Notice No. 73

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

ALCOHOL AND TOBACCO TAX AND TRADE BUREAU
U.S. DEPARTMENT OF THE TREASURY

Concerning

LABELING AND ADVERTISING OF WINES, DISTILLED SPIRITS AND MALT BEVERAGES

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January 25, 2008

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Via email and U.S. Mail
Director
Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
P.O. Box 14412
Washington, DC 20044-4412

Re: Notice No. 73: Notice of Proposed Rulemaking Regarding Labeling of and Advertising of Wines, Distilled Spirits, and Malt Beverages
72 Fed. Reg. 41859 (July 31, 2007)

Dear Sir or Madam:

The Washington Legal Foundation (WLF) submits these comments to the Alcohol and Tobacco Tax and Trade Bureau (TTB) in response to TTB's proposed regulation regarding the labeling and advertising of wines, distilled spirits, and malt beverages.

The proposed regulation would, if finalized, require a statement of alcohol content, expressed as a percentage of alcohol by volume on all alcohol beverage products. TTB also proposes a Serving Facts panel on alcohol beverages that would, if finalized, bring wine, beer, and spirit labels closer to the Facts panels now standard on foods, beverages, dietary supplements, and over-the-counter drugs. 72 Fed. Reg. at 41860.

Without taking a position on the particulars of what information TTB should mandate on alcohol beverage labels, WLF notes that TTB proposes *prohibiting* various types of information from appearing on labels. TTB proposes banning as "misleading" information such as:

- *Dietary Guidelines for Americans* advice on the definition of standard drink sizes (12 ounces beer; 5 ounces wine; 1.5 ounces distilled spirits) (72 Fed. Reg. at 41870-71);

- *Dietary Guidelines for Americans* advice on moderate drinking (72 Fed. Reg. at 41871); and
- Drink equivalency graphic (Fed. Reg. at 41871).

Further, TTB theorizes, without any supporting evidence, that providing information on alcohol content expressed as fluid ounces of alcohol per serving *may* also be misleading, and so might also be banned. 72 Fed. Reg. at 41866.

WLF is very concerned that TTB would ban truthful information from alcohol labels. As set forth in more detail below, it is our position that TTB may not constitutionally prohibit manufacturers or suppliers of alcoholic beverages from voluntarily providing any truthful and non-misleading information to the consuming public on product labels, subject only to reasonable rules governing formatting. *See Rubin v. Coors Brewing Co*., 514 U.S. 476 (1995).

I. *Interests of Washington Legal Foundation*

WLF is a national, nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 states. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to promoting legal policies that are consistent with a free-market economy and to defending the rights of individuals and businesses to go about their affairs without excessive intervention from government regulators. WLF has been especially active in opposing government regulatory actions that infringe on commercial speech rights – both the right of speakers to provide, and the right of consumer to receive, information that is truthful and not

misleading.

To that end, WLF has regularly appeared before the U.S. Supreme Court supporting the First Amendment protection of commercial speech. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005); *Nike, Inc. v. Kasky*, 539 U.S. 364 (2003); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF has also appeared in numerous lower federal courts supporting commercial free speech. For example, WLF successfully challenged the constitutionality of certain Food and Drug Administration (FDA) restrictions on the dissemination of truthful information about "off-label" uses of FDA-approved products. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd* (D.C. Cir. 2000).

In addition, WLF has submitted comments to this agency and its predecessor agency, the Bureau of Alcohol, Tobacco & Firearms (ATF) in a number of regulatory proceedings that dealt with labeling and related issues. *See, e.g., Notice No. 41: Advanced Notice of Proposed Rulemaking; Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages* (Apr. 29, 2005); *Proposed Rule on Flavored Malt Beverages and Related Proposals* (Oct. 21, 2003); *Advanced Notice of Proposed Rulemaking Regarding Alcohol Beverage Warning Statement* (Aug. 17, 2001); *Notice of Proposed Rulemaking Regarding Health Claims in the Labeling and Advertising of Alcohol Beverages* (Feb. 18, 2000).

Finally, WLF's Legal Studies Division has also published numerous educational

materials discussing commercial free speech issues. *See, e.g.*, John A. Hinman, *BATF Restriction On Truthful Health Claims On Wine Advertising Violates First Amendment* (WLF Legal Backgrounder, Sept. 11, 1992); Burt Neuborne, *Rubin v. Coors*: *Supreme Court Rejects Prohibitionism* (WLF Legal Opinion Letter, June 9, 1995); William C. MacLeod, *Actions Against Alcohol Ads Blow Chilling Winds On Commercial Speech* (WLF Legal Opinion Letter, May 2, 1997); Steven G. Brody, *New Judicial Precedents Expand Commercial Speech Protection* (WLF Legal Backgrounder, April 5, 2002).

II. Alcohol Beverage Labels Are Protected by the First Amendment

A. Constitutional Framework for Commercial Speech

WLF submits that TTB's failure to allow basic, truthful information on alcoholic beverage labels violates the First Amendment's protection of commercial free speech. For almost thirty years, the U.S. Supreme Court has recognized that the First Amendment protects even speech that does no more than propose a commercial transaction. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). More recently, the Court reiterated that "[T]he free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system because it informs the numerous private decisions that drive the system." *Rubin*, 514 U.S. at 481 (citations omitted).

The Supreme Court has specifically held that truthful information voluntarily included on beer labels is commercial speech protected by the First Amendment. *Rubin*, 514 U.S. at 481. In that case, the Supreme Court held that ATF regulations that *prohibited* the disclosure

on the label of a beer's alcohol content expressed in terms of the percentage of alcohol content violated the First Amendment. In light of *Rubin*, there can be little doubt that TTB cannot ban truthful information on alcohol beverage labels.

Suppression of truthful information about standard serving sizes, alcohol content expressed in fluid ounces per serving, and the *Dietary Guidelines for Americans* advice or other similar information must comport with the commercial speech doctrine set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980). Under *Central Hudson,* four factors are considered in determining whether a government restriction on commercial speech survives First Amendment scrutiny: (1) it must concern lawful activity and not be misleading; (2) the reviewing court must ask whether the asserted governmental interest is substantial; (3) if the first two inquiries yield positive answers, the reviewing court must determine whether the regulation "directly advances the governmental interest asserted"; and (4) the reviewing court must determine "whether the regulation is more extensive than is necessary to serve that interest." *See Rubin,* 514 U.S. at 482, *citing Central Hudson,* 447 U.S. at 566. Any rule TTB implements that bans disclosure of standard serving sizes, the fluid ounces of alcohol per serving, and other similar truthful information simply does not pass constitutional muster under *Central Hudson* and *Rubin*.[1]

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[1] Justice Stevens, who concurred in the *Rubin* decision, would have given the speech in that case full First Amendment protection, indicating that the case "aptly demonstrates the artificiality of a rigid commercial/ noncommercial distinction. The speech at issue here is an unadorned, accurate statement, on the label of a bottle of beer, of the alcohol content of the beverage contained therein." *Id*. at 494. The factual statements TTB proposes banning here

1. The Information TTB Proposes to Ban Concerns Lawful Activity and Is Not Inherently Misleading.

The information TTB proposes to prohibit, such as alcohol content expressed as fluid ounces per serving information, survives the first prong of the *Central Hudson* analysis – it does not propose an illegal transaction and is not inherently misleading. The Federal Alcohol Administration Act authorizes TTB to set forth standards for the advertising and labeling of alcohol beverages. 72 Fed. Reg. at 41863. This type of labeling information relates to the lawful sale and consumption of alcohol activity and contains truthful information that is not inherently misleading.

2. TTB Has Not Asserted Or Demonstrated A Substantial Governmental Interest In Banning This Information.

Under the second prong of the *Central Hudson* framework, TTB has the burden of asserting and demonstrating that banning labels containing truthful information serves a substantial governmental interest. To be sure, preventing consumers from being deceived is a substantial government interest. *See Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir.1999). But TTB has offered no evidence of how and to what extent consumers may be misled by basic, truthful information.

3. TTB Cannot Meet Its Burden of Demonstrating That Banning Truthful Label Information Would Advance the Governmental Interest In A Direct and Material Way.

Even if TTB could show that some types of truthful information about alcohol could

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are similarly accurate and unadorned statements about alcoholic beverages.

significantly mislead some consumers when conveyed in an inappropriate context, which WLF submits that it cannot, TTB would further have to show that banning such truthful information advances the government's interest "in a direct and material way." *Rubin,* 514 U.S. at 487 (quoting *Edenfield v. Fane,* 507 U.S. 761, 767 (1993)); *see also 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 505 (1996). The available evidence suggests that TTB cannot satisfy this third prong of the *Central Hudson* test; the burden is on TTB to demonstrate that it can meet this third prong, yet TTB has come forward with no convincing evidence.

Most fundamentally, the information from the *Dietary Guidelines for Americans* to which TTB objects is intended by the federal government to "provide authoritative advice for people … about how good dietary habits can promote health and reduce risk for major chronic diseases, [and it] serve[s] as the basis for Federal food and nutrition education programs."[2] This information is key to the U.S. government's nutritional initiatives, and the government in fact has a substantial interest in assuring dissemination of the *Dietary Guidelines for Americans*, not their suppression.

In *Rubin*, the Supreme Court considered the constitutionality of a similar ban on certain label information on malt beverages – specifically, alcohol content by volume. ATF asserted that the disclosure would lead to so-called "strength wars" by competing manufacturers, and increased alcohol consumption. The Court concluded, however, that the ban did not "directly and materially advance" the governmental interest "because of the overall irrationality of the

[2] http://www.health.gov/dietaryguidelines/history.htm

Government's regulatory scheme." 514 U.S. at 488. That was so, said the Court, because while the agency banned labels which specified the alcohol by volume, brewers were free "to disclose alcohol content in advertisements . . . in much of the country as allowed by state laws." *Id.*

The same irrationality pervades TTB's proposed labeling regulations. Manufacturers are permitted to provide consumers with the very information barred from product labels – information about standard serving sizes, alcohol content expressed as fluid ounces per serving, and *Dietary Guidelines* advice – in their advertisements and on their websites. Indeed, the U.S. government itself provides the same information on its own websites and in public communications. TTB's attempts to ban that same information on a label are as illogical as the scheme struck down in *Rubin* and thus do not satisfy the third prong of the *Central Hudson* test.

4. The Ban Is More Extensive Than Necessary

Finally, even if TTB could show that the label ban directly and materially advanced a substantial governmental interest, TTB would also be required to demonstrate that the ban is no more extensive than is necessary to cure potential consumer confusion about alcohol beverage consumption and composition. *See Rubin*, 514 U.S. at 490-91; *Central Hudson*, 447 U.S. at 566. TTB cannot meet this burden. The First Amendment embodies a strong preference for disclosure over suppression. *Pearson*, 164 F.3d at 658. Indeed, "the general thrust of federal alcohol policy appears to favor greater disclosure of information, rather than

less." *Rubin,* 514 U.S. at 484. "[I]f the government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002).

Significantly, *Rubin* held that the Act's ban and ATF's implementing regulations were not "sufficiently tailored" to meet the government's goals because there were alternatives to an outright prohibition that would achieve those goals equally well. 514 U.S. at 490. Those alternatives included a prohibition against marketing that emphasized high alcohol strength. *Id.* at 490-91. "[T]he availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to [the brewer's] First Amendment rights, indicates that [the ban] is more extensive than necessary." 514 U.S. at 491. *See also 44 Liquormart,* 517 U.S. at 507-08 (total ban on alcohol price advertising was not sufficiently tailored to meet the fourth prong of the *Central Hudson* test because there were alternative means of furthering the government's interest – promoting temperance – that did not involve speech prohibitions).

"The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503. The Supreme Court is very skeptical of government attempts "to deprive consumers of accurate information about their chosen products." *Id.* As the Supreme Court has repeatedly stated, freedom of speech means that "the speaker and the audience, not the government, assess the value of the information presented." *Id.* at 503-04 (quoting *Virginia*

State Bd. of Pharmacy, 425 U.S. at 762).

In sum, TTB may not prohibit information about alcohol content expressed as fluid ounces per serving, standard serving sizes, and the *Dietary Guidelines* and, indeed, must permit labeling to include this and other truthful, accurate statements about the content of alcoholic beverages on product labels.

III. Conclusion

For the foregoing reasons, WLF respectfully requests that as TTB finalizes these regulations, it should clarify that the agency is not prohibiting labeling that includes health advice from the *Dietary Guidelines for Americans*, and alcohol content expressed as fluid ounces per serving, standard serving size, and other truthful information. Such a ban would bar the dissemination truthful and nonmisleading information in violation of the First

Amendment and would deprive consumers of basic factual information upon which to make informed decisions regarding alcohol consumption. WLF further submits that any final rule that TTB may issue as a result of this rulemaking process should provide for – but at a minimum, may not prevent – the voluntary disclosure of this valuable consumer information.

Sincerely,

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Daniel J. Popeo
Chairman and General Counsel

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Richard A. Samp
Chief Counsel