclosure was not mandatory otherwise.⁸³

By 1993 however, the winds changed and comprehensive mandatory nutrient labeling was a hot topic. This shift was largely the result of a convergence of social and political factors beginning in 1990 with the passage of the Nutrition Labeling and Education Act (“NLEA”). The NLEA mandated uniform nutrition labeling of foods falling under the purview of the Food and Drug Administration (“FDA”).⁸⁴ In the wake of this sweeping reform, the BATF received an

⁷⁸ Prohibited Practices, BATF Rul. 76-1 (Jan. 1976) (to be codified at 27 C.F.R. pt. 7). The average analysis statement was defined by ATTD. *Id.* Specific carbohydrate and calorie values were defined by the agency and producers were required to display them on all twelve ounce malt beverage products making specific claims about the calorie or carbohydrate content of the products.

⁷⁹ *Id.* The statement of “average analysis” set out by the rule indicates the exact amount of each ingredient or nutrient that can be displayed on a label – Calories (96 grams); Carbohydrates (2.8 grams); Protein (0.9 grams); Fat (0.0 grams).

⁸⁰ Prohibited Statements, BATF Rule 80-3 (June 1980) (to be codified at 27 C.F.R. pt. 7).

⁸¹ *See supra* notes 16, 17 and accompanying text.

⁸² For example, a producer wishing to state their product was a light beer would be required to place a statement of average analysis on their product. Prohibited Statements, BATF Rul. 80-3 (June 1980) (to be codified at 27 C.F.R. pt. 7).

⁸³ *See id.*

⁸⁴ 21 U.S.C. § 343; *see infra* note 106.

anonymous petition requesting mandatory nutrition labeling of alcohol beverages.⁸⁵ The petitioner cited the NLEA and noted in its petition that “scientific advances have established a close relationship between diet and health” and “consumer . . . interest in nutritional information has become very important.”⁸⁶

The BATF published an Advanced Notice of Proposed Rulemaking (“ANPRM”) to solicit comments.⁸⁷ Fifty-five comments were received, forty-one of which opposed nutrition labeling.⁸⁸ Those in opposition included the Wine Institute, Beer Institute, the Delegation of Commission of the European Communities (“DCEC”) and even CSPI.⁸⁹ Of the seven commenters that supported mandatory nutrition labeling, two were large liquor conglomerates – Seagram’s and Brown-Forman.⁹⁰ The BATF ultimately terminated further rulemaking on the

⁸⁵ Nutrition Labeling for Wine, Distilled Spirits, and Malt Beverages, 58 Fed. Reg. 42,517 (proposed Aug. 10 1993) (to be codified at 27 C.F.R. pts. 4, 5, and 7). The Wine Institute, a California winery trade association, notes in its comment to ANPRM 41 that the statutory objective of the NLEA and the FAA are “not altogether consistent.” Comment 18661, http://tbt.gov/nprm_comments/tbtbnotice41/other/04118661.pdf. The Institute asserts that though the NLEA and FAA both mandate the dissemination of truthful information to consumers, the NLEA is designed primarily to promote “long-term health maintenance and prevention of disease.” *Id.* The FAA Act is more concerned with preventing deception and providing consumers with adequate information as to the “identity” and “quality” of products. *See supra* note 16 and accompanying text. For these reasons, the Wine Institute believes that labels should not be altered to provide information for people losing weight or for those concerned with heart disease. Comment 18661, http://tbt.gov/nprm_comments/tbtbnotice41/other/04118661.pdf. This could create a scenario where the label is beneficial for some consumers and misleading to others.

⁸⁶ *Id.* The petition specifically requested disclosure of the following nutrients and vitamins: calories; fat; saturated fat; cholesterol; sodium; carbohydrates; dietary fiber; sugars; protein; vitamin A; vitamin C; calcium; and iron. *Id.*

⁸⁷ Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages; Request for Public Comment, 70 Fed. Reg. 22,274, 22,277-78 (proposed Apr. 29 2005) (to be codified at 27 C.F.R. pts. 4, 5, and 7). Specifically, BATF asked whether nutrient information should be displayed on alcohol beverages? If such information should be mandatory or voluntary? If there should be exemptions for certain industry participants (ie. small businesses)? What the costs to the industry and consumer would be? Whether consumers would be willing to pay additional costs? Whether there were adequate alternative measures? And what the effect of alcohol is on the body’s affect to absorb nutrients?

⁸⁸ *Id.* at 22,278

⁸⁹ *Id.*

issue, again basing its decision substantially on (1) lack of consumer interest, and (2) incommensurate benefits to consumers.⁹¹

The topic of nutrient labeling would not emerge again until 2003 when the Bureau promulgated another ANPRM on the subject.⁹² However, while the comments filtered in on the ANPRM, trendy low-carb diets were taking hold and the TTB was forced to re-examine its long-standing 1976 rule regarding statements of calorie and carbohydrate content in the labeling and advertising of alcohol beverages.⁹³

Industry members had demonstrated a desire to make caloric and carbohydrate claims.⁹⁴ The TTB found these claims to be misleading because they implied “that consumption of ‘low carbohydrate’ wines, distilled spirits, or malt beverages may play a healthy role in a weight maintenance or weight reduction plan” and “such representations . . . provide incomplete information about the health effects of alcohol consumption.”⁹⁵ Expecting rulemaking on the subject in the near future, the TTB promulgated Interim Ruling 2004-1 (“2004-1”) to address the immediate concerns and requests of industry members and provide industry guidance on what sorts of claims can be made.⁹⁶ 2004-1 requires that a statement of average analysis include both

⁹⁰ *Id.* Lack of consumer interest was again identified as fatal.

⁹¹ *Id.* BATF specifically noted that “there was neither significant consumer interest in nutrition information . . . nor any convincing evidence that nutrition labeling would provide substantially useful information to consumers.”

⁹² *See infra* Part II.D for the full examination of ANPRM 41.

⁹³ Caloric and Carbohydrate Representations in the Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages, TTB Ruling 2004-1, <http://www.ttb.gov/rulings/2004-1.pdf>.

⁹⁴ *See supra* note 20 and accompanying text.

⁹⁵ Caloric and Carbohydrate Representations in the Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages, TTB Ruling 2004-1, <http://www.ttb.gov/rulings/2004-1.pdf>.

⁹⁶ *Id.*

the serving size and quantity of each nutrient.⁹⁷ 2004-1 stands as the current regulation on the caloric and carbohydrate claims as rulemakers push NPR 73 through the rulemaking process.⁹⁸

C) *Allergen Labeling*

Allergen labeling is a narrower issue within the broader ingredient labeling controversy. Concerns about allergic reactions to ingredients and substances used in alcohol production have historically provided part of the support for ingredient labeling rule proposals.⁹⁹ However, it was not until the turn of the century that the single issue of allergen labeling was separated from the broader ingredient labeling framework and put on the policy chopping block by itself.

Three consecutive events would bring the allergen labeling debate to center stage in 2004. First, CSPI petitioned the TTB in 2003 for comprehensive labeling reform on a host of issues, including disclosure of additives.¹⁰⁰ Second, in 2004 a senior research scientist at the Harvard school of Public Health petitioned the TTB to require allergen labeling of alcohol beverages.¹⁰¹ Third, in 2004 Congress passed the Food Allergen Labeling and Consumer

⁹⁷ *Id.* TTB also issued interim standards for the use of “low carbohydrate,” “reduced carbohydrate,” and “lower carbohydrate.” *See infra* Part III.B1.

⁹⁸ *Id.*

⁹⁹ *See* 39 Fed. Reg. at 27,812 (requesting comments on whether specific grains cause allergic reactions and noting that water would not be a listed ingredient because there are no allergic reactions to it); *see also* 40 Fed. Reg. at 6,355 6 (requesting information on allergies to distilled spirits); *see also* 44 Fed. Reg. 6,741 (“the Department will [be able to] provide consumers, particularly those allergic to a certain ingredient or type of ingredient, with valuable information); *see* 48 Fed. Reg. at 45,551 (discussing the health and allergy concerns raised in connection with ingredient labeling)

¹⁰⁰ CSPI Petition to TTB, <http://www.cspinet.org/booze/031216IngLabelingPetition.pdf>. CSPI argued that “[p]roviding information on alcohol, calories, and ingredients will help consumers make more informed choices about their consumption of alcohol and *help protect those Americans who can suffer serious, sometimes fatal, reactions to the myriad of additives or allergens that may be used in beer, wine, and liquor.*” (emphasis added).

¹⁰¹ *See* Major Food Allergen Labeling for Wines, Distilled Spirits, and Malt Beverages. 71 Fed. Reg. 42,260, 42,261 (Interim Rule, July 26, 2006); *see also* Major Food Allergen Labeling for Wines, Distilled Spirits and Malt Beverages, 71 Fed. Reg. 42,329, 42,330 (proposed July 26, 2006) (to be codified at

Protection Act (FALCP)¹⁰² which required the labeling of eight major food allergens¹⁰³ on the food and beverage products regulated by the FDA. Some of these regulated substances were, and still are, used in alcohol production.¹⁰⁴ Accompanying FALCPA was the House of Representatives Committee on Energy and Commerce Report (“Committee Report”).¹⁰⁵ The Committee Report noted that the Committee “expects that the TTB and the FDA will work together in promulgation of allergen regulations” with respect to alcohol beverages.¹⁰⁶ This directive effectively primed the pump for an alcohol beverage allergen labeling debate.

C.F.R. pts. 4, 5, and 7). The petitioner detailed her own allergic reaction to egg protein and her allergic reactions to egg whites in wine. *Id.* Egg whites are used as “fining” agents in the winemaking process. *See infra* note 104 and accompany text.

¹⁰² Food Allergen Labeling and Consumer Protection Act of 2004 § 201, 21 U.S.C. § 301 (2004) (“FALCP”). Section 202 of the FALCP contains Congress’ findings. *Id.* § 343. Congress found that two percent of adults and five percent of infants suffer from food allergies and that eight foods account for ninety percent of food allergies. *Id.* Congress held that for consumers to derive a benefit from allergen labeling, the foods must be listed in their “common or usual name.” *Id.*

¹⁰³ Those foods are milk, eggs, fish (e.g., bass, flounder, or cod), Crustacean shellfish (e.g., crab, lobster, or shrimp), tree nuts (e.g., almonds, pecans, or walnuts), wheat, peanuts, and soybeans and proteins derived from these sources. *Id.*

¹⁰⁴ “Fining” is the name given to the clarification process of winemaking. Wine Definitions, <http://www.winedefinitions.com/learningcenter/articles/fining.htm>. Wineries that filter their wines use industrial filtrations machines to filter out suspended solids. *Id.* However, suspended solids often must first be captured by larger substances so the filters will capture them *Id.* Winemakers use food substances listed in the FALCP to attract proteins and solids for fining – casein (milk), isinglass (fish oil), soy flour (soybeans), egg whites, bentonite (clay). *See* 70 Fed. Reg. at 22,280; *see also* 27 CFR 24.246 (listing ingredients approved by TTB for fining). Since TTB is using FALCP as a guide, it could be presumed that wines would be required to place on their labels the words “fish oil” and “clay.” There are clear economic ramification of listing such ingredients. *Id.*

¹⁰⁵ H.R. Report No. 608, 108th Cong., 2d Sess., at 3 (2004).

¹⁰⁶ *Id.* The HRCEC’s comments take into account the Memorandum of Understanding of 1987 (“MOU”). U.S. Food and Drug Administration, MOU number: 225-88-2000, <http://www.fda.gov/oc/mous/domestic/225-88-2000.html>. The MOU was an agreement executed by the FDA and BATF (TTB’s predecessor) to “clarify and delineate the enforcement responsibilities of each agency with respect to alcoholic beverages.” *Id.* Particularly, the MOU established a system of communication between the two agencies to effectuate sound policy decisions with respect to alcohol beverages. *Id.* “When FDA has determined that the presence of an ingredient in food products, including alcoholic beverages, poses a recognized public health problem, and that ingredient or substance must be identified on a food product label, BATF will initiate rulemaking proceedings to promulgate labeling regulations for alcoholic beverages consistent with BATF’s health policy.” *Id.*

Consistent with the HCREC Report, the TTB consulted with the FDA prior to issuing rulemaking proposals.¹⁰⁷ In 2005, the TTB published ANPRM 41 which requested comments on host of labeling issues including allergen labeling.¹⁰⁸ Because of the numerous topics presented for comment in ANPRM 41, only fifty of the roughly 19,000 comments received in response to ANPRM 41 addressed the specific issue of allergen labeling.¹⁰⁹ However, the vast majority of the fifty comments received favored mandatory allergen labeling, including conditional support from major alcohol beverage trade associations.¹¹⁰

The Beer Institute, the Distilled Spirits Council of the United States, the National Association of Beverage Importers, the Presidents' Forum, Spirits Canada, Wine America, and the Wine Institute submitted a consolidated comment.¹¹¹ The consolidated comment conditioned support for allergen labeling on harmonization of the proposed labeling regulation with international allergen labeling requirements.¹¹² The comments also proposed that any new

¹⁰⁷ 70 Fed. Reg. 22,280.

¹⁰⁸ *Id.* at 22,274.

¹⁰⁹ *Id.* at 22,460.

¹¹⁰ TTB identified support for mandatory allergen labeling from public interest groups, medical trade associations, and major alcohol beverage trade associations. *Id.*

¹¹¹ Consolidated Comment, http://ttb.gov/nprm_comments/ttbnotice41/other/04118645.pdf.

¹¹² See Council Directive 2003/89/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0089:EN:HTML>. On November 25, 2003, the European Union amended its rules regarding labeling of food and beverage products (including alcohol). Major Food Allergen Labeling, 71 Fed. Reg. at 42,336. The directive allows manufacturers and trade associations to conduct testing to empirically prove that certain ingredients or production process do not trigger allergic reactions. *Id.* As a result of these tests, the EU conditionally excluded eight major food allergens including egg whites, nuts, milk, isinglass and casein from the labels – popular fining agents used in the winemaking and brewing processes. *Id.*; see *supra* notes 103, 104. The industry caucus petitioned TTB to follow this same approach, however, TTB rejected the proposal. Consolidated Comment, http://ttb.gov/nprm_comments/ttbnotice41/other/04118645.pdf; Major Food Allergen Labeling, 71 Fed. Reg. at 42,337. TTB did however propose exemptions based on petitions: “Any person may petition . . . to exempt a particular product from labeling requirements The burden is on the petitioner to provide scientific evidence.” *Id.* at 42,338. Australia and New Zealand also mandate allergen

allergen labeling be based on the current sulfite warning.¹¹³ In what appears to be a rush to regulate on the wings of industry, interest group, and consumer support, the TTB published NPR 62 in 2006 to solicit further comments on allergen labeling and published an interim rule to allow voluntary allergen labeling.¹¹⁴ NPR 62 proposes mandatory labeling of particular substances but provides few exceptions or exemptions.¹¹⁵ This proposition has quickly lost the support of the alcohol industry.¹¹⁶ More importantly, NPR 62 is an important factor in analyzing the propriety of NPR 73 because allergen and nutrient labeling regulations could be implemented together or around the same time and impose substantial costs on the industry.¹¹⁷

D) *ANPRM 41 and NPR 73*

By 2003, comprehensive ingredient and nutrient labeling reform initiatives had

labeling. *See* Standard 1.2.3, cl. 4, http://www.foodstandards.gov.au/_srcfiles/FSC_amend_1_2_3_Warning_Statements_v89.pdf.

¹¹³ Consolidated Comment, http://ttb.gov/nprm_comments/ttbnotice41/other/04118645.pdf; *see* 27 C.F.R. § 4.32(e) (“There shall be stated on a front label, back label, strip label or neck label, the statement ‘Contains sulfites’ or ‘Contains (a) sulfiting agent(s)’ or a statement identifying the specific sulfiting agent where sulfur dioxide or a sulfiting agent is detected at a level of 10 or more parts per million, measured as total sulfur dioxide.”)

¹¹⁴ 71 Fed. Reg. 42,329; 71 Fed. Reg. 42,260.

¹¹⁵ *Id.* Under the proposed regulations, producers, bottlers, and importers must declare presence of milk, eggs, crustacean shellfish, tree nuts, wheat, peanuts and soybeans as well as ingredients that contain protein derived from these foods on a product label. 71 Fed. Reg. 42,329. *See infra* Part III.C.

¹¹⁶ Daniel Sogg, *Wine Producers Struggle With Proposal to Require Allergen Warning*, WINE SPECTATOR ONLINE, January 23, 2007, <http://www.winespectator.com/Wine/Features/0,1197,3585,00.html>. Wendell Lee, general counsel for the Wine Institute (one of the industry trade groups that originally signed a consolidated comment in support of mandatory allergen labeling in response to ANPRM 62) stated the wine industry association’s primary opposition to the structure of the proposed rule was based on the fact the rule “requires [industry members] to make a statement that [their] product contains an allergen when it may not.” Producers argue that wines that have been clarified using products that cause allergies contain those products in only negligible quantities, if at all, in the finished product – an argument that proved viable in defeating ingredient labeling. *See supra* Part II.A; *see also supra* 104 an accompanying text.

¹¹⁷ *See infra* Part IV.A.

experienced three decades of defeat by a defiant industry and unsatisfied government agency.¹¹⁸

Undaunted and with a new perspective on nutrient labeling, CSPI re-ignited the alcohol labeling policy debate in 2003 by petitioning the TTB for a monstrous reform that requested a complete overhaul of the Bureau's policies on ingredient, nutrient labeling, alcohol content and allergen labeling.¹¹⁹

This time around, CSPI did not face the Bureau alone. The petition was signed by the National Consumers League ("NCL") and backed by sixty-seven other organizations.¹²⁰ It also garnered the support of eight individuals, including four deans of schools of public health.¹²¹ The TTB responded to the colossal reforms proposed in CSPI's petition with an equally broad ANPRM. ANPRM 41 sought comments on a host of issues germane to nutrition, ingredient, alcohol content and allergen labeling.¹²² The TTB hoped responses to the various issues raised in

¹¹⁸ See *supra* Part II.A-C.

¹¹⁹ Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages; Request for Public Comment, 70 Fed. Reg. 22,274 (proposed Apr. 25, 2005) (to be codified at 27 C.F.R. pts. 4, 5, and 7). See CSPI Petition to TTB, <http://www.cspinet.org/booze/031216IngLabelingPetition.pdf>; See 72 Fed. Reg. 41,861; see also CSPI's Proposed Label *infra* Addendum A. CSPI is very careful to lay out the reasons why consumers need and will benefit from the information contained in the "Alcohol Facts" panel. *Id.* The Alcohol Facts panel includes a standard serving size, calories per serving, alcohol by volume and per serving, reference to the U.S. Dietary guidelines and ingredients. *Id.* TTB's proposed Serving Facts label does not adhere to this design, but rather follows a design that hues close to the FDA's Nutrition Facts panel, a panel consumers are familiar with. 72 Fed. Reg. 41,878. The only similarity between the panel proposed by CSPI and the one proposed by TTB in NPR 73 is the serving size, disclosure of the calories per serving and the ability of producers to place alcohol by volume and by serving within the Serving Facts panel, although doing so is not mandatory. *Id.* TTB did not adopt the graphical depiction defining a standard serving size, the reference to the U.S. Dietary Guidelines or the ingredients disclosure. *Id.*

¹²⁰ CSPI Petition to TTB, <http://www.cspinet.org/booze/031216IngLabelingPetition.pdf>. Appendix A to the petition identifies sixty-seven organizations including local and state government agencies, consumer health organizations, religious institutions, and medical associations. *Id.*

¹²¹ CSPI Petition to TTB, <http://www.cspinet.org/booze/031216IngLabelingPetition.pdf>. Appendix B to the petition identified eight individuals. *Id.* Most of the individuals were directors or deans of schools of public health including San Diego State, Vanderbilt, University of California at Los Angeles, and University of North Carolina.

¹²² 70 Fed. Reg. 22,275. TTB posited forty-four questions in all. See generally 72 Fed. Reg. 41,860.

ANPRM 41 would establish a framework to guide future rulemaking and help determine which regulations would adequately inform the public about the identity and quality of alcohol products.¹²³ Despite the breadth of topics contained in the ANPRM, the TTB was not shy in foreshadowing the immediate direction of future rulemaking.¹²⁴ The introduction to ANPRM 41 specifically identified an “increased interest in including nutrition and ingredient information on alcohol beverages” and further stated that the TTB believed the time was appropriate to consider amending alcohol beverage labeling regulations on those issues.¹²⁵

In 2007 the TTB did what it ominously stated it would do in ANPRM 41 and published NPR 73.¹²⁶ NPR 73 proposes amending labeling regulations to require on all alcohol beverage labels (1) a statement of alcohol content expressed as a percentage of alcohol by volume, and (2) a Serving Facts panel including a statement of calories, carbohydrates, fat and protein.¹²⁷ A “Serving Facts panel” on all alcohol beverages attempts to kill two birds with one stone by addressing the nutrition and ingredient labeling in one fell swoop.¹²⁸

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 72 Fed. Reg. 41,860.

¹²⁷ 72 Fed. Reg. 41,860. TTB also proposed to allow industry members to disclose on the Serving Facts panel the numbers of U.S. fluid ounces of pure alcohol per serving. *Id.*

¹²⁸ In 2006 allergen labeling was addressed in a separate proposed rule and interim ruling as delineated earlier in subpart C. 72 Fed. Reg. 41,878; *see also* NPR 73’s Proposed Label Formats *infra* Addendum B. NPR 73 describes the panel that must be presented for every possible bottle size. *Id.* at 41,878-84. 50 milliliter containers may use a linear display that presents the same information, but on three lines instead of in a panel. *Id.* at 41,881.; *see* 50 Milliliter Packaging Linear Display *infra* Addendum B.

III. KNOW YOUR LABEL: A CONCISE LOOK AT CURRENT ALCOHOL BEVERAGE LABELING REGULATIONS

The alcohol industry, like the tobacco and gaming industries, is inextricably enmeshed with public policy.¹²⁹ The industry operates in an environment regulated by a labyrinthine framework of treaties, constitutions, statutes and regulations.¹³⁰ Alcohol beverage labeling alone falls under the provisions of two international treaties, the Federal Alcohol Administration Act, and state laws.¹³¹

NPR 73's nutrition labeling proposal only directly implicates the consumer protection provisions of the FAA Act.¹³² The FAA Act requires the TTB to promulgate regulations that ensure alcohol beverage labels contain certain fundamental pieces of information.¹³³ Since the inception of the FAA Act in 1935, the TTB and its predecessor agencies have promulgated numerous regulations that have defined mandatory and voluntary labeling information as well as prohibited practices.¹³⁴

¹²⁹ MCGOWAN, *supra* note 15, at xiii. McGowan articulates that these so-called "sin" industries (alcohol, tobacco and gambling) are so heavily regulated that their very existence depends on the whim and fancy of legislatures. *Id.* However, the industries remain ingrained in society because they provide an enticing revenue source for federal, state and local governments. *Id.* The alcohol industry, unlike the tobacco and gaming industries, provides a unique regulatory problem because it can be divided into three distinct segments – wine, distilled spirits and malt beverages. *Id.*

¹³⁰ *Id.*

¹³¹ *See infra* note 181 and accompanying text.

¹³² *See supra* note 10.

¹³³ 27 U.S.C. § 205(e) (1935). Specifically, the Secretary of the Treasury is vested with discretionary power to promulgate rules that effectuate the provisions of the FAA Act. *Id.* *See supra* note 16 and accompanying text.

¹³⁴ *See supra* note 30 and accompanying text.

A) *Mandatory Label Information*

Under title twenty-seven of the Code of Federal Regulations, the TTB currently requires mandatory disclosure of seven pieces of information on the labels of *all* alcohol beverages:¹³⁵ (1) brand name, (2) the identity of the product, (3) the name and address of either the bottler, packer, or importer, (4) net contents, (5) alcohol content,¹³⁶ (6) the presence of sulfites and FD&C Yellow 5,¹³⁷ and (7) a government warning.¹³⁸ NPR 73 proposes to amend this mandatory labeling information by requiring two additional pieces of information.¹³⁹ First, all alcohol beverage labels would be required to disclose calorie, carbohydrate, protein and fat content in a Servings Facts panel.¹⁴⁰ Second, all alcohol beverage labels would be required to disclose alcohol content in percent by volume.¹⁴¹

B) *Nutrient Information*

Disclosure of nutrition facts is not currently mandatory. However, the TTB authorizes

¹³⁵ 27 C.F.R. §§ 4.32, 5.32, 7.22.

¹³⁶ Despite appreciable uniformity among the six other mandatory labeling requirements, alcohol content disclosure requirements are discernibly disparate for wine, malt beverages and distilled spirits. Provisions of the FAA Act, implementing regulations and case law have created an anomalous scheme in which all distilled spirits and those wines containing greater than 14% alcohol by volume are required to disclose alcohol content, but malt beverages are not required to do so but may do so on a voluntarily basis unless prohibited by state law. *See* 72 Fed. Reg. 41,865; 27 U.S.C. § 205(e) (1935); 27 C.F.R. §§ 4.36, 5.37, 7.26, 7.71; *see* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (holding that prohibiting beer labels from displaying alcohol content violated the First Amendment). This comment is narrowly focused on the NPR 73's proposed nutrient labeling regulation and does not explore NPR 73's proposal to require alcohol content on *all* alcohol beverages.

¹³⁷ In the case of malt beverages, aspartame as well. 27 C.F.R. §7.22(b)(7).

¹³⁸ 27 U.S.C. 213-219.

¹³⁹ 72 Fed. Reg. 41,860.

¹⁴⁰ *Id.*

¹⁴¹ *Supra* note 93.

truthful and specific statements about calorie and carbohydrate content.¹⁴² False or misleading representations are prohibited.¹⁴³ This includes those that imply that the consumption of low carbohydrate alcohol beverages is a healthy part of a weight reduction or weight maintenance plan.¹⁴⁴

Current regulations also prohibit “any health-related statement that is untrue in any particular or tends to create a misleading impression as to the effects on health of alcohol consumption.”¹⁴⁵ However, the regulations make a notable exception for “statements concerning caloric, carbohydrate, protein, and fat content.”¹⁴⁶ Such statements are not considered “health-related” within the meaning of the TTB regulations.¹⁴⁷

C) Voluntary Disclosure of Major Food Allergens

A producer, importer or bottler may declare, on a voluntary basis, major food allergens (milk, egg, fish, crustacean shellfish, tree nuts, wheat, peanuts, and soybeans and proteins derived from such foods) used in the production of an alcohol beverage.¹⁴⁸ However, if any food allergen is voluntarily declared, all major food allergens used in the production must be

¹⁴² 27 U.S.C. 213-219.

¹⁴³ Caloric and Carbohydrate Representations in the Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages, TTB Ruling 2004-1, <http://www.ttb.gov/rulings/2004-1.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ Health Claims and Other Health-Related Statements in the Labeling and Advertising of Alcohol Beverages, 68 Fed. Reg. 10,076 (Mar. 3, 2003); *see* 27 C.F.R. §§ 7.29(e), 4.39(h), 5.42(b)(8). Health claims have long been a concern. *See* 44 Fed. Reg. 6,740 (“comments received indicated objections to the proposed amendments were primarily based on . . . The possibility of inadvertently misleading the public as to the nutritional value of alcoholic beverages.”)

¹⁴⁶ *Id.*

¹⁴⁷ Serving facts panel would thus not expressly contradict the prohibitory text of current regulations relating to health-claims.

¹⁴⁸ 27 C.F.R. §§ 4.32a, 5.32a, 7.22a.

declared.¹⁴⁹

IV. STUCK IN THE MIDDLE: EXAMINING WHY NPR 73 FIRST GOES TOO FAR AND THEN FALLS TOO SHORT

NPR 73's proposed Serving Facts panel is a fantastic example of a solution in search of a problem. The regulation works in direct contravention of both the FAA Act and the RFA.¹⁵⁰ First, the proposed regulation overreaches by imposing substantial cost burdens on smaller producers,¹⁵¹ and worse yet, it then fails to even reach the level of providing consumers with adequate information as to the identity and quality of the products they are consuming.¹⁵² Essentially NPR 73 is a regulation that goes too far and falls short all at the same time. The following discussion analyzes NPR 73's proposed nutrient labeling regulation in light of the FAA Act, RFA, and the BATF's historical reasons for considering and rejecting similar mandatory labeling proposals as outlined in Part II.

A) Cost

It is difficult to assign a definitive monetary figure to the cost of implementing new mandatory nutrition labeling requirements, but one thing is certain, ours is not a world of zero transactions costs. Fundamental economic principles inform us that compulsory application of a nutrient labeling regulation would implicitly require the alcohol industry to expend funds for compliance and require the federal government to expend funds for administration and

¹⁴⁹ *Id.*

¹⁵⁰ *See supra* notes 16 and 164.

¹⁵¹ *See infra* Part IV.A.

¹⁵² *See infra* Part IV.B-C.

enforcement. These costs are ultimately passed on to the consumer.¹⁵³

Most of the costs at the industry level are associated with the lab testing fee and new label that would be required for each “formula” of a particular alcohol beverage.¹⁵⁴ Formulas (the composition of the product) vary year to year, especially with wine and beer.¹⁵⁵ Thus producers would effectively be prohibited from reaping the costs savings commensurate with purchasing labels for multiple years.¹⁵⁶ A greater volume of information on labels would precipitate costs for larger labels, different bottles, new labeling machines, modification of existing equipment and production disruption.¹⁵⁷

Costs associated with analytical testing are an additional concern.¹⁵⁸ Producers would be required to outsource testing or invest in laboratory facilities, equipment and personnel.¹⁵⁹ To address this concern, the TTB obtained price quotes from multiple laboratory testing facilities

¹⁵³ See *supra* note 41 and accompanying text.

¹⁵⁴ 72 Fed. Reg. 41,873. A differentiation in a product constitutes a new “formula.” *Id.* For example, a winery with 20 varieties of wine would have 20 different product formulas and be required to pay for 20 lab fees and 20 new designs. *Id.* If the winery’s Pinot Noir, Syrah, and Mourvedre also came in a reserve and cuvee, the winery would have 26 different product formulas and be required to pay for 26 lab fees and 26 new designs. *Id.* It is evident how such a regulation could quickly multiply costs and prove onerous for small wineries and craft brewers who may thrive on a diverse artisanal selection of beverage products that are typically produced in small or seasonal batches.

¹⁵⁵ WineAmerica, <http://www.wineamerica.org/issues/docs/WA%20Final%20Comments%20Serving%20Facts%201-08.pdf>. Wine not only varies year to year, but also vineyard to vineyard and vine to vine. *Id.* WineAmerica points out that “wineries do not manufacture to specification” because grapes are agricultural products and wine is a natural product that is variable “by lot, vintage year, grape variety and blend.” New labels would be required annually because there would be new values for the nutrient information on an annual basis.

¹⁵⁶ See *supra* note 65 and accompanying text. In the second rescission of T.D. BATF-66, The BATF provided a detailed regulatory analysis that indicated producers would have to forgo the cost saving typically commensurate with purchasing runs of labels for multiple years at one time. *Id.*

¹⁵⁷ 72 Fed. Reg. 41,872-73.

¹⁵⁸ *Id.* at 41,872.

¹⁵⁹ *Id.*

and estimated from these quotes that the costs associated with analytical testing would be on average \$250 per formula.¹⁶⁰ However, it is likely this figure leaves out recordkeeping and handling costs associated with conducting such tests.¹⁶¹

Larger producers may very well be able to absorb the costs associated with new labels and testing fees,¹⁶² however, the vast majority of wineries and breweries are small businesses and NPR 73 could effectively act as a tax on many of these small producers.¹⁶³ The Regulatory Flexibility Act of 1980 requires administrative agencies to consider flexible regulatory proposals

¹⁶⁰ *Id.* at 41,873.

¹⁶¹ Although there is no indication that the \$250 figure includes recordkeeping and handling costs, TTB did consider the issue. In certifying that it conducted proper analysis under the provisions of the Regulatory Flexibility Act, TTB stated it believed that NPR 73 “would not impose, or otherwise cause, a significant increase in reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.” *Id.* at 41,875; *see supra* note 164 and accompanying text.

¹⁶² History provides adequate evidence that large liquor conglomerates are attempting to take a greater stake in the market. Of the seven comments received in favor of nutrient labeling in 1993, two were from liquor conglomerates – Seagram’s and Brown-Forman. *See supra* text accompanying note 90; *see also* Cindy Skrzycki, *Another Shot at Labeling Alcohol*, WASHINGTON POST at D1 (July 19, 2005), available at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/18/AR2005071801595_2.html. The distilled spirits industry has been trying to change its image and capitalize on its low-card profile. *Id.* Big liquor does not want consumers to think of gin, vodka and whiskey as “hard” and more intoxicating than other alcohol beverages. *Id.* Larger producers such as Diageo, Seagram’s and Brown-Forman can not only absorb the costs, but they’re actually likely to reap a profit from the rule by not only pushing out competition, but also by creating a competitive marketing advantage. *Id.* However, even large producers such as Casa Cuervo, Kendall-Jackson, and Miller Brewing Company all oppose the nutrient labeling rule. *See* Comment 41, http://ttb.gov/nprm_comments/ttnotice41/other/0410041.pdf; Comment 18,653, http://ttb.gov/nprm_comments/ttnotice41/other/04118653.pdf (noting that wineries are “not configured to perform nutritional and/or ingredient testing” regardless of whether it is performed by a larger producer in house or outsourced by smaller producers); Comment 18,655, http://ttb.gov/nprm_comments/ttnotice41/other/04118655.pdf.

¹⁶³ U.S. Census Bureau statistics indicate that in 2002, of 1,100 wineries, over 700 had less than four employees and nearly 950 had less than twenty. Table 4. Industry Statistics by Employment Size: 2002, <http://www.census.gov/prod/ec02/ec0231i312130.pdf>. The Brewer’s Association, a craft brewing trade association, indicates that of the 1,442 U.S. breweries, 1,390 are craft breweries and nearly 1,300 of those are microbreweries or brewpubs. 2006/2007 Craft Beer Industry Statistics, <http://www.beertown.org/craftbrewing/statistics.html>. Basing its definition off standards established by the Small Business Administration, WineAmerica postulates that 98% of all wineries meet the SBA small business definition. Wine America Comments Opposing TTB Notice No. 73, Serving Facts Labeling, <http://www.wineamerica.org/issues/docs/WA%20Final%20Comments%20Serving%20Facts%201-08.pdf>.

and fit regulatory action to the scale of the businesses regulated.¹⁶⁴ In NPR 73 the TTB certified under the provisions of the RFA that the proposed rule would “not have a significant economic impact on a substantial number of small entities.”¹⁶⁵ This conclusory statement is relatively unsupported by facts or reasoning in NPR 73.

The TTB’s single solution to ameliorating the harsh effects of the regulation on small producers is to delay the effective date of any final rule three years in order to provide adequate time for implementation.¹⁶⁶ Delay or no delay, the TTB’s reasoning obscures the fact that the same costs (fixed or otherwise) are still incurred – just later. Further, as previously indicated, laboratory testing and label redesign are new costs associated with the regulation that would be incurred annually, not every three years.¹⁶⁷ A three year delay merely gives industry members

¹⁶⁴ 5 U.S.C. §§ 601-612. The RFA requires federal agencies to consider the impact of regulations on small entities in developing proposed and final regulations. *Id.* If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. *Id.* The initial regulatory flexibility analysis must be published in the Federal Register with the proposed rule. *Id.*; see 72 Fed. Reg. 41,875. An initial regulatory flexibility analysis is prepared in order to ensure that an administrative agency has considered all reasonable regulatory alternatives that would minimize the rule's economic burdens or increase its benefits for the affected small entities, while achieving the objectives of the rule or statute. *Id.* §§ 601-612.

¹⁶⁵ 72 Fed. Reg. 41,875. It is not clear from this statement if what TTB is intended to say is that there are not a substantial number of small entities that will be impacted economically or that the economic impact on the small entities will not be significant – the latter assertion being debatable and the former being ludicrous.

¹⁶⁶ *Id.* at 41,473. TTB cites a conclusion made by the FDA in a recently published rulemaking by the FDA regarding new labeling requirements for foodstuffs. *Id.* The FDA found that “firms typically update their label about every 3 years.” Food Labeling: Health Claims; Soluble Fiber From Certain Foods and Risk of Coronary Heart Disease, 72 Fed. Reg. 5,367, 5,372 (proposed February 6, 2007) (to be codified at 21 C.F.R. pt. 101). TTB used this FDA conclusion to substantiate the Bureau’s belief that most alcohol beverage industry members change their labels once every three years. 72 Fed. Reg. 41,873. Thus, the delay was to provide adequate time for the industry “to develop new labeling materials, deplete existing inventories, and coordinate the proposed labeling changes with their already scheduled labeling changes.” *Id.*

¹⁶⁷ See *supra* note 156 and accompanying text. To further prove that nutrient labeling is sound policy, even as applied to small producers, TTB cites an FDA re-labeling cost study conducted for a final rule regarding foodstuffs. 72 Fed. Reg. 41,872; Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims, 68 Fed. Reg. 41,434 (July 11, 2003). TTB then applies the study’s re-labeling cost estimate of \$2,600 per formula to a hypothetical winery selling five types of wine

time to ruminate over whether they will survive in the years to come and give those contemplating entering the market a good reason to withhold.¹⁶⁸

Ultimately, the higher production costs could force small producers to make fundamental changes to their operations or even cease operations. Because the additional costs are tacked on to each new batch or variation of a product, producer may react by homogenizing the product lines to avoid the additional costs of creating and selling new products.¹⁶⁹ This invariable double whammy – higher production costs and restraints on creativity – may put small producers at a competitive disadvantage where previously their market share was based on a diversity of styles and innovative recipes.¹⁷⁰

The triple whammy comes with the addition of allergen labeling.¹⁷¹ Producers, bottlers, and importers are currently staring down the barrel of both allergen and nutrient labeling proposals which could hit the code books around the same time and potentially compound producer costs twofold.¹⁷² Allergen labeling would require yet larger labels and could prospectively require costly testing for whether major food allergens have reached designated

and producing 320,000 cases annually to prove that the cost added to each bottle is minimal (7/100ths of a penny). 72 Fed. Reg. 41,872. A less representative example could hardly be conceived – TTB's hypothetical winery represents the top two percent of the wineries in the U.S. in terms of production capacity. Distribution of U.S. Wineries by Production Size, <http://www.wineamerica.org/newsroom/wine%20data%20center/2004%20Winery%20Distribution%20by%20Size.pdf>. Wine America, a public policy trade association for the wine industry, indicates that nearly 45% of U.S. wineries in 2004 produced less than 5,000 gallons of wine and over 70% produce less than 25,000 gallons.

¹⁶⁸ See *infra* Part V.B.

¹⁶⁹ It is likely that producer would homogenize their product lines into a just a few offerings so that the producer will not face the costs associated with more labels and more formulas.

¹⁷⁰ Brewer's Association Comments, http://www.beertown.org/craftbrewing/govt_affairs/Abgvpr73Erfcbafr/Notice_73_BA_Filing_Final.pdf. Craft brewers would not be able to offer seasonal brews. A trickle down effect could permeate wine regions and slow tourism as well

¹⁷¹ See *supra* Part II.C.

¹⁷² SOGG, *supra* note 116.

threshold levels.¹⁷³ If producers do not test for threshold levels in order to receive an exemption, they are required to disclose any major food allergen added during production.¹⁷⁴ Producers would then face the hardship of having to choose between expensive testing or blindly stating that their product contains fish or egg additives even when in fact those additives are not present in the final product.¹⁷⁵ Such disclosure could be misleading and could have a detrimental effect on sales.¹⁷⁶

The trickle-down effect of higher costs on would likely impact existing small breweries and wine regions. The most dramatic effect however, would be felt by emerging wine regions and new microbreweries. Emerging regions aren't likely to play home to large conglomerate wineries. These regions are infiltrated by small local producers and family operated businesses. By creating a barrier to entry for small producers and stifling experimentation at the most innovative level of the industry, NPR 73's effect is deleterious at best.¹⁷⁷

¹⁷³ 71 Fed. Reg. 42,333

¹⁷⁴ TTB skirts around the reality that allergen labeling is going to cost the producer in one way or another – in testing or in sales. TTB “note[s] that mandatory allergen labeling does not *necessarily* require producers to conduct any chemical analyses of their products” (emphasis added). *Id.* This is true because under the proposed regulation producers must list any major food allergens used in the production process unless they petition for and obtain an exemption. *Id.* at 42,337-38. An exemption is conditioned on proving to TTB that a product “does not cause an allergic response that poses a risk to human health” or when it is asserted that a product “does not contain allergenic protein, even though a major food allergen was used in production.” *Id.* at 42,337. Clearly there is no way to adequately obtain an exemption without testing each formula for threshold levels.

¹⁷⁵ SOGG, *supra* note 116. *See supra* note 104 and accompanying text.

¹⁷⁶ *Id.* BATF has historically rejected ingredient labeling proposals because there exists a strained relationship between the ingredient and additives used during the production process and the makeup of the final product. *See supra* notes 43, 69, 104. Thus ingredient labeling would add little value to consumers. Equally so, little value is derived by consumers from labels that disclose major food allergens not present in products. Producers can not even put “May Contain” they must be more absolute under the proposed rule and put “Contains.” 71 Fed. Reg. 42,337.

¹⁷⁷ *Id.* The Brewer's Association notes in its comments that “almost any new subset of the new mandatory labeling requirements proposed in Notice 41 would dramatically impact nearly every aspect of a small brewer's business, from its choice in ingredient to its ability to access markets.” *Id.* Further, the

Alone any one cost on the industry is probably not enough to raise concerns, but the combined effects could have substantial implications on the survivability of many small businesses. Additionally, in the end, the combined costs of the regulation are passed to the average consumer in the form of higher retail prices, less innovative products, less selection, and deprivation of tax dollars for government enforcement.¹⁷⁸ In light of the BATF's prior decisions and the provisions of the RFA, one thing appears certain; the burdens are not balanced righteously for small producers.¹⁷⁹

On an international level, great efficiencies and benefits could be achieved if the TTB implemented regulations with an eye towards international harmonization of labeling standards.¹⁸⁰ Various international trade organizations have long worked to achieve this policy goal and have succeeded with international agreements like the World Wine Trade Group's ("WWTG") Agreement on the Requirements for Wine Labeling.¹⁸¹ A nutrient labeling rule

Association notes that flexibility, creativity and innovation would be jeopardized by the proposed mandatory rules. *Id.*

¹⁷⁸ The alcohol industry's unique three tiered distribution system (producers – wholesalers – retailers) inflates the point of sale cost further beyond that which is incurred at the producer level by adding a second layer of cost at the wholesaler level. This fact was recognized by BATF and one of the factors in rescinding BATF-66. *See supra* note 65 and accompanying text.

¹⁷⁹ *See supra* notes 65, 164 and accompanying text.

¹⁸⁰ Both the Canadian Vintner's Association ("CVS") and the Winemaker Federation of Australia ("WFA") support bringing greater harmonization to international wine labeling. *See* Comment 92, http://ttb.gov/nprm_comments/other.shtml; Comment 16,499, http://ttb.gov/nprm_comments/other.shtml. Note though that the WFA is generally opposed to nutrient labeling because the WFA believes that doing so inappropriately implies that wine is "nutritious." Comment 92, http://ttb.gov/nprm_comments/other.shtml

¹⁸¹ *See* World Wine Trade Group, <http://www.wwtg-gmcv.org/>. The WWTG defines itself as "an informal association of national representatives of wine producing countries interested in participating in networking and information sharing to provide better access to international wine markets." Participants, <http://www.wwtg-gmcv.org/EnglishPages/participants.htm>. Member countries of the WWTG include New Zealand, Australia, Argentina, Canada, Chile, Mexico, and South Africa. *Id.* *See* World Wine Trade Group Agreement on Requirements for Wine Labeling, <http://ita.doc.gov/td/ocg/WWTGlabel.pdf>. The U.S. is a signatory to the Agreement on Requirements for Wine Labeling which has the effect of an international treaty to facilitate the international trade in wine through the adoption of common labeling

could potentially thwart these progressive efforts by imposing a non-tariff trade barrier on the international alcohol beverage community and U.S. importers in the same manner that it imposes a tax on small businesses in the U.S.

More illuminating is the fact that no wine producing or consuming country has mandatory nutrition labeling for alcohol beverages – the U.S. would stand alone on this policy.¹⁸² One of the BATF’s enumerated reasons for rejecting a 1975 ingredient labeling proposal was that international trade would be hindered because the U.S. would be the only country in the world to have ingredient labeling.¹⁸³ There is no identifiable reason why this same reasoning should not equally apply now.

B) Misleading Implications of the Serving Facts Display Panel

The consumer protection purposes underlying the labeling provisions of the FAA Act are different from the purposes underlying the NLEA and labeling of food items.¹⁸⁴ Food labels are

requirements. *Id.* See International Organisation of Vine and Wine, <http://www.oiv.int/uk/accueil/index.php>. OIV is “an intergovernmental organisation of a scientific and technical nature [sic] recognised competence for its works concerning vines, wine, wine-based beverages, table grapes, raisins and other vine-based products,” http://news.reseau-concept.net/pls/news/p_entree?i_sid=&i_type_edition_id=20411&i_section_id=&i_lang=33. Among OIV’s many publications on international standardization is the International Standard for the Labelling of Wines and Spirits of Vitivinicultural Origin, http://news.reseau-concept.net/images/oiv_uk/Client/OIV_Wine_Labelling_Standard_EN_2006.pdf. The Forward to the publication states its purpose is “to ease international exchange and to ensure fair information to consumers.” *Id.* The United States Department of Agriculture’s (“USDA”) Market Access Program (“MAP”) also facilitates international trade by using government funds to help U.S. producers, exporters, private companies, and other trade organizations expand commercial export markets. Market Access Program, <http://www.fas.usda.gov/mos/programs/map.asp>.

¹⁸² See Comment 92, http://ttb.gov/nprm_comments/other.shtml.

¹⁸³ See *supra* note 44.

¹⁸⁴ Comment 20,020, http://ttb.gov/nprm_comments/ttbnotice41/other/041200021.pdf. The Beer Institute argues that applying FDA guidelines to alcohol labeling creates problems by confusing consumers. *Id.* Further the Institute argues that “the purposes of government regulation of alcohol beverages go beyond the concepts underlying the NLEA.” *Id.* The Wine Institute noted similar concerns with TTB mirroring labeling decisions on FDA policies and the NLEA instead of the FAA Act. See *supra* note 85 and

designed to present detailed nutrient and dietary information in the context of a healthy diet.¹⁸⁵

Applying this labeling concept to alcohol labels creates serious problems that could contravene the congressional intent of the FAA Act and sound public policy.¹⁸⁶ The dominant concern is how consumers could improperly interpret the nutrient display – a concern that, despite a statutory mandate, the TTB neglects to fully discuss in NPR 73.

Consumers are familiar with the display of Nutrition Facts panels on food and beverage labels. Believing that nutrient information should be prominently displayed in a standardized, uniform format, the TTB proposed the “Serving Facts” panel which resembles the FDA regulated Nutrition Facts panel format.¹⁸⁷ The Serving Facts panel would conspicuously and pronouncedly display nutritional information without qualification.¹⁸⁸ Such a display could mislead consumers by improperly conveying the impression that alcohol beverages impart nutritional value and may play a role in a healthy diet.¹⁸⁹

accompanying text. The Beer Institute also extensively highlights the research conducted by the FDA before promulgating regulations. Comment 20,020, http://ttb.gov/nprm_comments/ttbnotice41/other/041200021.pdf. This same level of research has not been conducted by TTB. In fact TTB bases much of its reasoning on conclusions made by the FDA in other instances on issues regarding foodstuffs and the NLEA. *See* 72 Fed. Reg. 41,870: 41,872: 41,873.

¹⁸⁵ 21 C.F.R. 101.13(q)(3)(ii)

¹⁸⁶ *Id.* Comment 20,020, http://ttb.gov/nprm_comments/ttbnotice41/other/041200021.pdf.

¹⁸⁷ 72 Fed. Reg. 41,878. TTB changed the name of the panel from “Nutrition Facts” to “Serving Facts” and removed the “% daily value” column. *Id.* It appears that TTB recognizes the inherent confusion between the two panels.

¹⁸⁸ *Id.* *See infra* note 193 and accompanying text.

¹⁸⁹ *See* 44 Fed. Reg. 6,740. BATF indicated that the 1975 ingredient labeling proposal was rejected partially because the objections received to the proposed amendments were primarily based on the possibility that ingredient labeling could inadvertently mislead the public as to the nutritional value of alcoholic beverages. *Id.* Because brewer’s yeast was sold as a health product, BATF though some consumers might have erroneously been led to think that malt beverages were healthy because they contained yeast. 40 Fed. Reg. 52,613. CSPI’s reasons for not proposing nutrient labeling are founded on similar concerns that products like wine and distilled spirits often contain no fat, no protein and low carbohydrates. Prominent display of this information invites consumption. CSPI didn’t even propose extensive nutrient labeling beyond calories. CSPI Petition to TTB,

Nutrient information also becomes a dangerous advertising vehicle.¹⁹⁰ Producers have already identified a desire to use calorie and carbohydrate claims to capitalize on the latest low-carb diet crazes.¹⁹¹ Comparative advertising touting which directly or implicitly touts the nutritional value of products is an additional concern.¹⁹² Careful study is needed before altering regulations in a manner which could mislead consumers or unintentionally undermine other regulatory goals.

The limited space for explanatory material on alcohol labels should also raise substantial concerns. Labels do contain enough space to reasonably inform consumers of the complexities and subtleties inherent in nutrition labeling of alcohol beverages.¹⁹³ Only having room to provide partial information makes disclosing nutrient information in a meaningful manner on a label or in an advertisement impractical.¹⁹⁴ Producers should not have to attach a book to a product to give it fair treatment. One solution would be to allow producers to direct consumers to more complete

<http://www.cspinet.org/booze/031216IngLabelingPetition.pdf>. The Winemaker's Federation of Australia expressly asserted that including nutrition labeling on alcohol beverages is implying that wine is "nutritious" which could lead to inappropriate consumption. Comment 92, http://ttb.gov/nprm_comments/other.shtml

¹⁹⁰ See *supra* Part II.B1; see also *supra* notes 20, 90, 162 and accompanying text;

¹⁹¹ See *supra* notes 76, 93 and accompanying text.

¹⁹² If used in the marketplace, comparative advertising directly conflicts with the longstanding and prudent federal prohibiting such advertising. 27 U.S.C. § 205(e); 68 Fed. Reg. 10,076.

¹⁹³ For example, the U.S. Dietary Guidelines inform us that Alcohol supplies calories but few essential nutrients. U.S. Dietary Guidelines, <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>. Our bodies metabolize calories from alcohol much differently than food. *Id.* Alcohol also influences the way our bodies metabolize food. *Id.* It is for this reason that NPR 73 falls short of providing consumers with "adequate information" as required under the FAA Act. See Lawrence Feinman, *Absorption and Utilization of Nutrients in Alcoholism*, ALCOHOL HEALTH & RESEARCH WORLD (1989); see also Eric Jequier, *Alcohol Intake and Body Weight; a Paradox*, 69 AMERICAN JOURNAL OF CLINICAL NUTRITION 173-74 (1999).

¹⁹⁴ The vast majority of consumers lack the scientific knowledge and background to make partial information useful. It is more likely that partial information will cause consumers to draw improper inferences to fill in the blanks.

sources of nutritional data on alcohol beverages (i.e. U.S. Dietary Guidelines¹⁹⁵), but NPR 73 does not propose taking that extra step.¹⁹⁶ Consumers are left to figure it out themselves.¹⁹⁷

Even if sufficient label space is available to convey adequate information to consumers, the information overload that would accompany cluttered labels could detract consumers from important essential mandatory components currently required on all alcohol beverage labels including the government warning and sulfite declaration.¹⁹⁸ A large Serving Facts panel and potential food allergen disclosure may only serve to perpetuate label overcrowding issues.¹⁹⁹ A cluttered label is an unread label and an unread label would mean consumers are receiving very little, if any benefit from proposed additional information.

Despite the fact nutrient labeling may provide consumers interested in monitoring nutrient intake with important information, clear potential for consumer confusion exists on

¹⁹⁵ U.S. Dietary Guidelines, <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>. The first line of the Guidelines is enlightening, “The consumption of alcohol can have beneficial or harmful effects depending on the amount consumed, age and other characteristics of the person consuming the alcohol, and specifics of the situation.” This concise statement in and of itself highlights the complexities inherent understanding the nutritive properties of alcohol beverages. The Guidelines also indicate that certain individuals are more susceptible to the harmful effects of alcohol beverages. *Id.* Though the Guidelines provide very broad instruction, they at least provide consumers with more complete information.

¹⁹⁶ TTB opines that labeling of alcohol beverages with the U.S. Dietary Guideline’s advice on “moderate drinking” could mislead consumers. 72 Fed. Reg. 41,869. Moderate drinking is defined by the U.S. Dietary Guidelines as one “drink” per day for women and up to two “drinks” per day for men. U.S. Dietary Guidelines, <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>. This statement alone could certainly be misleading, but in context with the rest of the information conveyed in the Guidelines, the advice on moderate drinking makes relative sense. *Id.*

¹⁹⁷ *See supra* text accompanying note 194.

¹⁹⁸ *See* 27 C.F.R. § 4.32(e); Alcohol Beverage Labeling Act of 1988 (“ALBA”), 27 U.S.C. §§ 213-219(a). The government warning that resulted from ALBA supplements the FAA Act to remind the American public of the health hazards associated with alcohol consumption.

¹⁹⁹ *See* Addendum . Currently there are already seven mandatory pieces of information that must be displayed on labels. *See supra* Part III.A. A Serving Facts panel would constitute an eighth item and allergen labeling a ninth. *See supra* Part II.C. In addition, producers are free to include additional information like tasting notes or the histories, so long as that additional information is not prohibited by current regulations. All this information can create a confusing landscape.

numerous levels. The TTB and its predecessor agencies have been vigilant in exercising statutory authority to restrict disclosure of misleading information on alcohol beverage labels – an outlook entirely consistent with the mandate of congress under the FAA Act and sound public policy.²⁰⁰ The TTB and the industry should be certain first, through consumer and scientific research, that display of nutritional information will not undermine congressional mandates and existing health and safety reminders. This is a complex policy area that the BATF has decided on in numerous previous occasions and no valid change has occurred to warrant new regulations.

C) *Consumer Interest*

As explained in Part II, the BATF has considered and rejected similar mandatory labeling proposals on several occasions during the last three decades.²⁰¹ Among the various reasons advanced by the BATF for rejecting prior proposals, lack of consumer interest was cited as a fatal flaw in each.²⁰² Numerous questions are begged with respect to this critical issue: when did consumers become interested? When did they start purchasing wine, beer and spirits based on nutrient qualities?²⁰³

At the end of the ninety day comment period for ANPRM 41 over 19,000 comments had

²⁰⁰ 27 U.S.C. § 205(e). *See supra* Part II.A-D.

²⁰¹ *See supra* Part II.

²⁰² *See supra* notes 45, 58, 65, 68, 91 and accompanying text. Consumer interest was the common thread for withdrawing an ingredient labeling rule, exacting two rescissions and withdrawing a nutrient labeling rule.

²⁰³ The burden is on TTB to prove that the radical changes it proposes are necessary to meet consumer interest. The provisions of the FAA Act kick in when it is determined that consumers need nutrient information in order to be provided “adequate information” as to the identity and quality of alcohol products. 27. U.S.C. 205(e). The Brewer’s Association suggests that alcohol beverages are consumed “primarily for social purposes, not as a source of daily nutrition” a statement in line with one made by CSPI’s very own director of Alcohol Policies, George A. Hacker who is quoted as saying “Alcohol is not a food. It can’t meet dietary needs. It’s a social lubricant and an intoxicant.” SKRZYCKI, *supra* note 20. With both sides of the argument agreeing against the very thing TTB is proposing to do it is a wonder why TTB would so forthrightly assert the need to include serving facts information on alcohol beverages.

been received.²⁰⁴ The sheer volume of the response was overwhelmingly larger than responses to similar proposals in the past.²⁰⁵ More importantly, over 18,500 comments were from individual consumers commenting in favor of nutrient labeling.²⁰⁶ The TTB places great weight on this evidence, noting that “numerically significant” number of comments responding to ANPRM 41 “*clearly indicates* that consumers are very interested in having information about the calorie and nutrient content of the alcohol beverage products they purchase.”²⁰⁷ (emphasis added)

A closer look reveals the true source of this anomaly and that the weight the TTB places on these comments is unfounded. Most of the comments received in response to ANPRM from individual consumers are not the result of legitimate consumer demand or concern, but rather an artificial digital grass roots campaign instituted by the largest liquor conglomerate in the world.²⁰⁸

Consumer interest groups like CSPI and NCL have a strange and unwanted ally in the nutrient labeling fight – Diageo Plc.²⁰⁹ After CSPI and NCL filed their petition in 2003, Diageo instituted a national campaign for voluntary nutrient labeling of distilled spirits, beer and wine.²¹⁰ Over 18,000 of the 19,000 comments received from individual consumers in response to

²⁰⁴ 72 Fed. Reg. 41,863.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 41,866.

²⁰⁷ *Id.* at 41,868.

²⁰⁸ Laurie Woolever, *Federal Government Mulls Nutrition Labels for Wine: Wineries may be required to list calorie content, carbohydrates, fats, proteins and other information on labels*, August 7, 2007, available at <http://www.winespectator.com/Wine/Features/0,1197,3932,00.html>. Diageo has led what it calls a “consumer rights movement” since 2003, agitating for the right of alcohol beverage manufacturers to include information about carbohydrates, calories and serving sizes on product labels. There is ample reason to believe Diageo has more at stake in the issue. It can hardly be believe that a large liquor conglomerate would instigate a consumer “right to know” campaign to its detriment.

²⁰⁹ *Id.* Woolever conspicuously notes that “[t]he proposal has met with support in some circles, nonprofit and for-profit alike.”

ANPRM 41 were generated from web site forms at www.knowyourdrink.com.²¹¹ The website was created by Diageo as part of a slick public affairs, marketing, and political effort to promote a concept known as “equalization.”²¹² “Equalization” is a concept developed to convince policymakers, consumer groups, medical professionals, and the public that all alcohol beverages are equivalent. For example, 5 oz. wine = 12 oz. beer = 1 oz. distilled spirits.²¹³ The fact that not all distilled spirits, wine or malt beverages have the same alcohol content clearly contravenes the concept of equalization.

The TTB was quick to dispense with the idea of defining standard serving sizes or categorically equating alcohol products.²¹⁴ However, Diageo’s lobbying efforts leave to reason

²¹⁰ NPR 73 indicates in the introduction that shortly after CSPI’s petition was filed, TTB was “contacted by an industry member requesting approval to label its products with nutrition and other information.” 72 Fed. Reg. 41,860.

²¹¹ www.knowyourdrink.com

²¹² See www.knowyourdrink.com; 72 Fed. Reg. 41,866. Diageo’s website invites visitors to submit comments to TTB on the proposed nutrition and ingredient labeling regulations. *Id.* Ultimately, the website generated over 18,000 comments during the comment period which were contained in over twenty different form letters. *Id.* Consumers can also peruse their favorite Diageo products and examine what information a Serving Facts panel would contain. *Id.* Without giving too much deference to the response from the website, TTB carefully noted in NPR 73 that the response from www.knowyourdrink.com was “numerically significant.” 72 Fed. Reg. at 41,867. Diageo calls www.knowyourdrink.com part of Diageo’s “a global consumer information policy” <http://www.diageo.com/en-row/OurBrands/Knowyourdrink/>

²¹³ Equalization has been met with strong intra-industry opposition. The National Beer Wholesaler’s Association even formulated talking points to defend against the “equalization lobby.” http://www.nbwa.org/NR/rdonlyres/8C3E3DB0-18CB-4686-85CF-3C7BA82F2076/0/talking_points_on_equivalency_2005.pdf.

²¹⁴ CSPI’s Alcohol Facts proposal suggested that any nutrient labeling should include a declaration of the number of standard drinks per container. CSPI Petition to TTB, <http://www.cspinet.org/booze/031216IngLabelingPetition.pdf>. The petition suggested that a serving should be defined as 12 ounces of beer, 5 ounces of wine, and 1.5 ounces of 80-proof distilled spirits. *Id.* The standard drink concept is fundamentally flawed when one takes even a cursory look at the manner in which alcohol beverages are consumed. TTB noted that because alcohol beverages are customarily consumed in different manners (i.e. in pint glass, flutes, shot glass, martini glasses) defining a standard drink would be inappropriate. 72 Fed. Reg. 41,871. Rather, the Bureau adopted a specific serving size reference for each alcohol beverage product category based on the amount customarily consumed. *Id.* TTB notes that this amount is not a “recommended consumption amount” but “rather intended to be used as a reference amount.” *Id.* Again, this is information not conveyed to the consumer, the consumer is left

that nutrient labeling will give alcohol beverage industry members a dangerous comparative marketing tool that could be used to tout the low-car, no-fat, low-calorie profiles of certain products.²¹⁵

In general, the majority of commenters cited by the TTB in NPR 73 have in one way or another been “associated or encouraged by one of the two factions in [the] dispute.”²¹⁶ The 18,500 comments generated by www.knowyourdrink.com do not pinpoint a grass roots effort on behalf of American consumers to request nutrient information; they in fact manifest the danger of a powerful liquor lobby.²¹⁷ Requiring the disclosure of information that few consumers have demanded risks reducing the amount of information consumers may actually derive from alcohol beverages.

Conclusory statements of consumer benefit are unsatisfactory to justify a fundamental restructuring of labeling requirements. NPR 73 fails to justify or present *compelling* factual evidence that the reasons for rejecting similar proposals in the past are no longer valid or that new circumstances justify dramatic changes in alcohol beverage labeling policy. In the words of the BATF that put the final nail in the coffin of previous proposal, “there [is] neither significant consumer interest in nutrition information . . . nor any convincing evidence that nutrition labeling would provide substantially useful information to consumers.”²¹⁸

to guess that the 5 ounce serving size indicated on a wine Serving Facts panel is a reference amount, not a recommended amount.

²¹⁵ See *supra* Part II.B1; see also *supra* notes 20, 90, 162 and accompanying text.

²¹⁶ See *supra* note 68.

²¹⁷ 48 Fed. Reg. 45,555. BATF noted in its rescission of T.D. BATF-66, that consumer interest was illusory because the majority of individual commenters had been influenced by one side or another (i.e. the alcohol industry and the consumer interest groups). *Id.* Thus, the agency was not satisfied that there existed a legitimate “grass roots” interest in nutrient labeling. *Id.* BATF seemed hesitant to act without such a showing. It is alarming to that TTB now puts substantial weight on comments received from a public policy campaign blatantly designed to veil the subversive interests of liquor conglomerates.

²¹⁸ 70 Fed. Reg. 22,278.

V. SUGGESTIONS AND ALTERNATIVE COURSES OF ACTION

A) *Suggested Course of Action*

The TTB has ultimately failed to present a sound rationale or justification for the paradigm shift in longstanding alcohol labeling policy proposed by NPR 73.²¹⁹ Even if some consumers would derive benefits from a nutrition facts panel on alcohol beverages, there exist a sufficient number of others who could be inadvertently misled.²²⁰ Such consumer deception operates to directly contravene congressional intent and sound public policy.²²¹ The Federal Alcohol Administration Act was designed to protect consumers and maintain industry integrity.²²² The TTB's predecessors have maintained a rooted tradition in fulfilling their statutory responsibilities by exercising vigilance and prudence.²²³ NPR 73 would undermine the basic tenets of the FAA Act and uproot the very foundations on which the TTB is moored.²²⁴

A "one size fits all" regulation, though possibly efficient and standardized, does not necessarily comport with sound policy and historical precedent.²²⁵ The differences between beer, wine, and distilled spirits have served as the basis of innumerable laws, statutes, and judicial opinions.²²⁶ They are differences that should be appreciated and regulated with an ever present eye towards upholding congressional mandates. In the instant case, the facts and analysis have

²¹⁹ *See supra* Part IV.

²²⁰ *See supra* Part IV.B.

²²¹ *See supra* note 16 and accompanying text.

²²² Trade Practices, http://www.ttb.gov/trade_practices/federal_admin_act.shtml.

²²³ About TTB, <http://www.ttb.gov/about/history.shtml>.

²²⁴ *See supra* Part IV; *see also supra* note 16 and accompanying text.

²²⁵ Comment 18,660, http://www.ttb.gov/nprm_comments/tbnotice41/other/04118660.pdf.

²²⁶ *Id.*

shown that the best policy is one that protects the integrity of existing sound policy until consumer interest, informed research, and statutory responsibilities indicate an adequate alternative.²²⁷

B) Suggested Alternative Courses of Action

The TTB may yet find that its nutrient labeling proposal adequately prescribes to statutes, history and sound policy.²²⁸ As such, it is appropriate to discuss alternative courses of action.²²⁹ The belief was articulated (or rather lamented) in Part IV's introduction that NPR 73's proposed nutrient labeling regulation overextended by imposing substantial cost burdens on smaller producers and then failed to even reach the level of consumer protection delineated in the FAA Act.²³⁰ Alternative courses of action would seek to rectify one if not both of these concerns. There is no indication the following suggestions are mutually exclusive.

The first alternative course of action would be to tailor the regulation to accommodate the needs of small producers. This could be achieved through a small producer exemption.²³¹ An exemption would effectively ameliorate the hardship that would otherwise be borne by small producers. Small producers stand to suffer the most because they are not able to spread implementing costs over a large quantity of products.²³² These facts clearly lead to the dangerous

²²⁷ See *supra* Part IV. See *infra* Part V.C.

²²⁸ See *supra* Part II.

²²⁹ TTB discusses alternative courses of action in its proposal as well as part of its regulatory analysis and duties under the RFA. See *supra* note 164 and accompanying text. Mention of these proposals follows.

²³⁰ See *supra* Part IV.

²³¹ TTB considered and rejected the idea of a small business exemption. 72 Fed. Reg. 41872-73.

²³² See *supra* Part IV.A.

conclusion that the potential burdens to small businesses are substantially incommensurate with the potential benefits to consumers.²³³

Providing small brewers, wineries, and distilleries with an exemption constitutes a legitimate means of complying with the RFA and reflects an overarching Congressional policy that seeks to protect the survivability, interests, and assets of small businesses.²³⁴ This broad-based policy is readily evidenced by numerous regulations, executive orders and statutes, including one statute that the TTB heavily relies on as justification for prescribing nutrient labeling regulations – the NLEA.²³⁵ The implementing regulations of the NLEA provide “Small Business Exemptions” to producers that qualify based on either gross sales or number of employees.²³⁶ A producer is exempt from placing a Nutrition Facts label on their products if their annual gross domestic sales of *food* are not more than \$50,000 or their total gross sales are not more than \$500,000.²³⁷ Low volume producers (10,000 units or less) that also have ten or fewer employees are categorically exempt and other low volume/low employee producers may qualify if their products are listed with the Office of Food Labeling.²³⁸ This exemption structure

²³³ See *supra* Part IV.

²³⁴ See 35 U.S.C. § 41(h)(1) (requiring patent fees charged to small businesses to be reduced 50 percent); 47 U.S.C. § 257 (requiring the Federal Trade and Communications Commission to identify and eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services); 47 C.F.R. § 1.2110 (identifying preference for small businesses bidding for government contracts); RFA 5 U.S.C. §§ 601(3)-(4), 603(a) (ensuring federal administrative agencies consider the impact of regulations on small businesses); 26 U.S.C. § 5051(a)(2) (providing small producers with a lower excise tax rate); 26 U.S.C. § 5061(d)(4) (requiring less-frequent tax payments by small excise tax payees); 27 C.F.R. §§ 24.272, 25.165 (requiring mandatory electronic funds payments only from the largest excise tax payees); 21 C.F.R. § 1.368 (establishing less rigorous recordkeeping rules under the Bioterrorism Preparedness and Response Act of 2002 for small businesses).

²³⁵ See *supra* notes 84, 85 and accompanying text.

²³⁶ 21 C.F.R. 101.9(i).

²³⁷ *Id.*

²³⁸ *Id.*

could easily be applied to the alcohol beverage industry by providing exemptions based on gross sales, employees, volume or a combination thereof.

The TTB's justification for not providing a small business exemption is a conclusory statement that consumer protection would be "defeated by a permanent exemption."²³⁹ This malign rationale is devoid of any substantive discussion or empirical evidence. It could be inferred that the TTB's belief that an exemption would undermine the regulation is based on the fact that the vast majority of alcohol producers are in fact small businesses.²⁴⁰ Thus, only a handful of producers would be required to label their products which would create little uniformity in labeling standards. This fact clearly cuts more towards warranting a withdrawal of the proposal as opposed to an exemption.²⁴¹

The need for a small business exemption is justified in light of the onerous costs on small producers and amplified by evidence of the NLEA exemption and Congress's clear intent to provide protection mechanism for small businesses.

The second alternative course of action would seek to address the deficiencies in the information that is conveyed to consumers by the Serving Facts panel. Consumers are essentially confronted with a serving size and a quantitative value for four nutrients²⁴² – that is it; no qualifications or constraints. It is naïve to assume consumers will only take the nutrient information for its face value. The face value would be the quantity of a nutrient per serving. Consumers will draw inferences about the healthiness of a product; they will use the information for comparative purposes; they will factor the values into their diets. This is how consumers have

²³⁹ 72 Fed. Reg. 41,872.

²⁴⁰ See *supra* note 163 and accompanying text.

²⁴¹ An exemption would have the effect of exempting the majority of the industry. See *supra* note 163 and accompanying text.

²⁴² See NPR 73's Proposed Label Formats *infra* Addendum A.

historically utilized similar information on Nutrition Facts panels. There is no reason to believe they will conduct themselves differently when confronted with a familiar graphical display on an alcohol beverage. Artful phraseology will not defeat consumers' attempts to draw similarities between information on a "Serving Facts" panel and information on a "Nutrition Facts" panel.²⁴³

With these broad concerns in mind, it appears that product labels alone are not enough to communicate "adequate information" about the unique properties and effects of alcohol beverages to consumers.²⁴⁴ Directing consumers to a secondary source may solve this dilemma by providing additional information that would aid consumers in making informed purchasing and consumption decisions.²⁴⁵ I suggest that if alcohol beverages contain a nutrient panel, they must also direct consumers to the U.S. Dietary Guidelines which provides crucial supplemental information.²⁴⁶ The Guidelines include several pages of frequently update information that reminds consumers of well-known risks and benefits associated with alcohol consumption.²⁴⁷ Consumers are urged to consume alcohol beverages, if at all, moderately.²⁴⁸ More importantly, this information is presented in the broader context of a healthy diet and lifestyle.²⁴⁹ It is likely that consumers considering nutrient information are doing so in the context of their diet or lifestyle.

²⁴³ See *supra* note 187.

²⁴⁴ See *supra* notes 193-197 and accompanying text.

²⁴⁵ Comment 18,660, http://www.ttb.gov/nprm_comments/tbnotice41/other/04118660.pdf.

²⁴⁶ U.S. Dietary Guidelines, <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

The TTB considered using the U.S. Dietary Guidelines in conjunction with the Serving Facts panel, but ultimately rejected the idea.²⁵⁰ However, the proposal that the TTB rejected is different from my proposal. The TTB rejected placing the U.S. Dietary Guidelines' advice on moderate drinking on alcohol labels alone.²⁵¹ The advice on moderate drinking states "one drink for women, and up to two for men."²⁵² The TTB believed that this information conveyed alone would condone alcohol consumption for even those who should no consume alcohol.²⁵³ My proposition is simply to direct consumers to the U.S. Dietary Guidelines. Consumers could then visit the website or request the Guidelines. This solution illuminates the Serving Facts panel information in the context of the non-biased Guidelines. More importantly, this is an alternative satisfies the provisions of the FAA Act by providing consumers with "adequate information" as opposed to inferential or circumstantial information.

C) *Suggested Future Courses of Action*

The TTB's authority to prescribe labeling and advertising regulations is drawn from a distinct Congressional mandate; one that calls for special attention in formulating regulations so that the regulation balances the twin aims of preventing consumer deception and providing adequate information to consumers about the identity and quality of products.²⁵⁴ This special attention should be carried out in all facets of the rulemaking process including the gathering of research and empirical evidence to justify prescribing regulations. However, NPR 73 heavily

²⁵⁰ 72 Fed. Reg. 41,869.

²⁵¹ *Id.*

²⁵² U.S. Dietary Guidelines,
<http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>.

²⁵³ 72 Fed. Reg. 41,869.

²⁵⁴ *See supra* note 16 and accompanying text.

relies on research conducted by the FDA for tangentially related issues in the food labeling context.²⁵⁵ The FDA's statutory directives are similar with respect to an emphasis towards consumer protection, yet the context in which those directives are exercised is wholly distinct. TTB regulates products containing alcohol and the FDA regulates all other food and beverage products.²⁵⁶ Two agencies were created to address to separate products under two separate statutory schemes.

Applying substantial weight to research conducted by an agency operating under a separate and distinct congressional directive is unreasonable and unfair to the parties that ultimately bare the responsibility and cost of compliance. It is ok and even encouraged that administrative agencies coordinate efforts, combine resources, and facilitate the free flow of information.²⁵⁷ Consulting with the FDA and learning from their research methodology should be on of the TTB's goals in devising sound policy.²⁵⁸ Reasonably taking into consideration the knowledge, expertise and empirical studies of other agencies is nothing to frown upon. .However, the differences in each agency's statutory directives should be fully appreciated and should remain distinct and separate.

There is no reason why the TTB should not conduct its own independent research within the context of the alcohol beverage industry.²⁵⁹ This process would ensure that regulations affecting consumers and alcohol producers are based on detailed and carefully sourced research

²⁵⁵ See *supra* note 106 and accompanying text.

²⁵⁶ See *supra* notes 84, 85 and accompanying text. Products containing alcohol are widely known to prove deleterious to health for a wide range of reasons and for a wide range of people.

²⁵⁷ See *supra* note 106 and accompanying text.

²⁵⁸ See *supra* note 106 and accompanying text. The MOU signed by the two parties clearly established a working relationship between the FDA and TTB. See *supra* note 106. However, it has become apparent FDA conducts research and TTB piggybacks on their reasoning rather than conducting research within the context of the alcohol industry.

²⁵⁹ See *supra* notes 166, 167, 184-186 and accompanying text.

conducted in the pure context of alcohol public policy.²⁶⁰ Without this assurance, industry members and consumers are left with a mashing of conflicting policies and divergent viewpoints such as those manifested in the fragmented reasoning underlying NPR 73.²⁶¹ The TTB appears to have forced the facts to fit the rule rather than forced the rule to fit the facts. In other words, the evidentiary justification are so illusive that it appears the TTB formulated NPR 73 based upon their own peculiar precepts of what the rule should look like and then cherry-picked facts to substantiate their claims. These are disquieting methods that invite profound social, political and legal ramifications on the Bureau, the industry and ultimately, the consumer.

VI. CONCLUSION

I do not forebodingly suggest that NPR 73, if implemented, will cause tasting room and dinner party dialogue to reverberate with dismal expressions like “this viognier has a nice calorie count on the finish,” or “that scotch has a wonderful bouquet of protein.”²⁶² If convoluted conversations and tactless terminology were the only implications of NPR 73, there would be little to comment about.²⁶³

With the close of the comment period on January 27, 2008, the fate of NPR 73 now rests in the hands of the policymakers.²⁶⁴ 775 comments in all were received; a curiously small

²⁶⁰ See *supra* notes 166, 167, 184-186 and accompanying text.

²⁶¹ See *supra* Part IV.

²⁶² See *supra* notes 1-5 and accompanying text.

²⁶³ See *supra* Part I.

²⁶⁴ Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages, 72 Fed. Reg. 41,860 (proposed July 31, 2007) (to be codified at 27 C.F.R. pts. 4, 5, 7, and 24). Unlike many rulemaking proposals, no extension was granted for NPR 73. The final comment date remained January 27, 2008 which means that many wineries faced having to come together to comment during fall harvest – the busy time of year for the wine industry. It should also be noted that ANPRM 41 requested comments on a

number compared to the 19,000 comments received in response to the preceding ANPRM 41.²⁶⁵

In lieu of three decades of consumer antipathy and unimplemented proposals, the question is appropriately begged: will NPR 73 just be déjà vu all over again?²⁶⁶

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much broader range of topics including ingredient, allergen, and alcohol labeling. 70 Fed. Reg. 22,280. However, this fact can only marginally account for the nearly 19,000 fewer comments received.


²⁶⁵ Regulations.gov, <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TTB-2007-0062>.

²⁶⁶ See *supra* note 70 and accompanying text.

²⁶⁷ J.D. Candidate, Pepperdine School of law, June 2009; Bachelor of Science, Wine and Viticulture, Bachelor of Science, Agricultural Business, California Polytechnic University, June 2006.

ADDENDUM A


CSPT's Proposed Label

Alcohol Facts	
 Contains 5 Servings	Calories per Serving: 98 Alcohol by Volume: 13% Alcohol per serving: 0.5 oz
	Serving Size: 5 fl oz
U.S. Dietary Guidelines advice on moderate drinking: no more than two drinks per day for men, one drink per day for women.	

Ingredients: Grapes, yeast, sulfiting agents, and sorbates.

Liquor Industry's Proposed Label

Malt Beverage (5% ABV)

Serving Facts	
Serving Size 12 fl oz	
Servings Per Container 1	
Amount Per Serving	
Calories	150
Fat	0g
Carbohydrates	13.2g
Protein	1.1g
Alcohol	6 oz
A standard drink contains 0.6 fl oz of alcohol. A serving of this beverage is 1 standard drink.	
	

Diageo Product's Current Label



Serving Facts	Amount Per Serving	
	Serving Size 1.5 fl oz	Calories
Servings Per Container 17	Fat	0g
	Carbohydrates	0g
	Protein	0g
	Alcohol	0.6 fl oz

ADDENDUM B

NPR 73's Proposed Label Formats

Without Optional Alcohol Statement

Serving Facts	
Serving Size	5 fl oz (148 ml)
Servings Per Container	2 ½
Amt Per Serv.	
Calories	120
Carbohydrate	3g
Fat	0g
Protein	0g

With Optional Alcohol Statement

Serving Facts	
Serving Size	5 fl oz (148 ml)
Servings Per Container	5
Amount Per Serving	
Alcohol by volume	14%
fl oz of alcohol	0.7
Calories	120
Carbohydrate	3g
Fat	0g
Protein	0g

50 Milliliter Packaging Linear Display

Serving Facts: Serving size: 1.7 fl oz (50 ml); Servings per container: 1; **Alcohol by volume:** 14%; Fl oz of alcohol: 0.2; **Calories:** 41; **Carbohydrates:** 1g; **Fat:** 0g; **Protein:** 0g