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Advertising, Labeling & Formulation Division
Department of the Treasury
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street, NW
Washington, DC 20220

Dear TTB:

Please consider this letter as an appeal under 27 C.F.R. § 13.25. The applicant is Cold Spring Brewing Company (BR-MN-REF-1). The application at issue is TTB ID 10267001000218, for Ol' Glory Beer. Cold Spring properly filed the application for label approval on September 24, 2010. TTB issued a notice of denial on November 3, 2010.

The notice of denial claims:

> Use of the Pledge of Allegiance on a malt beverage label is prohibited under 27 C.F.R. 7.29(d). Under 7.29(d) labels shall not contain any statement which relates to the American flag. The Pledge of Allegiance is the official pledge to the flag by an act of Congress. Delete this text.

We believe this denial is in error, and TTB has a legal obligation to approve the label without further delay. The label complies with all applicable laws and regulations. To date, TTB has asserted that 27 C.F.R. § 7.29(d) should block various statements and images on the label (such as the Pledge of Allegiance). The applicant has argued that this regulation cannot be used to block these aspects of the label, to the extent the regulation is in conflict with the First Amendment to the United States Constitution. The regulation at issue, as applied to this particular label, is in direct conflict with the Constitution.

The Federal Flag Code (4 U.S.C. §§ 4-10) does not and cannot save the antiquated regulation here at issue. First of all, the Flag Code is a statute, and like the regulation, cannot take precedence over the Constitution. Second, the Flag Code, by its own terms, does not come close to banning the speech at issue. Replete with references to what

people "should" do, it imposes no obligations on private parties.[1] By contrast, the drafters knew how to impose obligations, and did so when it comes to governmental entities, by using the term "shall" as opposed to "should."[2] It is noteworthy that plenty of politicians and officials wear American Flag paraphernalia (such as lapel pins) notwithstanding the Flag Code's admonitions that "The flag should never be used as wearing apparel" and "No part of the flag should ever be used as a costume." 4 U.S.C. § 8(d), (j). It appears that the drafters of the Flag Code were well aware of the substantial danger that the Flag Code could conflict with the First Amendment, and for the most part they wisely kept the conflicts to a minimum.[3] To the extent the Bureau missed this opportunity many decades ago, when drafting 27 C.F.R. § 7.29(d), TTB should avoid moving further in the wrong direction.

In a leading case on these issues, the City of Clearwater, Florida sought to block a car dealer from displaying American flags for commercial purposes. Both the District Court and The Eleventh Circuit Court of Appeals dismissed the City's claim on the ground that the Flag Code is merely advisory and does not proscribe behavior. *Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993). The court underscored that "The operative provisions of the statute consistently use the term 'should,' and not 'shall,' when describing the proper manner for display of the flag." *Id.* at 1573. The court

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[1]For example, the Flag Code says they should stand at attention, they should remove headdress with right hand, they should remain silent, the flag should never be carried flat, the flag should never be used as drapery, the flag should never be used for advertising purposes, *etc.* 4 U.S.C. §§ 4-10. The Congressional Research Service, in a 2008 Report, has explained: "the Flag Code does not prescribe any penalties for non-compliance nor does it include enforcement provisions; rather the Code functions simply as a guide to be voluntarily followed by civilians and civilian groups." CRS Report, *The United States Flag: Federal Law Relating to Display and Associated Questions*, 1. The Flag Code is "merely declaratory and advisory." *Id.* at 9. The Report points out that while it may be in bad taste, offensive or otherwise unfortunate to act in a manner inconsistent with the Flag Code, it is not especially likely that any criminal or civil enforcement action could be within the bounds of the Constitution. *Id.* at 14.

[2]*See, e.g.*, 4 U.S.C. § 7(m) stating "By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory."

[3]There is no sign that the Flag and the Pledge are exclusively or even mainly reserved for the use of the military, veterans, the government, Congress or anyone else. There is no indication that one citizen ought to have a preferred right to show his reverence for this country and its symbols above and beyond that allowed to other citizens. By the same token, it's pretty clear that such speech elements are not reserved for non-commercial enterprises, or it would interfere with innumerable Hollywood movies and television shows over the years.

decided: "We must invalidate the Clearwater sign ordinance as facially unconstitutional. By exempting only government flags from the permit requirement, the City has unconstitutionally restricted expressive conduct based upon content." *Id.*

In a case of flag rules run amok, the City of Durham in 1998 threatened the American Legion with financial and criminal penalties based on its use of the American Flag (in a ceremony alongside the Veterans of Foreign Wars, the Marine Corps League, and the Military Order of the Purple Heart). *American Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601 (4th Cir. 2001). The veterans had the temerity to raise a flag larger than 60 square feet, at a time when the City allowed governmental flags no larger than 60 square feet. After the notice of violation, but before trial, the City had the good sense to amend the ordinance, to make it content-neutral. Nevertheless, the court said "Flags, especially flags of a political sort, enjoy an honored position in the First Amendment hierarchy." *Id.* at 605. The court explained that the Legion's attempt to "demonstrate intensity of patriotic feeling by flying a very large flag implicates First Amendment interests, at least to a sufficient degree to cause the City's ordinance to burden speech." *Id.* Noting that political flags go to the core of the First Amendment, the court said "The decisions of the Supreme Court and this Court indicate that the amount of burden on speech needed to trigger First Amendment scrutiny as a threshold matter is minimal." *Id.* Footnote 7 explains that flags are highly communicative and speech-laden, and footnote 9 says "the display of a flag is 'virtually pure speech.'" *Id.* at 607 and 609.

The US Supreme Court has frequently reviewed issues relating to the flag, US symbols, free speech, and beer labeling. In these cases, it would be difficult to find any support for TTB's position in this matter. In a 1989 decision about using the American flag as part of a political protest, the Supreme Court said "In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct related to it." *Texas v. Johnson*, 491 U.S. 397 (1989).[4] Further, in

[4]In other important cases relating to the flag, *Halter* is unlikely to affect the First Amendment protections that ought to be afforded to the label at issue, because it was decided well before the advent of modern commercial speech doctrine, and before the First Amendment applied to the states. *Halter v. Nebraska*, 205 U.S. 34 (1907). *Texas v. Johnson* explained: "Our decision in *Halter v. Nebraska* ... addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided 'nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment.' ... . More important, as we continually emphasized in *Halter* itself, that case involved purely commercial rather than political

striking down the government's abridgment of the speech at issue, the Court said "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries."[5]

Six years later, the Supreme Court invalidated part of ATF's beer labeling regulations because they improperly abridged speech. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). This leaves little room for doubt that 27 C.F.R. § 7.29(d) must fall by the wayside to the extent it conflicts with the First Amendment, as it so clearly does in this instance.

The label elements at issue implicate speech; these elements are either political speech or commercial speech or both, and in either case TTB must set aside the content-based denials to date and comply with the higher law as embodied in the First Amendment.[6] To the extent the label is political speech, the regulation cannot survive strict judicial scrutiny. Strict scrutiny would require TTB to articulate a compelling state interest, prove that the regulation serves that interest and is "necessary" to do so, and show that the regulation is narrowly tailored to serve that interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Rubin, supra*; and, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). TTB bears the burden of proof on each point and has no way to meet this burden. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). To the extent the label is commercial speech, the last 30 years of Supreme Court precedents demonstrate that the label would also be protected. The "party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Co.*, 463 U.S. 60, 71 (1983); *Central Hudson, supra*; *Rubin, supra*. Beyond that, the "substantial deference

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speech. ... *Texas v. Johnson*, *supra* at n.10.

[5]In discussing this case, the Congressional Research Service noted that the majority held that "There is no separate constitutional category for the American flag. The government may not prohibit expression of an idea merely because society finds the idea offensive, even when the flag is involved. Nor may a state limit the use of designated symbols to communicate only certain messages." CRS Report 95-709, *Flag Protection: A Brief History and Summary of Recent Supreme Court Decisions and Proposed Constitutional Amendments*, 5 (2009).

[6]Not incidentally, the speech on the Ol' Glory label may be further protected as religious speech, in view of the direct reference to God.

due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake." *Century Communications v. FCC*, 835 F.2d 292, 299 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). In a further sign that TTB cannot meet its burden, the *Central Hudson* test makes clear that there is little or no deference afforded an agency's determination that it has met this burden; "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

TTB seems to be pressing for the most restrictive means to suppress the speech at issue, when it is required by law to exercise its power in a narrowly-tailored, least-restrictive manner. The denial is breath-taking in its wide sweep; instructing the applicant that the label "shall not contain any statement which relates to the American flag." By this measure, TTB could block all manner of labels, not least of which would be the same label absent all references to the Pledge of Allegiance, Freedom, the Troops, and all imagery associated with the Flag. Confounding any predictability or absence of capriciousness, other recent TTB decisions are directly at odds with even the flawed principle asserted. TTB approved the Ol' Glory keg label with no fanfare earlier this year (see TTB ID 10005001000182).[7] So far, TTB has rejected the 16 ounce label, urged the applicant to "delete" the main aspects, and has given no weight to the

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[7]Also, in early 2009, TTB reviewed substantially the same label and raised no objection to the Pledge of Allegiance set forth on the label. The bottler and brand owner have substantially relied upon TTB's review and advice in this matter since approximately February 27, 2009. During that time, TTB has set forth no lawful reason for turning its position upside down. The same brand owner desires to set forth the speech at issue, on the label at issue, mainly to show his respect and reverence for this country and its institutions. Others may choose another manner by which to demonstrate their patriotism, but it is not for the government or any official thereof to decide the preferred way to do so (by prior restraint or otherwise). The same brand owner (Mr. Don Sessions) also wishes to share a substantial portion of the proceeds, attributable to sales of this product, with war veterans and their families and has a demonstrated track record of doing so in the past. The applicant has made many attempts to cooperate with TTB in this matter, and adjust the label to a point where it can be approved more readily. For example, several weeks ago, the applicant revised the label to add a large, clear disclaimer, to eliminate any realistic possibility that anyone may be misled about anything important. The additional speech says, on the front and center of the label in approximately 10 point bold, high contrast type, "NOT ENDORSED BY OR AFFILIATED WITH THE U.S. OR ANY OTHER GOVERNMENT." The applicant has submitted several variations. The disclaimer is no admission that the label does or could mislead; it is a good faith attempt to address TTB's purported concerns and goes along with the truism that the proper remedy for controversial speech is more speech, not suppression.

disclaimers offered by the applicant.

Beyond what TTB has already asserted, there is no legitimate argument that the label is misleading. The label clearly identifies the source as "Ol' Glory Brewing Co., Cold Spring, MN" and (above and beyond any requirement) says the beer is not endorsed by or affiliated with the U.S. or any other government. There is no evidence that any meaningful number of persons will assume this beer is made by the government.

TTB and its predecessor agency have seen fit to approve other labels with various of the speech elements as on the label at issue. ATF approved a beer label with "One Nation Under God With Liberty and Justice for All" and a second reference to the Pledge in 2002 (TTB ID 02225002000031). In all the years since then (despite 27 C.F.R. § 13.41 and TTB's position in the current matter) TTB has not seen fit to revoke the approval, and for good reason. TTB has likewise approved various other labels with the American Flag (*see, e.g.*, TTB ID 09205001000245 [approved wine label with American Flag and Confederate Flag]; TTB ID 08317001000072 [approved wine label with American Flag and Japanese Flag]; TTB ID 10046001000107 [approved wine label with soldiers, American Flag, famous battle scene]). If TTB sees fit to allow the American Flag and other flags on these approved labels, under similar or identical standards in Title 27, the Flag Code, and the Constitution – there is no basis to disallow such comparable elements here.

The regulation at issue, and TTB's position as to it, goes well past anything specifically covered in the labeling provisions of the Federal Alcohol Administration Act. 27 U.S.C. § 205(e). The regulation is further impaired not just by the Constitution but also by the FAA Act itself, where it specifies that rules such as those at issue here, need to be applied with great restraint, in view of the next to last paragraph of 27 U.S.C. 205(f). TTB has not shown that any states have a similar provision, with respect to labeling or advertising, that does not suffer from the same Constitutional defects as the other rules set forth so far.

Thus far, TTB has identified no harms that could be caused by approval of this label, and has presented no evidence to support its position. By contrast, the applicant has showed this label to many American war veterans. Of these, quite a few said they would not be interested in buying the product. None of them said the government's right

to ban speech on this label should take precedence over the applicant's First Amendment rights.[8]

It would be ironic and unfortunate for TTB to violate the most cherished and sacred of the country's pillars – the Constitution and respect for the law – in an unnecessary and ill-conceived effort to protect the symbols at issue. The flag and the Pledge are quite strong enough to survive association with a beer label, and the First Amendment is more than strong enough to make sure of that. TTB has an obligation to uphold the law and hence has an obligation to approve this label without further delay.

Very truly yours,

LEHRMAN BEVERAGE LAW, PLLC

Robert C. Lehrman
Attorney for Cold Spring Brewing Company
(BR-MN-REF-1)

[8]Of the American war veterans surveyed to date, the overwhelming majority were quite astounded that the government would seek to restrict a private party's right to recite the Pledge of Allegiance. The brand owner has shipped millions of cans of other products in the United States, with the Pledge on each can, with universally enthusiastic support of the Pledge and no known objection, according to counsel for the Ol'Glory brand. The company believes the Pledge is an integral part of the product at issue's name, identity, and marketing plan. It is not an afterthought or a gimmick. The company believes the Pledge should be encouraged and commended, rather than kept out of public view. The company also believes this label can help restore the citizenry's awareness of this important and too little understood aspect of our heritage.