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Salem Cider Convention

Report on Federal Regulations Concerning Cider

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Abstract

The purpose of this report is to help bring awareness to the cider making community about the Federal regulations concerning cider. The cider industry has enjoyed a long and rich history in the US and over the last several years has seen remarkable growth both in consumer interest and in the number of producers. It is our hope that this added momentum might precipitate change in how cider is understood legally. The purpose of this change is to help standardize the industry and tailor regulations so that they actually fit cider as a distinct product in the marketplace. Specifically, this report addresses concerns about the current definition of cider as well as regulations concerning carbonation levels and standards of fill.

Key Definitions

The following definitions concerning cider are verbatim from the CFRs (Code for Federal Regulations). As many are no doubt aware, cider, as a fruit based alcoholic beverage, currently falls under the provision of the wine industry. The following definitions therefore fall under the same regulations that the wine industry adheres to.

Hard Cider: “Still wine derived primarily from apples or apple concentrate and water (apple juice, or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration, must represent more than 50 percent of the volume of the finished product) containing no other fruit product nor any artificial product which imparts a fruit flavor other than apple; containing at least one-half of 1 percent and less than 7 percent alcohol by volume; having the taste, aroma, and characteristics generally attributed to hard cider; and sold or offered for sale as hard cider.”¹

Wine: “When used without qualification, the term includes every kind (class and type) of product produced on bonded wine premises from grapes, other fruit (including berries), or other suitable agricultural products and containing not more than 24 percent of alcohol by volume. The term includes all imitation, other than standard, or artificial wine and compounds sold as wine. A wine product containing less than one-half of one percent alcohol by volume is not taxable as wine when removed from the bonded wine premises.”¹

Effervescent Wine: “A wine containing more than 0.392 grams of carbon dioxide per 100 milliliters.”¹

Overview of Current Regulations

7% Rule

Currently Federal regulations differentiate between Hard Cider and wine made from apples (or Apple Wine) by stating that if the final product is below 7% ABV it is a hard cider and if it is above 7% then it is apple wine. Since most ciders produced have a final ABV of between 4% and 10% this artificial distinction unfortunately divides the industry in half. The distinction clarifies that if you are below 7% ABV (and meet the other specifications in the definition of Hard Cider) then your labeling process is controlled by the FDA. Otherwise the cider (or more accurately the apple wine) would be regulated by the TTB.

As apples are the primary ingredient of cider their natural composition plays a significant role in the outcome of a cider product. The sugar content (or brix) of an apple depends greatly upon growing conditions and will vary largely from region to region and year to year. Typically apples have a brix ranging from 8.8 to 18.2, but year to year even one variety can vary as much as 5 degrees. As such a cider producer could each year produce a cider from the same apple(s) and yet have a final product each year that varies in ABV. The concern here being that if a product one year

¹ CFR § 24.10.

² The information for this section can be found in CFR §24.190 - §24.193 as well as §4.21(e)(5)

was below 7% ABV and the following year above it then the regulatory agency and labeling requirements would also change. This can place an unnecessary burden upon the cider maker to choose between altering the product to fit an artificial category and changing the label for their product annually.

Of course there are ways around this problem. A cider maker can always regulate the alcoholic strength of their product by either adding water (diluting the alcohol) or adding sugar (“chapatalizing” to increase alcohol) if they choose. For cider makers using these processes to regulate their final product there is still a problem for the industry overall. By dividing the industry there becomes a loss of standardization. What may be acceptable on a label regulated by the TTB may not be approved by the FDA and vice versa. This creates a disparity and inequality in the industry around what kinds of information is required and/or permissible on a label. As the label is the visual representation of a product on the shelf it is of highest concern to producers that there is a not a disparity between what one producer can put on a label that another cannot simply because of a minor difference in ABV %.

Taxation²

Currently there are two taxation tiers for the cider industry depending on whether the cider is classified legally as “hard cider” or “apple wine”. These two tiers only apply if the product meets the requirements of a still wine. If the product meets the requirements for hard cider then it is taxed at a rate of 22.6 cents per gallon. For small winemakers (those producing less than 100,000 gallons of wine (or cider) per year) there is a reduction in this tax rate in the amount of 5.6 cents per gallon giving small wine/cider makers a final tax rate of 17 cents per gallon. If the product is classified as apple wine, the base tax rate is \$1.07 per gallon. Again there is a small winemakers credit of 90 cents giving a final tax rate for small winemakers of 17 cents per gallon. If the cider (either hard cider or apple wine) is carbonated above 0.392 grams of carbon dioxide per 100 ml then it is considered effervescent wine and becomes subject to different taxes. If the product is artificially carbonated then the rate becomes \$3.30 per gallon (\$2.40 for small producers), if it is naturally carbonated it is taxed at \$3.40 per gallon (with no discount for small producers).

According to §4.21(e)(5) page 4, the ATF was operating under the assumption that “all domestic cider was produced as still wine, with few exceptions.” While historically this may have been true, the majority of ciders professionally produced today are offered carbonated. The concern of many cider producers is that they cannot create a product that is as carbonated as their customers would prefer without incurring much higher taxes. For small producers the increase in taxes would be as much as 2,000% and for larger producers under 6% ABV (over 100,000 gallons annually) would be up to a 1,504% increase in taxes. While this distinction between effervescent and still products may be a helpful distinction in the wine industry where the majority of products are offered as still, it is becoming increasingly restrictive to the cider industry. What this means is that the final products from the cider industry are being shaped by regulations that are intended for another industry. Producers must choose between adequate carbonation with a much higher tax rate or lower carbonation to keep their costs and ultimately the price of their product down.

Standards of Fill

The ATF has set standards of fill for both still wine and sparkling wine. For still wine the allowed sizes (in millimeters) are 100, 187, 250, 375, 500, 750, 1000 and 1500. For effervescent or sparkling wines they are as follows 125, 200, 375, 750 and 1500. These classifications work insofar as cider is still considered a still wine and ought to be marketed as such. Unfortunately most cider makers do not make exclusively still ciders so the range of bottle sizes becomes smaller. Furthermore, many cider makers would like to see cider marketed as a unique product and industry. Having to use bottles associated only with the wine industry has made that process difficult. A growing concern amongst producers is the cost for bottles in the standard fill sizes that hold pressure. Most of the bottles are designed for the champagne industry and as such can hold much higher carbonation levels than most ciders would ever need. As an alternative cider producers have been looking at the beer industry where the bottle’s pressure specification match the product and as such provide a stable, safe medium for the product at a much better price. The beer industry does not have to conform to standards of fill for their bottles. Instead their bottle sizes are determined by the market. Unfortunately those bottles do not conform to the wine standards of fill and are currently unavailable to cider makers.

Perry

As the cider industry has grown and gained a foothold in the marketplace many cider makers have begun looking for creative ways to diversify their product lineup. One direction that many cider makers have turned to is Perry. Cider and Perry share a long history that cider makers would like to bring attention to and use as the cider industry develops and matures. There is growing concern that current regulations provide no structure for Perry as a distinctive product

¹ CFR § 24.10.

² The information for this section can be found in CFR §24.190 - §24.193 as well as §4.21(e)(5)

and have no clear definition as to what it is in distinction to wine. Currently any Perry produced is considered a pear wine and taxed as such.

Proposed Changes

Definition

Currently there are two definitions that govern the cider industry, hard cider and apple wine, and the division between the two being ABV %. It is proposed that going forward there only be one definition that encompasses the entire industry regardless of alcohol strength. By clearly defining cider the regulations governing the industry could easily evolve and expand with the industry instead of forcing wine standards upon the cider community. The proposed definition is as follows:

Hard Cider – A product derived primarily from pomaceous fruit or pome fruit concentrate and water (concentrate reconstituted to the original brix of the juice prior to concentration, must represent more than 50 percent of the volume of the finished product) containing no other fruit product nor any artificial product which imparts a fruit flavor other than those attributed to pomaceous fruit; containing at least one-half of one percent and less than 21 percent alcohol by volume; having the taste, aroma, and characteristics generally attributed to hard cider, and sold or offered for sale as hard cider.

The largest changes to the existing definition are the inclusion of all pomaceous fruit instead of just apples as well as increasing the ABV cap from 7% to 21%.

7% Rule

As is indicated by the definition above, it has been proposed to remove the 7% rule. In order to help standardize the cider community it was the general consensus of those at the convention to have all products that fall under the above definition to be regulated by the TTB (as opposed to the FDA regulating those under 7% and the TTB those above it). As the TTB requires COLAs (certificate of label approval) this may represent a slight increase in paperwork for some cider makers. It was general consensus that COLAs would help standardize the industry and any additional work generated by them would be more than compensated by this fact alone.

Taxation

Any change to the 7% rule would indicate a change in the tax structure. The following proposed taxes are to help accommodate the change in regulations and definitions concerning the cider industry. It is important to note that it was not the interest of the cider makers present to reduce the amount of taxes being paid, but rather standardize the industry and remove the threat of greatly inflated taxes for products being classified as effervescent wine. Currently the tax rates for effervescent wine are restrictive to the cider industry and it was general consensus that they should be removed. Furthermore all products falling under the new “hard cider” definition would be taxed at 22.6 cents per gallon regardless of annual production. By removing the small winemakers credit of 5.6 cents it is hoped that increase in tax revenue from all cider makers would offset any loss in tax revenue realized by the removal of the effervescent wine tax.

The greatest difference from current regulation (aside from the removal of the effervescent wine tax) is that right now any product over 7% ABV is taxed at \$1.07 per gallon with a small winemakers tax credit of 90 cents reducing taxes for producers under 100,000 gallons annually to 17 cents per gallon. The proposed change would actually increase taxes for all products over 7% ABV and under 100,000 gallons annually by five cents per gallon and reduce it by 85 cents per gallon for the few cider products that are both over 7% ABV and 100,000 gallons annually. It was the general belief at the convention that there are very few cider products on the market currently that are both over 7% ABV and 100,000 gallons annually and as such any lost tax revenue from them would be offset by the increase among all producers under 100,000 gallons annually.

Standards of Fill

The current standards of fill are limiting to the cider community and force it to conform to the wine industry. Currently the bottles available are created for the wine industry and force the emerging cider industry to pattern its

¹ CFR § 24.10.

² The information for this section can be found in CFR §24.190 - §24.193 as well as §4.21(e)(5)

image after it. Furthermore many of the bottles available for effervescent wines greatly exceed the needs of a carbonated cider and unnecessarily increase costs for the cider maker. Standards of fill have become very restrictive to the cider industry and it is therefore proposed to remove them as a regulation governing products that meet the requirements of the new “hard cider” definition.

Going Forward

In order to effect any change in current regulations concerning the cider industry there are at least two areas that need more researching. Currently we are operating under the assumption that by increasing the tax of small wine producers from 17 cents per gallon to 22.6 cents per gallon we are offsetting any loss of tax revenue from both the effervescent wine tax and tax generated by products both over 100,000 gallons annually and 7% ABV. This claim needs to be substantiated. Research must be done both on how much tax revenue would be lost by the change and how much revenue increasing small producers tax by 5.6 cents per gallon generates. Only then can we establish a fair tax rate that would remove the threat of the effervescent wine tax and help standardize the industry.

The second area of research revolves around a misconception by the ATF. As was previously quoted the ATF operates under the assumption that most cider currently produced commercially is produced still. To be able to effect any change in regulation we must show that this is no longer true. In order to do this a census of all commercial cider makers should be done along with breakdown of their product lineup. This census should include which products are carbonated and which are not along with a statement from the cider maker as to whether or not they find current regulations restrictive for how much carbonation they put into their product. Only then will we be able to show that this assumption is not only incorrect, but also damaging to the cider industry.

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