June 25, 2019

VIA ***www.regulations.gov***

Ms. Amy Greenberg
Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW, Box 12
Washington, DC 20005

Re: Notice No. 176: Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverage; Docket No. TTB-2018-0007

Dear Director Greenberg,

The New Civil Liberties Alliance ("NCLA") submits the following comments in response to the Alcohol and Tobacco Tax and Trade Bureau's ("TTB" or "the Bureau") Notice No. 176, Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, Docket No. TTB-2018-0007 (the "Proposed Rule" or the "Labeling Rule"). NCLA appreciates this opportunity to comment and express its concerns regarding the Proposed Rule.

I. Introduction & Summary

While the Proposed Rule's liberalization of Certificate of Label Approval ("COLA") regulations reforms an overly burdensome regulatory system, the Labeling Rule fails to address two principal defects in the Bureau's COLA scheme. First, at its core, the current COLA process is nothing more than the licensing of speech. As such, COLAs are unconstitutional prior restraints on liberties guaranteed to all Americans by the First Amendment. To ameliorate the unconstitutional impact of restraints on speech, the Rule should apply the process and post-publication enforcement of the proposed labeling requirements for COLAs related to personalized labels (Proposed Rule §§ 4.29, 5.29, and 7.29) to *all* COLAs.

Second, while the Proposed Rule incorporates approximately forty guidance documents—including some dating back to the *1950s*—the Rule does not abandon TTB's regulation-by-guidance practice. Federal agencies run afoul of APA requirements when they create rights or obligations binding on regulated persons or entities without engaging in notice-and-comment rulemaking. To correct this oversight in the Proposed Rule, the Bureau should adopt the rule proposed by NCLA to the Department of the Treasury on January 25, 2019, which petitioned the Treasury to engage in APA

notice-and-comment rulemaking to prohibit issuing, relying on, or defending the validity of improper guidance.

The Labeling Rule may have other practical and legal defects beyond the two upon which this NCLA comment focuses, such as the pre-COLA product evaluation process, the compelled speech labeling requirements, or the compelled and restricted speech in advertisements. NCLA reserves the right to comment further or to challenge practical, statutory, or constitutional defects associated with the Proposed Rule in any appropriate venue of competent jurisdiction in the future.

II. The New Civil Liberties Alliance Statement of Interest

The New Civil Liberties Alliance is a nonprofit civil rights organization founded to defend constitutional rights through original litigation, *amicus curiae* briefs, the filing of regulatory comments, and other means. The "civil liberties" of the organization's name include rights at least as old as the Constitution itself, such as the due process of law, the right to trial by jury, the right to live under laws made by elected lawmakers rather than by prosecutors or bureaucrats, and the right to free speech without prior approval or restraint from the government.

NCLA defends civil liberties by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution's design sought to prevent. This unconstitutional administrative state within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is thus the focus of NCLA's efforts.

Where NCLA has not yet brought suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb their own unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance such as prior restraints on speech. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, enforcement, and adjudication comply with the Administrative Procedure Act and with the Constitution.

III. The New Civil Liberties Alliance's Concerns with the Proposed Rule

A. The Proposed Rule Violates the First Amendment Because It Is an Unconstitutional Prior Restraint on Free Speech

1. *The Proposal to Ease COLA Prohibitions Does Not Change the COLA Scheme's Function as a Prior Restraint on Speech*

The Federal Alcohol Administration Act (the "FAA Act") prohibits brewers, vintners, and distillers from selling or shipping their alcoholic products in interstate or foreign commerce without having first received COLAs to certify that their labels comport with TTB regulations.[1] Failure to

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[1] *See* 27 U.S.C. § 205(e).

obtain a required COLA or a COLA exemption is a misdemeanor subject to a fine up to $1,000 per offense.[2]

Current TTB regulations deny COLAs to labels that licensing officials perceive to be "obscene or indecent,"[3] use words like "bonded" or "bottled in bond,"[4] depict "[f]lags, seals, coats of arms, crests, and other insignia" including the American flag,[5] and employ marketing phrases such as "pre-war strength" and "full oldtime alcoholic strength,"[6] among other things. The Bureau will also reject labels containing false or misleading information.[7] The Labeling Rule proposes to amend these regulations to improve clarity and to ease the regulatory burden on the alcoholic beverage industry.[8] For instance, TTB proposes to remove its total ban on the use of the American flag, and brewers will be allowed to describe their beer as "full oldtime alcoholic strength."[9]

Although less speech may be prohibited after the Proposed Rule's adoption, the Proposed Rule does nothing to alter the COLA review process. Alcoholic beverage producers will still submit their labels for approval prior to selling or shipping their alcoholic products in interstate or foreign commerce. If a producer fails to obtain a COLA, the producer faces the same penalties to which it was exposed under the pre-Proposed Rule's speech licensing scheme. This is precisely what the Constitution and the Bill of Rights expressly prohibit. Despite the prohibition, the Labeling Rule fails to change the COLA scheme's censorship function.

2. *The Proposed Rule's COLA Scheme Is Content-Based and Unconstitutionally Relies Upon the Bureau's Unbridled Discretion for Licensure*

The First Amendment asserts that "Congress shall make no law … abridging the freedom of speech[.]"[10] The United States Supreme Court has explained that prior restraints on free speech "are the most serious and the least tolerable infringement on First Amendment rights."[11] Indeed, while post-expression penalties or consequences may have a "chilling" effect on speech, prior restraint "freezes" speech.[12] Thus, "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[13]

The Proposed Rule's constitutional problem should be clear—the Bureau decrees what speech is authorized and what speech is prohibited, and issues or denies COLAs accordingly. As observed by the Supreme Court, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."[14] Moreover, "a scheme conditioning

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[2] *See id.* at § 207.
[3] 27 C.F.R. § 7.29(a)(3).
[4] *Id.* at § 7.29(c).
[5] *Id.* at § 7.29(d).
[6] *Id.* at § 7.29(f).
[7] *See, e.g.*, *id.* at § 7.29(a)(1), (4), (5) & (7) (regarding malt beverage label restrictions).
[8] Prop. Treas. Reg. Docket No. TTB-2018-0007, 83 Fed. Reg. 60562, 60566 (Nov. 26, 2018).
[9] *See id.* at 60578 (American emblems) *and* 60603 (puffery statements of potency).
[10] U.S. Const. amend. I.
[11] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).
[12] *See id.* (internal quotations and citations omitted).
[13] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).
[14] *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (internal quotations and citation omitted).

expression on a licensing body's prior approval of content 'presents particular dangers to constitutionally protected speech.'"[15]

TTB's licensing scheme is undeniably content-based. Consider, for example, the Bureau's proposal to "remove the blanket prohibition against the use of representations of, or relating to, the American flag, the armed forces of the United States, or other symbols associated with the American flag or armed forces."[16] TTB will continue to prohibit the use of these symbols, however, "where they create the impression that there was some sort of endorsement by, or affiliation with, the governmental entity represented[.]"[17] Thus, although liberalizing the use of patriotic symbolism on labels, TTB licensing officials will still examine the content and nature of the patriotic expression in advance to subjectively determine whether the expression could create a banned "impression."

Another unconstitutional component of TTB's COLA scheme is the unbridled discretion it vests in licensing officials. While "incidental burdens on speech" may be permissible in some commercial contexts, the government "may not … ignore constitutional rights."[18] Thus, even if TTB's speech prohibitions were content-neutral—which they are not—the government still "may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion."[19] Since a licensing agency with unduly broad discretion regarding whether to permit or prohibit speech poses a substantial risk to First Amendment liberty, the Supreme Court requires procedural safeguards of time, place, and manner to prevent *ad hoc* censorship and to afford denials meaningful judicial review.[20]

The Proposed Rule exacerbates, rather than ameliorates, this unconstitutional dynamic of the COLA process. As noted above with respect to patriotic expression in the form of American flags or insignias, TTB licensing officials will be asked to prohibit their use where the licensing officer thinks the symbols create the *impression* that the product is in some way endorsed by or affiliated with a governmental entity.[21] The Bureau's discretion to decide whether expression creates an "impression" or the extent to which the impression conjures up a notion that there was "some sort of endorsement," is quintessentially boundless.[22]

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[15] *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (quoting *Freedman v. Maryland*, 380 U.S. 51, 57 (1965)).

[16] Prop. Reg. at 60578.

[17] *Ibid.*

[18] *NAACP v. Button*, 371 U. S. 415, 439 (1963). The First Amendment does not distinguish between commercial and noncommercial speech. Accordingly, many courts, including the Supreme Court, have suggested that the gap in speech burden analysis may be narrowing. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (holding that content-based restrictions on commercial speech are subject to "heightened" judicial scrutiny rather than the "intermediate" scrutiny of the past). Thus, the TTB should take notice that courts may be ready to adopt NCLA's view that *all* prior restraints on speech are presumptively unconstitutional, as is the current state of affairs in the noncommercial context. *See, e.g.*, *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983) ("[A]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity[.]" (internal quotations and citations omitted)).

[19] *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 (1988) (emphasis in original).

[20] *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002).

[21] Prop. Reg. at 60578.

[22] *See id.*

Consider also the aspects of the COLA licensing regime that are not addressed in the Proposed Rule, such as prohibitions against obscene or indecent depictions and health-related statements.[23] With respect to obscenity, the *only* guidance to TTB licensing officials is that labels "may not contain any statement or representation that is obscene or indecent."[24] This discretion is inherently boundless because a licensing official must make his or her own *ad hoc* subjective determination as to whether the content of the COLA application meets his or her standards for decency.[25]

With respect to health, "labels may not contain any health-related statement that … tends to create a misleading impression as to the effects on health of alcohol consumption."[26] As with the American flag, the Proposed Rule uses the vague non-standard of divining an "impression," but it takes vagary one step further by freely admitting that the "TTB will evaluate such statements on a case-by-case basis[.]" Case-by-case review is antithetical to bounded standards. Indeed, we have already seen the lack of TTB's evenhandedness in making case-by-case evaluations. For instance, the Bureau rejected a beer label that contained an image of the King of Hearts playing card because, according to the agency, the heart image on the card implied a health benefit.[27] Nevertheless, the TTB granted a COLA for a wine label that contained an image of the Queen of Hearts playing card.[28] The point is not that these results are nonsensical—though they are—the point is that the lack of objective standards gives TTB licensing agents unbridled discretion to favor or disfavor the content of brewers', vintners', and distillers' speech. The Proposed Rule does not correct the unconstitutional COLA scheme's content-based prior restraint on speech nor its reliance upon the unbridled discretion of government censors.

3. The Proposed Rule Does Not Provide for Mandatory Constitutional Protections

The Proposed Rule does absolutely nothing to reform the unconstitutional system of appeals prescribed for TTB-rejected COLA applications. The Supreme Court has been clear that agencies "bear a heavy presumption against … constitutional validity" for their use of prior restraints of

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[23] *See id.* at 60577 (regarding obscene or indecent depictions) *and* 60605 (regarding health-related statements). Just yesterday, the United States Supreme Court struck down a federal ban on the registration of "immoral or scandalous" trademarks because they infringe upon First Amendment rights. *Iancu v. Brunetti*, No. 18-302, 588 U.S. ____, 1 (2019). Citing the *Matal v. Tam*, 137 S. Ct. 1744 (2017), which invalidated the federal bar on "disparaging" trademarks, the Court said "[t]he government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu*, 588 U.S. ____, 4. If "disparaging" and "immoral or scandalous" prohibitions are unconstitutional, it stands to reason that the TTB's viewpoint-based prohibitions are also unconstitutional.

[24] *See, e.g.*, *id.* at 60631 (Proposed Rule § 4.103). Wine and malt beverages have identical prohibitions against obscenity and indecency. *Compare id.* at 60631 ("§ 4.103 … Wine labels, containers, or packaging may not contain any statement or representation that is obscene or indecent.") *with id.* at 60682 ("§ 7.103 … Malt beverage labels, containers, or packaging may not contain any statement or representation that is obscene or indecent."). Curiously, distilled spirits appear to have additional restrictions: "§ 5.103 … Distilled spirits labels, containers, or packaging may not contain any statement, *design, device, picture,* or representation that is obscene or indecent." *Id.* at § 5.103 (emphasis added).

[25] TTB decency standards are reminiscent of Justice Potter Stewart's concurring opinion in *Jacobellis*: "I shall not today attempt further to define the kinds of [pornographic] material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it[.]" *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[26] Prop. Reg. at 60633 (Proposed Rule § 4.129(b)(1)).

[27] Tim Mak, Meet the Beer Bottle Dictator, Daily Beast (Aug. 12, 2014), *available at* http://www.thedailybeast.com/articles/2014/08/12/meet-the-beer-bottle-dictator.html.

[28] COLA TTB ID No. 19036001000116 (on file with author).

expression.[29] When dealing with the censorship of obscenity, for instance, "a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."[30] First, the restraint may be imposed for a brief period "during which the status quo must be maintained."[31] Second, "expeditious" judicial review must be available to the censored party.[32] Third, the censor bears "the burden of going to court to suppress the speech" and the burden of proof.[33]

The Bureau's content-based COLA scheme does not satisfy a single one of the Supreme Court's three mandatory safeguards. First, TTB's speech restraint is not imposed for a brief period during which the status quo is maintained. The Bureau has *90 days* to notify a COLA applicant of his or her approval or denial.[34] If TTB rejects the COLA application, the applicant's only remedy[35] is to appeal to the Bureau itself, which could take an additional *90 days*.[36] In the event of a loss on the first appeal, the applicant's only remedy is a second appeal to the censoring agency—a resolution which could take another *90 days*.[37] Indeed, a TTB officer may extend each of the censored applicant's two appeals by *90 more days each* if the officer "finds that unusual circumstances require additional time[.]"[38] Thus, the COLA process could take as long as 450 days—or roughly *one year and three months*—from the initial application to the exhaustion of administrative remedies. This is not a brief period maintaining the status quo.

Second, TTB's prior restraint also does not afford the applicant expeditious judicial review, and the regulations impermissibly place the burden of seeking judicial review on the censored applicant instead of the censoring agency. Under the current regulations, a censored applicant is powerless to reduce the 450-day COLA application and appeal process by seeking judicial review, because "[p]rior to applying to the Federal courts for review, an applicant must first exhaust his or her administrative remedies[.]"[39] Not only does the applicant have to wait for the Bureau to finish its lengthy appeal process, but the onus is on the applicant to seek judicial review once the appeal process is over and to bear the burden of proof in the course of the judicial review. Thus, TTB regulations miss all three elements required to safeguard against *ad hoc* censorship of protected speech.[40] This is not an "incidental" burden on speech. It is a regulatory scheme that flips well-established First Amendment jurisprudence on its head.

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29 *See Freedman v. Maryland*, 380 U.S. 51, 57 (1965).
30 *Id.* at 58.
31 *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990).
32 *Ibid.*
33 *Ibid.*
34 27 C.F.R. § 13.21(b).
35 Applicants may submit new applications and seek "informal resolution," but these options only increase the burden to the applicant and extend the COLA processing time. *See id.* at §§ 13.23 & 13.25(b).
36 *Id.* at §§ 13.21(c) & 13.26(b).
37 *Id.* at § 13.27(b).
38 *Id.* at §§ 13.26(b) & 13.27(b).
39 *Id.* at § 13.26(c).
40 The TTB may also revoke previously issued COLAs. *Id.* at § 13.41. As with a rejected application, an appeal of a revoked COLA could take as many as 450 days before the former COLA-holder may pursue judicial review of his or her censored speech. *See id.* at §§ 13.43, 13.44 & 13.45.

B. Even If the COLA Scheme Were Constitutional—Which It Is Not—The Bureau May Lack the Statutory Authority to Implement the Scheme's Prior Restraint on Speech

1. *The Scope of TTB's COLA Application Review and Assessment May Be Broader Than That Contemplated by the FAA Act*

While the FAA Act requires brewers, vintners, and distillers to obtain COLAs prior to their products entering interstate or foreign commerce, the Act does not require speech licensing—speech licensing is a TTB innovation.[41] The scope of TTB's application Form 5100.31 is much broader than what is mandated by the statute. Specifically, Form 5100.31 requires the applicant to submit an exact representation of the label applying for the COLA.[42] While label submission may be consistent with the Act's COLA application provision as it relates to adequacy of mandatory information, the Act does not require the submission of a precise label exemplar, nor does it require enforcement of label prohibitions prior to COLA issuance.

Even TTB regulations acknowledge that prior restraint is not the only tool available to ensure compliance with labeling regulations, as it may revoke COLAs previously granted for subsequent noncompliance.[43] Moreover, as the Bureau makes clear on Form 5100.31, a COLA does not relieve the holder of liability associated with failure to comply with the FAA Act—whether the noncompliance was overlooked at the application stage or whether it appeared later.[44]

2. *Broadly Interpreting the FAA Act's COLA Provision to Require Prior Restraints on Speech Is Inconsistent with Other Components of the Act*

In order to read the FAA Act's COLA provisions as requiring pre-approval of speech, one would have to ignore the glaring inconsistency with the Act's treatment of alcoholic beverage advertising—the very next item in the very same code section. This reading would create an absurd dichotomy. While alcoholic beverage label rules are enforced *ex ante*, mass marketed television, radio, and print advertisement rules—reaching far more consumers than just those perusing alcohol labels on store shelves—are enforced *ex post*. The FAA Act does not require this uneven treatment of free speech.

The Act's advertising requirements and prohibitions are nearly identical to those of labeling.[45] Like labels, advertisements must contain certain mandatory statements[46] and they have readability requirements for those statements.[47] Perhaps most notably, like labels, advertisements are prohibited

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[41] *See* 27 U.S.C. § 205(e).

[42] TTB Form 5100.31 Instr. A(4)-(6) (06-2016) (though modification may be allowed for size). Ninety percent of COLA applications are submitted online, but they require the same information. *See* Prop. Treas. Reg. Docket No. TTB-2018-0007, 83 Fed. Reg. 60562, 60565 (Nov. 26, 2018).

[43] *See, e.g.*, 27 CFR § 13.41 ("[COLAs] previously approved on TTB Form 5100.31, may be revoked by the appropriate TTB officer upon a finding that the label or bottle at issue is not in compliance with the applicable laws or regulations.").

[44] TTB Form 5100.31 II(A).

[45] *See* Prop. Reg. at 60564.

[46] *See, e.g.*, 27 CFR § 7.52 (requiring name and address of brewer and a conspicuous statement of class).

[47] *See, e.g.*, *id.* at § 7.53 (requiring malt beverage advertising legibility).

from making false or misleading statements,[48] making disparaging statements about a competitor's product,[49] being obscene or indecent,[50] making certain health-related statements,[51] and so on. Despite this, TTB employs traditional *ex post* deterrence to prevent a producer's abuse of its right to free speech in advertising, instead of the prior restraint scheme it uses for labeling.[52]

Thus, for the Act's labeling and advertising schemes to make sense in conjunction with one another, a COLA should not employ constitutionally-suspect prior speech restraints. The Bureau has demonstrated that it ably enforces its advertising regulations using traditional post-publication methods. It should reconcile the incongruity with which it regulates alcoholic beverage industry speech by abandoning pre-approval of speech on labels.

3. Broadly Interpreting the FAA Act's COLA Provision to Require Prior Restraints on Speech Is Inconsistent with the TTB's Interpretation of Its COLA Mandate in Its Own Guidance and in the Proposed Rule Itself

Existing agency guidance and the Proposed Rule strongly suggest that even the Bureau is aware that speech licensing is not required under the FAA Act. For instance, brewers, vintners, and distillers may change more than 30 categories of statements on their already-approved labels—many of which are material to the FAA Act's consumer protection goals—without additional TTB approval. For instance, vintners may alter wine label vintage dates, despite the substantial consumer interest in accurate quality assessment through vintage labeling.[53] Distillers may change the statement of percentage of neutral spirits and the name of the commodity from which the spirit is produced, despite the likelihood for consumer confusion.[54] Brewers may change the values for calories, carbohydrates, protein, and fat in a label's statement of average analysis, despite consumers' obvious reliance on accurate data for important health considerations.[55]

Also consider TTB Industry Circular No. 2011-4. In April 2011, despite the importance of warning label readability and the readability of other mandatory disclosures on alcoholic beverage labels, the Bureau ceased examining COLA applications to determine whether the text and images met type size, characters per inch, and contrasting background requirements.[56] Over the last eight years, all COLAs granted by TTB come with the admonishment to the COLA holder that despite the Bureau's election not to examine the label application for mandatory information readability, "[t]he responsible industry member must continue to ensure that the mandatory information on the actual labels is displayed … in accordance with the TTB labeling regulations[.]"[57] Circular No. 2011-4

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[48] *See, e.g.*, *id.* at § 7.54(a)(1), (4) & (8) (malt beverage prohibitions).

[49] *See, e.g.*, *id.* at § 7.54(a)(2) (malt beverage prohibitions).

[50] *See, e.g.*, *id.* at § 7.54(a)(3) (malt beverage prohibitions).

[51] *See, e.g.*, *id.* at § 7.54(e)(2) (malt beverage prohibitions).

[52] *See, e.g.*, *id.* at § 7.50 (lacking a pre-approval requirement for malt beverage advertisements).

[53] TTB, Complete List of Allowable Revisions to Approved Labels, *available at* https://www.ttb.gov/labeling/allowable_revisions.shtml#completeList (last visited May 1, 2019).

[54] *Ibid.*

[55] *Ibid.* In fact, TTB enforces accuracy in a label's statement of average analysis by periodic testing of beverages already in interstate commerce, not unlike the FDA's regulation of non-alcoholic consumables. *See* TTB Procedure 2004-1 (July 12, 2004).

[56] TTB Industry Circular No. 2011-4, *Streamlining the Certificate of Label Approval Review Process* (Apr. 29, 2011).

[57] *Ibid.*

changed the regulator's prior review to a system of deferred enforcement, which is wholly consistent with the letter, spirit, and purpose of the FAA Act.

The Proposed Rule provides further evidence that the Bureau understands that the FAA Act does not mandate a speech licensure scheme of prior restraint. For instance, if the Proposed Rule is adopted, COLA applicants may request permission to personalize labels without resubmitting labels for TTB approval.[58] To do so, the COLA applicant must submit a template for the label and "note on the application a description of the specific personalized information that may change."[59] Upon issuance, the COLA holder will be permitted to add personal messages, pictures, and artwork free from prior approval by TTB officials.[60] Similarly to Circular No. 2011-4, additions may not be "inconsistent with or in violation of the provisions of this part or any other applicable provision of law or regulations."[61] This proposed change is a welcome—and radical—departure from the current prior restraint on speech scheme, as TTB enforcement of the COLA prohibitions under 27 U.S.C. § 205(e) and 27 C.F.R. §§ 4.29, 5.29, and 7.29 will be post-publication only. Indeed, this change begs the question as to why the Proposed Rule would leave prior-publication review in place for other COLA applications.

4. *Broadly Interpreting the FAA Act's COLA Provision to Require Prior Restraints on Speech Is Inconsistent with Other Consumer Protection Statutes*

The FAA Act is principally a consumer protection statute.[62] Consumer protection is a common subject matter in the United States Code—the Bureau is not the only regulator of foodstuff labels. Congress also prohibits food and non-alcoholic beverage labels from making false and misleading statements,[63] making erroneous or unsupportable health claims,[64] and misbranding.[65] Additionally, like the FAA Act and TTB regulations, food and beverages have requirements regarding the use of warning labels[66] and the readability of warnings and other mandatory statements.[67] Despite the similarities in alcoholic and non-alcoholic labeling requirements and prohibitions, however, non-alcoholic foodstuffs are not required to submit labels to the government for a speech license.[68]

Protecting consumers from false or misleading statements on the labels of *all* consumables—food and alcohol included—is serious business. Despite the gravity of the matter or perhaps because

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[58] *See, e.g.*, Prop. Reg. at 60676 (explaining the process for personalizing malt beverage labels).

[59] *See, e.g.*, *id.*

[60] *See, e.g.*, *id.* Additional information regarding the alcoholic beverage or its characteristics will be prohibited, however. *Ibid.*

[61] *See, e.g.*, *id.*

[62] *See* TTB Home > Trade Practices > Fed. Alcohol Admin. Act *available at* https://www.ttb.gov/trade_practices/federal_admin_act.shtml (last visited May 2, 2019) (identifying industry integrity, consumer protection, and unfair trade practice prevention as the three interrelated goals of the FAA Act).

[63] *See* 21 CFR § 101.13.

[64] *See id.* at § 101.14.

[65] *See id.* at § 101.18.

[66] *See id.* at § 101.17.

[67] *See id.* at § 101.15.

[68] *See, e.g.*, Michal Addady, *Fortune*, "Coca-Cola Can't Keep Saying That Vitaminwater Is Healthy," *available at* http://fortune.com/2016/04/11/coca-cola-vitaminwater/ (last visited Apr. 30, 2019) (reporting that as the result of a lawsuit—not government pre-approved speech—Coke "must add the words 'added sugars' in two places on the Vitaminwater label.").

of it, Congress views *ex post* civil and regulatory enforcement as an effective tool for carrying out this crucial responsibility for non-alcoholic beverages and food. As a matter of consumer protection statutory scheme and policy, it is incongruous to assert that Congress has chosen to regulate alcohol labeling—and nothing else—with prior restraints on speech.

C. The Proposed Rule Fails to Prohibit the Bureau from Circumventing Notice-and-Comment Rulemaking When Creating Rights or Obligations Binding on Persons or Entities Outside the Bureau

Even though both the Constitution and the Administrative Procedure Act prohibit the practice, federal agencies often engage in the "commonplace and dangerous" acts of issuing informal interpretations, advice, statements of policy, and other forms of "guidance" that "make law simply by declaring their views about what the public should do."[69] To rein in these abuses and pursuant to 5 U.S.C. § 553(e), NCLA submitted a Petition for Rulemaking to the Department of the Treasury on January 25, 2019, proposing that Treasury issue a formal rule prohibiting the Department and its bureaus and offices from issuing, relying on, or defending the validity of improper guidance. Administrator John Manfreda received a copy of NCLA's Petition.

The Petition explained that on the occasions where Congress validly delegates authority to an agency, the agency may act on the basis of Congress' conferral.[70] To facilitate uniformity of procedure and standardization of administrative practice among agencies, Congress passed the Administrative Procedure Act in 1946.[71] The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]"[72] Where a rule is "substantive" or "legislative," the rule "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy."[73] Substantive or legislative rules require, at a minimum, APA notice-and-comment rulemaking.[74]

In contrast, "interpretive rules" are not subject to notice-and-comment requirements.[75] Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."[76] Nevertheless, agencies often promulgate legislative rules under the guise of mere guidance, without following the notice-and-comment requirements of the APA. The IRS and the TTB and its predecessor agency have utilized this unlawful practice to effect substantive change in alcohol labeling policy.[77]

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[69] Philip Hamburger, Is Administrative Law Unlawful? at 260, 114 (2014).

[70] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[71] *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

[72] 5 U.S.C. § 551(4).

[73] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

[74] *See id.* at 1021-22.

[75] *See id.* at 1021.

[76] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995).

[77] *See, e.g.*, TTB Industry Circ. No. 63-23 (1963) (including words such as "bite," "burn," "sting," "fire," "heat," "harshness," "roughness," "sharpness," "heaviness," and "congeners" as potentially prohibited as disparaging to competitors' products), *and* ATF Compl. Matters 94–1 (1994) (defining "malt beverages" to include beers fermented from at least 25% malted barley and made with at least 7½ pounds of hops per 100 barrels).

Not only does the Proposed Rule not fix this problem, it indicates that TTB will continue to use guidance as a means of regulating the industry.[78] While NCLA's January 2019 Petition for Rulemaking outlined a Treasury-wide rule to end unlawful guidance practices, the Petition's draft rule can be readily adapted to suit the Bureau's needs and added to the Proposed Rule, or separately offered for public comment.

IV. NCLA's Specific Recommendations and Conclusion

NCLA recommends that the Bureau withdraw the Proposed Rule and draft a new regulation for notice and comment that ends TTB's unconstitutional content-based censorship regime. The government preapproves beer labels but not pretzel labels. It preapproves wine labels but not cheese labels. And it preapproves vodka labels but not olive labels. NCLA agrees with the Supreme Court—the "risks of freewheeling censorship are formidable."[79] Post-publication regulatory schemes, such as those for pretzels, cheese, and olives, do a better job balancing the public interest in securing truthful information about the products they consume, without unconstitutionally burdening the speech of the producers who bring consumables to market.

Specifically, NCLA recommends that the Bureau abandon its requirement that alcoholic beverages include "labels identical to the labels appearing on the face of the certificate, or labels with changes authorized by TTB on the certificate[.]"[80] In its place, NCLA recommends that the Bureau apply the personalized label COLA application and certification process in Proposed Rule § 4.29 (wine), § 5.29 (spirits), and § 7.29 (malt beverages) to *all* COLAs with the following language, and revise the regulations elsewhere in the new rule to comport with this definition:

> **§ [4, 5 and 7].17.1 Definitions.**
> *Certificate of label approval (COLA).* A certificate issued on revised TTB Form 5100.31 that authorizes the bottling of wine, distilled spirits, and malt beverages, or the removal of bottled wine, distilled spirits, and malt beverages from customs custody for introduction into commerce, as long as the product bears labels ~~identical to the labels~~ materially consistent with the label template appearing on the face of the certificate~~, or labels with changes authorized by TTB on the certificate or otherwise~~.

Requiring alcoholic beverage producers to submit label templates consisting only of required information, rather than precise exemplars that include discretionary creative expression, is consistent with the FAA Act's requirement that alcoholic beverage producers obtain COLAs prior to introducing their products into interstate and foreign commerce. NCLA's proposed change will ensure that all required information will appear on labels, while not interfering with producers' rights to free speech with respect to creative statements and images. Consistent with current FAA Act provisions and TTB

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[78] *See, e.g.*, Prop. Reg. at 60567 ("Industry members should continue to rely on TTB's published rulings and other guidance documents on [nutrient content labeling] issues."), *and id.* at 60568-69 ("The revisions made in the proposed definition specifically recognize that TTB may authorize revisions in other ways, such as by issuing guidance on the TTB website.").

[79] *Conrad*, 420 U.S. at 559.

[80] Prop. Reg. at 60616 (proposed § 4.14.1), 60645 (proposed § 5.15.1) & 60672 (proposed § 7.17.1).

regulations, this change to the COLA process will not relieve certificate holders from liability for violations with the FAA Act, the Alcoholic Beverage Labeling Act, the Internal Revenue Code, or related TTB regulations. Moreover, this change will not alter the responsibility of the applicant to ensure that all information on the application is true and correct and that all labeling representations and claims are truthful, not misleading, not mislabeled, and do not contain language or images prohibited by statute or regulation.

Additionally, the Bureau should disavow the Proposed Rule's stated intention to continue its use of guidance as a means of regulating the industry. The Bureau should adopt NCLA's January 25, 2019 Petition for Rulemaking to the Treasury to ensure that all future rules promulgated for the purpose of establishing a substantive change to existing law or policy will, at a minimum, follow APA notice-and-comment procedures. NCLA's Petition is attached as Exhibit A, and NCLA stands ready to assist the Bureau in adapting the proposed rule to suit the unique needs of the Bureau's administrative profile.

Thank you again for the opportunity to provide NCLA's perspective on these important issues. We would be happy to assist the Bureau in recrafting the Labeling Rule to effectuate our proposed changes and satisfy minimum standards of constitutionality. If you have any questions, comments or concerns, please feel free to contact NCLA at mike.degrandis@ncla.legal.

Very truly yours,

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Mark Chenoweth
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Attachment