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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 5, 7, 26, and 27

[Docket No. TTB–2019–0005; Notice No. 183]

RIN: 1513–AC45

Elimination of Certain Standards of Fill for Distilled Spirits; Amendment of Malt Beverage Net Contents Labeling Regulation

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

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Alcohol and Tobacco Tax and Trade Bureau (TTB) addresses numerous petitions requesting that TTB amend the regulations that govern distilled spirits containers to provide for additional authorized standards of fill. TTB is proposing to eliminate all but minimum and maximum standards of fill for distilled spirits containers and thus eliminate unnecessary regulatory requirements and provide consumers broader purchasing options. TTB welcomes comments on this proposed deregulation, and it also seeks comments on the relative merits of alternatives, such as adding new authorized standards of fill and developing an expedited process for adding additional standards in the future. All of these approaches would eliminate restrictions that inhibit competition and the movement of goods in domestic and international commerce.

TTB is also proposing to amend the labeling regulations for distilled spirits and malt beverages to specifically provide that distilled spirits may be labeled with the equivalent standard United States (U.S.) measure in addition to the mandatory metric measure, and that malt beverages may be labeled with the equivalent metric measure in addition to the mandatory U.S. measure. Such labeling is currently allowed, but that is not explicitly stated in current regulations. This revision will align the distilled spirits and malt beverage labeling regulations with current policy and also with the wine labeling regulations. The wine labeling regulations state that wine may be labeled with the equivalent standard U.S. measure in addition to the mandatory metric measure.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Please send your comments on this proposed rule to one of the following addresses:

- Internet: <https://www.regulations.gov> (via the online comment form for this document as posted within Docket No. TTB–2019–0005 at “Regulations.gov,” the Federal e-rulemaking portal);

- U.S. Mail: Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; or

- Hand delivery/courier in lieu of mail: Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 400E, Washington, DC 20005.

See the **Public Participation** section of this document for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this proposed rule and any comments TTB receives about this proposal at <https://www.regulations.gov> within Docket No. TTB–2019–0005. A link to that docket is posted on the TTB Web site at <https://www.ttb.gov/wine/wine-rulemaking.shtml> under Notice No. 183. You also may view copies of this proposed rule and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20005. Please call 202–453–2135 to make an appointment.

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

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers regulations setting forth bottle size and related standards of fill for containers of distilled spirits distributed within the United States. The authority to establish these standards is based on two provisions of law: (1) Section 5301(a) of the Internal Revenue Code of 1986 (IRC), codified at 26 U.S.C. 5301(a), and (2) section 105(e) of the Federal Alcohol Administration Act (FAA Act), codified at

27 U.S.C. 205(e). Section 5301(a) of the IRC authorizes the Secretary of the Treasury to prescribe regulations “to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits ...” when the Secretary determines that such action is necessary to protect the revenue. Section 105(e) of the FAA Act authorizes the Secretary of the Treasury to prescribe regulations relating to the “size and fill” of alcohol beverage containers “as will prohibit deception of the consumer with respect to such products or the quantity thereof” TTB administers these IRC and FAA Act provisions pursuant to section 1111(d) of the Homeland Security Act of 2002, as codified at 6 U.S.C. 531(d). In addition, the Secretary of the Treasury has delegated certain administrative and enforcement authorities to TTB through Treasury Order 120–01, dated January 24, 2013 (superseding Treasury Order 120–01, dated January 24, 2003).

Current Standards of Fill for Distilled Spirits

The standards of fill for distilled spirits are contained in subpart E of part 5 of the TTB regulations (27 CFR part 5). The term “standard of fill” is used in the TTB regulations and in this document to refer to the authorized amount of liquid in the container, rather than the size or capacity of the container itself. For better readability, however, this document sometimes uses the terms “size” or “container size” and “standards of fill” interchangeably.

Within subpart E, paragraph (a)(1) of § 5.47a (27 CFR 5.47a(a)(1)) specifies the following metric standards of fill for containers other than those described in paragraph (a)(2) of that section:

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

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

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

In addition to the metric standards specified above, § 5.47a contains provisions regarding tolerances (discrepancies between actual and stated fill), unreasonable shortages in fill, and distilled spirits bottled or imported before January 1, 1980, and marketed or released from customs custody on or after that

date (the date on which the U.S. volumetric standards were replaced by the § 5.47a metric standards, as discussed in more detail below).

Current Standards of Fill for Wine

The standards of fill for wine are contained in subpart H of part 4 of the TTB regulations (27 CFR part 4). In a separate notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**, TTB is also proposing to eliminate most of the standards of fill for wine.

Malt Beverages

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

History of Standards of Fill for Distilled Spirits

Following the repeal of Prohibition, the standards of fill for distilled spirits were established in 1934 within Regulations 13, issued pursuant to the internal revenue laws. Similar standards were established in 1936 within Regulations 5, issued pursuant to the FAA Act. The standards of fill in Regulations 5 were as follows:

- For domestically manufactured, domestically bottled, or imported distilled spirits—
 - 1 gallon,
 - 1/2 gallon,
 - 1 quart,

- 4/5 quart,
- 1 pint,
- 1/2 pint,
- 1/8 pint, and
- 1/10 pint;
- For domestically manufactured, domestically bottled, or imported brandy—1/16 pint; and
- For Scotch and Irish whisky and Scotch and Irish type whisky, and for brandy and rum—4/5 pint.

Over the years, a number of changes were made to these standards. The most significant change took place in 1976 when TTB's predecessor agency, the Bureau of Alcohol, Tobacco and Firearms (ATF), adopted metric standards of fill for distilled spirits containers. These metric standards were adopted in T.D. ATF-25 (41 FR 10217, March 10, 1976 and 41 FR 11022, March 16, 1976).

ATF provided a phase-in period for the new metric sizes that lasted until January 1, 1980, at which time metric sizes became mandatory. The original metric standards of fill specified for distilled spirits containers were as follows:

- 1.75 liters;
- 1 liter;
- 750 milliliters;
- 500 milliliters;
- 200 milliliters; and
- 50 milliliters.

Later amendments to the metric standards for distilled spirits containers included:

- T.D. ATF–146 (48 FR 43319, September 23, 1983), which added 100 milliliters and 375 milliliters to the list of authorized sizes;
- T.D. ATF–228 (51 FR 16167, May 1, 1986), which began a phase-out of the 500-milliliter size; and
- T.D. ATF–326 (57 FR 31126, July 14, 1992), which authorized the 355-milliliter can and removed the 375-milliliter and larger sizes for cans.

As noted above, TTB also regulates the standards of fill for distilled spirits under section 5301(a) of the IRC, in order to protect the revenue. Historically, standardized sizes made it easier to conduct inventories of cased goods at distilleries and warehouses, thus facilitating tax assessment. Within the TTB regulations promulgated under the IRC to govern the establishment and operation of distilled spirits plants, § 19.511 (27 CFR 19.511) provides that liquor bottles for domestic use shall conform to the standards of fill provided in subpart E of 27 CFR part 5.

Prior Notices Seeking Comments on Changes to Standards

In addition to the rulemakings cited above that adopted or amended standards of fill for wine and distilled spirits, ATF twice solicited comments on whether the standards of fill should be retained, revised, or eliminated.

In 1987, ATF published an advance notice of proposed rulemaking (ANPRM), Notice No. 633 (52 FR 23685, June 24, 1987), which solicited comments on whether the standards of fill requirements for distilled spirits and

wine should be retained either in general or as metric standards. The Washington State Liquor Control Board (WSLCB) had petitioned ATF to amend the regulations to allow for the importation of distilled spirits not bottled in authorized metric standards of fill if the bottles were labeled with certain additional information.

In its petition, the WSLCB stated that many foreign manufacturers bottle their spirits in standards of fill that are not authorized in the United States (for example, 740 milliliters and 800 milliliters). Consequently, while these products could be shipped to other countries, they could not be imported into the United States. The WSLCB argued that the existing standards of fill stifled price competition on imported distilled spirits, resulting in an artificial price increase for U.S. consumers. Although the petition requested an amendment of the standards of fill requirements for distilled spirits only, the ANPRM requested comments on retaining or eliminating the standards of fill for distilled spirits and wine. On February 6, 1990, ATF published Notice No. 696 (55 FR 3980) and stated that it found no basis to eliminate the existing standards of fill for wine and distilled spirits.

In 1993, ATF published another ANPRM, Notice No. 773 (58 FR 35908, July 2, 1993), in response to three petitions requesting the reinstatement or addition of four sizes to the standards of fill for distilled spirits. The petitioners requested that the regulations be amended to include four sizes used in other countries: A 296-milliliter can, a 500-milliliter bottle, a 680-milliliter bottle, and a 946-milliliter bottle. The petitioners also made many of the same arguments for

retaining the existing standards that were noted in Notice No. 696. Although these petitions only involved an amendment to the existing standards for distilled spirits, ATF believed it was also appropriate to address the larger issue of retaining or eliminating the standards of fill requirements for distilled spirits and wine. A common theme in the three petitions was that the current standards of fill were hindering international trade between the United States and countries with different standard container sizes. As a result, ATF sought comment in Notice No. 773 on whether the existing standards of fill should be revised, retained, or eliminated. ATF did not undertake further rulemaking on this issue.

Petitions and Inquiries Regarding Changes to Standards

As noted above, in a separate notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**, TTB is proposing to eliminate most of the standards of fill for wine. The agency is taking that deregulatory action in response to a number of petitions from domestic and foreign wine producers requesting additional authorized sizes. TTB believes that the reasons cited by wine industry members for revisions to the standards of fill regulations also apply to the distilled spirits industry. As evidence of this, we note that TTB has received the following petitions and inquiry regarding changes to the standards of fill requirements for distilled spirits:

1. In 2012, the Japan Sake and Shochu Makers Association and the Nippon Distillers Association petitioned TTB to revise § 5.47a(a)(1) to include 720-milliliters, 900-milliliters, and 1.80 liters sizes for shochu, a type of distilled spirit commonly produced in Japan. The two trade associations state that

shochu is bottled in these sizes and it would be prohibitively expensive for their members to produce special sizes for the U.S. market. They argue that U.S. consumers will not be misled by the addition of new standards of fill, noting that various sizes of different but similar fill are available for other consumer goods in the United States, citing the example of an over-the-counter medicine that is available in containers of either 240-milliliters or 260-milliliters. Finally, the petitioners contend that not permitting these standards of fill is a technical barrier to trade and, as such, a violation of Article 2 of the Agreement on Technical Barriers to Trade, which is one of the World Trade Organization (WTO) agreements.

2. The National Tax Agency of Japan, part of Japan's Ministry of Finance, wrote to TTB in 2013 expressing support for the 2012 petition submitted by the Japan Sake and Shochu Makers Association and the Nippon Distillers Association. They noted that Japan does not have regulatory limitations on distilled spirits standards of fill, and opined that relaxing our regulations would benefit U.S. consumers.

3. In 2015, TTB received a petition from the Japan Sake and Shochu Makers Association, the Nippon Distillers Association, and the Japan Spirits and Liqueurs Makers Association. The three trade associations requested that TTB add the following distilled spirits container sizes to § 5.47a(a)(1): 700-milliliters, 720-milliliters, 900-milliliters, and 1.80 liters. Noting that Japanese shochu and whiskey are bottled in these sizes, the petitioners stated that allowing their importation into the United States will benefit American consumers. They also

maintained that the United States is obliged under the WTO agreement on technical barriers to trade to not enforce rules such as the current standards of fill that constitute unnecessary obstacles to international trade.

4. In 2017, an American company requested that TTB consider revising the distilled spirits standards of fill to include a 2-milliliter size. It stated it has a concept for a 2-milliliter sample size that could be given to consumers for free along with a mini brochure describing the product. According to the company, this packaging would allow the consumer to sample a product before purchase, and would be a good way for companies to promote products.

TTB Proposal

In view of the points made in the petitions and inquiries discussed above, TTB believes that it is appropriate to revisit the standards of fill issue. TTB is proposing to eliminate the existing standards of fill for distilled spirits, except that the regulations would maintain a minimum standard of 50 milliliters and a maximum standard of 3.785 liters. The minimum container size is needed to insure sufficient space on the container for required labeling. The maximum container size is needed to maintain the distinction between bottled and bulk products. TTB also welcomes comments on merely adding some or all of the standards of fill requested in the petitions, or adding some or all of those standards and also adopting an expedited approach for adding new sizes in the future. TTB is considering eliminating the standards of fill for the following reasons:

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

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

3. TTB believes that the proposed labeling requirements regarding net contents (see 27 CFR 5.32(b)(3) and 5.38) and those regarding the design and fill of containers (see 27 CFR 5.46) provide consumers with adequate information about container contents.

4. Limiting standards of fill is no longer necessary to ensure accurate calculation of tax liabilities or to protect the revenue. TTB verifies tax liability on the basis of a producer's production and removal records, and allowing additional standards of fill would not undermine TTB's efforts in this regard. ATF and TTB previously took the position that limiting the number of bottle sizes protected the revenue by facilitating accurate tax computations. This position was successfully litigated in Goldstein v. Miller, 488 F.Supp. 156 (D. Md. 1980), aff'd without opinion 649 F.2d 863 (4th Cir. 1981), cert. denied as Goldstein v. Regan, 454 U.S. 828 (1981). The litigation arose shortly after the enactment of the all-in-bond system of tax payment for distilled spirits under the Distilled Spirits Tax

Revision Act of 1979, Title VIII of Pub. L. 96–39, 96th Cong., 1st Sess. Under this system, the tax was calculated at the time of the removal of the bottled distilled spirits from the distilled spirits plant rather than at the early bulk stages before bottling. Due to the implementation of the system, ATF was especially concerned about standards of fill at that time. The all-in-bond system has now been in place for over 30 years. Audit experience since implementation of the all-in-bond system and since the Goldstein litigation leads TTB to conclude that the limitations on standards of fill are no longer necessary for revenue protection purposes.

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

In addition, we are proposing to amend the labeling regulations for distilled spirits and malt beverages to specifically state that distilled spirits may be labeled with the equivalent standard U.S. measure in addition to the mandatory metric measure, and to specifically state that malt beverages may be labeled with the equivalent metric measure in addition to the mandatory standard U.S. measure. This revision will formalize TTB's current policy and align the distilled spirits and malt beverage labeling regulations with the wine labeling regulations, which currently allow wine to be labeled with the equivalent U.S. measure in addition to the mandatory metric measure.

Discussion of the Proposed Changes

The specific regulatory amendments proposed in this document are as follows:

- In § 5.32, which concerns mandatory label information for distilled spirits, paragraph (a)(4) regarding net content information on “containers for which no standard of fill is prescribed” is removed because it would no longer be needed once all but a minimum and maximum standard of fill are eliminated. In addition, paragraph (b)(3) of § 5.32, which currently requires that net content information on “containers conforming to the standards of fill” appear on the brand label or back label, is amended to remove the reference to the standards of fill and to refer to § 5.38, which provides detailed requirements concerning the statement of net contents on distilled spirits labels.

- In § 5.38, entitled “Net contents,” the current texts of paragraphs (a) and (b) are removed because they distinguish between the requirements for labeling bottles that conform to the standards of fill requirements and those that do not, which would no longer be needed. (Containers that did not conform to the standards of fill requirements were those bottled before January 1, 1980, under a different regulatory requirement.) Proposed new paragraph (a) provides that the net contents of distilled spirits must be stated in metric measure, but may also be stated in the equivalent standard U.S. measure. Proposed paragraph (a) also provides a cross reference to the regulations in § 5.47, which address tolerances and the treatment of unreasonable shortages. Paragraphs (c) and (d) are redesignated as (b) and (c) respectively.

- In § 5.45, which concerns the applicability of §§ 5.46 through 5.47a (standard liquor bottle requirements, the standards of fill for containers bottled before January 1, 1980, and the standards of fill for containers bottled after December 31, 1979), paragraph (a) is revised to change the reference “§ 5.47a” to “§ 5.47” and paragraph (b) is removed. These revisions are necessary due to the removal of the current § 5.47, the standards of fill for distilled spirits bottled before January 1, 1980, discussed below. In addition, with the removal of paragraph (b), § 5.45 will not contain any information collection requirement, and, as such, TTB is removing the parenthetical reference at the end of the section to the information collection approved under Office of Management and Budget control number 1513–0064.

- Section 5.47, standards of fill for distilled spirits bottled before January 1, 1980, is removed. Since TTB is removing most standards of fill for distilled spirits bottled on or after December 21, 1979, there is no reason to retain separate standards for distilled spirits bottled before that date.

- Section 5.47a is renumbered as § 5.47, and paragraph (a) is revised to set forth only maximum and minimum metric standards and to specifically allow the optional addition of the equivalent standard U.S. measurement. The maximum metric standard (3.785 liters) corresponds to one wine gallon (see the definition of “in bulk” in 27 CFR 5.11). The minimum metric standard (50 milliliters) reflects what is prescribed in present § 5.47a. We believe the revised paragraph (a) text should apply to all types of containers, including cans, and therefore the revised text does not maintain the distinction between cans and

other containers that is in present § 5.47a(a)(2). In addition, paragraph (d) is removed to correspond to the removal of § 5.47 discussed above. We have retained the term “standards of fill” in the regulatory text to cover the maximum and minimum standards, as well as related factors, such as design, tolerance, and headspace, which have been traditionally associated with the term.

- In § 7.27, which concerns net contents, the introductory text of paragraph (a) is revised to specifically provide for the inclusion of an equivalent metric measure in addition to the specified U.S. measure.

- Finally, references to “§ 5.47a” are removed and replaced with “§ 5.47” in §§ 26.40(c), 26.206(c), 26.312, and 27.202.

Alternatives to the Proposal

TTB is also considering maintaining the standards of fill but liberalizing the existing regulatory scheme. It simply could add some or all of the petitioned-for standards of 700, 720, and 900 milliliters, and 1.8 liters, to § 5.47a(a). It also could institute an expedited process for considering future petitions to add additional standards of fill and help ensure § 5.47a is non-discriminatory and does not create unnecessary obstacles to competition, trade, or investment. For example, TTB could amend its regulations in § 5.47a to provide for administrative approvals of standards of fill. Under such an expedited system, the Administrator could authorize new standards of fill in response to a petition if the petition shows good cause for approval (such as commercial viability), barring the Administrator determining that the proposed standard would cause confusion. Administratively

approved standards of fill would then be published on the TTB website so that other industry members are aware of the additional authorized sizes.

Public Participation

Comments Sought

TTB requests comments on the proposals to eliminate the standards of fill for distilled spirits (with the exception of a minimum 50-milliliter standard and a maximum 3.785-liter standard), and to specifically provide for the optional addition of U.S. equivalents for distilled spirits and metric equivalents for malt beverages. TTB also requests comments on alternative approaches, such as maintaining the standards of fill but adding some or all of the petitioned-for standards (e.g., 700, 720 and 900 milliliters and 1.8 liters) to § 5.47a—including comments on the alternative of developing an expedited process for adding new standards of fill in the future and the criteria for approval of specific standards under an expedited process. TTB also requests comments on whether the proposal to allow the net contents statement on either the brand label or back label on a distilled spirits container is sufficient to inform the consumer about the net contents once standards of fill are eliminated, or whether TTB should require that the net contents be stated on the brand label. Currently, for distilled spirits bottled in containers conforming to the standards of fill, the net contents may be placed on either the brand label or a back label. Additionally, TTB understands that some state regulations on standards of fill for distilled spirits may incorporate TTB regulations by reference. TTB requests comments from state regulators on whether this proposal will present a regulatory issue at the state level. TTB

invites any other suggestions or alternatives related to the issue of standards of fill, including headspace requirements, for distilled spirits. Given the absence of standards of fill for malt beverages, TTB would be particularly interested in comments that address the merits of continuing to apply different rules to wine and spirits.

Any person submitting comments may present such data, views, or arguments that he or she believes necessary. Comments that provide the factual basis supporting the views or suggestions presented will be particularly helpful in developing a reasoned regulatory decision on this matter.

Submitting Comments

You may submit comments on this proposed rule by one of the following three methods:

- Federal e-Rulemaking Portal: You may send comments via the online comment form posted with this proposed rule within Docket No. TTB–2019–0005 on “Regulations.gov,” the Federal e-rulemaking portal, at <https://www.regulations.gov>. A direct link to that docket is available under Notice No. 183 on the TTB Web site at <https://www.ttb.gov/spirits/spirits-rulemaking.shtml>. Supplemental files may be attached to comments submitted via Regulations.gov. For complete instructions on how to use Regulations.gov, click on the site’s “Help” tab.
- U.S. Mail: You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005.

- Hand Delivery/Courier: You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 400E, Washington, DC 20005.

Please submit your comments by the closing date shown above in this proposed rule. Your comments must reference Notice No. 183 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and considers all comments as originals.

In your comment, please clearly state if you are commenting for yourself or on behalf of an association, business, or other entity. If you are commenting on behalf of an entity, your comment must include the entity's name as well as your name and position title. In your comment via Regulations.gov, please enter the entity's name in the "Organization" blank of the online comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

TTB will post, and you may view, copies of this proposed rule and any online or mailed comments received about this proposal within Docket No. TTB–2019–0005 on the Federal e-rulemaking portal. A direct link to that docket is available on the TTB Web site at <https://ttb.gov/spirits/spirits-rulemaking.shtml> under Notice No. 183. You may also reach the relevant docket through the Regulations.gov search page at <https://www.regulations.gov>. For information on how to use Regulations.gov, click on the site’s “Help” tab.

All posted comments will display the commenter’s name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including e-mail addresses. TTB may omit voluminous attachments or material that it considers unsuitable for posting.

You may view copies of this proposed rule and any electronic or mailed comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20005. You may also obtain copies for 20 cents per 8.5- x 11-inch page. Contact TTB’s Regulations.gov administrator at the above address or by telephone at 202–453–2135 to schedule an appointment or to request copies of comments or other materials.

Regulatory Analysis and Notices

TTB certifies that this proposed regulation, if adopted, will not have a significant economic impact on a substantial number of small entities.

Analysis of Impacts

The impacts of this proposed rule have been examined in accordance with Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

Executive Orders 13771, 13563, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Executive Order 13771 designation for any final rule resulting from the proposed regulation will be informed by comments received. The preliminary Executive Order 13771 designation for this proposed rule is deregulatory.

The proposed regulation has been designated by the Office of Information and Regulatory Affairs (OIRA) as significant under Executive Order 12866.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The proposal, if adopted, would reduce the regulatory burden on distilled spirits producers and importers by providing greater flexibility in the choice of product container sizes. Moreover, the proposed amendments would not impose, or

otherwise cause, a significant increase in reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of costs and benefits before proposing a rule with mandates that “may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” This proposed rule would impose no new mandates.

Purpose of the Rule

Several regulatory requirements are intended to decrease the risk that consumers will misjudge the quantities of distilled spirits in containers available for sale and to protect the revenue. These include:

- A requirement that quantities of spirits conform to values on a list of standard quantities, with each of the standard quantities separated by at least 50 milliliters (27 CFR 5.47a(a)(1)); and
- Provisions stating tolerances (discrepancies between actual and stated fill), unreasonable shortages in fill, headspace, and distilled spirits bottled or imported before January 1, 1980, and marketed or released from customs custody on or after that date (the date the U.S. volumetric standards were replaced by the metric standards).

The standard quantities are called “standards of fill.” Although originally these standard quantities were implemented to facilitate, at least in part, accurate tax collection (but are no longer needed for purposes of administering Federal

taxes), these requirements may decrease the risk of consumer confusion, but, under some circumstances, the limitation also may impose additional costs without a corresponding benefit.

This proposed rule would eliminate the requirement that quantities correspond to standards of fill, allowing spirits to be sold in any quantity between a minimum standard of 50 milliliters and a maximum standard of 3.785 liters. The proposed rule would also amend the labeling regulations for distilled spirits and malt beverages to state expressly that distilled spirits may be labeled with the equivalent standard U.S. measure in addition to the mandatory metric measure, and specifically to state that malt beverages may be labeled with the equivalent metric measure in addition to the mandatory standard U.S. measure. The changes to the standards of fill are expected to increase competition and economic efficiency by allowing manufacturers to produce at lower costs and introduce products that would otherwise be prohibitively costly or explicitly forbidden.

Background

Businesses are categorized by type using the North American Industry Classification System (NAICS). Establishments primarily engaged in distilling are classified under NAICS code 312140. Establishments primarily engaged in the wholesale distribution of distilled spirits and wine are classified under NAICS code 424820. Establishments primarily engaged in retailing alcoholic beverages, including wine, are classified under NAICS code 445310.

Total establishments, employees, and payroll for each category are reported by the Census Bureau in the County Business Patterns (CBP) data series. The most recent year for which CBP data were available at the time of this analysis was 2016. Total receipts for establishments in each category are reported by the Census Bureau in the Statistics of U.S. Businesses (SUSB) data series. The most recent year for which SUSB receipt data were available at the time of this analysis was 2012. Table 1 reports total establishments, employees, payroll, and receipts for each category.

Table 1: Industry Information

Industry	NAICS code	Establishments	Employees	Payroll (\$millions)	Receipts (\$millions)
Distilleries	312140	716	11,038	652	9,139
Wholesalers specializing in wine and distilled spirits	424820	2,599	87,026	6,462	76,170
Retailers specializing in wine and other alcoholic beverages	445310	33,958	167,286	3,795	43,085

Sources: Establishment counts, employee counts, and payroll are from 2016 County Business Patterns data published by the Census Bureau. Receipts are from 2012 Statistics of U.S. Businesses data published by the Census Bureau.

Costs

This proposed deregulation would, if implemented, impose no new mandates. However, the rule could create some costs for both consumers and

producers. We are unable to quantify the costs, but welcome public comment with relevant information.

Under the current standards of fill, consumers can misjudge a quantity only by mistaking one standard quantity for another. The difference between the smallest standard, 50 milliliters, and the next standard, 100 milliliters, is 50 milliliters, or 100 percent of the smaller standard. The absolute differences between adjacent standards are typically larger for larger quantities, and, for quantities below 1.75 liters, never fall below 33 percent of the smaller standard. Large differences between standards decrease the risk that one quantity on the list of standards will be mistaken for another.

The rule would create costs for consumers if eliminating the standards of fill increased confusion about the quantities available for sale. However, other regulations would mitigate confusion about quantities available for sale. See, *e.g.*, 27 CFR 5.32, 5.38, 5.46(a), 5.46(b), 5.47a(b), and 5.47a(c).

Under current regulations, net contents labeling rules require that the label or marking on the bottle itself accurately and legibly state the quantity of the volume of contents in containers. The limitation on headspace reduces the risk of consumer confusion by assuring the quantity contained corresponds closely to the volume of the container. Headspace is limited to 8 percent of capacity after closure for containers with net contents of 200 milliliters or more. Rules on tolerances limit discrepancies in fill amounts to measuring errors occurring under good commercial practice, to differences in bottle capacities, and to discrepancies due to variation in atmospheric conditions. Provisions related to

unreasonable shortages state that such shortages shall not be compensated by overages in other bottles of the same shipment.

Standards of fill may also have created secondary benefits that would be foregone with their elimination. For example, standard sizes may facilitate price comparison by consumers. When the net contents of bottles are equal, the relative prices of the bottles correspond to the relative prices per unit of spirits they contain. When container sizes differ, the relative prices of bottles may differ from the relative prices per unit, so the elimination of standards of fill could make the comparison of prices per unit more difficult. Price per unit labeling by retailers would decrease this potential impact of eliminating standards of fill on the ease of comparison. Although price per unit labeling by retailers is common, it is mandatory in just nine states, and, where it is mandatory, alcohol is typically excluded.¹ If a proliferation in container sizes occurs under this proposal to largely deregulate standards of fill, in the absence of unit price labeling at retail establishments, consumers may not make the most cost-effective purchasing choices, which would reduce economic efficiency.

The introduction of products that do not correspond to the standards of fill could also create some costs for distilled spirits manufacturers, wholesalers, and retailers. Potential costs include those related to the renovation of production facilities to accommodate new container sizes, the distribution of containers that do not conform to current standards, and the reconfiguration of retail spaces.

¹ See National Institute of Standards and Technology, "Unit pricing guide: A best practice approach to unit pricing." NIST Special Publication 1181 (2015), available at <http://dx.doi.org/10.6028/NIST.SP.1181>; National Institute of Standards and Technology, "U.S. Retail Pricing Laws and Regulations by State," Sept. 17, 2018, available at <https://www.nist.gov/pml/weights-and-measures/us-retail-pricing-laws-and-regulations-state>.

Many of the potential costs may be fixed costs—one-time initial adjustments—which may be more onerous for smaller producers who have lower production volumes across which to spread the fixed costs. However, new products would only be introduced if the expected profits from introducing them were positive. Therefore the expected value to consumers of the new products would generally exceed the expected cost of their production, including any costs created by deviation from the standards of fill, so that the benefits of introduction would be at least as large as the costs.

Benefits

This proposed deregulation could, if implemented, create a range of benefits. These include increasing economic efficiency by allowing producers to harness economies of scale, increasing the variety of products available to consumers, and increasing the competitiveness of the market for distilled spirits. These efficiency gains could lead to an increase in consumer surplus. We are unable to quantify the benefits, but we welcome public comment with relevant information.

In some other countries, distilled spirits are bottled in standard quantities that do not match the standards of fill in the United States. Reconfiguring those spirits production facilities to produce bottles specifically for the United States creates a fixed cost for each new size produced. If the cost of reconfiguration is sufficiently high, no bottles may be produced for the United States, despite positive demand for those products at prices that correspond to production at scale.

This proposal to eliminate all but the minimum and maximum standards of fill would allow more manufacturers producing primarily for foreign markets to sell their distilled spirits in the United States. The entry of those firms would increase competition in the spirits market. More competitive markets allocate resources more efficiently by matching prices more closely to costs, so an increase in the competitiveness of the spirits market would generate economic benefits.

The introduction of those products would also increase consumer choice by providing consumers with options they may prefer to those currently available. Distilled spirits made primarily for foreign markets may not be the only new products introduced. Spirits makers currently producing for the United States could also choose to introduce products that deviate from the current standards of fill. Bottles that deviate from the current standards may allow consumers to more closely match the quantities they purchase to the quantities they desire to consume. Furthermore, some limited evidence suggests that consumers value novelty in wine bottle sizes, and novel bottle sizes may be of value to producers in differentiating their brands.² Possibly, consumer willingness to pay premiums for novel bottle sizes in wine production may also apply to spirits, although we do not find any studies directly analyzing this notion for bottled spirits.

Deviation of containers from current standards of fill may also enhance productive efficiency among U.S. producers through economies of scale. For example, under current rules, a U.S. spirits producer who both sells domestically

² See Henrich Brunke, Franziska Thiemann & Rolf Mueller, "Odd Prices for Odd Bottles at VDP Auctions," paper presented at Enometrics XVI conference of the Vineyard Data Quantification Society in Namur, Belgium (2009); J. François Outreville, "Does the Bottle Size Matter? An Investigation into Differences between Posted and Market Price," American Association of Wine Economists Working Paper Number 86 (2011).

and exports to the European Union (EU) must use different containers conforming to the standards of fill of each respective market. The standard bottle size of distilled spirits is 750 milliliters in the U.S. and 700 milliliters in the EU. The proposed rule would allow domestic producers to use a single 700 milliliter bottle size to serve both markets, if they so choose.

Alternatives

The requirement that net contents conform to standards of fill reduces the risk of consumer confusion about quantity at the cost of restrictions on producers that decrease market efficiency. Consumer information about net contents is also a concern for other types of beverages, and the regulatory approaches taken for those beverages suggest some alternatives to the proposed deregulation.

(1) Add new standards of fill. One alternative would be to add new standards of fill to the current list. For example, standards of 720 milliliters, 900 milliliters, and 1800 milliliters could be added to accommodate a foreign petition seeking access to the U.S. market without incurring the fixed costs of changing its current bottle sizes. One problem with that approach is that the proposed 720 milliliter standard would be only 30 milliliters below the current standard of 750 milliliters, a difference of just 4 percent of the current standard. Similarly, the 900 milliliter proposed standard is close to the 1000 milliliter current standard, and the 1800 milliliter proposed standard would be virtually indistinguishable visually from the 1750 milliliter current standard. Standards separated by such small amounts might contribute to consumer confusion.

However, the piecemeal addition of new standards as circumstances change involves costs that would be avoided by eliminating the standards of fill entirely. The addition of new standards through rulemaking would continue to involve the burden on industry of petitioning for new standards and awaiting the outcomes and the burden on the government of responding to the petitions and promulgating new rules.

Standards of fill are not the only tool available for reducing the risk of consumer confusion about quantities available for sale. The appearance of net contents on the label is another tool, and more prominent net contents labeling may achieve the same reduction in the risk of confusion without incurring the costs associated with the standards of fill. Currently, distilled spirits must generally conform to standards of fill, and net contents can appear on the brand label or back label affixed to the container (spirits bottled before 1980 must show net contents on the front of the container), or be blown or etched onto the front, back, or side of the bottle itself. Malt beverages need not conform to standards of fill, but net contents must generally appear on the brand label (27 CFR 7.22). Similarly, beverages like carbonated soft drinks need not conform to standards of fill, but net quantity of contents must appear on the principal display panel (21 CFR 101.7).

(2) Eliminate standards of fill but require net contents on brand label for all containers. An alternative to the proposed rule would be to eliminate the standards of fill but require that net contents appear on the front label, analogous to the requirements for soft drinks. The front label is more visible to consumers

and would decrease the risk of confusion about net contents relative to the appearance of net contents on some other label. Relative to the proposed rule, this alternative would create new costs associated with changing labeling for spirits producers who do not currently state net contents on the front label.

(3) Eliminate standards of fill but require net contents on the brand label only for non-standard container sizes. A third alternative is to eliminate the requirement that net contents conform to a standard of fill, but require that net contents be stated on a label affixed to the front of the bottle only when the net contents do not conform to a currently existing U.S. standard of fill (otherwise, the net contents label may be affixed to either the front or back of the bottle, as usual). This alternative would avoid creating new costs for production that continues to conform to current standards of fill, but it could create some potential costs for spirits sold in non-standard bottle sizes, including domestic producers selling to foreign markets. Such potential costs would not be incurred under the proposed rule. However, in two cases, sales of spirits in new bottle sizes may avoid additional labeling costs under this alternative. First, when the producer's current practice already states net contents on the front label for its distilled spirits products, this alternative requirement would be business-as-usual and incurs no additional costs if applied to new bottle sizes. The second case applies to a foreign producer who uses non-standard size bottles and initiates new exports to the United States as a result of the issuance of this alternative. The producer would already be required to design and apply new conforming labels to their bottled spirits destined for the U.S. market, so an obligation to

place net contents labels on the front of the bottle would not impose an additional burden.

(4) Eliminate the standards of fill but enlarge the minimum type size of the net contents statements for all containers. Another alternative to the proposed rule would be to eliminate the standards of fill but require the net contents appear in a larger than currently mandated minimum type size on either the front or back label for all containers. By making the net contents statements more visible to consumers, the likelihood of potential confusion should be reduced. Larger net contents statements may also help the aging population to read them more easily. Current standards require the net contents statement be made in type size of at least 2 millimeters for containers larger than 200 milliliters, or at least 1 millimeter for containers of 200 milliliters or less (27 CFR 5.33(b)(6)). This requirement would likely impose new costs on all producers except those who may already state net contents in larger than minimum type sizes that would conform to new minimum type size standards.

(5) Eliminate the standards of fill but enlarge the minimum type size of the net contents statements only for non-standard container sizes. A variation of the preceding alternative would be to eliminate the standards of fill but require the net contents to appear in a larger than currently mandated minimum type size on either the front or back label only for containers not conforming to a current standard of fill size. The distinction in type size requirements of the net contents statements between new container sizes (larger minimum type) and the current standard container sizes (smaller minimum type) would help draw special

attention to the net contents of the former, and reduce consumer confusion about the new container sizes. This requirement would impose costs only on producers using non-standard container sizes.

(6) Eliminate the standards of fill but enlarge the minimum type size of the net contents statements initially only for non-standard container sizes, then for all containers. This alternative would eliminate the standards of fill but require the net contents to appear in a larger than currently mandated minimum type size on either the front or back label initially only for containers not conforming to a current standard of fill size, then phase-in the same larger minimum type size for all containers. This variant would have the advantage of drawing consumers' particular attention to the net contents of the new container sizes for an initial three year period, before requiring all containers to print net contents in the larger minimum type size. The net contents statements for the new bottle sizes would "stand out" during the three year period because few of the standard sized bottles would use the larger type size. This temporary distinction would help consumers to understand the contents of the new bottle sizes appearing in the market, and reduce the chances of confusion. Larger net contents statements may also help the aging population to read them more easily. This requirement would initially impose costs associated with modifying the labels only on producers using non-standard container sizes, then impose costs on all producers after three years.

Alternatives (2) through (6) intend to increase the likelihood that consumers would see and understand the net contents of spirits at a glance in a

retail space potentially stocked with many different (and sometimes similarly) sized containers. We have no reason to question whether the net contents statements under current labeling rules adequately inform consumers. However, if the proposed deregulation results in a larger number of container sizes (sometimes similarly sized), then consumers may need to rely more upon net contents information on the labels, so improving their visibility may help to constrain potential confusion.

A requirement that net contents appear on the brand label, or that net contents be written in larger print type size would constitute a new mandate on producers. Changing labels would involve administrative costs as well as the costs of redesigning labels and replacing printing equipment like engraving plates or cylinders. The proposed deregulation avoids those costs by avoiding changes to the labeling requirements.

Alternatives (3) and (5) apply only to non-standard container sizes, and therefore impose no new mandates on producers complying with current standards of fill. Distilled spirits producers electing to use alternative container sizes may face costs associated with changing their labels. However, producers would only be expected to undertake those changes if doing so maximized profits. Therefore changes to labeling would only be expected if making them were less costly than conforming to the standards of fill. Furthermore, making such changes would only maximize profits if the expected value to consumers exceeded the cost of production, including the cost of any labeling changes.

As mentioned previously, a related matter is the ease of price comparison by consumers. Under current standards of fill rules, it is relatively simple to understand price differences per volume unit of spirits because one may readily compare a range of spirits in the same standard size containers. If the proposed deregulation results in more container sizes that do not match a current U.S. standard, then unit price comparison would become more difficult. When consumers are not well-informed about relative unit pricing, they are less likely to make cost-effective purchasing decisions, resulting in reduced economic efficiency and potential welfare losses.

We welcome comment on these and other alternatives, including information that will aid us in quantifying their costs and benefits.

Paperwork Reduction Act

The collection of information in this rule has been previously approved by the Office of Management and Budget (OMB) under the title “Labeling and Advertising Requirements Under the Federal Alcohol Administration Act,” and assigned control number 1513–0087. This proposed regulation would not result in a substantive or material change in the previously approved collection action, since the nature of the mandatory information that must appear on labels affixed to the container remains unchanged.

Drafting Information

Jennifer Berry of the Regulations and Rulings Division drafted this document, along with other Department of the Treasury personnel.

List of Subjects

27 CFR Part 5

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

27 CFR Part 7

Administrative practice and procedure, Advertising, Customs duties and inspection, Imports, Labeling, Malt beverages, Reporting and recordkeeping requirements, Trade practices.

27 CFR Part 26

Alcohol and alcoholic beverages, Caribbean basin initiative, Claims, Customs duties and inspection, Electronic funds transfers, Excise taxes, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Surety bonds, Virgin Islands, Warehouses.

27 CFR Part 27

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

Amendment to the Regulations

For the reasons discussed in the preamble, TTB proposes to amend 27 CFR parts 5, 7, 26, and 27 as follows:

PART 5—LABELING AND ADVERTISING OF DISTILLED SPIRITS

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

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

2. In § 5.32, paragraph (a)(4) is removed and reserved and paragraph (b)(3) is revised to read as follows:

§ 5.32 Mandatory label information.

* * * * *

(b) * * *

(3) Net contents in accordance with § 5.38.

* * * * *

3. Section 5.38 is amended by:

- a. Revising paragraph (a);
- b. Removing paragraph (b); and
- c. Redesignating paragraphs (c) and (d) as paragraphs (b) and (c),

respectively.

The revision reads as follows:

§ 5.38 Net Contents.

(a) Standards of fill. The net contents of distilled spirits shall be stated in metric measure. The equivalent standard U.S. measure may also be stated on the container in addition to the metric measure. See § 5.47 of this part for tolerances and for regulations pertaining to unreasonable shortages.

* * * * *

4. Section 5.45 is amended by:

- a. Revising paragraph (a);
- b. Removing and reserving paragraph (b); and
- c. Removing the parenthetical phrase at the end of the section containing the reference OMB control number 1513–0064.

The revision reads as follows:

§ 5.45 Application.

(a) No person engaged in business as a distiller, rectifier, importer, wholesaler, or warehouseman and bottler, directly or indirectly, or through an affiliate, shall sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or receive therein or remove from customs custody any distilled spirits in bottles unless such distilled spirits are bottled and packed in conformity with §§ 5.46 and 5.47.

* * * * *

§ 5.47 [Removed]

5. Section 5.47 is removed.

§ 5.47a [Redesignated as §5.47]

6. Section 5.47a is redesignated as § 5.47.

7. In newly redesignated § 5.47, the section heading and paragraph (a) is revised and paragraph (d) is removed.

The revisions read as follows:

§ 5.47 Standards of fill.

(a) Authorized standards of fill. Subject to the tolerances allowed under paragraph (b) of this section and the headspace prescribed in § 5.46(b), distilled spirits containers, other than bulk, may not contain more than 3.785 liters or less than 50 milliliters.

* * * * *

PART 7—LABELING AND ADVERTISING OF MALT BEVERAGES

8. The authority citation for part 7 continues to read as follows:

Authority: 27 U.S.C. 205.

9. In § 7.27, paragraph (a) introductory text is revised to read as follows:

§ 7.27 Net contents.

(a) Net contents shall be stated in standard U.S. measure as follows, and the equivalent metric measure may also be stated:

* * * * *

PART 26—LIQUORS AND ARTICLES FROM PUERTO RICO AND THE VIRGIN ISLANDS

10. The authority citation for part 26 continues to read as follows:

Authority: 19 U.S.C. 81c; 26 U.S.C. 5001, 5007, 5008, 5010, 5041, 5051, 5061, 5111–5114, 5121, 5122–5124, 5131-5132, 5207, 5232, 5271, 5275, 5301, 5314, 5555, 6001, 6109, 6301, 6302, 6804, 7101, 7102, 7651, 7652, 7805; 27 U.S.C. 203, 205; 31 U.S.C. 9301, 9303, 9304, 9306.

§ 26.40 [Amended]

11. In § 26.40, paragraph (c) is amended by removing the phrase “§ 5.47a,” and adding, in its place, the phrase “§ 5.47”.

§ 26.206 [Amended]

12. In § 26.206, paragraph (c) is amended by removing the phrase “§ 5.47a,” and adding, in its place, the phrase “§ 5.47”.

§ 26.312 [Amended]

13. In § 26.312, the first sentence is amended by removing the phrase “or § 5.47a”.

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

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

Authority: 5 U.S.C. 552(a), 19 U.S.C. 81c, 1202; 26 U.S.C. 5001, 5007, 5008, 5010, 5041, 5051, 5054, 5061, 5121, 5122–5124, 5201, 5205, 5207, 5232, 5273, 5301, 5313, 5382, 5555, 6109, 6302, 7805.

§ 27.202 [Amended]

15. In § 27.202, the first sentence is amended by removing the phrase “§ 5.47a” and adding, in its place, the phrase “§ 5.47”.

Signed: June 18, 2019.

Mary G. Ryan,

Acting Administrator.

Approved: June 20, 2019.

Timothy E. Skud,

Deputy Assistant Secretary
Tax, Trade, and Tariff Policy.

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