



November 18, 2022

VIA ELECTRONIC SUBMISSION

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

Re: Implementation of Refund Procedures for Craft Beverage Modernization Act Federal Excise Tax Benefits Applicable to Imported Alcohol – Notice No. 215

Dear Director Greenberg:

On September 23, 2022, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published temporary and proposed rules implementing certain changes to the Internal Revenue Code (Code)¹ made by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Tax Relief Act),² which amended the Craft Beverage Modernization Act (CBMA) provisions of the 2017 tax law commonly known as the Tax Cuts and Jobs Act (TCJA).³ The temporary rule establishes procedures for taking advantage of quantity-limited reduced tax rates and tax credits applicable to imported alcohol products.⁴ The text of the temporary rule generally serves as the text of the proposed rule.⁵ The proposed rule includes an additional amendment clarifying that a foreign producer may not assign CBMA tax benefits on distilled spirits, wine, or beer unless it produces the product.⁶

This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed and temporary rules (collectively, the proposed rules). Advocacy is concerned that the proposed rules lack the substantive information necessary to establish a factual basis for certification under

¹ Internal Revenue Code, Title 26 U.S.C., as amended.

² Consolidated Appropriations Act, 2021, Div. EE, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

³ Act of December 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁴ 87 Fed. Reg. 58021, September 23, 2022; 87 Fed. Reg. 58043, September 23, 2022.

⁵ 87 Fed. Reg. 58043 at 58043.

⁶ *Id.*

the Regulatory Flexibility Act (RFA).⁷ Specifically, the certification statement does not identify the small entities affected by the rules, nor does it adequately describe the costs of the rules to those small entities. Without that information, it is not possible to perform the threshold analysis necessary to support a certification that the proposed rules will not have a significant economic impact on a substantial number of small entities.

To resolve this issue, Advocacy recommends that TTB perform the threshold economic analysis necessary to supply a factual basis for certification. If the agency finds that it can certify the proposed rules, we recommend that it extend the public comment period and republish the RFA assessment, including the required factual basis for certification.

If TTB is not able to certify after performing the required threshold analysis, Advocacy recommends that the agency prepare and make available for public comment an Initial Regulatory Flexibility Analysis (IRFA). The IRFA should adequately assess the small business compliance costs of the proposed rules and include consideration of significant alternatives that would accomplish the objectives of the regulation while minimizing the economic impacts to small entities.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁸ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.¹⁰

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."¹¹

⁷ 5 U.S.C. § 601 et seq.

⁸ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁹ Small Business Jobs Act of 2010, Pub. L. 111-240, §1601, 124 Stat. 2504 (2010).

¹⁰ *Id.*

¹¹ *Id.*

B. The Craft Beverage Modernization Act

The CBMA provisions of the Code provide for reduced rates or tax credits for beer, wine, and distilled spirits produced in or imported into the United States.¹² Foreign producers use the CBMA tax benefits by assigning them to U.S. importers of their products. U.S. importers pay the federal excise tax on imported beer, wine, and distilled spirits, and must receive an assignment of the CBMA tax benefits from the foreign producer to take advantage of them.¹³

In 2020, the Tax Relief Act made the CBMA tax benefit provisions permanent.¹⁴ At that time, Congress also transferred responsibility for administering certain CBMA provisions from U.S. Customs and Border Protection (CBP) to the Department of the Treasury (Treasury) after December 31, 2022.¹⁵ CBP had administered the CBMA tax provisions related to imported products since 2018.

The Tax Relief Act also changed the timing in which importers can claim the tax credits assigned to them. Beginning on January 1, 2023, importers who elect to take advantage of assigned tax benefits must first pay the full tax rate to CBP and subsequently submit a refund claim to Treasury.¹⁶ The text of the statute states that the tax benefits “shall be allowed as a refund, determined for periods not less frequently than quarterly, to the importer in the same manner as if such amount were an overpayment of tax[.]”¹⁷ The statute also amended the overpayment rules for this purpose such that no interest will be allowed if a payment is refunded within 90 days after the importer files a valid claim, rather than the standard 45 days.¹⁸

C. The Proposed Rules

On September 23, 2022, TTB published a notice of proposed rulemaking and a notice of temporary rulemaking in the *Federal Register*, each entitled “Implementation of Refund Procedures for Craft Beverage Modernization Act Federal Excise Tax Benefits Applicable to Imported Alcohol.”¹⁹ The proposed rules implement regulations in accordance with the changes to the CBMA provisions of the Code found in the Tax Relief Act.²⁰ The proposed rules outline that importers must pay the full rate of tax to CBP for imports starting on January 1, 2023.²¹ Importers may then file a refund claim after the close of each calendar quarter covering the entries in that quarter using TTB’s new electronic filing system, “myTTB”.²² Importers may only claim a refund if the foreign producer of the imported alcohol has also registered with TTB and assigned their CBMA tax benefits to that importer using myTTB.²³ The proposed regulations

¹² 26 U.S.C. §§ 5001(c), 5041(c), and 5051(a).

¹³ *See id.*

¹⁴ *See* Pub. L. No. 116-260, Div. EE; Pub. L. No. 115-97, §§ 13801-13808; Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 144, 133 Stat. 2534 (2019) (extending and amending CBMA provisions).

¹⁵ *See* Pub. L. No. 116-260, Div. EE, § 107(e); *see also* §107(f).

¹⁶ *See* Pub. L. No. 116-260, Div. EE, § 107.

¹⁷ *Id.*

¹⁸ *Id.*; 26 U.S.C. § 6611(e)(1).

¹⁹ *See* Proposed rule, 87 Fed. Reg. 58043; Temporary rule, 87 Fed. Reg. 58021.

²⁰ *Id.*

²¹ 87 Fed. Reg. 58021 at 58022.

²² 87 Fed. Reg. 58021 at 58029.

²³ 87 Fed. Reg. 58021 at 58023, 58026.

express the agency’s belief that a quarterly refund period “is necessary to provide TTB an opportunity to analyze entry data for potential over-assignment of CBMA tax benefits based on noncompliance with controlled group limitations.”²⁴

In the RFA section of the proposed rules, TTB certified “that the regulations will not have a significant economic impact on a substantial number of small entities.”²⁵

II. TTB’s Certification of the Proposed Rules Lacks a Factual Basis and is Invalid

The RFA requires that regulatory agencies either certify that a proposed regulation will not have a significant economic impact on a substantial number of small entities or prepare an IRFA to accompany every proposed rule.²⁶ If an agency certifies the rule, it must include a statement providing the factual basis for the certification. An agency’s certification is subject to judicial review.²⁷ TTB’s certification statement does not attempt to identify the small entities affected by the proposed rules. Further, the statement does not include cost estimates or other data necessary to perform an analysis of the economic impacts to the regulated small entities. For these reasons, Advocacy asserts that TTB’s certification lacks a factual basis and is therefore invalid.

A. TTB Failed to Identify the Regulated Small Entities

In its certification statement, TTB asserts that while it “believes the majority of businesses subject to the regulations are small businesses, the regulations in this document will not have a significant impact on those small entities.”²⁸ Despite the acknowledgment that most businesses impacted by the regulation will be small, TTB does not identify the affected small entities. The agency does not provide information such as the number of affected small entities or associated North American Industry Classification System (NAICS) codes. TTB should include in their analysis NAICS 424810: Beer and Ale Merchant Wholesalers and NAICS 424820: Wine and Distilled Alcoholic Beverage Merchant Wholesalers. If other small entities such as retail stores or restaurants are affected by the rule, TTB should identify their NAICS codes as well. Additionally, the certification statement does not break down the affected entities into smaller size groups (e.g., based on revenue or employment). Without adequately identifying the small entities affected by a regulation, it is not possible to perform the threshold economic impact analysis necessary to support a valid certification.

B. TTB Provided Insufficient Information about the Costs to Small Entities

TTB similarly failed to provide any analysis to support its assertion that small entities will not experience a significant economic impact. Instead, the agency states that it is “requiring the minimum information necessary to administer the statutory requirements of The Tax Relief Act” and that any “burden flows from the statute itself and the shift to the refund method of obtaining CBMA tax benefits.”²⁹ Advocacy agrees that the shift to the refund method is required by

²⁴ 87 Fed. Reg. 58021 at 58029.

²⁵ 87 Fed. Reg. 58021 at 58030.

²⁶ 5 U.S.C. § 603, 605.

²⁷ 5 U.S.C. § 611.

²⁸ 87 Fed. Reg. 58021 at 58030.

²⁹ *Id.*

statute, and therefore regulatory costs flow from that statute. This fact does not, however, eliminate the RFA's requirement that TTB estimate those costs and analyze their impacts.

Moreover, Advocacy is concerned that TTB omitted and underestimated compliance costs associated with the proposed rules. The only compliance cost that the agency directly addressed in the proposed rules relates to the establishment of the myTTB filing system. In support of certification, the agency states that the "electronic systems established by TTB will not pose a significant burden because the majority of the foreign producers and importers already file electronically with FDA and CBP respectively."³⁰ This statement does not address the cost burden associated with learning a completely new electronic filing system.

In preparing these comments, Advocacy spoke with the National Association of Beverage Importers (NABI). Although NABI applauded TTB's efforts to launch user-friendly foreign producer and importer portals, the organization reported that its small business members would likely face a disproportionate burden in learning to use myTTB. Small businesses often do not have dedicated tax and compliance support staff. Consequently, those businesses generally must dedicate a larger share of their limited time and resources to learning and training employees in new systems. NABI also expressed concerns that the foreign producer portal is currently only available in English and that the importer portal has not launched. Each of these issues has the potential to delay or inhibit claim filing using myTTB. Advocacy contends that small businesses face a disproportionate burden in familiarizing themselves with myTTB, and that the associated costs could be significant.

Of even greater concern, TTB omitted any discussion of costs associated with the refund method of obtaining CBMA tax benefits. Small importers were previously allowed to claim CBMA tax credits with CBP upon entry. Those importers must now overpay excise taxes at entry. Importers will not be able to request a tax refund until the end of the quarter in which they import products. Further, because of statutory changes, importers will not receive interest on their overpayments unless more than 90 days elapse between filing a valid claim and receipt of a refund. In a worst-case scenario, the combination of these regulatory and statutory changes could result in a small business overpaying their taxes without accruing interest for up to six months.³¹ Small importers that improperly file claims due to confusion about the new system or have technical issues could face additional costs.

Advocacy believes that these changes impose significant costs to small importers that should have been addressed in an RFA analysis. While larger businesses may be able to shoulder overpayments for an extended period, small importers may not be able to do so. At least a portion of these costs are associated with TTB's discretionary decision to implement a quarterly

³⁰ *Id.*

³¹ This scenario could occur if products enter the U.S. on day one of a quarter. The importer would then have to wait until the end of the quarter to file a refund claim. TTB would then have 90 days to refund the overpayment before interest began to accrue.

refund period.³² TTB could have allowed businesses to file more frequently to alleviate the cost burden of the refund method.

C. Advocacy's Recommendations

For the reasons above, TTB's certification is improper. The agency did not adequately describe the small entities impacted by the proposed rules or estimate costs to those entities. Advocacy recommends that TTB perform the threshold economic analysis necessary to supply a factual basis for certification. If the agency finds that it can certify the proposed rules, we recommend that it extend the public comment period and republish the RFA assessment, including the required factual basis for certification.

If TTB finds it cannot certify, the agency must prepare and publish for comment an IRFA in accordance with the RFA. Among other requirements, the IRFA should consider regulatory alternatives which accomplish TTB's stated objectives and minimize the significant economic impact of the regulation on small entities. Advocacy strongly recommends that those alternatives include an examination of more frequent refund periods.

III. Conclusion

Advocacy is concerned that the proposed rules lack the factual basis required for certification. We urge TTB to perform the threshold economic impact analysis necessary to determine if certification is appropriate. Following completion of that analysis, we recommend that the agency extend the public comment period and either republish the certification statement or publish an IRFA. We are available to assist TTB in its outreach to small entities and in its economic impact analysis.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

Sincerely,

/s/

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Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

³² Treasury is statutorily required to determine refund periods "not less frequently than quarterly[.]" This language allows TTB discretion in determining more frequent refund periods. *See* Pub. L. No. 116-260, Div. EE, § 107.

/s/
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