

OFFICE OF ADVOCACY  
U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

November 16, 1999

Chief, Regulations Division  
Bureau of Alcohol Tobacco and Firearms  
U.S. Department of the Treasury  
P.O. Box 50221  
Washington, DC 20091-0221

Re: Notice # 872 – Prohibition of Certain Alcohol  
Containers and Standards of Fill for Distilled  
Spirits and Wine

To the Chief of the Regulations Division:

The Bureau of Alcohol Tobacco and Firearms (ATF) published a Notice of Proposed Rulemaking (NPRM) on February 9, 1999 in the Federal Register<sup>1</sup>. We have heard from some of the businesses that will be affected by the proposed rule and reviewed some of the comments that were filed as part of that record. Because it appears that the proposed regulation has an impact on these small businesses, we urge the ATF to consider the comments carefully and do a thorough analysis of the impact that this regulation will have on small entities before a final rule is implemented. If the businesses are mistaken in their reading of the proposal, then the ATF should at least correct the misimpression the rule created.

The Office of Advocacy's comments are submitted under our general authority of the Office of Advocacy to monitor Agency compliance with the Regulatory Flexibility Act (RFA)<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>3</sup> Additionally, the Small Business Act<sup>4</sup> authorizes the Office of Advocacy to represent the interests of small businesses before federal agencies.

**SIGNIFICANT IMPACT ON A SUBSTANTIAL NUMBER OF SMALL BUSINESSES**

This office reviewed the ATF certification at the time of the NPRM. The ATF said:

*Under the Regulatory Flexibility Act (5 USC 601 et. seq.), ATF must consider whether a notice of proposed rulemaking would have a significant economic impact on a substantial number of small entities.*

*The factual basis of this proposal does not create a burden on small entities.*

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<sup>1</sup> 64 Federal Register pp. 6485-6489

<sup>2</sup> 5 U.S.C. §601 et seq.

<sup>3</sup> P.L.104-121

<sup>4</sup> 15 U.S.C. §634(c)

- ▶ *It will not impose, or otherwise cause, a significant increase in recordkeeping or other compliance burdens on a substantial number of small entities.*
- ▶ *It will not have significant secondary or incidental effects on a substantial number of small entities.*

*This proposal **strengthens existing regulations** [emphasis supplied] that prohibit the use of unauthorized container sizes and that protect consumers from being misled about the identity, quality or quantity of the product. ATF believes that because this proposal addresses only deceptive or confusing packaging, and not the products themselves, it will not burden sales or otherwise impose costs on distributions or retailers of alcoholic beverage products, accordingly, ATF certifies this proposed rule will not have a significant impact on a substantial number of small entities. ATF is not required to conduct an initial regulatory flexibility analysis.<sup>5</sup>*

We have heard from some business owners and their representatives and have reviewed the comments they filed. These businesses certainly believe that a significant number of packagers (and the brokers, dealers and suppliers who do business with these packagers) will suffer a substantial impact as a direct result of these proposed regulations. Some of the packagers have received prior approval from the ATF to market and sell its products using distinctive packaging that might now be prohibited. They relied on this approval as assurance that they were in compliance with the law and existing regulations and made significant business investments.. These businesses have read the proposed regulations and concluded that compliance will require a fundamental and expensive change in their business.

#### WHAT THE AGENCY MUST DO

Once the agency has certified a proposed rule, if comments it subsequently receives from small businesses make it clear that there will be a significant impact on a substantial number of small businesses, the agency must re-propose the regulation and an initial regulatory flexibility analysis must be done.<sup>6</sup> This is the only way to provide adequate notice to those businesses that will be affected so that they can make informed comments. This will also let those who are to be regulated know the basis for regulating: for example, the ATF should set out the facts and studies that have led it to conclude that consumer confusion exists to such an extent that government action is warranted as proposed.

Further, the RFA requires an agency to consider alternatives if a rule is expected to have a significant economic impact on a substantial number of small entities. There may be alternative methods of implementation that may reduce the economic burden on small businesses, without sacrificing the intent of the regulation to avoid consumer confusion and loss of revenue.

In the alternative, if the agency believes that commenting small businesses are mistaken in their assessment of the intent and impact of the regulation, then the agency's final regulation should

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<sup>5</sup> 64 FR 26 p. 6488

<sup>6</sup> see *Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411 (M.D. Fl. 1998); In that case, when an initial analysis had not been prepared, violated the Regulatory Flexibility Act and the Administrative Procedures Act because the public had not had an opportunity to review and provide comments on the information in the IRFA or the agency's alternatives. An IRFA would not only identify the industry and the anticipated economic impact, it will also provide a valuable record to justify and add credibility to the rule.

directly address that point and the regulation should be amended or modified so that there can be no question that the impact envisioned by the small businesses was not intended and will not occur.

Please feel free to contact me or Russell Orban in my office at 205-6946 if there is any help or further information I can provide you in this matter. With respect, I remain

Very sincerely,

*Jere W Glover* (signed)

Jere W. Glover  
Chief Counsel for Advocacy