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August 29, 2001

Chief, Regulations Division  
Bureau of Alcohol, Tobacco and Firearms  
PO Box 50221  
Washington, DC 20091-0221  
Attn: Notice No. 917

**Re: Response to Request for Comments on Alcohol Beverage Health  
Warning Statement ANPR (Notice No. 917; Docket 99R-507P)**

Dear Regulations Division Chief:

The Food Marketing Institute<sup>1</sup> (FMI) is pleased to respond to the Bureau of Alcohol, Tobacco and Firearms's (ATF's) request for comments on the agency's advance notice of proposed rulemaking for alcohol beverage health warnings statements. 66 Fed. Reg. 28135 (May 22, 2001). As discussed more fully below, ATF's current regulations fulfill the direction of the Alcoholic Beverage Labeling Act of 1988 (P.L. 100-690) and, therefore, should not be amended absent a further congressional mandate or a clear and compelling need.

ATF should look beyond the petition underlying the instant proceeding to consider all relevant data and information, including the studies that we understand the Wine Institute submitted and any data on the limits of warning label efficacy, before deciding whether the alcohol beverage warning label regulations should be amended. Moreover, as required by the Regulatory Flexibility Act and Executive Order 12866, ATF should also evaluate the potential costs and possible benefits and consider the

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<sup>1</sup> FMI conducts programs in research, education, industry relations and public affairs on behalf of its 2,300 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of \$340 billion — three-quarters of all food retail store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 60 countries.

economic impact of a new rule on small businesses before proceeding in this matter as requested by the petitioner.

**A. Background**

The Alcoholic Beverage Labeling Act of 1988 (ABLA) was enacted because Congress found “that the American public should be informed about the health hazards that may result from the consumption or abuse of alcoholic beverages” and that “it would be beneficial to provide a clear, nonconfusing reminder of such hazards.” 27 USC § 213. The ABLA was intended to achieve “national uniformity in such reminders in order to avoid the promulgation of incorrect or misleading information” and so that “the public may be adequately reminded about any health hazards that may be associated with the consumption or abuse of alcoholic beverages....” 27 USC § 213(1).

Toward that end, the ABLA requires persons who manufacture, import or bottle alcoholic beverages for sale or distribution in the United States to provide the following statement on the beverage’s container:

GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

P.L. 100-690, Sec. \_\_\_\_; 27 U.S.C. § 215(a). The statute further requires the statement to be:

- Located in a conspicuous and prominent place on the container, as determined by the Secretary;
- In a type size determined by the Secretary; and
- Placed on a contrasting background.

27 USC § 215(b).

As directed by Congress, ATF promulgated regulations to implement the ABLA. 27 CFR, Part 16; 55 Fed. Reg. 5414 (Feb. 14, 1990). In relevant part, the regulations require the placement of the statement set forth in the ABLA on either the brand label, a separate front label, or on a back or side label that is separate and apart from all other information. 27 CFR § 16.21. In addition, ATF’s rules require the labels to be designed so that the statement is “readily legible under ordinary conditions.” 27 CFR § 16.22(a)(1). The statement itself must appear “on a contrasting background” and the phrase “government warning” must appear in capital letters and bold type; the remainder of the statement may not appear in bold type. 27 CFR § 16.22(a)(1), (2). The regulations provide further restrictions with respect to the printing, including the maximum number of characters per inch, the size of type that may be used and a general prohibition against compressing the statement in a manner that is not readily legible. 27 CFR § 16.22(a)(3).

**B. ATF's Current Regulations Sufficiently Implement Congressional Intent Expressed in ABLA**

ATF's regulations effectively carry out the mandate and direction of the ABLA. As directed by Congress, ATF determined the "conspicuous and prominent location" for the statements on alcohol beverage containers and the appropriate type size for the ABLA statement. Despite the very particular direction that Congress provided to ATF on this matter in the ABLA, Congress did not direct ATF to use or even to investigate the use of pictograms, nor did Congress require that the statement be placed on the front of the container; rather Congress specifically delegated this determination to ATF, a determination that the agency made a decade ago following an extensive rulemaking process. The agency should not lightly dismiss or move to re-open regulations that were carefully crafted with input from a substantial number of interested citizens.

To the extent that ATF determines that some labels are inadequate as a result, for example, of poor legibility or inadequately contrasting backgrounds, the agency should work with or take enforcement action against the manufacturers, importers and bottlers who are responsible under the ABLA and the agency's regulations for complying with the current law. Indeed, given the length of time associated with rulemaking, if the agency truly perceives a problem, ATF should aggressively enforce the existing regulations against manufacturers. Rulemaking is time-consuming and any persons that are not meeting current standards may not meet new requirements either without direction from ATF.

**C. ATF Should Consider All Available Information in Deciding Whether To Proceed with Rulemaking**

We urge ATF to consider all of the available information carefully before deciding whether to proceed with rulemaking on this issue. In addition to the studies referenced in the Center for Science in the Public Interest (CSPI) petition, we understand that the Wine Institute has also conducted and submitted studies regarding the efficacy of the labeling currently required.

In light of the data that suggest that a substantial cross-section of the public is aware of the current alcohol beverage statements, the agency should also consider whether or not the small segment of the population that may not have changed their behavior after the labels were mandated has failed to change because they do not see or understand the labels or because they voluntarily choose to ignore them. In the latter case, changing the warning as suggested in the CSPI petition is unlikely to affect behavior, despite the increased costs and diversion of resources that will be required to undertake the rulemaking and the resulting compliance activities.

Moreover, the agency should obtain and consider data on the efficacy of warning labels generally and on the impact of "over-warning" the public; that is, ATF should

consider whether increased labeling will have the opposite effect and undermine the efficacy of the current labeling statement. Assuming that further behavior modifications are necessary, ATF should consider whether labeling is an effective means of encouraging these changes or whether labels have a finite level of effectiveness, which level may already have been achieved.

**D. ATF Should Consider Potential Costs and Benefits of New Alcohol Beverage Warning Labels under Regulatory Flexibility Act and EO 12866 Before Proposing New Regulations**

Rulemaking of the sort urged by the CSPI petition would have a significant economic impact, particularly on small businesses, and would, therefore, trigger the requirements of the Regulatory Flexibility Act (RFA) and Executive Order No. 12866 (EO 12866).<sup>2</sup>

The purpose of the RFA is to ensure that federal agencies analyze the impact of regulations on small business and competition. Under the RFA, agencies are required to consider alternatives to their actions that will allow the agency to achieve its regulatory objectives without burdening small businesses unnecessarily. Toward this end, the RFA requires each federal agency “to prepare and make available for public comment an initial regulatory flexibility analysis” whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. The analysis must describe the impact of the proposed rule on small entities.

Under Section 611 of the RFA, a small entity that is adversely affected or aggrieved by a final agency action is entitled to judicial review of agency compliance with the requirement of the RFA. Thus, failure to follow proper rulemaking procedures may subject an agency to suit. Accordingly, if ATF decides to proceed and issue a proposed rule, the notice should be accompanied by an initial regulatory flexibility analysis to comply with the RFA.

Similarly, a proposed rule of the magnitude requested by CSPI may be an economically significant rule that would trigger the cost-benefit assessment required by EO 12866 to evaluate the potential costs and benefits of the proposed rule. Among other things, EO 12866 is intended to minimize duplication and ensure that agencies promulgate only those regulations that are required by law, necessary to interpret the law, or made necessary by compelling public need. EO 12866 § 1(a). In this case, as discussed more fully above, the regulations required by and necessary to interpret the law have already been promulgated; if any labels currently being applied are deficient, the more direct and effective remedy is to conduct compliance or enforcement actions targeted to the persons who are not in compliance, rather than to conduct rulemaking.

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<sup>2</sup> A quick review of the innumerable comments filed in the docket for this matter from small vineyards throughout the United States regarding the impact that the rulemaking would have on them should dispel any doubts that the agency may harbor in this regard.

ATF Regulations Division Chief

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We appreciate the opportunity to comment on this matter and respectfully encourage ATF to support the existing regulations.

Sincerely,

Tim Hammonds  
President and CEO