

The Spirit Is Willing: A Proposal for American Single Malt Whiskey

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ABSTRACT

Over the past twenty-five years, small, independent American distilleries have carved out a new niche in the United States liquor market: craft single malt whiskey. Inspired by the success of single malt Scotch and other single malts, American craft distillers are now fighting for their own shelf behind the bar and in the liquor store aisle. In 2018, a cadre of these distillers petitioned the U.S. Treasury Department's Alcohol and Tobacco Tax and Trade Bureau to formally recognize a new category of whiskey in the Code of Federal Regulations: American Single Malt Whiskey. For purposes of consumer protection, the Treasury Department historically has regulated the production and sales of whiskey in America. Whiskey distillation and bottling is a long and complicated process for distillers who do not take shortcuts. This Note will consider the proposal proffered by the American Single Malt Whiskey Commission. It will then suggest that the proposal is doctrinally sound, beneficial from a policy standpoint, and comports with existing regulations and precedent. Finally, this Note will conclude by speculating as to the likely success of the American Single Malt Whiskey proposal.

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INTRODUCTION

Ulysses S. Grant liked his whiskey—maybe a bit too much. “Grant is a drunkard,” his rivals told Abraham Lincoln. “[H]e is not himself half the time; he can’t be relied upon” You could almost hear the satisfaction in their voices. But Lincoln was having none of it. “So Grant gets drunk, does he?” asked the President. “Yes, he does, and I can prove it,” was the reply. “Well, you needn’t waste your time getting proof[,]” Lincoln shot back. “[Y]ou just find out, to oblige me, what brand of whiskey Grant drinks, because I want to send a barrel of it to each one of my generals.”¹

Apparently, Grant liked Old Crow, a Kentucky Bourbon distilled by Scottish immigrant James Crow.² When one mentions American-made whiskey,³ usually bourbon (think of Maker’s Mark or Jim Beam) or Tennessee Whiskey (think of Jack Daniels) come to mind. Those brands are some of the big players in the American whiskey market. Since the early 1990s, however, the United States has experienced tremendous growth of artisanal or “craft” distilleries, independently owned operations producing limited annual bottlings.⁴ As of 2018, there were over 1800 craft

1. ALEXANDER K. MCCLURE, “ABE” LINCOLN’S YARNS AND STORIES 377 (1904).

2. *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 679 F.3d 410, 415 (6th Cir. 2012) (citing Julia Reed, *Bourbon’s Beauty*, NEWSWEEK, Dec. 21, 2008); BRIAN F. HAARA, *BOURBON JUSTICE: HOW WHISKEY LAW SHAPED AMERICA* 5 (2018).

3. In American English, both “whisky” (the Scottish and Canadian spelling) or “whiskey” (the American and Irish spelling) are acceptable. This Note will prefer “whiskey” in all but specific instances: brands like Maker’s Mark that expressly label their products as “whisky,” quotations, and specific references to products of countries that spell “whisky” without the “e,” e.g., Scotch Whisky. We ask the reader to kindly ignore the occasional absent “e.”

4. The American Craft Spirits Association defines a craft distillery as:

[a] distillery [that] values the importance of transparency in distilling, and remains forthcoming regarding their use of ingredients, their distilling location and process, bottling location and process, and aging process[; a] distillery that produces fewer than 750,000

distilleries in the United States—122 of them in Washington State alone.⁵ In order to pool knowledge and resources, craft distilleries have banded together into trade and lobbying associations such as the American Craft Spirits Association and the American Distilling Institute.⁶ One such association, the American Single Malt Whiskey Commission, is a cohort of some 160 independent distilleries producing craft single malt whiskey.⁷ The Commission is seeking to add the category of American Single Malt Whiskey to the types of whiskeys already recognized and classified in the Code of Federal Regulations (CFRs).⁸ This proposal is timely as the Alcohol and Tobacco Tax and Trade Bureau (TTB)—the agency that regulates U.S. alcohol production, advertising, and labeling—is currently in the process of conducting a massive overhaul of the section of the CFRs that regulates the production and labeling of distilled spirits.⁹ The CFRs currently recognize some forty-one different types of whiskey—domestic categories like bourbon and rye, and international categories such as Scotch Whisky, Irish Whiskey, and Canadian Whisky. This Note argues that American Single Malt Whiskey would be a favorable addition to those ranks.

Because some background and industry-specific vocabulary necessary to explore this topic, Part I of this Note will summarize how whiskey is made. Part II will briefly trace whiskey’s regulatory history leading up to the Federal Alcohol Administration Act of 1935. This history, in turn, will help the reader understand both the standards of identity (the current federal regulatory scheme used to categorize whiskey and other distilled spirits) and the TTB’s proposed changes to whiskey classification in the CFRs. Part III will consider the proposed category of

gallons annually; a] distillery that directly or indirectly holds an ownership interest of less than 50% of the DSP.

Craft, AM. CRAFT SPIRITS ASS’N, <https://americancraftspirits.org/about-acsa/craft/> [https://perma.cc/T34D-LABT]; *see also* LEW BRYSON, TASTING WHISKEY: AN INSIDER’S GUIDE TO THE UNIQUE PLEASURES OF THE WORLD’S FINEST SPIRITS 184 (2014).

5. AM. CRAFT SPIRITS DATA PROJECT, ANNUAL CRAFT SPIRITS ECONOMIC BRIEFING 10–12 (2018), <https://www.parkstreet.com/wp-content/uploads/2018-craft-spirits-data-project.pdf> [https://perma.cc/6P35-K2CH].

6. *See generally* AM. CRAFT SPIRITS ASS’N, <https://americancraftspirits.org/> [https://perma.cc/V8X9-6CUY]; AM. DISTILLING INST., <https://distilling.com> [https://perma.cc/Y72W-RZ5K].

7. *See* AM. SINGLE MALT WHISKEY COMM’N, <http://www.americansinglemaltwhiskey.org/> [https://perma.cc/VKQ4-AH43].

8. *See id.*

9. Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, 83 Fed. Reg. 60,562 (proposed Nov. 26, 2018) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19). This proposal is referred to in the distilling industry and in this Note as TTB Notice No. 176. *See Distilled Spirits - Notices of Proposed Rulemaking*, ALCOHOL & TOBACCO TAX & TRADE BUREAU (Nov. 26, 2019), <https://www.ttb.gov/distilled-spirits/notices-of-proposed-rulemaking> [https://perma.cc/S9QJ-EZDA] (referring to this proposed rule as “Notice No. 176”).

American Single Malt Whiskey as a new standard of identity and argue that such a proposal aligns well with two of the TTB's leading regulatory objectives—protection for consumers and efficiency for producers. In the conclusion, this Note will consider the likelihood that the TTB will adopt this proposal.

I. WHAT IS WHISKEY?

*“The water was not fit to drink.
To make it palatable, we had to add whisky. By diligent
effort, I learned to like it.”*

– Winston Churchill

After the fall of the Roman Empire, Irish monks became the guardians of the classical works of Greek and Latin writers.¹⁰ Behind those monastery walls, the monks not only spent time hand-copying old parchments but also pioneered the art of distilling (and presumably, drinking) what they called in Gaelic *uisce beatha*, a translation from the Latin *aqua vitae*—water of life.¹¹ The word “whiskey” is simply the anglicization of *uisce beatha*—it was pronounced “ush-ka-tha,” was phonetically corrupted to “ush-ki,” and from that, we got “whiskey.”¹²

All whiskeys start with cereal grains.¹³ In American whiskey, the most commonly used grains are corn, rye, wheat, and barley.¹⁴ While the selection and blending of grains determine the flavor and aroma of the finished product, almost all whiskeys use at least some barley in the mixture because it is easy to malt and rich in enzymes.¹⁵ Malting is the process by which the barley kernels are soaked in water and made to sprout, which in turn releases enzymes that help break down the grains' complex carbohydrates.¹⁶ The next step is to steep the grains in hot water, which releases their flavors and converts the starches into sugars; this becomes a hot, wet, mushy mixture called the “mash.”¹⁷ After the mash cools, yeast is added. The yeast feed on the sugars, fermenting the mash and creating alcohol and carbon dioxide as byproducts.¹⁸ If we just stopped

10. See generally THOMAS CAHILL, *HOW THE IRISH SAVED CIVILIZATION: THE UNTOLD STORY OF IRELAND'S HEROIC ROLE FROM THE FALL OF ROME TO THE RISE OF MEDIEVAL EUROPE* (1996).

11. BRYSON, *supra* note 4, at 15.

12. See *id.*

13. HAARA, *supra* note 2, at 10.

14. Derek H. Kiernan-Johnson, *The Potemkin Temptation or the Intoxicating Effect of Rhetoric and Narrativity on American Craft Whiskey*, 15 *LEGAL COMM'N & RHETORIC* 1, 11–12 (2018).

15. Interview with Jason Parker, Founder and Chief Distiller, Copperworks Distillery, in Seattle, Wash. (Sept. 21, 2019).

16. *Id.*

17. Kiernan-Johnson, *supra* note 14, at 12.

18. *Id.* at 13.

there, we would have beer—a fizzy, grain-flavored mix of alcohol and water.¹⁹ Whiskey, however, requires two more steps: distillation and aging in oak casks.

Distillation is the process of separating the alcohol from the water and mash by means of a still. First, the mixture is strained, yielding a water-alcohol blend called the “wash.”²⁰ Next, the wash is reheated in the still. Because alcohol has a lower boiling point than water (173.3°F), the alcohol turns to vapor first, rises up through the copper tubes of the still, and then condenses as it cools. The condensed alcohol distillate then drips down into a separate container.²¹ But distilleries do not want the first vapors of alcohol that rise up off the wash (they contain methanol and other volatile poisons, plus they have a harsh taste and smell), nor do they want the last of the vapors, which have a dull, bitter taste.²² The real art of distilling whiskey is the extraction of the “heart cut,” the vapors in the middle of the run, which condense into a liquid with a rich flavor, captivating smell, and smooth taste.²³ Master distillers can tell just by the odor when the heart cut starts to flow through the tubes of the still.²⁴ At that point, they flip a valve and divert the distillate into a separate container. The distillation process is repeated two or three times, each time making cuts and each time increasing the alcohol concentration.²⁵ The end result is a clear, high-alcohol spirit that is ready for the final step: aging.²⁶

United States law requires that most American whiskeys be aged in new oak containers that have been “charred.”²⁷ Using a torch or a fire, the barrel makers allow flames to lick or “toast” the inside of the barrels to leave an inner layer of charcoal that will interact with the distillate (otherwise, the whiskey would just taste like raw oak).²⁸ The charred oak barrels—called “casks” or “cooperage” in the whiskey business and “containers” in the CFRs—impart flavor, smoothness, and color to the

19. DAVE BROOM, *WHISKY: THE MANUAL* 49 (2014).

20. This process of straining the solids of the mash yielding the wash is Scottish practice, also employed by many American craft distilleries. However, all of the major American distilleries skip this step and instead distill directly on the grain. Telephone Interview with Chuck Cowdery, author, (Sept. 23, 2019).

21. *See* BRYSON, *supra* note 4, at 36.

22. *Id.*

23. *Id.*

24. Interview with Steve Hawley, Exec. Dir., Am. Single Malt Whiskey Comm’n, Seattle, Wash. (Sept. 21, 2019).

25. BRYSON, *supra* note 4, at 36.

26. *Id.*

27. 27 C.F.R. § 5.22(b)(1)(i) (2020). This long-standing American aging praxis was subsequently codified at 27 C.F.R. § 5.22. *Id.*

28. BRYSON, *supra* note 4, at 42.

alcohol.²⁹ The charcoal surface on the interior of the casks also acts as a natural filtering agent, removing sulfur and other harsh flavors from the whiskey as it ages.³⁰ During the aging or “maturing” process, distillers speak of a “conversation” between the oak and the whiskey; the casks “breathe” like lungs as air pressure and temperature change over the seasons and years.³¹ After the required maturation (usually several years, and in the case of some whiskeys, decades), the cask-strength whiskey is generally diluted with water down to not less than 80 proof (40% alcohol by volume, or ABV) and subsequently bottled.³²

Finally, it is important for our purposes to understand the distinction between blended whiskey and single malt whiskey. The “single” in “single malt whiskey” refers not to the type of grain used (“malt” means malted barley) but rather reflects the fact that the whiskey originates from a single distillery.³³ Jason Parker, founder and chief distiller at Copperworks Distillery in Seattle, Washington, explained it this way: “The opposite of ‘single malt whiskey’ is ‘blended malt whiskey.’ Take Johnnie Walker, for example—they don’t own stills. They just buy casks of aged malt whiskey from a bunch of individual distilleries and blend them together.”³⁴ Blending allows bottlers to achieve uniform taste and texture; that is why one bottle of Johnnie Walker Red Label tastes the same as every other bottle of Johnnie Walker Red Label.

Until the 1970s, all Scotch Whiskies were blends.³⁵ In that decade, however, people realized that individual Scottish distilleries were creating whiskies unique in taste and flavor.³⁶ Thus emerged on the scene single malts like Glenfiddich, The Glenlivet, and The Macallan, the three top-sellers on the single malt market today.³⁷ Since then, single malt whiskies have been a high-growth part of the whiskey market around the world.³⁸ In addition to Scotland, other countries such as Ireland, Japan, France, Canada, and the United States (certainly not an exhaustive list) produce some very fine single malts.

29. BROOM, *supra* note 19, at 53; HAARA, *supra* note 2, at 12. “Cooperage” is a generic term for the wooden barrels used to age wine and spirits. For more detailed information, see generally HENRY H. WORK, *WOOD, WHISKEY AND WINE: A HISTORY OF BARRELS* (2014).

30. BRYSON, *supra* note 4, at 42.

31. BROOM, *supra* note 19, at 53; Kiernan-Johnson, *supra* note 14, at 15.

32. *Id.* at 17.

33. Interview with Jason Parker, *supra* note 15.

34. *Id.*

35. *Id.*

36. See BRYSON, *supra* note 4, at 107.

37. Richard Woodard, *Top 10 Best-Selling Scotch Malt Whiskies*, SCOTCHWHISKY (Sept. 24, 2018), <https://scotchwhisky.com/magazine/features/20897/top-10-best-selling-scotch-malt-whiskies/> [<https://perma.cc/TF4J-UV92>].

38. BRYSON, *supra* note 4, at 107.

II. WHISKEY WATCHDOG:
THE TAX AND TRADE BUREAU AND THE STANDARDS OF IDENTITY

*“Too much of anything is bad, but too much good
whiskey is barely enough.”*

– *Mark Twain*

A. Whiskey Law, Past and Present

Since 1789, the United States Department of the Treasury has overseen the taxation of alcohol. It was only in the twentieth century, however, that the federal government became concerned with regulating how distilled spirits were made and marketed.³⁹ During the late 1800s, unscrupulous bottlers known as “rectifiers” cashed in on the popularity of whiskey by flooding the market with imitation blends.⁴⁰ The rectifiers would blend neutral spirits such as vodka with a variety of ingredients (prune juice, burnt sugar, crushed beetles, tea, plant extract, and artificial coloring, to name a few) to create whiskey knock-offs.⁴¹ Blenders and rectifiers had an advantage over those who distilled whiskey in the traditional way—they had no need to age their product for several years in casks, and they could falsely label their imitations as “bourbon,” “whiskey,” or even use the adjective “pure.”⁴²

Genuine distillers like Edmund Haynes Taylor Jr. were outraged and sought relief in the courts and in new legislation.⁴³ Taylor and fellow Kentuckian John G. Carlisle (then–U.S. Secretary of the Treasury) spearheaded the Bottled-in-Bond Act of 1897.⁴⁴ Essentially a consumer-protection law, the Act required disclosures on the label about both the distiller (as opposed to just its bottler) and how the spirit was made.⁴⁵ Furthermore, in order for a spirit to be labeled as “Bottled in Bond,” it had to originate in one distillery, be bottled without additives (also called “blending” in this context), be aged in a federally bonded warehouse, and bear a tax stamp.⁴⁶ “The obvious purpose of the measure [was] to allow the distilling of spirits under such circumstances and

39. Michael Mercurio, Note, *Safe Harbor on the Rocks: TTB Label Approval for Beer, Wine, and Spirits, and the Uncertain Status of the “Safe Harbor” Defense*, 7 NOTRE DAME J. INT’L & COMPAR. L. 107, 110 (2017).

40. BRYSON, *supra* note 4, at 94.

41. HAARA, *supra* note 2, at 4.

42. *Id.* at 90–91.

43. *Id.* at 4; *see, e.g.*, E.H. Taylor, Jr. & Sons Co. v. Taylor, 85 S.W. 1085, 1086 (Ky. 1905).

44. HAARA, *supra* note 2, at 91.

45. *See* BRYSON, *supra* note 4, at 140.

46. *Id.*

supervision as [to] give assurance to all purchasers of the purity of the article purchased”⁴⁷ Two lacunae in the legislation, however, eventually became apparent: (1) the Act made no provision for authentic whiskey blenders, and (2) it lacked the teeth necessary to stop the rectifiers from labeling their swill as “whiskey” or “bourbon.”⁴⁸

The Food and Drugs Act of 1906 attempted to correct these defects by imposing the term “imitation whiskey” on the rectifiers’ products—a term the rectifiers never accepted.⁴⁹ Essentially another consumer protection law, the Act mandated accurate labeling of *all* food and drink, including the labeling of distilled spirits.⁵⁰ Two years later, in *United States v. Fifty Barrels of Whisky*, the Federal District Court of Maryland relied on that law in an *in rem* libel action brought by the government against a New Orleans distillery.⁵¹ In that case, fifty barrels of molasses rum were seized in Baltimore Harbor because they were purposefully mislabeled “Bourbon Whisky.”⁵² More than fifty expert witnesses—mostly bourbon and rye distillers—testified at trial that only alcohol distilled from cereal grains like corn, barley, or rye could be properly called “whiskey” (as opposed to rum, which is distilled from fermented sugar-cane juice or molasses).⁵³ Though the court ruled against the distillery’s misrepresentation, the battle between the distillers and the rectifiers continued unabated. It became so contentious, in fact, that President William Howard Taft personally intervened in 1909 when he instituted strict definitions for “straight” and “blended” whiskies.⁵⁴ This measure sought to “further protect the public and to provide assurances that the public could know exactly what they were buying and drinking.”⁵⁵ Taft said that rectifiers could still use the word “whiskey,” but had to label their products as “*blended* whiskey;” whereas, non-rectified distillers

47. W.A. Gaines & Co. v. Turner-Looker Co., 204 F. 553, 557 (6th Cir. 1913) (quoting Act March 3, 1897, c. 379, 29 Stat. 626 (U.S. Comp. St. 1901, p. 2150) committee report submitted to the House of Representatives).

48. BRYSON, *supra* note 4, at 95.

49. *Id.*; Telephone interview with Chuck Cowdery, *supra* note 24.

50. Mark W. Podvia, *Bourbon and the Law: A Brief Overview*, 21 LEGAL HIST. & RARE BOOKS, Summer 2015, at 1, 9.

51. *United States v. Fifty Barrels of Whisky*, 165 F. 966, 970 (D. Md. 1908).

52. *Id.* at 967.

53. *Id.* at 968. As Judge Thomas J. Morris stated in the jury instructions:

The jury are instructed that if from the evidence they shall find that the word “whisky,” as understood by scientific men, the liquor trade, and by the public generally, is confined to a distillate of grain, and shall further find that the contents of the barrels libeled in this case are a distillate of molasses, and that the said barrels were branded “Bourbon Whisky,” then the said barrels were misbranded, and their verdict must be for the libellant [sic].

Id. at 971.

54. HAARA, *supra* note 2, at 5.

55. *Id.*

could call their product “straight whiskey.”⁵⁶ The laws and Taft’s regulations constituted the first-ever federal consumer-protection measures.⁵⁷ In his book, *Bourbon Justice: How Whiskey Law Shaped America*, Brian F. Haara noted that “[u]ltimately, consumers were protected from bad whiskey before they were protected from tainted food, dangerous products, and misleading advertising.”⁵⁸

Though the Food and Drugs Act of 1906 has since been replaced and the rectifiers controversy has long been resolved, the federal government’s insistence upon accurate labeling of whiskey and other distilled spirits has vigorously persevered in American statutory law and accompanying regulations.⁵⁹ In this regard, the chief statutory law in force today is the Federal Alcohol Administration Act (FAA Act) of 1935, passed into law after the repeal of Prohibition.⁶⁰

B. The Standards of Identity

The FAA Act sought to prohibit consumer deception and to provide “[a]dequate information as to the identity, quality, and alcohol content of products.”⁶¹ In other words, Congress wanted to ensure that the liquor consumer “[got] what he thought he was getting” and “[was] told what was in the bottle.”⁶² To this end, the FAA Act authorized the Department of the Treasury to issue regulations governing the labels and identification of distilled spirits.⁶³ The Alcohol and Tobacco Tax and Trade Bureau (TTB), a division of the Department of the Treasury, is currently tasked with regulating and enforcing what are known as the “standards of identity” for distilled spirits.⁶⁴ These standards (set forth in Title 27, Part 5 of the CFRs) outline the criteria for producing each type of distilled spirit. The standards of identity reveal “why American whiskey is made

56. *Id.* (emphasis added); see also *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 679 F.3d 410, 416 (6th Cir. 2012).

57. HAARA, *supra* note 2, at 85.

58. *Id.*

59. The Federal Alcohol Administration Act, 27 U.S.C. § 205(e) (1935); 27 C.F.R. § 5.22 (2020).

60. 27 U.S.C. §§ 205(e)–(f) (1935) (updated generally by the Alcoholic Beverage Labeling Act of 1988 (ABLA), 27 U.S.C. § 213 et seq. (2020)).

61. Modernization of the Labeling and Advertising, 83 Fed. Reg. 60,562, 60,563 (proposed Nov. 26, 2018) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19) (italics omitted).

62. *Id.* at 60,562 (quoting *Hearings on H.R. 8539 before the Comm. on Ways and Means*, 74th Cong., 1st Sess. 10 (1935)).

63. Standards of Identity for Pisco and Cognac, 77 Fed. Reg. 18,146 (proposed Mar. 27, 2012) (to be codified at 27 C.F.R. pt. 5); see also Mercurio, *supra* note 39, at 111 (“The three central purposes of the FAA Act—which are, therefore, the central purposes of the TTB—are to ‘ensure the integrity of the industry’ by issuing, suspending, and revoking permits; to ‘protect consumers’ by requiring producers to have a Certificate of Label Approval (COLA) and by ensuring that the information on the labels is accurate; and to ‘preclude unfair trade practice.’”).

64. Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,562.

the way it is, and tastes the way it does, and even something about why Scotch, tequila, and rum taste the way they do.”⁶⁵ The standards do not tell producers what to make; rather, the standards govern labeling.⁶⁶ They say, in effect, that if a producer wants to label a spirit “bourbon whisky” or “malt whisky,” certain minimum criteria must be met.⁶⁷ For example, if a producer wants to label a bottle as “malt whiskey,” it must be “[w]hiskey produced at not exceeding 80% alcohol by volume (160 proof) from a fermented mash of not less than 51 percent malted barley and stored at not more than 62.5% alcohol by volume (125 proof) in charred new oak containers.”⁶⁸ As the CFRs state, “[a] product shall not bear a designation which indicates it contains a class or type of distilled spirits unless the distilled spirits therein conform to such class and type.”⁶⁹ Distillers must submit label designs to the TTB through what is known as the Certificate of Label Approval (COLA) Process.⁷⁰

The standards provide the framework for the TTB to categorize distilled spirits by “class” (e.g., whiskey, brandy, gin, rum, etc.) and, within each class, by “type” (the “class” of whiskey includes bourbon whiskey, rye whiskey, wheat whiskey, malt whiskey, corn whisky, Canadian Whisky, Irish Whiskey, and Scotch Whisky, to name some of the types).⁷¹ As stated above, the TTB currently recognizes forty-one different types of whiskey, each distinct in its ingredients, additives, methods of aging, and manner of blending or bottling.⁷² Table 1 below presents an excerpt from the TTB’s *Beverage Alcohol Manual*, a resource used by producers to help them design labels in conformance with the standards of identity:

65. BRYSON, *supra* note 4, at 137.

66. Telephone interview with Chuck Cowdery, *supra* note 24.

67. See 27 C.F.R. § 5.22(b) (2020). “The class and type of distilled spirits shall be stated [on the label] in conformity with § 5.22 if defined therein.” 27 C.F.R. § 5.35(a) (2020).

68. ALCOHOL & TOBACCO TAX & TRADE BUREAU, DEP’T OF TREASURY, THE BEVERAGE ALCOHOL MANUAL (BAM): A PRACTICAL GUIDE 4-2 (2007) [hereinafter THE BEVERAGE ALCOHOL MANUAL]; see also 27 C.F.R. § 5.22 (2020).

69. 27 C.F.R. § 5.35(b) (2020).

70. 27 C.F.R. § 13.21 (2020).

71. Amendment to the Standards of Identity for Distilled Spirits, 78 Fed. Reg. 12,591 (proposed Feb. 25, 2013) (to be codified at 27 C.F.R. pt. 5).

72. THE BEVERAGE ALCOHOL MANUAL, *supra* note 68, at 4-2-4-5.

| Table 1: Standards of Identity for Whiskey Excerpt from <i>The Beverage Alcohol Manual</i> ⁷³ at 4-2, 4-5 | | | |
|---|--|----------------|---|
| Class | General Class Definition | Type | General Type Definition |
| WHISKY | Spirits distilled from a fermented mash of grain at less than 95% alcohol by volume (190 proof) having the taste, aroma and characteristics generally attributed to whisky and bottled at not less than 40% alcohol by volume (80 proof) | BOURBON WHISKY | Whisky produced in the U.S. at not exceeding 80% alcohol by volume (160 proof) from a fermented mash of not less than 51 percent corn and stored at not more than 62.5% alcohol by volume (125 proof) in charred new oak containers |
| | | RYE WHISKY | Whisky produced at not exceeding 80% alcohol by volume (160 proof) from a fermented mash of not less than 51 percent rye and stored at not more than 62.5% alcohol by volume (125 proof) in charred new oak containers |
| | | WHEAT WHISKY | Whisky produced at not exceeding 80% alcohol by volume (160 proof) from a fermented mash of not less than 51 percent wheat and stored at not more than 62.5% alcohol by volume (125 proof) in charred new oak containers |

73. *Id.* *The Beverage Alcohol Manual* is based on statutory law (Federal Alcohol Administration Act (FAA Act), 27 U.S.C. § 201 et seq. (2020); Alcoholic Beverage Labeling Act of 1988 (ABLA), 27 U.S.C. § 213 et seq. (2020); Internal Revenue Code (I.R.C.) 26 U.S.C. ch. 51 (2020)) and implementing regulations (27 C.F.R. § 5 (2020), Labeling and Advertising of Distilled Spirits, 16, 19, 250, 251, 252).

| | | | |
|--|--|-----------------|--|
| | | MALT WHISKY | Whisky produced at not exceeding 80% alcohol by volume (160 proof) from a fermented mash of not less than 51 percent malted barley and stored at not more than 62.5% alcohol by volume (125 proof) in charred new oak containers |
| | | SCOTCH WHISKY | Unblended whisky manufactured in Scotland in compliance with the laws of the United Kingdom |
| | | CANADIAN WHISKY | Unblended whisky manufactured in Canada in compliance with its laws |

C. TTB Notice No. 176

On November 26, 2018, the TTB proposed extensive changes to the labeling and advertising regulations for wine, distilled spirits, and malt beverages in the hopes of achieving greater simplicity and clarity.⁷⁴ Known in the industry as “TTB Notice No. 176,” the proposal is indeed massive, spanning 132 pages of the Federal Register, with three columns per page, in nine-point font. “The TTB proposes to reorganize and recodify these regulations in order to simplify and clarify regulatory standards, incorporate guidance documents and current policy into the regulations, and reduce the regulatory burden on industry members where possible.”⁷⁵ Part of this proposal involves modifying the standards of identity for whiskey as currently delineated in the CFRs.⁷⁶ The suggested modifications germane to our topic can be summarized as follows.

⁷⁴ Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, 83 Fed. Reg. 60,562 (proposed Nov. 26, 2018) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19).

⁷⁵ *Id.*

⁷⁶ 27 C.F.R. § 5.22(b) (2020).

First, whiskeys that meet the standard for a certain type must be labeled as that type. Under the current regulations, it is unclear whether the type of whiskey must be stated on the label; under the proposed rules, if it qualifies as malt whiskey, it has to be labeled as such.⁷⁷ The one exception in the proposal is the so-called “Jack Daniels Rule”—Tennessee Whiskey can be labeled as such even if it meets the standards for one of the other type designations.⁷⁸ Second, the place, state, or region where the whiskey is distilled or aged may appear on the label if it is true (“e.g., [a bottle labeled as] ‘New York Bourbon Whisky’ must be distilled and aged in the State of New York”).⁷⁹ Third, “whisky” or “whiskey” are both acceptable spellings for labels.⁸⁰ Fourth, the TTB proposes that a new type of whiskey be added to the class called “White Whisky or Unaged Whisky.”⁸¹ Fifth, if a distiller wants to say that whiskey is “aged,” it must be aged in new oak containers or with oak (usually oak chips).⁸² Finally, a new table is proposed for the CFRs that specifically mentions each domestic type of whiskey, the source grain(s) of the mash, the length of aging required, the proof at which it must be stored, and whether other additives can be blended in.⁸³ Table 2 presents an illustrative excerpt of the proposed chart.⁸⁴ A distilled spirit may use the designation listed in the first column (“type”) when it complies with the production standards in the subsequent columns:

77. Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,596.

78. *Id.* at 60,596; Ashley Brandt, *Are You Ready for the TTB’s New Alcoholic Beverage Labeling and Advertising Regs that Would Change Distilled Spirits Standards of Identity Labeling Practices? (New TTB Advertising and Labeling Rules Part 10)*, LIBATION L. BLOG (Mar. 7, 2019), <https://libationlawblog.com/2019/03/07/are-you-ready-for-the-ttbs-new-alcoholic-beverage-labeling-and-advertising-regs-that-would-change-distilled-spirits-standards-of-identity-labeling-practices-new-ttb-advertising-and-labeling/> [https://perma.cc/CUK4-WUVV]. Tennessee Whiskey goes through a specific process of charcoal filtering that sets it apart from other bourbons and whiskeys; it has gained a certain amount of protection under American law, particularly under international accord. *See, e.g.*, United States-Mexico-Canada Agreement art. 3.C.2, Nov. 30, 2018, 134 Stat. 11, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/03_Agriculture.pdf [https://perma.cc/F6ZR-EV2B].

79. Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,662.

80. *Id.* at 60,661.

81. *Id.* at 60,597; see *infra* Conclusion for discussion of White Whiskey.

82. Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,593.

83. *Id.* at 60,596–97.

84. *See id.* at 60,662. This is not an exact reproduction of the proposed table in Notice No. 176; rather, it is an excerpt of what the table for Malt Whiskey would look like.

| Table 2: Illustrative excerpt of proposed new table to be included in CFRs ⁸⁵ | | | | | |
|--|--|--------------------|--|---------------------------|---|
| Type | Source | Distillation proof | Storage | Neutral spirits permitted | Allowable coloring, flavoring, blending materials permitted |
| Malt Whisky | Fermented mash of not less than 51%, Malted Barley | 160° or less | Charred new oak barrels at 125 proof or less | No | Yes |

Upon proposing these changes in late 2018, the TTB solicited extensive public comment and input. The comment period ended on June 26, 2019.⁸⁶ Many craft distillers saw the TTB's proposed changes and solicitation of public input as the opportunity to proffer the category of American Single Malt Whiskey. Led by the American Single Malt Whiskey Commission, they have vigorously petitioned the TTB to incorporate this new type into the class of whiskey. The Bureau is currently in the process of sorting through these public comments but has yet to issue a complete ruling on every proposal under consideration. The remainder of this Note will consider the American Single Malt Whiskey Commission's proposal and why the TTB ought to receive it favorably.

85. Modernization of the Labeling and Advertising Regulations, 83 Fed. Reg. at 60,662.

86. Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages; Comment Period Extension, 84 Fed. Reg. 9990 (proposed Mar. 19, 2019) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19). TTB actually extended the comment period by ninety days to accommodate those who wanted to submit feedback.

III. WHISKEY, NEAT: AMERICAN SINGLE MALT WHISKEY

*“Happiness is having a rare steak, a bottle of whisky,
and a dog to eat the rare steak.”*

– Johnny Carson

A. Background

In 1993, Clear Creek Distillery in Portland, Oregon, was the first American craft distillery to make its own single malt whiskey.⁸⁷ Much has changed since then, most noticeably, the explosion of artisanal distilleries producing new and varied craft spirits.⁸⁸ Christian Krogstad, founder and master distiller of Westward Whiskey, also in Portland, notes that American-made single malts have gone from obscurity to ubiquity in the last ten years: “We’ve got 100 distilleries now making single malts, and in 10 years it’s going to be 500”⁸⁹ And a 2017 article in *Huffpost* noted the following: “As a category, American single malt has definitively arrived. It’s ready for official recognition that will allow the category to fully mature and flourish—and whiskey lovers all over the world will be all the better for that.”⁹⁰

Enter the American Single Malt Whiskey Commission, a consortium of nearly 160 U.S. distilleries, each producing its own version of single malt whiskey.⁹¹ Steve Hawley is the Executive Director of the Commission and one of the founders of Westland Distillery in Seattle, Washington. He notes the widespread popularity of single malts, which admittedly are most closely associated with Scotch Whisky but have more recently branched out to other countries: “Single malt as a whiskey is something that is globally recognized. There are regions all over the world, certainly many outside of Scotland, that are making single malt whiskey.”⁹² Hawley underscores that this is not about competing with Scotch or converting people from foreign single malts to domestic ones:

87. Kirk Miller, *It’s Time to Embrace American Single Malt, the Spirits World’s Newest Category*, INSIDE HOOK (July 3, 2019), <https://www.insidehook.com/article/booze/american-single-malt-whiskey> [https://perma.cc/46MF-N6XU].

88. CRAFT SPIRITS DATA PROJECT, *supra* note 5 (stating that there are more than 1800 craft distilleries in the U.S.).

89. Wayne Curtis, *The Emerging Styles of American Single Malt*, SEVENFIFTY DAILY (May 23, 2019), <https://daily.sevenfifty.com/the-emerging-styles-of-american-single-malt/> [https://perma.cc/49JZ-B4QH].

90. Denver Nicks, *Stranahan’s Red Rocks Release Party Was One Giant Leap for American Single Malt Whiskey*, HUFFPOST (Dec. 19, 2017), https://www.huffpost.com/entry/stranahans-red-rocks-release-party-was-one-giant-leap_b_5a3973cbe4b0d86c803c6cc2 [https://perma.cc/ZH2B-GSNX].

91. AM. SINGLE MALT WHISKEY COMM’N, *supra* note 7.

92. Interview with Steve Hawley, *supra* note 24.

“The point isn’t to make a replica of Scotch Whisky in Seattle. [Rather,] we’re trying to express our own sense of place through whiskey. America now has a great opportunity to expand on the notions of what single malt can be and explore new possibilities.”⁹³

Besides its member distilleries, the American Single Malt Whiskey Commission’s efforts are supported by other trade organizations. The American Craft Spirits Association (ACSA) also favors the establishment of this new category. In a letter to the TTB, the ACSA voiced approval for the proposed addition to the standards of identity for distilled spirits: “ACSA supports the inclusion of a new type for ‘American Single Malt Whiskey’, subject to the standards recommended by the American Single Malt Whiskey Commission”⁹⁴ Likewise, the American Distilling Institute, “the oldest and largest community of small-batch, independently owned distilleries[,]” supports the American Single Malt Whiskey Commission’s proposal to the TTB.⁹⁵ Regional trade organizations have also backed the proposal. For example, the Virginia Distillers’ Association, representing thirty-two member distilleries in that state, also “firmly and formally support[s] the petition.”⁹⁶ In addition, many other individuals and distillers have posted favorable comments on the official government website collecting feedback on TTB’s Notice No. 176.⁹⁷ In sum, American Single Malt Whiskey is an idea whose time has come.

B. A New Standard of Identity

What exactly is the standard of identity proposed for American Single Malt Whiskey? According to the American Single Malt Whiskey Commission, there are six components:

- 1) Made from 100% malted barley

93. *Id.*

94. Margie Lehrman, CEO, Am. Craft Spirits Ass’n, Comment Letter on the Proposed Rule for the Modernization of the Labeling and Advertising Regulations for Wine, Spirits, and Malt Beverages (June 26, 2019), <https://americancraftspirits.org/wp-content/uploads/2017/02/ACSA-Comments-TTB-Rulemaking-FINAL-2.pdf> [<https://perma.cc/9RQP-GW82>].

95. Erik Owens, Am. Distilling Inst., Comment Letter on the Proposed Rule for the Modernization of the Labeling and Advertising Regulations for Wine, Spirits, and Malt Beverages (June 25, 2019), <https://distilling.com/wp-content/uploads/2019/06/American-Distilling-Institute-Comment-on-Notice-176.pdf> [<https://perma.cc/A8E2-YHTX>].

96. Amy Ciarametaro, Exec. Dir., Va. Distillers’ Ass’n, Comment Letter on Proposed Rule for the Modernization of the Labeling and Advertising Regulations for Wine, Spirits, and Malt Beverages (June 21, 2019), <https://www.regulations.gov/document?D=TTB-2018-0007-0694> [<https://perma.cc/6ZNY-KYAW>].

97. Comments on Proposed Rule, Modernization of the Labeling and Advertising Regulations for Wine, Spirits, and Malt Beverages, <https://www.regulations.gov/document?D=TTB-2018-0007-0001> [<https://perma.cc/JF5P-YQBX>].

- 2) Distilled entirely at one distillery
- 3) Mashed, distilled, and matured in the United States of America
- 4) Matured in oak casks of a capacity not exceeding 700 liters
- 5) Distilled to no more than 160 Proof (80% alcohol by volume)
- 6) Bottled at 80 (U.S.) Proof or more (40% alcohol by volume)⁹⁸

Like the existing standards of identity in the CFRs, this proposed definition is neither arbitrary nor subjective. In fact, most of the existing standards of identity are simply reflections of what industry norms already were prior to the standards.⁹⁹ For example, long before regulations in the CFRs—or even the Federal Alcohol Administration Act of 1935, for that matter—bourbon makers were already making their mash out of at least 51% corn and were aging their product in new American oak casks. Therefore, the Federal Alcohol Administration and the Bureau of Alcohol, Tobacco, and Firearms (the TTB’s predecessors, respectively) simply codified in the CFRs what was already industry practice for bourbon.¹⁰⁰ Similarly, the proposed definition of American Single Malt Whiskey put forth by the Commission is mostly based on current industry standards. As Jason Parker of Seattle’s Copperworks Distillery notes:

We are picking the standards from the industry that we want and that make sense. We don’t want to change what the word “whiskey” means. A lot of those rules or parameters already exist in Scotland or America. In the CFRs, there is a category of whiskey and then there are types. We want to add a new type. The world is already familiar with the concept of single malt whiskey [such as those produced in] Scotland, Ireland, [or] Japan . . . We want to be compared to the world standard.¹⁰¹

The proposed elements try to adhere to worldwide standards for single malts while preserving creative freedom for American distillers. “While our proposed Standard of Identity . . . stays true to the definitions established in Scotland and around the world for single malt whiskey, we have purposefully omitted some restrictions that would unnecessarily inhibit innovation,” said Parker.¹⁰² He added that such a new category would show support for domestic craft distilleries and would signal that American Single Malt Whiskey is as unique as bourbon and equally

98. AM. SINGLE MALT WHISKEY COMM’N, *supra* note 7.

99. Interview with Jason Parker, *supra* note 15.

100. Telephone interview with Chuck Cowdery, *supra* note 24.

101. Interview with Jason Parker, *supra* note 15.

102. *Id.*

deserving of its own standard of identity.¹⁰³ Let us briefly consider the rationale behind each component of the American Single Malt Whiskey Commission's proposal.

Made from 100% malted barley. According to Parker, this requirement simply boils down to an industry standard. Single malt whiskey is “globally and historically recognized to be made from one hundred percent malted barley.”¹⁰⁴ This is not to say that whiskey cannot be made from other grains, but if it is going to be single malt whiskey, it will be made exclusively from barley.¹⁰⁵

Distilled entirely at one distillery. As in Scotland, what makes a whiskey a “single” malt whiskey is the fact that it originates from one single distillery. As Parker noted, “[a] more accurate name for American Single Malt Whiskey would be ‘American Single Distillery Malted Barley Whiskey.’ That’s what it really means.”¹⁰⁶

Mashed, distilled and matured in the United States of America. The rationale behind this component of the Commission's proposal is self-explanatory. American Single Malt Whiskey must be made entirely in America.

Matured in oak casks of a capacity not exceeding 700 liters. This requirement is a break with the existing standards of identity: bourbon, rye, and most other types of American whiskey (except corn whiskey) are required to be aged in new cooperage.¹⁰⁷ In Scotland, Ireland, and Canada, however, most whiskeys are aged in used casks, often former bourbon or sherry casks.¹⁰⁸ The American Single Malt Whiskey Commission wanted more flexibility on this point than American rules currently offer.¹⁰⁹ “We don’t care about used or new; we don’t care about what type of heat

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* The American Single Malt Whiskey Commission's proposal breaks with one Scottish tradition. In order to be called “single malt” in Scotland, the whisky has to be brewed, fermented, and distilled at one location. Here in America, many small distilleries brew the mash and ferment it at one location (usually a nearby brewery, as the equipment and process for making whiskey and beer are virtually the same at that stage) and then distill and age it at another. The Commission wanted to preserve this freedom to outsource the brewing by only requiring distilling at one site.

107. 27 C.F.R. § 5.22(b) (2020).

108. BRYSON, *supra* note 4, at 46.

109. See 27 C.F.R. § 5.22(b) (2020). Dave Broom, author of *Whisky: The Manual*, offers insight into why distillers might prefer used cooperage:

Because the spirit pulls flavour from the wood, the first time a cask is filled there will be more to be absorbed. With each subsequent fill there will be less flavour in the oak. As long as this is monitored . . . the distiller can create subtly different variations on the original character. A whisky aged for 10 years in a fresh cask will taste different to the same whisky aged in a reused cask.

BROOM, *supra* note 19, at 54.

treatment [the cask] has (toasted or charred),” said Parker.¹¹⁰ However, he noted, the 700-liter limit is a global standard.¹¹¹

Distilled to no more than 160 Proof (80 percent alcohol by volume). This precept reflects the American definition of whiskey: whiskey must come off the still at 160 proof or lower.¹¹² According to Hawley, this requirement helps maintain the flavor of the barley.¹¹³ If it comes off the still at too high an alcohol content, the malted barley loses its flavor and becomes tasteless, like vodka.¹¹⁴

Bottled at 80 (U.S.) Proof or more (40% alcohol by volume). This specification is also an American regulation. All base spirits (vodka, gin, whiskey, etc.) must be bottled at 80 proof or higher.

In judging the feasibility of the American Single Malt Whiskey Commission’s proposal, the TTB will likely ask two key questions. First, why should it establish American Single Malt Whiskey as a new category of whiskey in the CFRs? Second, what benefits might accrue from such a measure that align with the federal government’s stated policy goals for regulating distilled spirits? The following section attempts to answer those questions, arguing that creating the American Single Malt Whiskey category would foster not only greater protection for consumers but also more efficacious regulatory compliance and marketing for producers.

C. Policy Arguments for American Single Malt Whiskey

The Alcohol and Tobacco Tax and Trade Bureau’s ultimate *raison d’être* is to collect taxes, as its name indicates.¹¹⁵ However, harkening all the way back to the rectifiers controversy, the TTB also plays a regulatory role. In this capacity, its regulatory arm seeks to protect consumers by requiring producers to comply with labeling and production standards. Nevertheless, the TTB is not antithetical to the industry it regulates.¹¹⁶ Indeed, the proposed regulatory changes in Notice No. 176 are primarily aimed at simplifying and streamlining regulations to reduce the burden on

110. Interview with Jason Parker, *supra* note 15.

111. *Id.* There is good reason for the 700-liter limit. Much of what gives whiskey its distinctive smell, flavor, and bouquet is the interaction between the distillate and the charred wood over the course of years. A cask larger than 700 liters holds too much liquid and does not allow enough contact between the whiskey and the wood. For this reason, Japan, Scotland, and Ireland have limited their single malt cask size to 700 liters. *Id.*

112. BRYSON, *supra* note 4, at 37.

113. Interview with Steve Hawley, *supra* note 24.

114. *Id.*

115. Kiernan-Johnson, *supra* note 14, at 34.

116. Telephone interview with Chuck Cowdery, *supra* note 24; Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, 83 Fed. Reg. 60,562 (proposed Nov. 26, 2018) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19).

producers.¹¹⁷ This section suggests four policy reasons why the TTB should create this new standard of identity: (1) it would help and educate the consumer to make informed choices; (2) it would help prevent consumer deception; (3) it would clarify label design and help producers comply with the label approval process; and (4) it would augment brand recognition, which helps producers market their products. The first two policy goals are chiefly aimed at consumer protection, while the third and fourth seek to assist the industry's producers. Even prior to Notice No. 176, the TTB and its predecessors have invoked all four policy justifications as reasons to add to or modify the standards of identity for distilled spirits.

1. Educating the Consumer to Make Informed Choices

The FAA Act empowered the TTB to regulate spirits in order to “provide the consumer with adequate information as to the identity and the quality of the product, the alcohol content thereof, the net contents of the package, and the manufacturer or bottler or importer of the product.”¹¹⁸ Informing consumers will principally be achieved by providing them with a clear definition of this proposed whiskey type. This has been a chief concern of the federal government since the Bottled-in-Bond Act of 1897.¹¹⁹ This policy goal usually carries considerable weight when changes to the standards are contemplated. For example, in 1936, producers of cordials petitioned the Federal Alcohol Administration to create a standard of identity for liquor infused with fruit flavors.¹²⁰ The debate at the time centered around whether these flavor-infused spirits had to be labeled as “cordials” (there was a reasonable concern of confusion as a cordial is basically liquor that has been flavored and sweetened). After some consideration, the Administration approved the labeling of the bottles as “flavored” (e.g., “orange-flavored brandy,” “apricot-flavored gin,” “lemon-flavored rum,” etc.) without requiring that the word “cordial” be added to the label. The Administration’s rationale was that such a specific label was clear enough to obviate any customer confusion.¹²¹ At the time, no separate standard of identity for flavored liquors was thought necessary, and one was not written into the CFRs until 1969.¹²² In that year, a new standard of identity for flavored spirits—one

117. 83 Fed. Reg. at 60,562.

118. *Id.* at 60,563.

119. See HAARA, *supra* note 2, at 4; see also *W.A. Gaines & Co. v. Turner-Looker Co.*, 204 F. 553, 557 (6th Cir. 1913).

120. Standards of Identity for Distilled Spirits (CRD59), 57 Fed. Reg. 29,017 (proposed June 30, 1992) (to be codified at 27 C.F.R. pt. 5).

121. *Id.*

122. *Id.* at 29,018.

distinct from cordials—was finally codified in the CFRs.¹²³ The Administration did require that any product designated as “flavored” must display the ABV content on the label and must be bottled at 70 proof or more.¹²⁴

Again, helping the consumer make an informed decision was the key motivation behind this requirement:

Adoption of these proposed changes would make it easier for the consumer to locate and better understand key items describing the contents of a container.

The quantity in a container is of great importance to the buyer and in the case of distilled spirits, this includes both net contents and alcoholic content. Therefore, the alcoholic content of the product and the net contents . . . should be shown on the brand (principal) display label in every instance.¹²⁵

In a contemporaneous ruling, the Alcohol, Tobacco and Firearms Bureau (the predecessor of the TTB) considered whether age statements on bottles of blended whiskey needed to be disclosed.¹²⁶ The ATF decided that it would be “in the interest of the consumer” to clearly state the age of the youngest whiskey in the blend.¹²⁷ Likewise, improving consumer understanding of what is in the bottle is a motivating factor for this latest round of proposed modifications to the CFRs.¹²⁸

The American Single Malt Whiskey Commission’s craft distillers share this concern. They seek to “equip consumers with the necessary information to make informed decisions so they can have confidence in the product they are choosing to buy.”¹²⁹ Their own standard of identity would further this goal. “We want simplification and clarity,” said Hawley. “We want consumers to know what they are buying.”¹³⁰

123. 27 C.F.R. § 5.22(b) (2020); Intoxicating Liquors: Labeling and Advertising of Distilled Spirits, 33 Fed. Reg. 14,439, 14,460 (Sept. 26, 1968) (to be codified at 27 C.F.R. pt. 5).

124. Standards of Identity, 27 C.F.R. § 5.22(i) (2020).

125. 33 Fed. Reg. at 14,460.

126. 27 C.F.R. § 5.40(a) (2020).

127. Intoxicating Liquors, 34 Fed. Reg. 20,335, 20,337 (Dec. 30, 1969) (to be codified at 27 C.F.R. pt. 5).

128. Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, 83 Fed. Reg. 60,562, 60,566 (proposed Nov. 26, 2018) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19).

129. Steve Hawley, Am. Single Malt Whiskey Comm’n, Comment Letter on Proposed Rule Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages (June 24, 2019) [hereinafter Comment Letter from Steve Hawley], <https://beta.regulations.gov/document/TTB-2018-0007-0934> [<https://perma.cc/7SFS-CUTT>].

130. Interview with Steve Hawley, *supra* note 24.

2. Preventing Consumer Deception

In addition to education, consumer clarity and protection have been major concerns in the existing federal regulations as well as in the FAA Act, which is still in force today.¹³¹ As the TTB noted in Notice No. 176:

[T]he FAA Act authorizes the Secretary [of Treasury] to issue regulations to prevent deception of the consumer, to provide the consumer with “adequate information” as to the identity and quality of the product, to prohibit false and misleading statements, and to provide information as to the alcohol content of the product.¹³²

Negotiated trade agreements with foreign countries evince one scenario where consumer protection is a weighty policy factor. Over the past fifty years, the TTB and its predecessors have carved out new standards of identity based on international agreements that afforded regulatory protection to certain foreign countries’ distinctive spirits. These particular regulations have a twofold objective: to prevent consumer deception and to protect—usually through a quid pro quo agreement—certain American spirits abroad.

For example, in 1972, the Mexican government asked the United States to recognize and protect tequila as a distinctive product of Mexico.¹³³ A few years earlier, the National Association of Alcoholic Beverage Importers had submitted such a petition, and Department of the Treasury concluded that such a new standard of identity would protect consumers from imitation tequila.¹³⁴ After negotiations between the two governments, the United States agreed to Mexico’s request so long as Mexico agreed to recognize bourbon as a distinctive product of the United States.¹³⁵ This meant that no product labeled “Tequila” could be sold in the United States that was not manufactured in Mexico in accord with the laws of that country (and vice-versa for bourbon sold in Mexico).¹³⁶

This bilateral agreement had precedent. The CFRs had already designated Scotch Whisky, Irish Whiskey, and Canadian Whisky as distinctive products of their respective countries, assigning them their own standards of identity in the CFRs.¹³⁷ In return, each foreign government accorded the same recognition and protection to bourbon as a distinctly

131. Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,562.

132. *Id.*

133. Standard of Identity for Tequila, 38 Fed. Reg. 33,470 (Dec. 5, 1973) (to be codified at 27 C.F.R. pt. 5).

134. Intoxicating Liquors, 34 Fed. Reg. 20,335, 20,342 (Dec. 30, 1969) (to be codified at 27 C.F.R. pt. 5).

135. Standard of Identity for Tequila, 38 Fed. Reg. 33,470.

136. *Id.*

137. *Id.*

American product.¹³⁸ Again, consumer protection was of paramount concern: “All whisky manufactured in Scotland, Ireland, or Canada, shall be deemed to be Scotch, Irish, or Canadian whisky, and shall be so designated, in conformity with [27 C.F.R.] § 5.22(b) (7), (8), and (9), unless the application of such designation to the particular Product will result in consumer deception”¹³⁹ This prevented domestic producers from trying to pass off their products as well-recognized foreign spirits. For example, in *Scotch Whiskey Association v. Consolidated Distilled Products, Inc.*, a U.S. district court held that “Loch-A-Moor” Scotch deceived and confused the public with its Scottish-sounding name and its label claiming it was “made with 100 percent imported Scotch whiskies,”¹⁴⁰ only to disclose in small print that Loch-A-Moor is a domestic product.¹⁴¹ Some twelve years earlier, the Department of the Treasury had already prohibited such designations that closely mimic other well-known product labels in an effort to mislead consumers¹⁴²: “No label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter, creates any impression or inference as to the age, origin, identity, or other characteristics of the product unless . . . [it] conveys no erroneous impressions as to [the same].”¹⁴³

The American Single Malt Whiskey Commission maintains that its own category in the CFRs alongside Scotch and bourbon will also protect consumers. As it stands now, domestic distillers can label any single malt produced in any fashion as “American Single Malt Whiskey” without a clear benchmark that a standard of identity would afford.¹⁴⁴ “We believe that by securing a formal Standard of Identity in the C.F.R., consumers will benefit from the clear definition of what constitutes a single malt whisk(e)y produced in the U.S.”¹⁴⁵ The next section will examine the TTB’s concern for consumer protection in the label approval process.

138. *Id.*

139. Intoxicating Liquors, 34 Fed. Reg. at 20,342.

140. Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 253 n.19 (3d Cir. 2011) (citing Scotch Whiskey Ass’n v. Consol. Distilled Prods., Inc., No. 79 C 3107, 1981 WL 40524, at *3 (N.D. Ill. May 7, 1981)).

141. *Id.*; *Scotch Whiskey Ass’n*, 1981 WL 40524, at *3; see also James Bonar-Bridges, *The Proof Is on the Label? Protecting Kentucky Bourbon in the Global Era*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 491, 502 (2016).

142. Intoxicating Liquors, 34 Fed. Reg. at 20,342.

143. *Id.*

144. Comment Letter from Steve Hawley, *supra* note 129. “TTB is currently approving labels bearing American Single Malt Whiskey without a clear definition that identifies exactly what is in the bottle and the process used to create the product.” *Id.*

145. *Id.*

3. Clarifying Label Design to Help Producers Comply with the COLA Process

One of the TTB's key functions vis-à-vis producers is to approve labels for alcohol bottles.¹⁴⁶ Certificate of Label Approval (COLA) is the somewhat arduous process by which producers submit label designs to the TTB for approbation.¹⁴⁷ Again, the policy justification behind this requirement is consumer protection. The TTB states in Notice No. 176 that it "is particularly interested in . . . whether the proposed revisions to the labeling and advertising regulations will continue to protect the consumer by prohibiting false or misleading statements and requiring that labels provide the consumer with adequate information about the identity and quality of the product."¹⁴⁸ The FAA Act's labeling regulations were enacted chiefly to "prohibit deception of the consumer . . . [and anything] likely to mislead the consumer."¹⁴⁹ In approving such labels, the TTB ensures compliance with the FAA Act and the standards of identity, a recurring concern of the Bureau and its predecessors.

Sometimes, modifications to the standards of identity are made at the behest of the big players in the industry; but even then, the TTB insists that any company wishing to make changes to labeling requirements do so through the formal petitioning process. This approach reflects the Bureau's solicitude for label accuracy and transparency. For example, in 1983, Hiram Walker & Sons petitioned the ATF requesting that the standard of identity for "straight whiskey" as delineated in 27 CFR § 5.22(b) be redefined and expanded. Up to that point, producers had to age "straight whiskey" for at least four years, and if blended, the blend had to be mixed from casks produced by the same proprietor in the same distillery.¹⁵⁰ Already in 1969, the Department of the Treasury had mandated that the ages and percentages of straight whiskies in a blend be clearly labeled for the sake of the consumer.¹⁵¹ Hiram successfully petitioned the ATF to allow the blending of whiskies produced in different distilleries by different proprietors to also bear the moniker of "Straight

146. Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, 83 Fed. Reg. 60,562, 60,563 (proposed Nov. 26, 2018) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19).

147. 27 U.S.C. § 205(e) (2020). Regarding the arduous nature of the COLA process, see generally Hannah Simms, Note, "Handmade" or "Made by Hand": Assessing Alcohol Labeling Practices and Evaluating a Popular Consumer Class Action, 9 KY. J. EQUINE, AGRIC. & NAT. RES. L. 145, 155 (2016).

148. Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,562.

149. 27 U.S.C. § 205(e) (2000).

150. Change in Standard of Identity for Straight Whiskies of the Same Type, 52 Fed. Reg. 41,419 (proposed Oct. 28, 1987) (to be codified at 27 C.F.R. pts. 5, 19). Maker's Mark is an example of this change; it is labeled "Kentucky Straight Bourbon Whisky."

151. Intoxicating Liquors, 34 Fed. Reg. at 20,337.

Whiskey.”¹⁵² Barton Brands, Brown-Forman (producer of Jack Daniels),¹⁵³ and the National Association of Beverage Importers, Inc (a trade association that represents all U.S. importers of beer, wine, and spirits) joined Hiram in the petition.¹⁵⁴ The ATF accepted that a bottle labeled as “Straight Whiskey” could be a blend of whiskey from disparate distilleries *as long as the distilleries were from the same state*;¹⁵⁵ likewise, the reduction of aging requirements from four years to two was met with approval.¹⁵⁶ The bottom line seems to be that, even while the big players may command the TTB’s attention more readily, they still must go through standard approval procedures in order to change or update the production and labeling of their spirits.

While clarity and protecting consumers against deception is important, TTB Notice No. 176 notes that a key objective of the proposed CFR revisions is to “reduce the regulatory burden on industry members where possible.”¹⁵⁷ The craft distilleries that belong to the American Single Malt Whiskey Commission probably do not enjoy the support of the big players in the industry (after all, they represent the competition); the craft distilleries are, however, subject to the same labeling regulations. And the craft whiskey boom shows that the Commission’s proposal does enjoy the support of consumers, especially their desire for greater choice.¹⁵⁸ The Commission forcefully argues that a new single malt whiskey designation would be helpful in its corner of the industry, particularly when engaging the COLA process. “It is our intention to provide truthful and accurate information that benefits the consumer and marketplace. The establishment of a Standard of Identity . . . would do just that.”¹⁵⁹

4. Augmenting Brand Recognition

From the standpoint of the craft distillers, the greatest benefit from the American Single Malt Whiskey proposal will probably lie in the area of product placement and marketing. This may appear self-serving, but it

152. Straight Whiskies of the Same Type, 52 Fed. Reg. at 41,419.

153. Felipe Schrieberg, *The 25 Best-Selling Whisky Brands in the World*, FORBES (Nov. 27, 2018), <https://www.forbes.com/sites/felipeschrieberg/2018/11/27/the-25-best-selling-whisky-brands-in-the-world/#6ab2848b2e83> [<https://perma.cc/EA85-33RU>].

154. Mission Statement, NAT’L ASS’N OF BEVERAGE IMP. <http://www.bevimporters.org/mission-statement> [<https://perma.cc/2AET-EB9K>].

155. Straight Whiskies of the Same Type, 52 Fed. Reg. at 41,421.

156. *Id.*

157. Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, 83 Fed. Reg. 60,562 (proposed Nov. 26, 2018) (to be codified at 27 C.F.R. pts. 4, 5, 7, 14, 19).

158. Comment Letter from Steve Hawley, *supra* note 129.

159. *Id.*

should not be taken in a pejorative sense. Lest we forget, distilleries large or small are basically in business to sell booze. In this regard, branding efforts should not be derided. In bars and in liquor stores, bottles are almost always arranged on the shelves according to category—the gins are all in one place, the Scotches in another, the bourbons in yet another. America's craft distillers hope that the creation of the American Single Malt Whiskey category will raise their branding profile both domestically and internationally.¹⁶⁰

There is already a well-established practice in agriculture of branding and marketing products through trademarks, certification marks, or what the Europeans call “geographic indications.”¹⁶¹ Take Roquefort cheese, for example, a well-known French geographic label that has found protection in American courts.¹⁶² In order to sell cheese in the United States called “Roquefort,” the product has to originate in the town of Roquefort-sur-Soulzon in France and be aged in the caves of that region, commensurate with French law.¹⁶³ Yes, you can find Gorgonzola, Stilton, and a dozen other types of bleu cheese on the supermarket shelf, but if it is labeled “Roquefort,” it has to be the real thing.¹⁶⁴ New Jersey attorney Alex Feigenbaum notes that this has an overall benefit for the producers: “Because of the limited supply, the cheese makers of Roquefort can demand a premium price for their cheese and control the market supply of this product. In this way, a geographic indication can, like a trademark, create a quasi-monopoly.”¹⁶⁵ Napa Valley wines, Idaho potatoes, Florida citrus products, and Vidalia onions are similar domestic examples of marketing through the creation of unique and recognizable brands tied to geographic indicators.

Examples of closer analogues to craft single malt whiskey are Kentucky Bourbon, Tennessee Whiskey, Scotch Whisky, and French Cognac—these products tend to stand out on the shelf and are recognized by consumers. In large part, the brand recognition these spirits enjoy is due to their quality and historic status. And as mentioned earlier, over the years, certain foreign spirits have found protection in the standards of identity through international trade agreements. For example, in 1970, the French Minister of Foreign Affairs and the U.S. Ambassador to France

160. Telephone interview with Margie Lehrman, CEO of Am. Craft Spirits Ass'n, Partner at Lehrman Beverage L. (Sept. 4, 2019).

161. Alex Feigenbaum, Note, *Cheers!: An Examination of “Vodka” Under Legal Regimes for the Protection of Geographic Indications and Appellations of Origin*, 44 SYRACUSE J. INT'L L. & COM. 179, 187 (2016).

162. *See Cmty. of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 495 (2d Cir. 1962).

163. *See id.*

164. *See id.*

165. Feigenbaum, *supra* note 161, at 188.

negotiated an ad hoc agreement by letter in which France agreed to protect bourbon in exchange for U.S. protection in the standards of identity for Cognac, Armagnac, and Calvados.¹⁶⁶ This agreement was subsequently solidified by the 1994 Distilled Spirits and Spirit Drinks Agreement between the United States and the European Union, which also added Spanish Sherry (Brandy de Jerez) as a protected type.¹⁶⁷ In January 2019, the United States and United Kingdom negotiated an agreement to mutually protect each other's distinctive spirits in anticipation of Brexit.¹⁶⁸ The same principle was also at work in the recently-negotiated United States, Mexico, Canada Free Trade Agreement (USMCA). The USMCA and its predecessor, the North American Free Trade Agreement (NAFTA), have nearly identical language reaffirming respective recognition by each nation of the other's distinctive spirits: Bourbon Whiskey and Tennessee Whiskey, Tequila and Mezcal, and Canadian Whisky.¹⁶⁹

International accords such as these were the result of trade negotiations, which sought to protect and elevate the branding profiles of each nation's spirits. However, the consumer also derives benefit from this type of branding: buyers have confidence in what they are purchasing, and manufacturers have incentive to produce and maintain high quality goods.¹⁷⁰ As already mentioned, those foreign spirits have not only found

166. J. Thomas McCarthy & Veronica Colby Devitt, *Protection of Geographic Denominations: Domestic and International*, 69 TRADEMARK REP. 199, 226 n.155 (1979).

167. Podvia, *supra* note 55, at 5, 13–14 (“The EC agrees to restrict, within its regulatory framework (Council Regulation No. 1 576/89, Article 11 or an equivalent successor regulation) the use of the product designations . . . ‘Bourbon whiskey’/‘Bourbon whisky’ and ‘Bourbon’ as . . . spirit drinks products of the USA. In exchange, the United States agreed to restrict the terms ‘Scotch whisky’, ‘Irish whiskey’/‘Irish whisky’, ‘Cognac’, ‘Armagnac’, ‘Calvados’ and ‘Brandy de Jerez’ to distilled spirits/spirit drinks products of the Member States of the EC.”).

168. Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland on the Mutual Recognition of Certain Distilled Spirits/Spirit Drinks, U.K.–U.S., Jan. 31, 2019, https://ustr.gov/sites/default/files/US-UK_Agreement_on_Distilled_Spirits_signed_Jan._31_2019.pdf [<https://perma.cc/K54F-YKMQ>].

169. Agreement between the United States of America, the United Mexican States, and Canada, Art. 3. C.2, July 1, 2020, Distinctive Products, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/03_Agriculture.pdf [<https://perma.cc/7JNZ-HND8>]. Two other recent examples of this pattern dealt with the 2013 U.S. recognition of Pisco as distinctive products of Chile and Peru, and Cachaça (pronounced Ka-chaw-saw) as a distinctive product of Brazil. Standards of Identity for Pisco and Cognac, 77 Fed. Reg. 18,146 (proposed Mar. 27, 2012) (to be codified at 27 C.F.R. pt. 5). In the case of Pisco, the United States-Peru Trade Promotion Agreement and the United States-Chile Free Trade Agreement protected Pisco as a distinctive brandy type from each country in exchange for those countries protecting Bourbon and Tennessee Whiskey. *Id.* In the case of Cachaça, the TTB participated with the U.S. Trade Representative in negotiations with the Brazilian government. In exchange for protecting American Bourbon and Tennessee Whiskey, Brazil requested that the United States recognize Cachaça, a Brazilian rum. 27 C.F.R. § 5.22(f)(1) (2020); Press Release, Dep’t of Treasury, TTB Amends the Distilled Spirits Identity Regulations to Recognize “Cachaça” as a Type of Rum and Distinctive Product of Brazil (Feb. 22, 2013), <https://www.ttb.gov/images/pdfs/press-releasefy1305-cache-td.pdf> [<https://perma.cc/BS65-LNVS>].

170. Feigenbaum, *supra* note 161, at 186.

protection in law and in international accords but have also built highly recognizable branding profiles around their names and geographic origins. Through the American Single Malt Whiskey Commission's proposal, America's craft distilleries are arguing for their own shelf at the liquor store and behind the bar—and perhaps one day, for their products to be on par with bourbon and Tennessee Whiskey in foreign markets.¹⁷¹ “The formal establishment of this category would signal to the world that not only do we believe in and support our own distilleries, but we also recognize that American Single Malt Whisk(e)y is unique (as Bourbon is) and deserves to be defined and protected.”¹⁷²

Without a doubt, educating consumers, preventing consumer deception, streamlining label approval, and improving brand recognition are worthy results to hope for with any new standard of identity. And the TTB usually takes all of these policy goals into account at the same time when considering a regulatory modification. In 1991, for example, a coda on the question of how to label flavored liquor showed the TTB's concern for both consumer protection and the industry's request. In that year, the ATF received a petition to drop the minimum bottling ABV from seventy proof to sixty proof (35% ABV to 30% ABV).¹⁷³ Five big players backed the proposal: Brown-Forman Corporation, Hiram Walker & Sons, Inc., McDermott, Will & Emery, Jim Beam Brands, Co., and Intercontinental Packaging, Co.¹⁷⁴ The TTB approved the proposed changes for several reasons: (1) they were in line with public perception of flavored products as closely associated with cordials and liqueurs; (2) they reflected domestic and international trends toward lower ABV content; (3) they offered consumers greater choice; (4) they benefited the industry; and finally, (5) they required ABV amounts on the labels, so there would be no public deception.¹⁷⁵ The American Single Malt Whiskey Commission hopes to achieve similar goals in its proposal to the TTB.

In sum, the TTB should approve a new standard of identity for American Single Malt Whiskey because it would be beneficial both to consumers and producers. Consumers would benefit from greater clarity and assurance that the products they buy conform to established standards. Producers would benefit both in the labeling process and in greater brand recognition.

171. Comment Letter from Steve Hawley, *supra* note 129.

172. *Id.*

173. Standards of Identity for Distilled Spirits (CRD59), 57 Fed. Reg. 29,017 (proposed June 30, 1992) (to be codified at 27 C.F.R. pt. 5).

174. *Id.*

175. *Id.*

CONCLUSION: PROSPECTS FOR SUCCESS

Given the analysis above, the success of the American Single Malt Whiskey Commission's proposal probably depends on whether the TTB perceives sufficient benefit to both consumers and producers, and whether consumers manifest sufficient demand for the product.¹⁷⁶ However, the Commission would do well to also emphasize several ancillary economic benefits it claims will result from increased sales and production should this new category receive approval. The Commission claims that most American craft distilleries source their barley from American farmers and malting companies, thus benefiting domestic agriculture.¹⁷⁷ The Commission also suggests that the growth of these distilling operations will create more jobs, particularly with the ever-growing emphasis on locally-sourced products and the farm-to-table movement.¹⁷⁸ Finally, the Commission members claim that this increased economic growth will lead to higher profit margins for producers and greater tax revenue for the government.¹⁷⁹

Whether or not any of these benefits materialize remains to be seen. But first things first, the TTB must agree to create a new category for American Single Malt Whiskey, and that is no slam dunk. "I think it's a very long shot," said Chuck Cowdery, a Chicago-based attorney and author of several books and numerous articles on whiskey.¹⁸⁰ He predicts that the TTB will both find the category redundant and be reticent to accept the American Single Malt Whiskey Commission's used-cask standard:

I think that the TTB's response will be: "We have a malt whiskey category that is on the books and consistent with other standards, and if you want to add 'American' to it, you can." The rules just say that if you want a statement of origin, it has to be true. In fact, they can use the term "American Single Malt Whiskey" already. What they can't use is the term "Malt Whiskey" as it's currently defined in the CFRs because they don't want to follow the rules for Malt Whiskey, namely new cooperage.¹⁸¹

176. See generally Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,566. See also Straight Whiskies of the Same Type, 52 Fed. Reg. at 41,420; Standards of Identity for Distilled Spirits (CRD59), 57 Fed. Reg. at 29,018.

177. Comment Letter from Steve Hawley, *supra* note 129.

178. *Id.*

179. *Id.*

180. Telephone interview with Chuck Cowdery, *supra* note 24. Cowdery is the author of *Bourbon, Straight: The Uncut and Unfiltered Story of American Whiskey* (2004), *Bourbon, Strange: Surprising Stories of American Whiskey* (2014), *The Best Bourbon You'll Never Taste: The True Story of A. H. Hirsch Reserve Straight Bourbon Whiskey, Distilled in the Spring of 1974* (2012), and the producer/director of the documentary *Made and Bottled in Kentucky* (1992).

181. *Id.*

On the other hand, some believe that the freedom such a proposal accords to American craft distilleries might be warmly embraced by the consumer. As author and whiskey expert Lew Bryson notes about bourbon and rye, but which could well apply, *mutatis mutandis*, to other whiskey types:

The strict rules about how American whiskey can be made are a double-edged sword. They assure the consumer of a quality product, unadulterated by cheap neutral spirits, colorings, or flavors—the bane of the rectifiers banished for good—and ostensibly guarantee that bourbon and rye will maintain a consistent style. . . . The flip side of the regulations is that they seem to force these whiskeys into what could be a stultifying similarity: all made with a majority of one grain, all distilled to roughly the same proof, all aged in the same new charred oak barrels, all chivvied into the same rough age groups, and no fiddling with color or flavor.¹⁸²

Different from past occasions when the standards of identity were altered, however, the unique factor in play here is that the proposals in Notice No. 176 *originated* with the TTB. Furthermore, the TTB has sought extensive public input. Given this reality, the Commission's proposal for an American Single Malt Whiskey category stands a chance at serious consideration. Craft distilleries have grown in number as well as economic and political clout. Perhaps as stand-alone companies, craft distilleries are not big players, but together with their respective trade organizations, they wield considerable economic power. Combining this power with the growing popularity of single-malt whiskeys might be enough to convince TTB that greater choice and transparency for the consumer would benefit all.

In spite of this inclination, Cowdery notes that there are powerful economic forces that may oppose the American Single Malt Whiskey Commission's proposal. In particular, he worries that American Single Malt Whiskey might be perceived as a threat to the reigning Single Malt King—Scotch:

I think in this environment, it's a question of how much they are going to change the rules. But a lot of the big players don't want this changed. It's true that some criticize the TTB as too beholden to the industry they want regulated. But all the big ones that have an interest in Scotch will be more likely opposed to this proposed change.¹⁸³

Moreover, the TTB has at times modified the standards of identity without much perceived benefit. For example, in 1968, the TTB created

182. BRYSON, *supra* note 4, at 144, 146.

183. Telephone interview with Chuck Cowdery, *supra* note 24.

the category of “Light Whiskey,” a high proof distillation aged in used cooperage.¹⁸⁴ But Light Whiskey never caught on and has not seen the commercial success anticipated, in part because it was too similar to neutral spirits. As Cowdery noted, the consumer basically said, “if we want vodka, we’ll drink vodka.”¹⁸⁵ So perhaps this experience will add to the TTB’s reluctance to create yet another type of whiskey when there are forty-one on the books already.

However, in all this, there is one wild card—one fact that firmly bolsters the American Single Malt Whiskey Commission’s case: in Notice No. 176, the TTB is currently proposing to add *another* new type of whiskey to the standards of identity—White Whiskey or Unaged Whiskey.¹⁸⁶ The TTB justifies this addition by pointing to the “marked increase in the number of products on the market that are distilled from grain but are unaged or that are aged for very short periods of time.”¹⁸⁷ Under current regulations, if the distillate is not aged, it cannot be called whiskey (corn whiskey excepted).¹⁸⁸ The TTB believes that many distillers are trying to get around the minimum aging requirement, and this new proposed standard would give producers a lawful way to market such products.¹⁸⁹

But there is a second reason that the TTB is considering this addition: consumer demand for these products.¹⁹⁰ Like the TTB’s recognition of the Flavored Spirits class in 1936—which was incorporated into the standards of identity in 1969 and subsequently modified in 1991—this new recognition seems to evince the TTB response to producers’ praxis and consumers’ demand. Now, there certainly is a demand for American Single Malt Whiskey, and the craft distillers are making plenty of it, as shown by growth in sales across the country. Therefore, the American Single Malt Whiskey Commission’s argument to the TTB should go along these lines: “there is a strong consumer demand, and if you are going to create one new type whiskey, why not create two?”

The TTB expressly invited public comments on the White Whiskey proposal.¹⁹¹ One such comment from the Texas Whiskey Association (representing fifteen Texas distilleries) lauds the proposal.¹⁹² However,

184. BEVERAGE ALCOHOL MANUAL, *supra* note 68, at 4-4; *see also* 27 C.F.R. § 5.22 (2020).

185. Telephone interview with Chuck Cowdery, *supra* note 24.

186. Modernization of the Labeling and Advertising, 83 Fed. Reg. at 60,597.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 60,611.

191. *Id.*

192. Spencer Whelan, Exec. Dir., Tex. Whiskey Ass’n, Comment Letter on Proposed Rule for the Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt

three big players oppose it. The Scotch Whisky Association opposes it on the grounds that all whiskey should be aged and such a designation risks confusing consumers.¹⁹³ The Association of Canadian Distillers opposes it for similar reasons, as does the American Distilled Spirits Association, which represents twenty-seven large companies that produce over half of all spirits sold in the United States.¹⁹⁴

Whether the TTB approves the category of American Single Malt Whiskey this time around is unsure. Given the fact that the White Whiskey proposal—which did come from the TTB—seems to be getting significant pushback from the big players, both domestic and international, the prospects do not appear favorable. That said, it is only a matter of time before the craft distillers become big players of their own, perhaps not individually, but by banding together. More importantly, if American Single Malt Whiskey continues to grow in popularity, the TTB will eventually have to respond to consumer demand. In other words, even lacking a favorable result with the TTB at present, the path forward for the craft distilleries is clear: grow in popularity, prestige and political power. And the way to speed down this path can be summed up in three words: make good whiskey!

“What whiskey will not cure, there is no cure for.”

– Irish Proverb.

Beverages (June 20, 2019), <https://www.regulations.gov/document?D=TTB-2018-0007-0764> [<https://perma.cc/BXA8-J57R>].

193. Scotch Whisky Ass’n, Comment Letter on Proposed Rule for the Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages (June 26, 2019), <https://www.regulations.gov/document?D=TTB-2018-0007-1005> [<https://perma.cc/4GV4-UV75>].

194. Jan H. Westcott, President & CEO, Ass’n of Canadian Distillers, Comment Letter on Proposed Rule for the Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages (June 21, 2019), <https://www.regulations.gov/document?D=TTB-2018-0007-0933> [<https://perma.cc/FSQ6-FSJ6>]; Matt Dogali, President & CEO, Am. Distilled Spirits Ass’n, Comment Letter on Proposed Rule for the Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages (June 20, 2019), <https://beta.regulations.gov/comment/TTB-2018-0007-1101> [<https://perma.cc/JUM5-XTAE>].