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Proposed Food & Drug Administration (FDA) Labeling Revisions Would Impact Wines Below 7 Percent ABV and Certain Non-Malt Beers

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On March 3, 2014, the **Food & Drug Administration (FDA)** published a Notice of Proposed Rulemaking (NPRM) that, if and when finalized, would make important changes to the labeling of all foods subject to FDA's primary labeling jurisdiction. While most alcohol beverages fall under the primary labeling authority of the **Alcohol and Tobacco Tax and Trade Bureau (TTB)**, wines below 7 percent alcohol by volume (ABV) and beers containing no malted barley or no hops fall within the scope of FDA's primary labeling authority.

The NPRM seeks to adjust FDA's labeling and related rules to address certain concerns about the American diet, particularly the so-called obesity epidemic. As such, it aims to increase and improve the amount of labeling information about critical attributes like calories and the addition of sugars to food. FDA's proposed regulations would:

- Put a greater emphasis—with larger and bolder type—on calories. FDA believes the number of calories is especially important to maintaining a healthy weight.
- Place greater emphasis on the number of servings per package and amount per serving.
- Delete the requirement to list calories from fat; however the quantity (in grams) of total, saturated and trans fat will still be required. FDA has shifted its focus to the type of fat rather than the total amount of fat.
- Require the amounts of potassium and Vitamin D on the label, but not the amounts Vitamins A and C.
- Update certain serving size requirements. These updates would reflect the reality of what people actually eat, according to recent food consumption data.
- Update Daily Values for various nutrients. In addition, the Percent Daily Value (%DV) would

shift to the left of the Nutrition Facts label. FDA says it wants to help consumers visually and quickly put nutrient information in context.

Significantly, the NPRM expressly addresses the subject of wines below 7 percent ABV and beer falling within FDA labeling jurisdiction in its proposed rules for added sugar labeling. As noted above, a proposed regulation would require the mandatory declaration of added sugars as a line item in the familiar Nutrition Facts label required by current regulations. That declaration would include any brown sugar, corn sweetener, corn syrup, dextrose, fructose, fruit juice concentrates, glucose, high-fructose corn syrup, honey, invert sugar, lactose, maltose, malt sugar, molasses, raw sugar, turbinado, sugar, trehalose and sucrose. And because (according to FDA) no scientific means permits the measurement of added sugars (as distinguished from sugar intrinsic to the food), the NPRM proposes a new record-keeping requirement to document the addition of sugars to foods subject to the labeling rule.

Fermentation, of course, consumes sugar as yeast converts that sugar into alcohol (and other byproducts like CO_2). The NPRM acknowledges this fact, but indicates that FDA does not possess adequate information to assess the degradation of added sugars during the fermentation of wine and beer. FDA asks commenters to provide information on this issue.

Notwithstanding FDA's apparent lack of information on the subject, it proposes a specific regulation for beer and wine (plus certain baked goods) within its jurisdiction in order to address the fermentation of added sugars. The NPRM speculates that manufacturers of some beer and wine could determine the amount of added sugars in the finished food product through laboratory analysis or by relying on scientific documents (*e.g.*, journal articles or reference books) showing the amount of added sugars typically consumed during fermentation in a specific food. In the alternative, the NPRM speculates that manufacturers may be able to record the amount of sugars added to beer and wine before and during fermentation and record that information in databases, recipes, formulations or batch records.

The NPRM accordingly proposes a separate record-keeping requirement for producers of beer and wine subject to FDA's primary labeling jurisdiction. These manufacturers must keep records of all relevant scientific data and information relied upon that demonstrates the amount of added sugars in the food after fermentation, as well as a narrative explaining why the data and information demonstrates the amount of added sugars declared in the finished beer or wine. In the alternative, a manufacturer must make and keep records of the amount of sugars added to the food before and during the processing of the beer or wine, and, if packaged as a separate ingredient, as packaged.

As part of the rulemaking process, the NPRM seeks comments from the industry and interested persons on all aspects of the proposed regulations. Comments are due on or before May 26, 2014, although an extension of time is possible.