Docket No. TTB-2018-0007

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

ALCOHOL AND TOBACCO TAX AND TRADE BUREAU

on

Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 83 FED. REG 60562 (November 26, 2018)

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Submitted Electronically (www.regulations.gov)
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street, NW, Suite 400
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Re: Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages; Notice of Proposed Rulemaking; Docket No. TTB-2018-0007, 83 Fed. Reg. 60562 (November 26, 2018)

Dear Sir or Madam:

Washington Legal Foundation (WLF) is pleased to submit these comments in response to the Alcohol and Tobacco Tax and Trade Bureau's (TTB) proposed rule to modernize the Federal Alcohol Administration Act's labeling and advertising regulations for alcohol products.

TTB's efforts to streamline the rules and finally recognize long-standing First Amendment precedents are welcome. But parts of the proposed rule do not adequately protect the commercial-speech rights of alcohol-beverage providers and consumers. The proposed rule also fails to give adequate notice to alcohol-beverage providers of what is expected of them. WLF's comments focus primarily on the prohibition of statements on labels or in advertisements that are "disparaging" or "indecent." The Supreme Court has recently struck down similar rules in the trademark context in *Matal v. Tam* and *Iancu v. Brunetti*. Should the proposed rule go into effect as written, it will be ripe for a similar, likely successful, challenge.

While encouraging civility in the wine, beer, and spirits marketplace may be a noble cause, simply stating that such regulation "reflects … longstanding ATF and TTB policy" will not save rules that restrict otherwise truthful commercial speech from successful court challenges.

Before enacting the rule, TTB should take steps to further clarify the prohibitions on labels and advertisements to ensure they provide all interested parties with adequate guidance. This will avoid overly subjective review of labels and advertisements and limit the number of lawsuits challenging agency decisions.

I. Interests of WLF

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center, with supporters throughout the United States. WLF devotes much of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal courts to urge that judicial interpretations of alcohol advertising laws receive proper scrutiny and directly advance government interests. *See, e.g.*, Br. of Washington Legal Foundation, *Missouri Broadcasters Ass'n v. Taylor*, No. 18-2611, 2018 WL 673847 (8th Cir. 2018); *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, often produces and distributes articles on a wide array of legal issues related to alcohol advertising. *See, e.g.*, Katherine A. Fallow, Garret A. Levin, & Carrie F. Apfel, *Fourth Circuit Upholds Ban on Alcohol Advertising*, WLF LEGAL OPINION LETTER (August 20, 2010); Bryce L. Friedman, *Overturning of Alcohol Ad Ban Confirms Commercial Speech Rights*, WLF LEGAL OPINION LETTER (July 25, 2008); David Versfelt & Adonis Hoffman, *Alcohol Advertising: Federal & State Regulators Should Tread Lightly*, WLF LEGAL BACKGROUNDER (October 6, 2006).

WLF believes that TTB's proposed rule, while in many ways clarifying and organizing the current regulations, inadequately protects commercial-speech rights. TTB is interested in promoting marketplace civility and ensuring that consumers are not misled, but rules promoting those laudable aims must still avoid unduly chilling free speech rights under the First Amendment. Some of the proposals will require significant labeling changes, yet the proposal does not do enough to clearly define what is required of alcohol producers, distributors, and retailers.

II. The Proposed Rule

TTB's proposed rule seeks to "reorganize and codify [labeling and advertising] regulations in order to simplify and clarify regulatory standards … and reduce the regulatory burden on industry members where possible." TTB's stated intent is to improve understanding of the regulatory requirements and to make compliance easier and less burdensome. The proposal would implement extensive changes to modernize the rules so they are more in step with vast evolutionary changes in the alcohol industry today.

TTB acknowledges that recent First Amendment case law imposes significant constraints on the agency's regulatory authority. For the first time, TTB proposes regulations that will take heed of the Supreme Court's decision in *Rubin v. Coors*

Brewing Co., 514 U.S. 476 (1995), which recognized commercial-speech protections for alcohol labels.

Among other proposals, the regulations would remove outdated language, such as the Prohibition-era ban on use of the term "pre-war strength," a reference to the time before World War I. It would consolidate its alcohol-beverage advertising regulations in a new part, 27 CFR part 14, Advertising of Wine, Distilled Spirits, and Malt Beverages. It would also include new labeling requirements to protect consumers. For example, it would require that information appear on "closed packaging" to ensure consumers see it. And it would prohibit the misleading use of certain terms that apply to one commodity on labels of a different commodity.

III. TTB's Prohibitions of Certain Statements Fail Supreme Court Precedent and Chill Commercial-Speech Protections

Though a long-standing TTB policy, the prohibitions on disparaging statements about competitors and indecent labels and advertisements violate commercial-speech rights under the First Amendment. The proposed rule runs counter to the ever-increasing protections afforded to commercial speech. In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the U.S. Supreme Court set out a baseline test for analyzing commercial-speech regulations. The Court's four-step analysis asks whether 1) the expression is speech protected by the First Amendment; 2) the government has a substantial interest in regulating the speech; 3) the regulation directly and materially advances the government's substantial interest; and 4) the regulation is narrowly tailored. 447 U.S. at 566.

In recent years, the Court has applied "heightened scrutiny," that is, scrutiny more exacting than the *Central Hudson* standard, where the restriction at issue discriminates against specific speakers or content. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 552 (2011). In *Sorrell*, the Court explained the need for "heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Id.* at 566.

TTB's proposed rule would do just that. TTB's prohibition of certain disparaging statements or indecent labels or advertisements goes too far. The rule discriminates on the basis of viewpoint and cannot survive the exacting scrutiny such speech regulation requires.

A recent Supreme Court decision, *Matal v. Tam*, 137 S. Ct. 1744 (2017), should also give TTB serious pause. There, the Court struck down the "disparagement clause" of § 1052 of the Lanham Act, which prohibited federal trademark registration for marks that

might disparage any persons, living or dead. The Court held that the ban "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." 137 S. Ct. at 1751.

The Court applied the *Central Hudson* test, but also emphasized that *Sorrell* provides for heightened scrutiny when a law or regulation engages in viewpoint discrimination. The government asserted its interest in "protecting the orderly flow of commerce," but the Court rejected this, finding the clause was not "an anti-discrimination clause; it [was] a happy-talk clause." *Id.* at 1765. The Court held that free speech was more important than ridding the commercial market of offensive expressions. "The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social 'volatility,' free speech would be endangered." *Id.*

The proposal does not ignore *all* First Amendment interests. TTB acknowledges the Supreme Court's decision in *Rubin v. Coors Brewing Co.* In *Coors*, the Court struck down, on First Amendment grounds, the Federal Alcohol Administration Act's ban on disclosing alcohol content on beverage labels. The Court found that the Government's regulation of speech was not sufficiently tailored to its goal of preventing "strength wars." *Id.* at 490.

But the proposal still maintains TTB's antiquated view of commercial-speech jurisprudence. It also lacks the clarity that TTB says it seeks to provide. It is both vague and overbroad and will likely cost many providers, both large and small, significant sums as they attempt to interpret the rules to design compliant labels and advertisements. The danger of a rule that does not explicitly state what is prohibited is that agencies can aggressively expand, or abruptly alter, the import of their regulations. Because agencies currently are afforded great deference to interpret their own regulations, TTB can suddenly change how it interprets rules whenever it chooses. WLF urges TTB to eliminate that vagueness by providing more concrete examples of labeling and advertising that it considers misleading or otherwise prohibited.

IV. The Regulations Fail to Put Alcohol Beverage Providers on Notice of What is Required

In enacting a regulation, it is important to eliminate subjectivity as much as possible. Here, TTB is merely repeating longstanding TTB policy that prohibits the "use of false or misleading statements that explicitly or implicitly disparage a competitor's product." But the proposed rule fails to provide helpful guidance on what is required.

The same issues that led the Supreme Court to overturn the ban on disparaging comments in the Lanham Act in *Tam* are present here. TTB tried to avoid this problem by limiting prohibited disparaging comments to those that are false or "would tend to mislead the consumer." But such language is vague, gives far too much discretion to the Administrator, and does not put advertisers on notice of what may be prohibited. Rejecting or accepting labels and advertisements comes down to a highly subjective determination by TTB officials. While there is bound to be subjective review of any agency regulation, TTB's prohibition of certain disparaging statements or indecent labels or advertisements does not provide adequate notice to alcohol-beverage providers.

Without clearly defining what statements are prohibited, a regulation or statute may be found unconstitutional, as the Supreme Court held this week in *Iancu v. Brunetti*, No. 18-302, 588 U.S. ___ (2019). The Court struck down the Lanham Act's ban on "immoral or scandalous" trademarks because it "aim[ed] at the suppression of" views and covered all the "great many immoral and scandalous ideas in the world," not just the profanity the Government sought to prohibit. Slip op. at 10-11. The Government urged the Court to interpret the statute in a way that avoids any First Amendment problems. But the Court refused, saying doing so would require it to fashion a new law, and it cannot "'rewrite a law to conform it to constitutional requirements." *Id.* at 9 (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)).

TTB's proposed regulation not only limits false, misleading labels and advertisements, but it also allows TTB to reject factually accurate statements. This provision accords TTB great latitude to restrict the speech of alcohol providers for simply using a term TTB subjectively finds misleading. In the proposed rule, for example, TTB finds the phrase "We do not add arsenic to our [product]" to be misleading. But such an example borders on the absurd, as virtually no consumer will take that statement to mean that other providers *do* add arsenic to their products. TTB also explains that phrases such as "This wine doesn't have the hoppy taste of beer" are acceptable but "bourbon-flavored beer" is not. The proposed policy allows "puffery," as well as truthful, nonmisleading comparative claims "that place the competitor's product in an unfavorable light." But if the only examples providers can turn to are those like "We do not add arsenic to our [product]," they will be left in the dark about what the rule reasonably requires of them.

The proposed examples do not clarify the limits of accepted language and, especially given the protective trend in Supreme Court commercial-speech jurisprudence since *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), may infringe on or chill the First Amendment rights of those businesses making truthful, non-misleading on-label statements. The Constitution does not permit TTB to prohibit labeling and advertising as potentially misleading simply because TTB does not approve of it. Rather, it is

incumbent on TTB to show that some non-negligible number of consumers might actually be misled.

A case from the D.C. Circuit highlights the dangers of allowing agencies to promulgate vague regulations, beyond the potential First Amendment implications. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The agency has the power to "interpret" vague regulations, which then receive deference from the courts under *Auer v. Robbins*, 519 U.S. 452 (1997).

> Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Appalachian Power Co., 208 F.3d at 1020. To prevent this from happening, TTB must issue clear, concise rules that industry members can follow.

TTB's proposed language is overbroad as it substantially prohibits speech rights protected by the First Amendment. Like the statute at issue in *Matal v. Tam*, the proposed rule does not place clear limits on what may or may not be said. The danger of a rule that does not explicitly state what is prohibited is that agencies can aggressively expand, or abruptly alter, the import of their regulations. Because agencies are afforded great deference to interpret their own regulations, TTB can suddenly change how it interprets rules whenever it chooses. Like many other regulators, TTB may then invoke *Auer* to seek deference for those new interpretations. TTB should clarify exactly what types of statements are prohibited.

V. Alternatives to Federal Regulation

Product labeling is often what sets one wine, beer, or spirit apart from another in a highly competitive market. A lack of consistency and clarity in the federal rules that govern alcohol labels can be ruinous, especially to smaller alcohol providers who can barely afford regulatory compliance counsel, let alone a constitutional expert. Delays due to labeling uncertainty or regulatory rejection also deprive consumers of new products.

An alternative, more appropriate approach would be to promote self-regulation and self-policing of labels and advertisements that stray outside the normal commercial discourse. Groups such as the Distilled Spirits Council of the United States ("DISCUS") or the Brewer's Association have for years regulated the conduct of its own members. For example, DISCUS produces a Code of Responsible Practices for Beverage Control Advertising and Marketing (the "Code") that applies to all promotional activity. Among the various provisions, the Code ensures that advertisements are not directed to those under the age of 21 and that advertising and marketing materials "reflect generally accepted contemporary standards of good taste." And it encourages members to promote an internal system to ensure compliance with the Code. DISCUS touts its Codes as being active, adjusting quickly to social and technological changes as well as handling member complaints within a week.

In another example, The Brewer's Association, which represents smaller, independent brewers, in 2017 issued a self-regulatory decision that prohibits beers whose labels it found to be "obscene" from touting that it won a Brewers' Association-sponsored Great American Beer Festival award.

Such self-regulation is preferable over excessive government regulation, particularly when it comes to speech. Organizations are better suited than federal bureaucracies to adjust to societal changes and can produce clear, concise rules for their members. And these codes can hold members to a higher standard than any laws or regulations require, serving the government's interest without exposing alcoholic beverage providers to subjective determinations by TTB officials.

VI. Conclusion

"Alcoholic beverage businesses often operate in an environment of uncertainty created by vague regulations, inconsistent enforcement, unpredictable policy changes, and capricious decisions." Tracy Jong & Luis Ormaechea, *Trends to Note in Alcoholic Beverage Trademark Law that Can Impact the Decision Making Process for Businesses at Critical Points in the Alcoholic Beverage Produce Life Cycle*, 12 Buff. Intell. Prop. L.J. 19, 64 (2018). TTB's proposed rule seeks to clarify and simplify the regulations for alcohol-beverage providers. The Agency should strive to actually uphold that ideal.

Sincerely,

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