



MILLER BREWING COMPANY  
 3939 W. HIGHLAND BLVD.  
 P.O. BOX 482  
 MILWAUKEE, WI 53201-0482  
 414-931-3582

*Celebrating 150 years of brewing excellence*

Kelly H. Grebe  
 Senior Assistant General Counsel

September 26, 2005

Mr. Francis W. Foote  
 Director  
 Regulations and Rulings Division  
 Tax and Trade Bureau  
 Washington, DC 20220

**RE: TTB Notice No. 41: Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages**

Dear Mr. Foote:

Miller Brewing Company (Miller) thanks the Alcohol and Tobacco Tax and Trade Bureau (TTB) for this opportunity to supplement The Beer Institute's comment on the advance notice of proposed rulemaking titled "Notice No. 41: Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages; Request for Public Comment," 70 Fed. Reg. 22274 (April 29, 2005). Miller, now in its 150<sup>th</sup> year of operation, is the second largest brewer in the United States with seven major breweries located across America. Worldwide, the company employs nearly 6,500 people who share a strong commitment to responsibly brew, bottle and market the highest quality beer for Miller customers.

## I. OVERVIEW

The principles underlying this comment are simple. First and foremost, Miller supports the TTB's mission to ensure that product labels and advertising for alcohol beverages provide consumers with adequate information as to identity and quality and do not include false or misleading statements. The TTB regulations now in effect satisfy those objectives. Any change to existing requirements should be consistent with the 70-year tradition of federal oversight of alcohol labeling and advertising by Congress, the Department of Treasury, TTB and its predecessors, and supporting agencies.

In light of these principles, Miller supports TTB's effort to examine calorie and carbohydrate claims. Notice No. 41's questions on calories and carbohydrates are timely and relate to issues with which TTB should be concerned. At the same time, Miller strongly opposes proposals to add an "Alcohol Facts" or a "Serving Facts" label to alcohol-beverage products. Neither label is necessary; indeed, neither proposal was preceded by widespread public interest in altering or replacing the existing statements of average analysis and percentage of alcohol by volume. Both types of proposed labels would be misleading and potentially dangerous to consumers. They also would be inconsistent with the existing regulatory scheme for alcohol-beverage labeling. The purported "standard drink," a prominent feature of both labels, is a myth that tries to contradict the reality of how different types of alcohol beverages are packaged, poured, and consumed. And in any event, the addition of an "Alcohol Facts" or "Serving Facts" label to alcohol beverages at this time would be premature at best in light of the Food and Drug Administration's current re-examination of the way that serving size is calculated and displayed on food labels.

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## II. CALORIE AND CARBOHYDRATE CLAIMS

Of all the major issues considered in Notice No. 41, Miller believes that calorie and carbohydrate claims are the most appropriate and timely, particularly in light of the fact that light beer brands now constitute more than 50% of the malt beverage volume sold in the United States. Miller does not object to any of the following: (1) TTB's current substantive standards for the use of claims such as "low carbohydrates" or "reduced carbohydrates" in the labeling and advertising of alcohol beverages; (2) ongoing TTB monitoring of the standards for such carbohydrate claims and revision of those standards if necessary; (3) a TTB definition of the terms "low calorie" and "reduced calorie" for alcohol beverage products; or (4) the establishment by TTB of substantive standards for the use of the terms "light" and "lite" on alcohol-beverage labels – provided, of course, that the method for developing new standards is objective and reliable, and the eventual notice of proposed rulemaking is based on the best available evidence.

## III. PETITION FOR "ALCOHOL FACTS" LABEL AND INGREDIENT LABELING

The proposed "Alcohol Facts" label discussed in Notice No. 41 would include seven items of information: the beverage's alcohol content expressed as a percentage of volume; the serving size; the amount of alcohol in fluid ounces per serving; the number of calories per serving; the ingredients (including additives) from which the beverage is made; the number of standard drinks (servings) per container, accompanied by a graphic symbol such as a beer mug, wine glass, or shot glass; and the *U.S. Dietary Guidelines* advice on moderate drinking for men and women. Miller opposes the "Alcohol Facts" label for four main reasons, which are discussed in detail below.

### A. The "Alcohol Facts" Label Is Unnecessary and Misleading to Consumers

TTB regulations currently provide that alcohol quantity, when listed on a product label, be expressed as a percentage of alcohol by volume. This number is succinct, clear, accurate, neutral, easy to understand, and easy to compare (i.e., the larger the percentage, the stronger the beverage). The percentage of alcohol by volume requires no explanation, definition, or graphic icon. It is a consistent measure that does not vary or fluctuate by the size of the drink. Miller believes that the display of a percentage of alcohol by volume remains the best means of indicating alcohol content on a product label or in advertising.

Inserting an additional reference to alcohol content in terms of fluid ounces per serving is not only unnecessary, but would also be misleading and potentially dangerous to consumers. In direct contrast to percentage of alcohol by volume, ounces of alcohol per serving rise and fall according to the serving size selected for the label and, more importantly, the size of the serving actually consumed. And whenever the size of the serving size actually consumed varies from what has been recommended, the statement of ounces of alcohol per serving is worse than misleading; it is factually inaccurate.

In addition, the existing labels on light beers and wines must – and the labels for all alcohol products may – include a statement of average analysis, which for a 12-ounce can of light beer displays the calorie count plus the number of grams of carbohydrates, protein, and fat. The statement of average analysis, like the percentage of alcohol by volume, is straightforward, familiar, neutral, appropriate, and easy to locate, understand and compare. Each statement of average analysis also has the virtue of being individually approved by the TTB in the course of the label-application process.

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The statement of average analysis was first used in 1976, almost 30 years ago. Since that time, the policy has been reviewed and critiqued in two formal regulatory proceedings, both of which concluded without changing the fundamental approach. Importantly, the proposals to add an "Alcohol Facts" or "Serving Facts" label were not preceded by any heightened, grass-roots consumer sentiment that the information in the percentage of alcohol by volume and the statement of average analysis is insufficient or that alcohol beverage labeling should include more information than the percentage of alcohol by volume and the statement of average analysis (where applicable) already provide.

**B. The "Alcohol Facts" Label Is Inconsistent with the Established Regulatory Framework for Labeling and Advertising of Alcohol Beverages**

The federal government has long recognized the many differences between alcohol beverages and other beverages and foods by treating them individually and separately. The Federal Alcohol Administration Act, now in effect for 70 years, governs the labeling and advertising of alcohol beverages. The corresponding statute for foods and other beverages is the Nutritional Labeling Education Act of 1990 (NLEA), which does not apply to alcohol beverages. The lead cabinet-level agency for regulating the labeling and advertising of alcohol beverages is the Department of Treasury. For food and other beverages, the lead agency is the Department of Health and Human Services.

The current requirements for alcohol labeling and advertising result from a careful and deliberative process that has included countless Federal Register notices, public comments, hearings, agency pronouncements, Congressional activity, and court decisions. The same is true for the current requirements for food labeling and advertising. The resulting differences between food labels and alcohol-beverage labels demonstrate that the regulatory scheme is working, and that the two lead agencies have maintained focus on the distinct products for which they are primarily responsible.

The design and approach of the proposed "Alcohol Facts" label are virtually identical to the Nutrition Facts Panel that appears on food products. Adopting the "Alcohol Facts" label would short-circuit the tradition of separate and individual regulation while co-opting a feature of food labeling without an adequate showing that it is appropriate for alcohol products. Indeed, Miller asserts that the "Alcohol Facts" label would be wholly inappropriate.

For example, food labels present detailed nutrient content and dietary information in the context of a healthy diet. The servings of listed items such as carbohydrates, cholesterol, protein and fat are expressed not only in grams, but also in a percentage daily value based on a 2,000 calorie diet. The 2,000 calorie diet has no equivalent in alcohol products, which have no recommended daily nutritional value. Moreover, adding nutritional recommendations would contradict TTB's statements opposing the placement of health claims on alcohol beverage labeling.

Another example: The inclusion of ingredients in the proposed "Alcohol Facts" label is inconsistent with both the decision by a TTB predecessor (the Bureau of Alcohol, Tobacco and Firearms or ATF) to rescind ingredient labeling regulations as well as a decision by the Circuit Court for the District of Columbia that upheld the ATF's decision. *Center for Science in the Public Interest v. Department of the Treasury*, 797 F.2d 995 (D.C. Cir. 1986). In justifying its decision, ATF emphasized the absence of two key pieces of evidence – consumer interest in an ingredient listing and ultimate usefulness of the information:

The Department has also considered the value of the information. As the preceding discussion of the comments points out, there is a serious question as to the usefulness of full ingredient disclosure even if it were required. The substantial transformation involved in the production process means that there is only a strained relationship

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between the initial ingredients which go into the production process and the ultimate contents of the product to be consumed. Apart from this fact, there is also considerable medical and scientific dispute over the degree to which components of the initial ingredients may survive the production process to cause allergic reaction. Therefore, on this second score, there is also a lack of persuasive evidence that indiscriminate ingredient labeling will provide significant and useful information to consumers generally. Under circumstances where there is neither evidence of a substantial consumer interest in the information, nor clear evidence that the information would provide substantially useful information to consumers generally, the Department concludes that the indiscriminate ingredient disclosure rules of T.D. ATF-66 should be rescinded prior to the effective date.

48 Fed. Reg. 45555 (October 6, 1983). Miller believes that these factors are as true today as they were at the time ATF made its decision.

Other examples of the inappropriateness of the "Alcohol Facts" label are discussed in other subparts of this section.

### C. The "Standard Drink" is a Myth That Tries to Contradict Reality

Aside from the obvious fact that beer, wine, and hard liquor each contain alcohol, the differences between the three beverages far outnumber their similarities, especially when considering the ways that they are packaged, poured, served, and consumed.

Beer is packaged for consumers in single-serving containers, typically 12-ounce bottles or cans. Wine and hard liquor are packaged in bottles that contain multiple servings. The size of individual servings from the wine or hard liquor bottle can vary substantially and depend entirely on the person pouring the contents into a glass.

Beer is usually consumed without being mixed with other ingredients. And while the same may be true of wine, the exact opposite is the case with spirits, which are frequently combined with each other and with non-alcohol beverages such as water, soda, or tonic. The hard liquor in a mixed drink may be measured using a shot glass or free poured from the bottle and added before or after ice and other ingredients. Even when a shot glass is used, "over pours" are common, especially when someone who orders hard liquor from a bartender watches as the drink is made.

In bars and restaurants, beer is the only one of the three beverages to be ordered and served according to quantity. Packaged beer is ordered by the can or bottle, either of which normally contains 12 ounces. Draft beer is ordered by size – e.g., 16 ounces or 22 ounces. Wine, on the other hand, is simply ordered by the glass, which does not have a fill line. The glass of wine a customer receives may hold 5 ounces but could just as easily contain 4 or 6 ounces – a range that is more significant than it may seem on first impression. (A glass containing 6 ounces of wine contains 50 percent more alcohol than 4 ounces of the same wine.)

The variations possible with a glass of wine only multiply when ordering hard liquor, where alcohol quantity varies greatly by type of drink, recipe, glass size, and the pour provided by the bartender.

Four California researchers have studied the average alcohol content of drinks poured and consumed at home by more than 300 respondents throughout the United States. Kerr, William C.; Greenfield, Thomas K.; Tujague, Jennifer; and Brown, Stephan. "A Drink Is a Drink? Variation in the Alcohol Content of Beer, Wine and Spirits Drinks in a U.S. Methodological Sample." *Alcoholism: Clinical and Experimental Research* (in press). The research was supported by grants from the National

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Institute on Alcohol Abuse and Alcoholism. The authors reported that self-mixed drinks containing spirits averaged 0.89 ounces of pure alcohol, 48.3 percent more than 0.6 ounces, an amount sometimes defined as a "standard drink." (Indeed, this is the definition proposed in the "Serving Facts" label discussed later in Notice No. 41.) Wine drinks had the second highest average-alcohol content, 0.66 ounces, which is 10 percent more than 0.6 ounces, while beer drinks contained an average of 0.56 ounces of alcohol, 6.7 percent less than 0.6 ounces. The authors stated that the distribution of alcohol content had "an especially wide range for wine and spirits drinks, due mainly to the variability of drink pours for these beverages." The authors also suggested that both the mixing method and the resulting alcohol content of spirits drinks can vary substantially by the gender, age, and possibly the ethnicity of the drinker.

"[T]he finding that so many drinkers, particularly of spirits, consume drinks containing considerably more alcohol [than 0.6 ounces] highlights the importance of beverage-specific alcohol assessment and raises questions about the validity of using a single drink standard," the authors concluded. "Our results also highlight the need to assess beverage-specific drinking patterns, as the fact that drinks of any type *could* have equivalent strength is not an accurate description of the actual drinks Americans consume."

Legislators and regulators have consistently treated hard liquor differently from beer and wine precisely because of the corresponding difference in potency. The distinction in policymakers' minds can be traced back to the end of Prohibition. "The social implications of the liquor trade would present but few difficulties and the task of the legislator would be simple" if the only alcohol beverages consumed were "light beers and wines," wrote the authors of the famous Fosdick Report, Raymond B. Fosdick and Albert L. Scott. *Toward Liquor Control*, p. 35 (1933). "The real problems" for legislators are created primarily by "distilled liquors and, secondarily, the heavier beers and wines," the authors stated. *Id.* The same sentiment can be found in a 1933 report to the legislature of Miller's home state of Wisconsin, in which the members of an interim committee endorsed distinct approaches for beer v. "liquor."

The Committee feels that the general open sale of beer throughout the state has promoted the cause of temperance. We believe, and the Rockefeller Committee and leading liquor students agree, that the general consumption of beer decreases the use of liquor. We believe that the general open sale and advertising of beer should continue. To further promote temperance in the consumption of liquor the Committee bill prohibits insofar as practicable, the advertising and display of liquor. To prevent the sale of liquor to boys and girls under twenty-one years of age all the old law that the Committee thought of benefit is rewritten in this bill. Their presence is not allowed in a liquor store.

Wisconsin Legislative Interim Committee on the Regulation of the Sale of Intoxicating Liquors, Submitted to the 1933 Special Session of the Legislature, at pp. 5-6. These quotes from the 1930s underscore that the current regulatory approach to different types of alcohol beverages was instituted for a variety of reasons and has been in effect for many years. There is no need to change that approach now.

**D. The "Alcohol Facts" Label Is Premature and Potentially Counterproductive**

The Food and Drug Administration (FDA) has undertaken a fundamental re-examination of its labeling regulations concerning serving size. This process officially began less than six months ago in an advance notice of public rulemaking titled "Food Labeling: Serving Sizes of Products that Can Reasonably Be Consumed at One Eating Occasion; Updating of Reference Amounts Customarily Consumed; Approaches for Recommending Smaller Portion Sizes," 70 Fed. Reg. 17010 (April 4, 2005). The notice focuses on how the FDA might make serving-size information on the Nutrition Facts Panel (NFP) more helpful and useful for consumers when deciding what foods and how much of these foods

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they should eat. Specifically, FDA is considering whether to update its "reference amounts customarily consumed per eating occasion" (RACCs), which would lead to changes to the listed serving size and nutrient values; uniformly declare a whole food package as a single serving when it can be reasonably consumed at one sitting; and allow comparative calorie claims for smaller portions of identical foods.

Most consumers in focus groups conducted by the FDA "indicated that they incorrectly thought a serving size was a recommended portion size, rather than a standardized unit of measure," according to the notice. 70 Fed. Reg. at 17012. Some participants also said that typical serving sizes are unrealistic and observed that the amounts people eat vary according to age, body type, and lifestyle. Overall, the notice says, "participants indicated that they cared about nutrition and reported using the NFP, but also said that they did not want to spend a lot of time reading labels and did not always consider nutrition when deciding what to eat."

In the notice, FDA plainly states its concern over the perception that a serving size is a recommended portion size. "[W]e do not want consumers to confuse the serving size on the food label (which is required by the act to be based on the amount customarily consumed) with an amount that is recommended for consumption," the notice states. "For example, if data show that consumers are drinking larger amounts of carbonated beverages and FDA increases the RACC, which will likely increase the serving size on the food label, additional educational efforts may be required to reinforce to consumers that a larger serving size on the container is not a 'recommended' serving size." 70 Fed. Reg. at 17012.

Questions in the FDA notice that explore this issue further include the following: "Do consumers recognize the differences between serving sizes on food labels and servings recommended in dietary guidance? If so, what do consumers think the differences are? What information on a label would help make this distinction clearer? . . . Would consumers think that an increase in serving size on food labels means more of the food should be eaten? What additional education efforts should be provided to consumers to avoid such a conclusion?"

TTB should not make rules that would involve the display of serving size on labels for alcohol beverages until FDA has decided whether, and if so, how to amend its regulations concerning serving size on food products. Acting prior to the completion of the FDA's decision-making process would be premature and possibly counterproductive.

#### IV. REQUESTS FOR VOLUNTARY "SERVING FACTS" LABELING

The proposed "Serving Facts" label would have four components in common with the "Alcohol Facts" label already discussed: (1) calories per serving; (2) serving size; (3) the number of purported "standard drinks" (servings) per container; and (4) alcohol content expressed in fluid ounces per serving (this time without a reference to the percentage of alcohol by volume). As a result of this overlap in contents, all four of Miller's objections to the "Alcohol Facts" label fully apply here.

In addition, the "Serving Facts" label would include (1) grams of fat per serving; (2) grams of carbohydrates per serving; (3) grams of protein content per serving; (4) a definition of a "standard drink" as well as the number of standard drinks found in a serving of the alcohol beverage; and (5) three icons depicting three very different alcohol beverage serving containers -- a beer mug, a wine glass, and a disproportionately large shot glass -- separated by equal (=) signs and each carrying the legend "0.6 oz."

Three of the five additional "Serving Facts" components -- fat, carbohydrates, and protein -- already appear on the statement of average analysis that is mandatory for light beer and wines, voluntary for all alcohol beverages, and individually approved by TTB in the course of the label-application

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process. As discussed above, Miller believes that the statement of average analysis provides consumers with adequate information concerning all three of these components.

That leaves the proposed definition of a "standard drink" and the beverage icons separated by equal (=) signs, to which Miller registers its strongest possible objection. These would only multiply the opportunities for consumers to be misled and perpetuate the myth that a standard drink exists. They reinforce the potential misconception that a mixed drink, regardless of size and recipe, will include exactly 1.5 ounces of alcohol, which just isn't true. The icons' effort to equate beer, wine, and hard liquor would undermine an otherwise consistent educational message provided in America for the past 30 years. The icons are an effort to use federal regulation to sanction and convey a very misleading and potentially dangerous message on alcohol beverage labels indicating to consumers that all alcohol beverages are the same.

## V. CONCLUSION

Miller believes that TTB's examination of calorie and carbohydrate claims is timely and appropriate. At the opposite end of the spectrum, the proposals to require an "Alcohol Facts" or "Serving Facts" label represent the wrong ideas for the wrong products at the wrong time. At the very least, TTB should not act on these proposals until FDA has completed its re-examination of the way that serving size is calculated and displayed on food labels. Miller, however, believes that the evidence available today overwhelmingly supports the arguments that The Beer Institute, Miller, and others make in opposition to the proposed labels. Consumers are adequately informed by existing labeling. Neither the "Alcohol Facts" nor "Serving Facts" proposal was preceded by widespread consumer interest in altering or replacing the existing statements of average analysis and percentage of alcohol by volume. The new information in the proposed labels would be misleading and dangerous to consumers. Either proposal would disrupt the course of the existing regulatory tradition for alcohol-beverage labeling. And above all, the purported "standard drink" that is the foundation for both proposed labels simply does not exist. Miller urges TTB to reject both of the proposed new labels in their entirety.

Respectfully submitted,



Kelly H. Grebe  
Senior Assistant General Counsel  
Miller Brewing Company