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COMMISSION AUTHORIZED

Comments of the Bureau of Economics
of the Federal Trade Commission*

on

Use of the Word "Light" (Lite)
in the Labeling and Advertising of Wine,
Distilled Spirits, and Malt Beverages
Notice No. 659
Bureau of Alcohol, Tobacco and Firearms

November 15, 1988

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* These comments are the views of the staff of the Bureau of Economics of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner. Questions or comments concerning this document may be addressed to Curtis Wagner (202-326-3348), staff economist, Federal Trade Commission.

Comments on the Use of the Word "Light" (Lite)
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Notice No. 659, BATF

The Bureau of Alcohol, Tobacco and Firearms (BATF) proposes to revise its regulations governing the advertising and labeling of "light" or "lite" alcoholic beverages. BATF's first notice of proposed rulemaking was issued on August 12, 1986.[1] The staff of the Federal Trade Commission (FTC) submitted comments on December 31, 1986.[2] On June 12, 1988, BATF, noting that its previous proposals are still under consideration, advanced two additional proposals, and requested additional comment.[3] The staff of the FTC's Bureau of Economics is pleased to respond.

Under BATF's first new proposal, "Alternative No. 1," any light malt beverage, wine or distilled spirit of less than 80 proof that is labeled or advertised as a "light" beverage must have 20 percent fewer calories than its producer's regular product.[4] Under BATF's second proposal, "Alternative No.

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[1]Use of the Word "Light" (Lite) in the Labeling and Advertising of Wine, Distilled Spirits, and Malt Beverages, 51 Fed. Reg. 28836-40 (August 12, 1986).

[2]The FTC has jurisdiction over the advertising and labeling of alcoholic beverages under Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. 45 et seq.). BATF has jurisdiction over alcoholic beverage advertising and labeling under the Federal Alcohol Administration Act of 1935 (FAA Act), 27 U.S.C. 201 et seq. Section 5(f) of the FAA Act, 27 U.S.C. 205(f), prohibits "false," "misleading," "obscene," or "indecent" statements in distilled spirits, wine, or malt beverage advertisements. Even more broadly, Section 5(f) prohibits any statements relating to "irrelevant" matters, "irrespective of falsity," that the Secretary of the Treasury finds to be likely to mislead the consumer. Additionally, Section 5(f) confers the authority to require mandatory information "as will provide the consumer with adequate information as to the identity and quality of the products advertised."

[3]Use of the Word "Light" (Lite) in the Labeling and Advertising of Wine, Distilled Spirits, and Malt Beverages, 53 Fed. Reg. 22678-80 (June 17, 1988).

[4]Id. at 22678. If the producer does not make a regular product, then the regular product of a competitor is to be selected as the standard.

2," the brand or front label of the light product must include a caloric comparison between the light and regular products of the same brand.[5]

We suggest that neither of these rules is necessary in the absence of a showing that consumers are deceived by current advertising and labeling. The new proposals are likely to add to the costs of marketing, and it is not clear that they will offer sufficient benefits to consumers to justify the costs. Before implementing these proposals, BATF may wish to determine through copy testing[6] or market research if any consumer misunderstandings exist. Even if BATF believes that current light beverage labeling does deceive consumers, market research is still desirable to tailor the remedy proposed by BATF to the discovered deception.

Experience of the Federal Trade Commission

The mission of the FTC is to foster a competitive marketplace, free of unfair and deceptive practices. Our statutory standard is Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."[7] As part of this mandate we have

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[5]Id. at 22679. If the brand does not have a regular product, then a competitor's regular product is to be selected for the comparison.

[6]Copy testing involves showing an advertisement or a label to a sample of consumers and then asking the consumers how they interpret the advertisement or label.

[7]15 U.S.C. 45.

acquired substantial experience on issues relating to food and beverage advertising and labeling.[8]

Prior FTC Staff Comments before BATF

In offering its 1986 proposals, BATF stated that "[t]hese proposals, if adopted, will provide a concise meaning to 'light' (lite). This, in turn, will provide industry with guidelines on the use of these terms and will minimize consumer confusion in this complex area."[9]

In its 1986 comment, the FTC staff noted that terms often have multiple meanings (such as a light color as opposed to lower in calories) which depend upon context, and yet, in many cases little or no consumer confusion has resulted. Absent such confusion, regulatory standards are

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[8]The FTC staff has filed numerous comments before federal agencies concerning standards and disclosures in the advertising and labeling of food products. See the Comments of the Staff of the Bureau of Economics of the Federal Trade Commission before the U.S. Department of Agriculture, Labeling of Meat Food Products, Under Certain Circumstances, That Contain Mechanically Separated (Species), Docket No. 86-049P, November 8, 1988; Comments of the Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics before the Food and Drug Administration, Proposal to Amend the Rules Governing Health Messages on Food Labels and Labeling, Docket No. 85N-0061, December 3, 1987; Comments of the Federal Trade Commission's Bureaus of Economics, Consumer Protection, and Competition before the Food Safety and Inspection Service, U.S. Department of Agriculture, Standards for Frankfurters and Similar Cooked Sausages, Docket No. 85-009F, June 22, 1987; Comments of the Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition before the Bureau of Alcohol, Tobacco and Firearms, Use of the Terms "Cereal Beverage," "Near Beer," "Alcohol-Free," and "Non-Alcoholic" In the Labeling and Advertising of Malt Beverages, Notice No. 610, January 28, 1987; and Comments of the Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics before the Bureau of Alcohol, Tobacco and Firearms, Use of the Word "Light" (Lite) in the Labeling and Advertising of Wine, Distilled Spirits, and Malt Beverages, Notice No. 600, December 31, 1986.

[9]51 Fed. Reg. at 28836.

often not necessary. The FTC staff also noted that manufacturers of products with desirable characteristics (such as reduced caloric content) often have a sufficient incentive to provide voluntarily information that is valued by consumers.[10] For these reasons, the FTC staff suggested that appropriate government intervention generally requires a showing that deception has occurred.[11] In addition, where government action is appropriate, remedies should be designed to ensure that consumers benefit. This also generally requires information about the nature of the deceptive or misleading impressions.[12]

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[10]It is not difficult to find examples of the profitability of such voluntary disclosure. One may cite the proliferation of lower calorie foods and beverages. The development of the "light" label for malt and other alcoholic beverages is itself an example of how desirable product characteristics can be communicated through voluntary disclosure.

[11]In some cases, there are legitimate reasons for the government to act without such evidence. For example, potential threats to consumer health may warrant immediate regulatory action. In these cases, however, the regulations should clearly protect the health of consumers. The new BATF proposals do not meet this condition. As noted below, these regulations may not provide adequate protection to consumers if deception exists in this market. Moreover, evidence of any deception or confusion should be readily obtainable through market research or copy testing. BATF staff has stated to us that it still possesses no such evidence, nor is any contained in any of the comments received by BATF in response to its 1986 proposals.

[12]The FTC staff applied the above principles in its evaluation of the 1986 BATF proposals. We urged BATF not to implement its proposed mandatory calorie disclosure for "light" products in the absence of evidence indicating its necessity. The staff also noted that BATF had not shown that this requirement would be more effective than current practices in communicating calorie information to consumers. In the absence of any indication of consumer deception, the FTC staff opposed the elimination of "light wine" as a distinct product category denoting lower alcoholic content. The FTC staff supported BATF's decision not to require caloric labeling for all alcoholic beverages. BATF also asked for comment on the desirability of both a maximum threshold level of calories for products bearing the "light" designation as well as a maximum caloric content for a light product relative to its regular product. It did not at that time propose implementation of either standard. The FTC staff suggested that both standards would be unnecessary and costly. The present comment reiterates our position in light of the two specific proposals now being considered by

BATF's Current Proposals

BATF states the rationale for its new proposals in the following terms: "Since ATF determined in Notice No. 600 that an upper limit on caloric content is unnecessary, a definite fractional standard on caloric content should be considered to prevent any misleading impressions that may be conveyed by the use of that term."[13] BATF staff have informed us that they are concerned about possible deception in the present and, even if none currently exists, possible deception in the future.

BATF may wish to determine by copy testing whether consumer misperceptions exist before imposing further restrictions on the use of the term "light" (lite). This will not only ensure against unnecessary regulation, but will also ensure that necessary regulation is effective. At present, the existence of consumer deception has not been established by empirical research.

Mandating a Fractional Caloric Standard (Alternative No. 1)

Alternative No. 1 requires each light beverage to have 20 percent fewer calories than its regular counterpart. In its 1986 comment, the FTC staff articulated concerns about possible manufacturing distortions from imposing a maximum level of calories for any "light" product.[14] While Alternative 1 is

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BATF.

[13]53 Fed. Reg. at 22679.

[14]See 1986 Comment at 13.

somewhat different from the earlier proposal because it proposes a separate threshold for each product, Alternative No. 1 nevertheless fails to remove the risk of manufacturing distortions.

For example, a producer of a regular beverage with a below average caloric content may be deterred from offering a light product, even though the light counterpart would have fewer calories than most of the existing light brands. Because the regular product has relatively few calories, its producer would be penalized with a relatively more demanding standard in order to manufacture a light counterpart.

Alternative 1 may also risk manufacturing distortions by firms that produce both a regular and a light product. For example, firms may be induced to increase the calories of their regular products in order to meet the "20 percent less" standard for their light products.

BATF believes that alcoholic beverage consumers have come to associate the term "light" with a product that is lower in calories than a comparable "regular" product.[15] However, "comparable" appears ambiguous in this general context. It may mean the regular product of each manufacturer in relation to its own light product. It may mean the average regular product, or simply the brand with the highest calories. It is difficult to know what the prevalent meaning of "light" actually is among alcoholic beverage consumers without having undertaken empirical research. Indeed, there may not be a prevalent meaning at all; rather, the understanding of the designation may vary markedly with the context.[16] Thus, contrary to the

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[15]53 Fed. Reg. at 22679.

[16]Moreover, the meaning of the word "light" in the alcoholic beverage market may undergo shifts in meaning over time, and there is no method for determining in advance how its meaning will evolve. An appropriate policy

intention of BATF, it is possible that any rule that restricts the use of the word "light" may mislead rather than inform most consumers.

For example, in some segments of the alcoholic beverage market, a significant number of consumers may not even associate the term "light" with caloric content. Rather, the connotation in this context may refer to low alcoholic content or a clearer color. Therefore, Alternative No. 1 appears to be especially costly for wine (where the term "light" has been used to indicate low alcoholic content) and beer (where "light" has referred to color). As BATF notes, "[t]o prohibit products which are currently labelled as 'light' from bearing such a designation could result in substantial consumer confusion."[17]

In sum, we suggest that BATF undertake consumer perception testing to determine what consumer understanding of "light" is in its various contexts. Only then can BATF evaluate whether deception exists. If it does, then BATF should also consider testing various remedies to find the best means of curing the deception.

Mandated Caloric Comparisons (Alternative No. 2)

As an alternative to establishing a maximum (relative to a similar regular product) caloric standard for light alcoholic beverages, BATF is also considering a mandated caloric comparison on the product's brand label. The concerns in our 1986 comment about mandated information disclosure also

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for one period may be highly inappropriate for another.

[17]Fed. Reg. at 22679.

apply to Alternative No. 2.[18] Moreover, BATF has already decided that caloric disclosures on regular alcoholic products are unnecessary.[19]

In addition to the relabeling costs to manufacturers, Alternative No. 2 may impose unnecessary costs that impede the flow of information. Products often do not have a single quality dimension, and mandated disclosure may provide information that is not deemed important by consumers. This could reduce the space available for information that consumers do value.

Moreover, if some type of mandated disclosure is necessary on a light product, it is unclear whether the appropriate disclosure is that of the regular product's calories. Depending on the nature of the deception, a disclosure of the average calories for all regular products may be more useful. Again, we suggest market research to determine the appropriateness of the proposed remedy. If market research indicates a problem, it should also indicate the appropriate remedy for this problem.

Conclusion

BATF may be better able to increase consumer information and promote competition by allowing all advertising that is neither false nor deceptive. We suggest that BATF refrain from adopting either one of these two proposals, unless consumer testing first indicates their desirability. This research is needed not only to determine whether a problem exists, but also to discover the nature of the problem. Without such empirical foundations,

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[18]See 1986 Comment at 6-10.

[19]51 Fed. Reg. at 28836. BATF staff has informed us that all alcoholic beverages currently disclose their own calorie content on the label if they are marketed as being reduced or lower in calories.

consumer protection policies may be ineffective or even counterproductive.