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Ain't No Laws When You're Producing Claws: How Inadequate Labeling of Alcoholic Beverages Puts Consumers with Allergies at Risk

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AIN'T NO LAWS WHEN YOU'RE PRODUCING CLAWS: HOW INADEQUATE LABELING OF ALCOHOLIC BEVERAGES PUTS CONSUMERS WITH ALLERGIES AT RISK

Audrey Quinn[†]

ABSTRACT

Despite being a consumable product, alcoholic beverages are not regulated by the Food and Drug Administration (FDA). While allergic reactions are rare, this makes it next to impossible for a consumer to know from where the flavors of their beverage are coming. This note proposes a dual partnership with the FDA and the Bureau of Alcohol, Tobacco, and Firearms to include ingredient labels on all alcoholic beverages. Though alcoholic beverage producers can cite proprietary, pecuniary, and liberty interests at tension with this proposal, all ultimately pale in comparison to the need for consumers to know what is in their glass.

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INTRODUCTION

If given the truth, [the people] can be depended upon to meet any national crisis. The great point is to bring them the real facts—and beer.¹

– Abraham Lincoln

A strong aroma of cloves gives way to banana and bubblegum fruitiness,² the hallmark scents and tastes of a hefeweizen.³ For most, a hefeweizen is an accessible, if slightly banal, beer style. Easy for even non-beer fans to drink, it's often the first recommendation at a craft brewery. But while these accessible flavor profiles translate to an easy user experience, ignorance regarding *how* these flavors exist potentially signals trouble for consumers with allergies. Though allergic reactions to allergens in alcoholic beverages are rare,⁴ the complete lack of mandatory ingredient labeling in America's alcoholic beverage industry is incongruent with general consumer expectations for digestible products.⁵

For as long as humans have recorded laws, alcoholic beverages have been subject to some form of regulation.⁶ Despite this, the current

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1. Joe McClain, *For Presidents, Beer is a Great Leveler*, POLITICO (Feb. 2, 2002), <https://www.politico.com/story/2012/02/presidents-reach-common-ground-over-beer-073044> [<https://perma.cc/ZR4Z-KVHN>].
 2. RANDY MOSHER, TASTING BEER 91 (Margaret Sutherland & Sarah Guare eds., 2d ed. 2017).
 3. *Id.*
 4. Though rare, researchers have reported on instances of allergic reactions to ingredients in beer. See Thomas Herzinger, MD et al., *Anaphylaxis to Wheat Beer*, 92 ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY 6, 673 (Jun. 2004); Joana Sofia Pita et al., *Beer: An Uncommon Cause of Anaphylaxis*, 12 BMJ CASE REPORTS 1 (2019).
 5. Part of the Food and Drug Administration's work entails informing consumers of what ingredients are used to produce food and most non-alcoholic beverages consumed in the United States. See *Overview of Food Ingredients, Additives & Colors*, FDA, <https://www.fda.gov/food/food-ingredients-packaging/overview-food-ingredients-additives-colors> [<https://perma.cc/Q3Y7-KUP7>].
 6. Rules 108-11 of The Code of Hammurabi dictate punishments for tavern keepers. THE CODE OF HAMMURABI (L.W. King, trans.),

ingredient labeling standards for alcoholic beverage producers are woefully inadequate. This leaves consumers with almost no knowledge of exactly what they are drinking. And while Louis Pasteur strictly defined what could be considered beer in the 1870s,⁷ brewers today go far beyond the basics of water, malt, hops,⁸ and yeast to create their products.⁹ While current consumption habits show consumers eschewing classic beer for trendy “hard seltzer” in the name of health,¹⁰ few consumers know that malt beverages can contain myriad undisclosed, and potentially harmful, ingredients.¹¹ While humans have consumed alcoholic beverages for centuries, America’s current alcoholic beverage labeling standards do not reflect our country’s modern values of informed consumer choices¹² and public health.¹³

As shown by the work of the Food and Drug Administration (FDA), labeling ingredients in food and beverages benefits public

<https://avalon.law.yale.edu/ancient/hamframe.asp> [<https://perma.cc/5PKJ-S7GH>] [hereinafter HAMMURABI].

7. RICHARD W. UNGER, *BEER IN THE MIDDLE AGES AND THE RENAISSANCE* 1 (2004).
8. Initially, the addition of hops in beer mainly served to preserve beer. MOSHER, *supra* note 2, at 18. Today, hops are added to create piney, floral, and citrusy flavors in beer. *Id.* at 83.
9. For a discussion on isinglass, a product derived from fish bladder, *see infra* Part V.A.
10. The hard seltzer beverage category is on-track to be worth \$2.5 billion in 2021. Carmen Reinicke, *Hard-Seltzer Sales are Booming in the US—And UBS Says These 5 Beer Companies are Best Positioned to Profit from the Trend*, MKTS. INSIDER (July 30, 2019), <https://markets.businessinsider.com/news/stocks/beer-companies-stocks-best-for-hard-seltzer-boom-ubs-2019-7-1028400172> [<https://perma.cc/A9D9-BWT4>].
11. Presently, the United States Code allows malt beverage producers to voluntarily disclose known allergens in their products; disclosing one necessitates disclosing all. 27 C.F.R. § 7.22a (2020).
12. *See* Lisa M. Soederberg-Miller & Diana L. Cassady, *The Effects of Nutrition Knowledge on Food Label Use: A Review of the Literature*, 92 *APPETITE* 207-16 (2015).
13. “In updating the [nutrition facts label], we saw a need to acknowledge that Americans are eating differently than two decades ago when labeling requirements were first introduced” Susan T. Mayne, *Statement on New Guidance for the Declaration of Added Sugars on Food Labels for Single-Ingredient Sugars and Syrups and Certain Cranberry Products*, FDA (Jun. 18, 2019), <https://www.fda.gov/news-events/press-announcements/statement-new-guidance-declaration-added-sugars-food-labels-single-ingredient-sugars-and-syrups-and> [<https://perma.cc/54UB-LGD8>].

health.¹⁴ In contrast, label requirements for alcoholic products under the jurisdiction of BATF (Bureau of Alcohol, Tobacco, and Firearms) provide general production information¹⁵ and safety warnings.¹⁶ These labels do very little to inform a consumer of *what* they are drinking. A comprehensive ingredient-labeling scheme for alcoholic beverages would advance the health interests of consumers and the economic interests of producers. By providing consumers with information to make more healthful choices to suit their individual needs,¹⁷ alcoholic beverage producers can avoid potential losses in revenue caused by consumer misunderstanding of a product's ingredients.¹⁸ Additionally, alcoholic beverage producers can protect themselves from baseless fearmongering tactics from their competition, such as vilifying common adjunct ingredients used in the brewing process.¹⁹

In this note, I advocate for mandatory labeling of all ingredients in alcoholic beverages. For purposes of brevity, this note will focus only on beer and malt beverages—which together in the United States alone grossed over \$11 billion in sales in 2018.²⁰ Part I defines beer and malt beverages and provides an overview of their current labeling

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14. See Irina A. Iles et. al, *Nutrient Content Claims: How They Impact Perceived Healthfulness of Fortified Snack Foods and the Moderating Effects of Nutrition Facts Labels*, HEALTH COMM., 33:10, 1308-16; DOT: 10.1080/10410236.1351277.
 15. See 27 C.F.R. §§ 25.142-43 (2020).
 16. The following includes the mandatory statement required on all alcoholic beverage labels in full: “GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.” 27 U.S.C. § 215(a) (2018).
 17. Iles et al., *supra* note 14.
 18. “[H]ealth trends and claims . . . whether accurate or not, can sow seeds of doubt in consumers regarding the food they are eating, especially when they feel like they have lost control over the choices offered by the food system. In situations in which there is uncertainty regarding the cause of the problem, it is common that lay people’s perceptions of the risks and the problem’s origin will differ from the dominant views of the scientific community.” Kent D. Messer et al., *Process Labeling of Food: Consumer Behavior, the Agricultural Sector, and Policy Recommendations*, 56 CAST Issue PAPER 1, 4 (Oct. 2015).
 19. Producers can and do use scare tactics to lure consumers away from competitors. See Mahita Gajanan, *Bud Light Took a Stance Against Corn Syrup. But Experts Say That Doesn't Make Beer Better or Healthier*, TIME (Feb. 4, 2019), <https://time.com/5520120/bud-light-corn-syrup/> [<https://perma.cc/82RZ-HE2L>].
 20. Jan Conway, *Supermarket Sales of Alcoholic Beverages in the United States in 2018, by Product Category*, STATISTA (Jul. 29, 2019), <https://www.statista.com/statistics/676997/us-alcoholic-beverage-dollar-sales-by-category/> [<https://perma.cc/FGY8-QVWJ>].

requirements. Part II briefly discusses why alcoholic beverages, a consumable product, are regulated by a subsidiary of the Department of Treasury and not the FDA. Part III provides insight into what millions of Americans risk when coming into contact with allergens. Though those with food allergies are often spared the most severe reactions from consuming alcoholic beverages produced using allergens, this does not justify leaving consumers ignorant about what is in their glass. Part IV is my proposal for a dual-department review of alcoholic ingredient label requirements that mirror the FDA requirements for food and non-alcoholic beverages.²¹ In this section I propose two options for ingredient labeling, as processing agents in alcoholic beverages present a unique challenge. Under my proposal, alcoholic beverage producers can choose between a standard ingredient label, or a “processed-using” label. Finally, Part V addresses some anticipated industry criticisms to my proposal, including threats to producers’ proprietary, pecuniary, and liberty interests.

I. CHEERS TO THE UNKNOWN: WHAT’S IN MY GLASS?

A. General Label Requirements

Current mandatory labeling requirements for alcoholic beverages emphasize the location of production and safety risks associated with consumption. Though the former necessarily changes from product to product, all labels display a clear and distinct safety warning.²² This information, though helpful, informs consumers where their drink came from, and some health risks of drinking it— but provides little insight as to *what* they are drinking. Furthermore, recent trends show that consumers are leaning towards beverages they perceive to be “healthier,” even though these consumers are still unaware of the ingredients in those drinks.²³

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21. A notable exception to the FDA’s general reluctance to regulate alcoholic beverages is those that contain caffeine, on the grounds that the caffeine addition to malt beverages is an “unsafe food additive.” See *Caffeinated Alcoholic Beverages*, FDA (Nov. 17, 2010), <https://www.fda.gov/food/food-additives-petitions/caffeinated-alcoholic-beverages> [<https://perma.cc/ZG3G-ZWZU>].
 22. It is mandatory to include the following statement in full on all alcoholic beverage labels: “GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.” 27 U.S.C. § 215(a) (2018).
 23. See Jessica Migala, *White Claw and Other Spiked Seltzer is Popular, but is it Healthy?*, EVERYDAY HEALTH (medically reviewed by Kelly Kennedy), <https://www.everydayhealth.com/white-claw-other-spiked-seltzer-popular-but-is-it-healthy/> [<https://perma.cc/Z9TN-DKFZ>]; Jaya

B. Beer

Beer is a “[b]road term that describes any fermented, nondistilled beverage made from barley malt or other cereal grains.”²⁴ While particular beer styles can call for a certain percentage of cereal grains,²⁵ malted barley is a primary ingredient in all beer.²⁶ There are myriad ways to profile beer aromas and flavors—like the strong whiff of peppery spice in a saison,²⁷ or the distinct caramel flavor profile of an amber ale.²⁸ However, these aromas and flavors, though strong enough to reveal the beer style, may or may not be physically present in the beer itself.

The labels of bottles and cases of beer must include “the name or trade name of the brewer, the net contents of the bottle, the nature of the product such as beer, ale, porter, stout, etc., and the place of production (city, and when necessary for identification, State).”²⁹ These requirements are grossly inadequate—with this information, how can a consumer identify how the peppery aroma of a saison or the caramelly-flavor of an amber ale got in their glass? For those with food allergies, these sorts of flavors signal imminent bodily harm—but the allergen itself may or may not be present in their drink.³⁰

Some major beer producers have capitalized on this knowledge gap by going beyond the BATF’s bare-bones minimums in hopes of both educating and attracting consumers. Major imported beers, including Corona, Guinness, and Heineken, already display some nutritional information in hard-to-read places, such as the bottom of a bottle.³¹

Saxena, *Alcohol Brands Have Set Their Blurry Sights on the Slippery Concept of Wellness*, EATER (June 5, 2019, 10:46 AM), <https://www.eater.com/2019/6/5/18650893/alcohol-brands-wellness-healthy-wine-beer> [<https://perma.cc/HDB7-79YE>].

24. MOSHER, *supra* note 2, at 345.
25. For example, as its name suggests, brewers producing an oatmeal stout use malted or raw oats; this addition results in a “very soft, rich creaminess and a hint of cookielike nuttiness.” *Id.* at 253.
26. MOSHER, *supra* note 2, at 344 (defining barley and its use in beer).
27. *Id.* at 299.
28. *Id.* at 317.
29. 27 C.F.R. § 25.142(a) (2020).
30. For example, the yeast used to produce a hefeweizen beer creates a strong banana flavor. MOSHER, *supra* note 2, at 91. Though this flavor is a natural result of the yeast, a consumer with a banana allergy could take a harmless sip of a beer and suddenly think their health is at risk.
31. Maura Judkis, *How “Light” is a Bud Light Anyway? That 24-Pack is Finally Going to Tell You*, WASH. POST (Jan. 11, 2019), <https://www.washingtonpost.com/news/voraciously/wp/2019/01/11/thi-s-carbs-for-you-bud-light-will-soon-start-showing-you-just-how-many-calories-youre-chugging/> [<https://perma.cc/HN4Y-TP5L>].

Taking this trend further, Anheuser-Busch's Bud Light beer is the first brewed and bottled in the United States to utilize a spin on food labeling. Unlike the typical "serving sizes" and "nutritional facts" categories, Bud Light's labels are "serving facts," with a separate line for "ingredient disclosure."³² In a press release announcing Anheuser-Busch's voluntary disclosure, Andy Goeler, vice president of Marketing for Bud Light said, "we believe increasing on-pack transparency will benefit the entire beer category and provide our consumers with the information they expect to see."³³ Bud Light's current promotional materials emphasize its four ingredients: "barley, rice, hops, and water."³⁴ The labeling Bud Light is using, however, does not conform with FDA standards.³⁵ Though a welcome start for more transparency in the alcoholic beverage industry, Bud Light's voluntarily-added ingredient labeling reads more as promotional, as opposed to nutritional, material. Nevertheless, this is currently the most comprehensive ingredient information consumers have when shopping for beer.

This new labeling puts at least one subsidiary of Anheuser-Busch's massive portfolio ahead of schedule for an industry-wide agreement to

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32. *Bud Light Elevates Transparency in the Beer Industry with New On-Pack Ingredients Label*, ANHEUSER-BUSCH (Jan. 11, 2019), <https://www.anheuser-busch.com/newsroom/2019/01/Bud-Light-Elevates-Transparency-in-the-Beer-Industry-with-New-On-Pack-Ingredients-Label.html> [<https://perma.cc/5R5U-TSK6>].
33. *Id.*
34. *Brewing Process*, ANHEUSER-BUSCH INBEV BUD LIGHT, <https://www.budlight.com/en/brewing.html> [<https://perma.cc/3WMD-CVNX>] [Hereinafter ANHEUSER-BUSCH].
35. "Bud Light has just launched new packaging that includes an FDA-like nutrition label. The label won't appear on individual cans or bottles, rather on the outer packaging. It doesn't exactly conform to FDA standards either, listing the ingredients first, and nutrient information only afterwards." *Bud Light Announces Nutrition Labels, but They're Missing Something*, FOODUCATE (Jan. 19, 2019), <https://www.fooducate.com/community/post/Bud-Light-Announces-Nutrition-Labels-But-They-re-Missing-Something/5C3CD872-6707-1FE9-4A7C-BEEB9F7CBD66> [<https://perma.cc/M5TG-9VTW>]. Additionally, the promotional material's listing of "barley, rice, hops, and water" does not conform with the FDA standards of "listing of each ingredient in descending order of predominance." *A Food Labeling Guide: Guidance for Industry*, U.S. DEP'T. OF HEALTH AND HUMAN SERVS., FOOD & DRUG ADMIN. 17 (Jan. 2013) [hereinafter HHS & FDA]. Finally, the promotional material label does not mention yeast; since it is the introduction of yeast that creates the alcohol in beer, it is likely that this constitutes a "technical effect in the finished product" that would warrant disclosure in a proper ingredient label. *Id.* at 18.

disclose ingredients and serving facts by the end of 2020.³⁶ Anheuser-Busch, along with MillerCoors, Heineken USA, Constellation Brands Beer Division, North American Breweries, and Craft Brew Alliance—a group that “produce[s] more than 81% of the volume of beer sold in the United States”—are part of this agreement.³⁷ However, it is not clear whether this agreement includes any type of governmental agency review for the accuracy of the labeling. Even if the other parties to this agreement follow Anheuser-Busch’s example, consumers will still be just as ignorant as to what they are drinking.

C. Malt Beverages

Though described as a “more restrictive category than beer,”³⁸ malt beverages are a vague and troubling alcoholic beverage category. Federal guidance defines a “malt beverage” as “the general name given . . . for all products made at a brewery with malted barley and hops.”³⁹ Under this definition, almost anything can be a malt beverage—even beer. Somewhat more helpfully, the Oxford Companion to Beer defines a *flavored* malt beverage as “an alcoholic beverage made from original base containing malt, but then stripped of malt character and then flavored . . .”⁴⁰ While the malt base of a malt beverage must be made from at least twenty-five percent malt and contain at least seven-and-a-half pounds of hops per one hundred barrels of finished product, fifty-one percent of the final alcohol in the product must come from malt.⁴¹ These numbers give marginal insight into what constitutes a malt beverage, but ultimately leave a consumer with more questions than answers.

BATF regulations require that brand labels for malt beverages give a brand name, class, name, address, net contents, and alcohol contents.⁴² In addition, malt beverage labels can be subjected to more

36. *Introducing the Brewers’ Voluntary Disclosure Initiative*, BEER INST., <https://www.beerinstitute.org/beer-policy-regulatory/voluntary-disclosure> [<https://perma.cc/2H9L-ZVL5>].

37. *Id.*

38. MOSHER, *supra* note 2, at 263.

39. DEP’T OF TREASURY, ALCOHOL AND TOBACCO TRADE AND TAX BUREAU, WHAT YOU SHOULD KNOW ABOUT MALT BEVERAGE LABELS (2008), <https://www.ttb.gov/images/pdfs/p51903.pdf> [<https://perma.cc/S3R6-5U9R>].

40. GARRETT OLIVER ET AL., OXFORD COMPANION TO BEER 362 (2011).

41. *Id.*

42. 27 C.F.R. § 7.22(a)(1)-(5) (2020).

requirements if they are imported,⁴³ bottled by permit or a retailer,⁴⁴ or contain certain color additives⁴⁵ or sulfites.⁴⁶ The requirements for a majority of malt beverages prioritize *where* malt beverages are produced, and the consumer only gleans additional insight into *what* is in their drink if the FDA has previously mandated the disclosure of certain ingredients.

Malt beverage producers are required to disclose their use of FD&C Yellow No. 5 or sulfites above a certain threshold because the FDA recognizes the risk of bodily harm stemming from these additives.⁴⁷ However, the concern about risk of bodily harm ends here—current federal law does not require malt beverage producers to disclose major food allergens in their products.⁴⁸ This includes milk, egg, fish, shellfish, tree nuts, wheat, peanuts, and soybeans,⁴⁹ to which an estimated thirty-two million Americans are allergic.⁵⁰ If a malt beverage producer chooses to disclose a known allergen in its product, then it must disclose all allergens present.⁵¹ Producers can petition for exemption from the disclose-one-disclose-all standard.⁵² Because producing a malt beverage

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43. 27 C.F.R. § 7.22(b)(1) (2020) (“[i]n the case of imported malt beverages, name and address of importer . . .”).
 44. 27 C.F.R. § 7.22(b)(2) (2020) ([i]n the case of malt beverages bottled or packed for the holder of a permit or retailer, the name and address of the bottler or packer . . .”).
 45. § 27 C.F.R. § 7.22(b)(4) (2020) (“[a] statement that the product contains FD&C Yellow No. 5 . . .”); 27 C.F.R. § 7.22(b)(5) (2020) (“[a] statement that the product contains the color additive cochineal extract or the color additive carmine . . .”).
 46. 27 C.F.R. § 7.22(b)(6) (2020) (“[t]he statement ‘contains sulfites’ or ‘contains (a) sulfating agent(s)’ or a statement identifying the specific sulfating agent where sulfur dioxide or a sulfating agent is detected at a level of 10 or more parts per million . . .”).
 47. “FD&C Yellow No. 5 may cause itching and hives in some people. This additive is widely found in beverages . . . FDA requires all products using FD&C Yellow No. 5 to identify it on labels so that consumers who are sensitive to the dye can avoid it.” *How Safe are Color Additives?* FDA, <https://www.fda.gov/consumers/consumer-updates/how-safe-are-color-additives> [<https://perma.cc/DQE5-4N7G>].
 48. 27 C.F.R. § 7.22a (2020).
 49. 27 C.F.R. § 7.22(a)(1)(i) (2020).
 50. *Facts and Statistics*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/life-with-food-allergies/food-allergy-101/facts-and-statistics> [<https://perma.cc/Q89K-Q3SW>].
 51. 27 C.F.R. § 7.22a(b).
 52. 27 C.F.R. § 7.22b.

requires fining agents to clarify the final product, such as isinglass,⁵³ this disclose-one-disclose-all standard means malt beverage producers are likely not disclosing known allergens in their products.

While federal guidance leaves one wondering what exactly constitutes a malt beverage, consumers are very familiar with the product itself: Smirnoff Ice, Bud Light Lime, Mike's Hard, Redd's Cider, and White Claw Hard Seltzer are all popular malt beverages.⁵⁴ White Claw Hard Seltzer in particular has enjoyed unprecedented sales.⁵⁵ Though it may owe some of its success to a particularly popular meme,⁵⁶ White Claw markets itself as a purportedly healthier alternative to beer or liquor.⁵⁷ And while White Claw seems to be following the lead of Bud Light⁵⁸ in disclosing its ingredients,⁵⁹ it is unclear whether any governmental agency is reviewing the accuracy of White Claw's disclosures. For now, however, it seems the most information a consumer can get for the amorphous malt beverage category is what White Claw Hard Seltzer is willing to disclose.

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53. Isinglass is dried swim bladder of certain fish. It is used by some alcoholic beverage producers to clarify their product so it can be sold faster. MOSHER, *supra* note 2, at 94.
54. Conway, *supra* note 20.
55. White Claw sales grew 283% between July 2018 and July 2019. Jordan Valinsky, *America is Running out of White Claw Hard Seltzer*, CNN (Sept. 6, 2019, 3:12 PM), <https://www.cnn.com/2019/09/06/business/white-claw-shortagetrend/index.html> [<https://perma.cc/C2AD-79BG>]. Economists estimate that White Claw may have outsold Budweiser in at least a few specific weeks in 2019. Dion Rabouin, *White Claw May Have Actually Outsold Budweiser This Summer*, AXIOS (Oct. 9, 2019), <https://www.axios.com/summer-white-claw-outsold-budweiser-909e414e-7cb3-45a9-be4112d7c6312a94.html> [<https://perma.cc/9H3W-D8Z7>].
56. Originating from YouTube, the meme "Ain't no laws when you're drinking Claws" was a summer 2019 mantra for many Millennials. Amanda Mull, *White Claw is What Happens When Being Cool Becomes Exhausting*, ATLANTIC (Aug. 27, 2019), <https://www.theatlantic.com/health/archive/2019/08/why-summer-white-claw/596920/> [<https://perma.cc/YK97-UAL3>].
57. See Migala, *supra* note 23; Saxena, *supra* note 23.
58. See *infra* Part I.B.
59. White Claw's FAQs say it's hard seltzer is made "from a blend of seltzer water, [a] gluten free alcohol base, and a hint of fruit flavor." *Frequently Asked Questions*, WHITE CLAW HARD SELTZER, <https://www.whiteclaw.com/70/faq/index.html> (last visited Jan. 17, 2020) [<https://perma.cc/DX7F-45W9>]. Its FAQs further say that their products do not contain common allergens. *Id.* Under current federal law, however, the company is under no obligation to disclose the presence of allergens. See 27 C.F.R. § 7.22a (2020).

II. FROM DRY TO WET: POST-PROHIBITION REGULATORY DEPARTMENT CHANGES

Though regulating alcoholic beverages dates back to the Code of Hammurabi,⁶⁰ the United States initially did little to regulate the alcohol industry. Instead, early American law focused on taxing, rather than regulating, alcohol.⁶¹ As a result, before Prohibition, the labeling of alcoholic beverages fell under the discretion of the FDA.⁶² Though there was no explicit language to establish FDA review, courts generally held alcoholic beverage producers to the same legal standards as food and non-alcoholic beverage producers.⁶³ This review-by-default standard changed after the enactment of the Eighteenth Amendment.

Barring the production, transportation, and sale of intoxicating liquors,⁶⁴ the Eighteenth Amendment ushered in societal discord, flapper dresses, and a new perspective on the regulation of alcohol. Though the Amendment banned the importation and exportation of alcohol, it did not actually ban the consumption of alcohol.⁶⁵ What the Amendment did, however, was shift local policing priorities to enforcement of Prohibition, much to the chagrin of citizens.⁶⁶ In

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60. Rules 108-11 of The Code of Hammurabi dictate punishments for tavern keepers. HAMMURABI, *supra* note 6.
61. *See, e.g.*, Act of July 24, 1813, ch. 25 (repealed 1817) (imposing taxes on imported spirits in an effort to pay down debts from the Revolutionary War).
62. United States v. Thirty-Six Bottles of London Dry Gin, 210 F. 271 (3d Cir. 1914) (action for misbranding of gin bottles in violation of the Food and Drugs Act of 1906). *See also* Judson O. Berkey, *The History of Alcoholic Beverage Labeling Regulation and its Implications for a Health Claim on Wine Labels*, LEDA AT HARV. L. SCH., <https://dash.harvard.edu/bitstream/handle/1/8944671/jberkley.html?sequence=2> [<https://perma.cc/4N6J-FMC3>].
63. *See* Thirty-Six Bottles of London Dry Gin, 210 F. at 271 (general provision against misbranding of articles applied to alcoholic beverages). *See also* Berkey, *supra* note 62.
64. U.S. CONST. amend. XVIII § 1. *See also* Berkey, *supra* note 62.
65. *See* U.S. CONST. amend. XVIII § 1. *See also* Berkey, *supra* note 62.
66. Eliot Ness, one of the most famous Prohibition watchdogs has a beer named after him at Great Lakes Brewing Company in Cleveland, Ohio. *Eliot Ness*, GREAT LAKES BREWING COMPANY, <https://www.greatlakesbrewing.com/eliotness> [<https://perma.cc/96VA-M387>]. In an interesting twist of fate, the mother of the founders of the brewery worked for Ness as a stenographer. *Id.*

addition to being a wildly unpopular Amendment in retrospect,⁶⁷ the Eighteenth Amendment is also the only Amendment to be repealed.⁶⁸

Because bootleg liquor, such as moonshine, was dangerously prepared and consumed, alcoholic beverage production remained a major problem throughout Prohibition.⁶⁹ During Prohibition, thousands of people died from drinking unsafe or tainted alcohol.⁷⁰ Sadly, the government was behind many of these deaths: in an effort to curtail the production of moonshine, the government increased the toxicity of the non-consumable alcohols moonshiners distilled to create moonshine.⁷¹ Instead of halting moonshine production, however, the government allowed the now-lethal concoction to reach consumers, killing thousands of people during Prohibition.⁷² Perhaps as an acknowledgment the government's involvement in these deaths, alcoholic beverage labeling regulation post-Prohibition focused on protecting consumers from mislabeled alcoholic beverages. In 1933, Congress established the Federal Alcohol Control Administration, with the purpose of protecting "the consumer against deception from false and misleading labeling and advertising of alcoholic beverages."⁷³ Though the regulatory department

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67. Among many of its criticisms, Prohibition notably led to an increase in potency of alcohol products and deaths associated with alcohol. Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST.: POL'Y ANALYSIS (July 17, 1991), <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure> [<https://perma.cc/5VQS-6EZT>].
68. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.
69. Lily Rothman, *The History of Poisoned Alcohol Includes an Unlikely Culprit: The U.S. Government*, TIME (Jan. 14, 2015, 12:00 PM), <https://time.com/3665643/deadly-drinking/> [<https://perma.cc/236S-T7GA>]. In an effort to curtail bootlegger's use of methanol (wood alcohol) in the production of moonshine, the United States' government created a new formula that doubled its potency. *Id.* This did not curtail moonshiner's use of the now-toxic alcohol. *Id.* In 1927, Time noted that "[t]hree ordinary drinks of this may cause blindness." *National Affairs*, TIME (Jan. 10, 1927), <https://time.com/vault/issue/1927-01-10/page/12/> [<https://perma.cc/HCF9-2L99>].
70. During Prohibition, "the death rate from poisoned liquor was appallingly high throughout the country. In 1925 the national toll was 4,154 as compared to 1,064 in 1920." Thornton, *supra* note 67.
71. Rothman, *supra* note 69. *See also* Thornton, *supra* note 67 ("[T]he increasing number of deaths created a public relations problem . . . because they weren't exactly accidental.").
72. Deborah Blum, *The Chemist's War*, SLATE (Feb. 19, 2010, 10:00 AM), <https://slate.com/technology/2010/02/the-little-told-story-of-how-the-u-s-government-poisoned-alcohol-during-prohibition.html> [<https://perma.cc/47WF-2CSF>].
73. *See also* Berkey, *supra* note 62.

changed over time, this focus on labeling and advertising continues to be at the center of the BATF's work today.

Founded in 1972⁷⁴ and nestled within the Department of the Treasury,⁷⁵ the BATF's main focus is on taxation of products under its watch. As a result, most products under BATF regulation enjoy fewer label requirements.⁷⁶ Courts consistently hold that, so long as an alcoholic beverage does not contain caffeine, the BATF has exclusive jurisdiction over its labeling.⁷⁷ This also includes administrative decision-making deference.⁷⁸ This means that so long as the BATF provides "minimal" justification for its policies, courts do not intervene.⁷⁹

Despite this near-exclusive jurisdiction over alcoholic beverages,⁸⁰ the BATF has relinquished its exclusive jurisdiction over other products in the past. As of 2009, the FDA controls the manufacturing, distribution, and marketing of cigarettes.⁸¹ However, the BATF still

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74. *ATF History Timeline*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/our-history/atf-history-timeline> [<https://perma.cc/WH9Z-QACJ>] (referencing Treasury Department Order 221).
75. *Alcohol, Tobacco, Firearms, and Explosives Bureau*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/alcohol-tobacco-firearms-and-explosives-bureau> [<https://perma.cc/DFB6-2G52>].
76. An exception to this is the tobacco industry, which has been subjected to more labeling requirements since the FDA's partial takeover in 2009. *Family Smoking Prevention and Tobacco Control Act - An Overview*, FDA, <https://fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview> [<https://perma.cc/GU5X-7A6P>].
77. *Brown-Forman Distillers Corp. v. Mathews*, 435 F. Supp. 5, 8 (W.D. Ky. 1976); *Cruz v. Anheuser-Busch, LLC*, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 70627 at * 8 (C.D. Cal. June 3, 2015) (dismissal of class action suit for misleading labeling of products because the FDA does not regulate alcoholic beverage labels and companies are not required to disclose more than "adequate information about the quality of the product while avoiding the display of falsities that may mislead consumers") (citing *Wawzskiewicz v. Dep't. of the Treasury*, 607 F. 2d 296, 297-98 (D.C. Cir. 1981)). Additionally, though there is no case law on the subject, the FDA regulates caffeinated alcoholic beverages. See FDA, *supra* note 21.
78. *Ctr. for Sci. in Pub. Interest v. Dep't of Treasury*, 797 F. 2d 995, 997 (D.C. App. 1986) ("Although we reject several of the BATF's stated reasons for the second recession [of a rule requiring labeling] we conclude that the agency has nonetheless managed to bring itself within the confines of reasoned decision making and adequately, if minimally, explained its reversal").
79. *Id.*
80. See FDA, *supra* note 21.
81. FDA, *supra* note 76.

controls the taxation and production standards for cigarettes and enforces federal and state tobacco laws.⁸² This dual department control of a singular product improves public health.⁸³ Furthermore, allowing the FDA to control the consumable aspects of a product, and allowing the BATF to tax and enact regulations over the same product, allows both government agencies to operate within their respectively familiar framework.

My proposal suggests a shared regulatory review akin to the BATF and the FDA's regulation of cigarettes. Allowing the BATF to continue to oversee the taxation, production standards, and enforcement laws for alcoholic beverages ensures consistency in taxation, standards, and law. Similarly, allowing the FDA to regulate the ingredient labeling of all alcoholic beverages ensures accurate ingredient labeling in line with consumer expectations.

III. WHEN IT'S ALWAYS ALLERGY SEASON: THE CONFUSION BETWEEN ALLERGIC REACTIONS TO ALCOHOL AND AN ALLERGY TO ALCOHOL ITSELF

"This product may contain tree nuts." Consumers are well-accustomed to seeing this type of warning on packaged food and drinks subject to FDA regulation.⁸⁴ However, there is no analogous law requiring the same of alcoholic beverages. Even more troubling, malt beverages producers can choose to disclose known allergens in their drinks.⁸⁵ This lack of information puts consumers with allergies at risk—and while a severe allergic reaction is unlikely,⁸⁶ consumers still deserve to know what is in their glass.

82. *Alcohol & Tobacco*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/alcohol-tobacco> [<https://perma.cc/68KC-CXY8>].

83. "Smokers light up less when cigarettes are more expensive. So, more smokers may have been nudged to quit after a federal government increased tobacco taxes by 62 cents in 2009." Richard Harris, *Cigarette Smoking in the U.S. Continues to Fall*, NPR (Nov. 10, 2016), <https://www.npr.org/sections/health-shots/2016/11/10/501589893/cigarette-smoking-in-the-u-s-continues-to-fall> [<https://perma.cc/4M4Z-VPD6>]. This tax increase, implemented after the FDA's partial control of the tobacco industry, could be behind a 1.7 percent decrease in the smoking rate in the U.S. between 2014 and 2015 alone. *Id.*

84. *See Have Food Allergies? Read the Label*, FDA, <https://www.fda.gov/consumers/consumer-updates/have-food-allergies-read-label> [<https://perma.cc/WH6B-PA7B>].

85. 27 C.F.R. § 7.22a (2020).

86. *See* Herzinger et al., *supra* note 4; Pita et al., *supra* note 4.

Severe food allergies are increasing amongst Americans.⁸⁷ Among the most troubling of these increasingly-common food allergies is peanut allergies. The American College of Allergy, Asthma and Immunology found that peanut allergies in children have increased twenty-one percent since 2010.⁸⁸ Though this increase ultimately affects less than three percent of the children in the United States,⁸⁹ schools across the country have implemented measures to limit student exposure to peanuts—with some schools going entirely peanut-free.⁹⁰ Though experts suspect peanut-free policies do not prevent allergic reactions,⁹¹ these extreme measures show how seriously policymakers take food allergies.

The same cannot be said for exposure to food allergens through alcoholic beverages. Those with food allergies are often left in the dark about potential allergens lurking in their drinks. It is hard to even identify how often allergic reactions occur from drinking alcoholic beverages—the FDA encourages those who suffer allergic reactions from food to submit a report⁹² but the BATF offers no such option to alcoholic beverage consumers. While reported instances of anaphylaxis from beer consumption are rare,⁹³ the complete lack of opportunity for consumer reporting could mean there are a great deal of unknown allergic reactions to alcoholic beverages. Because of the lack of consumer reporting, it's unclear how a consumer who suffers an allergic reaction to an alcoholic beverage can hold an alcoholic producer liable.

Two other reasons compound the difficulty of tracking allergens in alcoholic beverages. First, although many alcoholic beverage recipes call

87. *New study suggests 21 percent increase in childhood peanut allergy since 2010*, AM. C. OF ALLERGY, ASTHMA & IMMUNOLOGY (Oct. 27, 2017), <https://acaai.org/news/new-study-suggests-21-percent-increase-childhood-peanut-allergy-2010> [https://perma.cc/2YUV-L5TM].

88. *Id.*

89. *Id.*

90. David Stukus, *Nut-Free Schools: Points to Ponder*, U.S. NEWS (Aug. 25, 2016, 6:00 AM), <https://health.usnews.com/health-news/patient-advice/articles/2016-08-25/nut-free-schools-points-to-ponder> [https://perma.cc/49HH-EWL9]. *See also* RAVENSWOOD ELEMENTARY SCHOOL, *We Strive to be a Nut-Free School*, <https://www.ravenswoodelementary.org/nut-freeschool> [https://perma.cc/V5S3-RJJY].

91. Stukus, *supra* note 90.

92. The FDA offers consumers three ways to report adverse reactions to food, such as allergic reactions. *How to Report a Non-Emergency*, FDA, <https://www.fda.gov/safety/report-problem-fda/how-report-non-emergency> [https://perma.cc/3UJP-ATKL]. The website also offers a link for consumers to report adverse reactions to meat and poultry, even though both are regulated by the U.S. Department of Agriculture. *Id.*

93. *See* Herzinger et al., *supra* note 4; Pita et al., *supra* note 4.

for a certain quantity of ingredients that are common allergens, the final product may or may not include traces of the allergen itself.⁹⁴ Second, alcohol itself can cause its own form of allergic reactions for certain consumers, thereby leaving those who suffer from the reaction unsure of its true cause.⁹⁵

Studies show the risk of severe allergic reactions to common allergens used in producing beer or malt beverages is low.⁹⁶ Regardless of the risk of severe reactions, however, consumers deserve to know what ingredients are in or played a part in making their alcoholic beverage. In fact, consumers with allergies may choose to forgo alcoholic products they can safely consume, out of a fear of the unknown: for example, if you are allergic to nuts and a beer is described as a “nut brown ale,”⁹⁷ you are more like than not simply not going to indulge in that drink. Holding alcoholic beverages, a consumable product, to an entirely different standard from almost every other consumable product on the market leaves consumers underinformed and producers potentially needlessly foregoing potential revenue.

IV. TWO DEPARTMENTS ARE BETTER THAN ONE

America’s current alcoholic beverage labeling requirements emphasize health concerns⁹⁸ and location of production.⁹⁹ Building on these priorities, my proposed changes to alcohol beverage labeling will inform consumers not only *where* their drink was made, but *what* is in their drink. Furthermore, my proposal protects the propriety aspects of

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94. For example, brewers introduce hops into a beer during production, but later filter out the hops. The flavor remains, but the hops themselves are rarely present in the beer. *See* MOSHER, *supra* note 2, at 83 & 347.
95. *Compare Alcohol Intolerance*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/17659-alcohol-intolerance> [<https://perma.cc/9DQQ-XSYW>] (noting that allergic reactions to alcohol includes facial flushing, nausea, rapid heartbeat, throbbing headache, and hangover-like symptoms) *with* Danielle Dresden, *How Does Alcohol Affect Allergies?*, MED. NEWS TODAY (Jan. 31, 2019), <https://www.medicalnewstoday.com/articles/324333> [<https://perma.cc/337H-4HRK>] (noting that alcoholic beverages can induce allergy symptoms, such as headaches and hives).
96. *See* Herzinger et al., *supra* note 4; Pita et al., *supra* note 4.
97. *See, e.g., Nut Brown Ale*, PEAK ORGANIC BREWING CO., <https://www.peakbrewing.com/nut-brown-ale-1> [<https://perma.cc/3673-86BG>].
98. 27 U.S.C. § 215(a) (2018).
99. 27 C.F.R. § 7.22(a)(1)-(5) (2020).

additives such as yeast strains¹⁰⁰ and hop styles¹⁰¹ the same way companies protect their secret recipes with the vague ingredient “natural flavors.”¹⁰² My proposal requires statutory and regulatory law reflecting the FDA’s control over the regulation of ingredient labeling for all alcoholic beverages. This law will mandate that alcoholic beverage producers label the ingredients used in their products in descending order of quantity in the final product.¹⁰³ I also propose two options for labeling of ingredients, allowing producers to choose how to disclose processing agents that have a technical effect in the finished product.¹⁰⁴ Simply put, my goal is that my proposed ingredient label requirements will allow a consumer to readily identify whether the banana flavor in their hefeweizen is the result of a yeast strain or actually from added banana.

My proposal necessitates a memorandum of understanding between the FDA and the BATF, outlining the responsibilities of each. Though I believe the FDA should have complete control over the ingredient labeling of all alcoholic beverages, I also believe the BATF should retain its power to tax producers and determine production requirements. My proposal allows both regulatory agencies to do what they do best— and stands to greatly benefit both consumers and producers.

Because alcoholic beverage producers are not required to disclose their ingredients, consumers are woefully underinformed as to what they are drinking. Presently, a few popular beer and malt beverage producers voluntarily disclose their ingredients.¹⁰⁵ In the case of Bud Light, however, this voluntary disclosure does not conform with FDA standards.

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100. Several species of yeast are used in brewing, all dependent on what flavor profile the brewer is trying to create. *See* MOSHER, *supra* note 2, at 350. For example, the yeast strain *brettanomyces* naturally creates barnyard, pineapple, and other aromas. *Id.* at 345.
101. Hops “give beer its bitterness and characteristic aroma.” *Id.* at 347. Common hop styles include amarillo, mosaic, centennial, and chinook. *Hop Guide*, BEER ADVOCATE, <https://www.beeradocate.com/beer/101/hops/> [<https://perma.cc/99YY-YHHK>].
102. For example, Coca-Cola’s ingredients are: “carbonated water, high fructose corn syrup, caramel color, phosphoric acid, *natural flavors*, caffeine.” *Coca-Cola Nutrition Facts*, COCA-COLA, <https://www.coca-colaproductfacts.com/en/products/coca-cola/original/12-oz/> [<https://perma.cc/7XSZ-TYEN>] (emphasis added).
103. Current FDA guidelines require the “listing of each ingredient in descending order of predominance.” HHS & FDA, *supra* note 35, at 17.
104. *Id.* at 18.
105. ANHEUSER-BUSCH, *supra* note 34; *see* WHITE CLAW HARD SELTZER, *supra* note 59.



Bud Light's current ingredient and nutrition labeling.¹⁰⁶

Because there is no governmental review or oversight of this label, consumers have no way to verify the label's accuracy. Even more troubling, the average consumer likely does not know ingredient label requirements. Many consumers are not even aware that the FDA does not regulate most alcoholic beverages. An average consumer will likely accept Bud Light's information without a second thought. And while Bud Light's labeling reads more like advertising than information a consumer can use, it is still the best, and practically only, way for a consumer to verify alcoholic beverage ingredients. Furthermore, while Bud Light has been quick to emphasize the exclusion of corn syrup from its beer,¹⁰⁷ experts say brewing with corn syrup does not make a difference in nutrition or taste.¹⁰⁸ Nevertheless, Bud Light's "transparent" labeling allows the company to capitalize on consumer confusion and ignorance, and vilifies a commonly-used processing agent in mass-produced beer.¹⁰⁹ This stokes consumer concern: if Bud Light is boasting it does not use corn syrup, does this mean Miller Lite does?¹¹⁰ Finally, it is worth mentioning that Bud Light's placement of the ingredients is improper: the FDA requires ingredients displayed below a product's serving or nutritional facts.¹¹¹

106. ANHEUSER-BUSCH, *supra* note 34.

107. Gajanan, *supra* note 19.

108. Different from high fructose corn syrup, corn syrup is used as fuel for the yeast during the fermentation process. Once fermentation is complete, the corn syrup is filtered from the finished product. *Id.*

109. *Id.*

110. *Id.*

111. HHS & FDA, *supra* note 35, at 23.

While my proposal calls for disclosure of all ingredients used in producing an alcoholic beverage, the prevalent use of processing agents presents a unique issue. In order for the ingredient labeling to fully inform consumers of what is in their glass, these processing agents must be disclosed; whether in a standard ingredient label or in a separate, “processed using” label, is up to producers. This information will further empower consumers with allergies to take their health needs into consideration.

Without government intervention in the labeling of alcoholic beverages, behemoth producers are free to capitalize on ignorance.¹¹² My proposal for mandatory ingredient labeling in alcoholic beverages seeks to put consumers in a position of power. Informing consumers of the ingredients and processing agents used in producing their beverages ensures that consumers know what they are drinking and can opt-out from consuming products containing ingredients to which they are opposed. Consumers of alcoholic beverages should have the same information at their disposal as consumers of food and non-alcoholic beverages.

A. Standard Ingredient Label

In the event a producer chooses to have the standard ingredient label to which consumers are accustomed, it would follow the same format as other FDA-regulated products. Below is an example of what a standard ingredient label¹¹³ would look like for Bud Light:

INGREDIENTS: WATER, BARLEY, RICE, HOPS, YEAST.

Though unlisted on Bud Light’s current “ingredient” label, yeast is used in the production of beer.¹¹⁴ Without the government mandating further disclosure, however, we cannot know for certain what else goes into producing Bud Light. Nevertheless, this information, while largely similar to what Bud Light already disclosed, better informs a consumer of what they are drinking. Under this standard ingredient label, a consumer knows for certain every ingredient that played a part in creating their drink.

Under my proposal, brewers must disclose if the barley and rice used in production are genetically modified organisms (GMOs). Though

112. Gajanan, *supra* note 19.

113. For purposes of the examples in this note, I used the FDA’s recommendations for nutrition facts typfacing. I kept the Helvetica font recommendation, but used size 8 font for reading ease. *Food Labeling Guide*, *supra* note 35, at 36.

114. *See generally* MOSHER, *supra* note 2.

GMOs are subjected to the same standards as non-GMOs,¹¹⁵ the FDA requires GMO disclosures and consumers find this information useful.¹¹⁶ Disclosing the presence of GMOs would benefit consumers who are morally opposed to modified crops—and while this preference may be the result of scare mongering,¹¹⁷ requiring this information will hold alcoholic beverages to the same standard as food and non-alcoholic beverages. With this information, Bud Light ingredient labeling would look like this:

**INGREDIENTS: WATER, BARLEY, RICE, HOPS, YEAST.
PARTIALLY PRODUCED USING GENETIC
ENGINEERING.**

B. Processed-Using Ingredient Label

As an alternative to the standard ingredient label, producers could create a separate line for items used in the processing of alcoholic beverages, but not present in the final product. This option could prove to be an appropriate middle-ground for consumers and producers: it would give a consumer the full extent of ingredients used in the production of their drink but would also assure a consumer with allergies that they are not in fact consuming something that could harm them. Furthermore, this separate line labeling would allow a consumer with a moral aversion to a product¹¹⁸ to opt out of consuming something to which they are opposed. Again, it is difficult to give an inclusive example of what this might look like without comprehensive ingredient information, but an ingredient label for Bud Light with a separate “processed using” line would look like this:

INGREDIENTS: WATER, BARLEY, RICE.

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115. See *Consumer Info About Food from Genetically Engineered Plants*, FDA, <https://www.fda.gov/food/food-new-plant-varieties/consumer-info-about-food-genetically-engineered-plants> [https://perma.cc/M5U4-8K9Q].
116. For a discussion on consumer impressions of GMOs, see Shahla Wunderlich & Kelsey A. Gatto, *Consumer Perception of Genetically Modified Organisms and Sources of Information*, 6 *ADVANCES IN NUTRITION* 842, 843 (2015).
117. Though some consumers admonish the proliferation of GMO crops, the science has shown time and time again GMO “crops help solve a range of problems.” Editorial Board, *Scientists Refute the Scaremongering About GMOS*, WASH. POST (May 19, 2016), [washingtonpost.com/opinions/scientists-refute-the-scaremongering-about-gmos/2016/05/19/47607924-1c7a-11e6-b6e0-c53b7ef63b45_story.html](http://www.washingtonpost.com/opinions/scientists-refute-the-scaremongering-about-gmos/2016/05/19/47607924-1c7a-11e6-b6e0-c53b7ef63b45_story.html) [https://perma.cc/R9YU-7JEN].
118. Stephen Lamb, *Why We Need Mandatory Labeling of GMO Products*, STAT (Feb. 19, 2020), <http://www.statnews.com/2020/02/19/why-we-need-mandatory-labeling-of-gmo-products/>.

**PRODUCED USING: HOPS, YEAST.
PARTIALLY PRODUCED USING GENETIC
ENGINEERING.**

Under this standard, hops and yeast would likely be in the “produced using” line: though both are used in the brewing process and have more than an incidental effect on the final product, both are also removed before the final product reaches consumers. Additionally, ingredients to clarify a beer, such as isinglass, would be disclosed under the “produced using” line. Under this label standard, producers of White Claw must disclose the grain profile used in its beverages.¹¹⁹ Though the grain is eliminated during the fining process,¹²⁰ a consumer with a gluten allergy would likely want to know of the former presence of the allergen. This disclosure would also require malt beverage producers to label, in descending order of predominance, what grains are used in the production of their finished products. This would prevent malt beverage producers from shifting the grain profile of their products based on crop prices. Finally, brewers using spices, fruits, and the like in their beers must disclose their presence in the “ingredients” line, as these ingredients cannot be removed from the final product.

V. NOT SO FAST: INDUSTRY CRITICISMS

With more regulation comes more aggravation for producers, and the alcoholic beverage industry is no exception. However, when the total lack of ingredient labeling standards in the alcoholic beverage industry is considered alongside the long-standing FDA ingredient labeling requirements for food and non-alcoholic beverages,¹²¹ many criticisms can be easily rejected or addressed by following FDA precedent. Though producers are likely to cite threats to their proprietary, pecuniary, and liberty interests, my ingredient labeling proposal protects these interests while simultaneously protecting consumer health.

119. Though White Claw Hard Seltzer is branded as gluten-free (*see* WHITE CLAW HARD SELTZER, *supra* note 59), malt beverages contain at some degree of malt grains (*see* DEP'T OF TREASURY, *supra* note 39). This mystery-mix of grains could contain something to which someone is allergic.

120. Alcoholic beverage producers use fining agents to remove haze created during the fermentation process. *See Process for Clarifying a Fermentation Product*, CA Patent No. 2120292A1, <https://patents.google.com/patent/CA2120292A1/en> [<https://perma.cc/Y44D-2Q92>].

121. The FDA introduced food labeling regulations in 1973. INST. OF MED. COMMITTEE ON THE NUTRITION COMPONENTS OF FOOD LABELING, NUTRITION LABELING: ISSUES AND DIRECTIONS FOR THE 1990S 45 (Porter DV, Earl RO, eds.) [hereinafter NUTRITION LABELING]

A. *Proprietary, or Why Should We Risk Our Secrets?*

Beer is comprised of four basic ingredients: water, malt, hops, and yeast.¹²² Despite this simplicity, hundreds of beer styles derive from this recipe, often aided by additives along the way. Malt beverages follow a similar pattern, though the percentage of malt base varies.¹²³ The readily-identifiable flavor profiles that define a beer style are often the natural result of specific yeast strains or hop styles.¹²⁴ While my proposal will require disclosing if hops and yeast were used in making an alcoholic beverage, I believe the specific yeast strain or hop style used should be entitled to trade secret protection. This is because, for many brewers, specific yeast strains are proprietary—and while the general recipe for beer is almost always, hops, water, barley, and yeast, a brewer's specific choice in yeast is what oftentimes makes the product.¹²⁵

One way the FDA protects trade secrets, such as food or beverage recipes is through the ingredient label “natural flavors.” Under federal law, “natural flavors” are any ingredient “whose significant function in food is flavoring rather than nutritional.”¹²⁶ Producers of products such as Coca-Cola use this “natural flavors”¹²⁷ terminology to protect their recipe while still informing consumers *something* caused the flavor. Mirroring this, using vague identifiers such as “yeast” or “hops” in lieu of specific yeast or hop strains ensures that beer and malt beverage recipes will remain protected. And while reverse-engineering is always a risk associated with ingredient disclosure,¹²⁸ some brewers already

122. *See generally* MOSHER, *supra* note 2.

123. Federal law defines any alcoholic beverage using a malt base as a malt beverage. DEP'T OF TREASURY, *supra* note 39. The industry definition is a finished product that derives 51% of its final alcohol content from a malt base. GARRETT OLIVER ET AL., *supra* note 40, at 362.

124. *See generally* MOSHER, *supra* note 2.

125. *See generally* *Brewers Yeast*, THE YEAST BAY, <https://www.theyeastbay.com/brewers-yeast-products>[<https://perma.cc/F5SB-L38B>].

126. 21 C.F.R. § 101.22 (2020).

127. List of ingredients for Coca-Cola: “carbonated water, high fructose corn syrup, caramel color, phosphoric acid, *natural flavors*, caffeine.” COCA-COLA, *supra* note 102 (emphasis added). This ingredient list informs consumers quickly—and allows an interested consumer to research more if they're unfamiliar with an ingredient—while still protecting Coca-Cola's recipe with the vague “natural flavors”.

128. *See* Megan Garber, *Reverse Engineering McDonald's: How to Make a Scarily Authentic Filet-o-Fish*, THE ATLANTIC (Mar. 18, 2013), <https://www.theatlantic.com/technology/archive/2013/03/reverse-engineering-mcdonalds-how-to-make-a-scarily-authentic-filet-o-fish/274124/> [<https://perma.cc/4R7Q-SPWF>].

readily give their recipes, and even yeast strains, to consumers.¹²⁹ Under my proposal, it does not make sense to allow an alcoholic beverage producer to hide its entire recipe on the basis of proprietary interests.

Though identifying the existence of hops or yeast in a beverage is simple and does not put proprietary interests at risk, ingredients in “trace” or incidental amounts pose a trickier problem. FDA guidance does not mandate disclosure of ingredients in incidental amounts¹³⁰ with no functional or technical effect on the finished product.¹³¹ However, all major food allergens, regardless of incidental amount or effect on the finished product, must be disclosed.¹³² A natural reading of these two requirements means brewers must disclose the use of isinglass, or fish bladder,¹³³ to clarify their beer.¹³⁴ Though some major alcoholic beverage producers ended their use of isinglass,¹³⁵ an absence of labeling of both ingredients and incidental ingredients with technical effects on a product prevents a consumer from knowing whether their drink is safe for them.¹³⁶

B. Pecuniary, or Why Should We Pay More?

There is no doubt that my proposal will cost producers more—it will require creating new labels for beverages and waiting for FDA approval of the labeling. Producers might even fear that disclosing their ingredients could have an adverse effect on sales, thereby costing them even more money. The FDA’s mandate that producers label added

129. *How To: Culture Bell’s House Yeast from a Bottle or Can of Bell’s Beer*, BELL’S BREWERY, <https://www.bellsbeer.com/news/how-culture-bell-s-house-yeast-bottle-bell-s-beer> [<https://perma.cc/CP9M-HHHD>].

130. For example, sulfites added to any food and present at less than ten parts per million can be considered incidental and are not required to disclose. HHS & FDA, *supra* note 35, at 18.

131. *Id.*

132. This includes milk, egg, fish, shellfish, tree nuts, wheat, peanuts, and soybeans. *Id.* at 20-21.

133. Isinglass is dried swim bladder of certain fish. MOSHER, *supra* note 2, at 94. The introduction of isinglass allows a brewer to speed up the “clearing” process of brewing and, more importantly, get their product out to sell faster. *Id.*

134. For most beer styles, clarity is a desirable trait, and brewers take care over the entire process to ensure a beer’s clarity. *Id.* at 114. However, haze hallmark identifier for certain beers. This includes hefeweizens and “East Coast” IPAs. *Id.* at 115.

135. Liam Stack, *Guinness is Going Vegan*, N. Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/business/guinness-is-going-vegan.html> [<https://perma.cc/49HH-EWL9>].

136. An estimated 2.3% of Americans are allergic to some form of seafood. Scott H. Sicherer et al., *Prevalence of Seafood Allergy in the United States Determined by a Random Telephone Survey*, 114 J. ALLERGY CLINICAL IMMUNOLOGY 159, 161 (2004).

sugar shows that providing consumers with new information might affect consumer choices down the line.¹³⁷ However, researchers are hesitant to say that increases in disclosures on labels has any immediately meaningful impact on consumer choices.¹³⁸

It has been said that a spoonful of sugar makes the medicine go down.¹³⁹ Over the past few decades, however, Americans have consumed far more than a spoonful as copious amounts of added sugar have been added to everything—even condiments.¹⁴⁰ This increase in sugar, in turn, has put the health of millions of Americans at risk.

In 2016, the FDA reformed nutrition fact labels to disclose how much added sugars are included in each serving of food or drink.¹⁴¹ Many critics spoke out against this change in ingredient labeling,¹⁴² the

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137. Early estimates from the adoption of added sugar labeling claim the labeling “could prevent nearly a million cases of cardiovascular disease and Type 2 Diabetes in the United States and save billions of dollars in health care.” *Study: Massive Health Gains from New Food Labels with Sugar Details*, AM. HEART ASS’N NEWS (Apr. 15, 2019), <https://www.heart.org/en/news/2019/04/15/study-massive-health-gains-from-new-food-labels-with-sugar-details> [<https://perma.cc/8GUY-XYTW>]. *But see* Neha Khandpur et al., *Simplifying Mental Math: Changing How Added Sugars Displayed on the Nutrition Label Can Improve Consumer Understanding*, *APPETITE* 114, 46 (2017) (study showing added sugar labeling improves consumer understanding, but does not significantly impact consumer choices).
138. At least some researchers cite consumers’ lack of careful reading of nutritional labels, often reaching wrong conclusions, and codependent food shopping decisions as reasons to believe more labeling does not majorly impact consumer choices. Utpal Dholakia, *Will FDA’s Nutritional Label Changes Affect Consumer Behavior?*, *PSYCHOLOGY TODAY* (May 24, 2016), <https://www.psychologytoday.com/us/blog/the-science-behind-behavior/201605/will-fda-s-nutritional-label-changes-affect-buyer-behavior> [<https://perma.cc/2LVH-CYVD>].
139. *MARY POPPINS* (Walt Disney Productions 1964).
140. *See How to Spot – and Avoid – Added Sugar*, HARV. HEALTH PUBL’G (Oct. 2014), <https://www.health.harvard.edu/staying-healthy/how-to-spot-and-avoid-added-sugar> [<https://perma.cc/LB6G-SHJB>]. One tablespoon-sized serving of Heinz ketchup has four grams of sugar. Casey Seidenberg, *Do You Know How Much Sugar is in Your Ketchup?*, *WASH. POST* (June 2, 2015), https://www.washingtonpost.com/lifestyle/wellness/do-you-know-how-much-sugar-is-in-your-ketchup/2015/06/02/9496b77e-fe5f-11e4-833c-a2de05b6b2a4_story.html [<https://perma.cc/DN6K-LKSA>].
141. *The New and Reformed Nutrition Facts Label—Key Changes*, FDA (Jan. 2018), <https://www.fda.gov/media/99331/download> [<https://perma.cc/6BR5-LL54>].
142. Roberto A. Ferdman, *Why the Sugar Industry Hates the FDA’s New Nutrition Facts Label*, *WASH. POST* (May 20, 2016), <https://www.washingtonpost.com/news/work/wp/2016/05/20/why-the-sugar-industry-hates-the-fdas-nutrition-facts-label> [<https://perma.cc/W9JX-4WKC>].

first major change since 1973.¹⁴³ Some feared that the added sugars label “puts added sugar in an unfairly negative light, vilifying even small amounts.”¹⁴⁴ Despite their worst fears, however, this label change has yet to meaningfully impact revenue.¹⁴⁵

In line with America’s overall concern with public health,¹⁴⁶ the goal of my proposal is not to influence consumers, but to inform consumers about what they are drinking. Studies show that the changes in labeling added sugar have not impacted consumers’ choices.¹⁴⁷ However, this logic does not extend to all ingredient labeling, especially in the context of labeling known allergens. Consumers with allergies or a moral aversion to a product will not purchase that product. While this could result in some marginal dips in sales, this does not justify keeping consumers in the dark. And while some alcoholic beverage producers try to capitalize on the “wellness” trend,¹⁴⁸ at the end of the day, few people reach for Cheetos or a beer because they think it is a healthy choice. Consumers of these products are looking for a little indulgence—but that does not mean the health of those with allergies should be at risk.

C. Liberty, or Why Should We Be Told What to Say?

A final criticism I anticipate from the alcoholic beverage industry is that mandatory labeling is compulsory speech. FDA laws mandating labeling are a form of compulsory speech— as a result, the FDA has had its fair share of claims of violating the First Amendment rights of certain industries. However, the FDA’s success in mandating added sugar labeling shows compulsory speech that seeks to improve public health by better informing consumers of what they are consuming can survive First Amendment analysis.¹⁴⁹

143. The FDA introduced food labeling regulations in 1973. NUTRITION LABELING, *supra* note 121.

144. Ferdman, *supra* note 142.

145. “[O]ur results suggest that the addition of added sugars to the [nutrition fact label] may improve consumer understanding, but might have very limited impact on *behavior*. However, the inclusion of added sugars on the [nutrition fact label] might spur industry action to reduce added sugar content [. . .] [.]” Khandpur et al., *supra* note 137, at 46 (emphasis added).

146. See Iles et al., *supra* note 14.

147. *Id.*

148. Millennials and Gen-Z spend less on alcohol than previous generations. Saxena, *supra* note 23. “To lure back younger customers, alcohol brands are turning to ‘wellness,’ arguing that their products are a natural part of any healthy, balanced diet.” *Id.*

149. Colleen Smith, *A Spoonful of (Added) Sugar Helps the Constitution Go Down: Curing the Compelled Speech Commercial Speech Doctrine with the FDA’s Added Sugars Rule*, 71 FOOD & DRUG L.J. 442, 477 (2016).

The tobacco industry, also regulated by the BATF, has weathered threats to its First Amendment rights. Since the FDA began overseeing the manufacturing, distribution, and marketing of tobacco products in 2009,¹⁵⁰ the FDA has attempted drastic measures to restrict tobacco marketing and tobacco sales to youth.¹⁵¹ With a goal of improving public health,¹⁵² the FDA implemented many measures to inform, and perhaps influence, consumer behavior.

One of the FDA's failed attempts to influence consumers was a push to include graphic warning labels on all cigarette packages. Depicting "diseased lungs and a cadaver bearing chest staples on an autopsy table,"¹⁵³ the FDA-proposed labels covered half of every cigarette package manufactured or distributed in the United States.¹⁵⁴ The proposed label was ultimately rejected on First Amendment grounds, with the court holding that "it is clear that the Government's *actual* purpose is not to inform or educate, but rather to advocate a change in behavior—specifically to encourage smoking cessation and to discourage potential new smokers from starting . . ." ¹⁵⁵ The court further held that "[a]lthough an interest in informing or educating the public about the dangers of smoking *might* be compelling, an interest in simply advocating that the public not purchase a legal product is not."¹⁵⁶

The sugar industry also claimed constitutional threats from added labeling. The FDA's recent added sugar labeling mandate not only inspired fear of profit losses in the sugar industry,¹⁵⁷ but also spurred legitimate constitutional debate about whether this compulsory speech was unconstitutional.¹⁵⁸ Like the FDA's proposed tobacco labels, the FDA hoped to better inform consumers about a given product. Unlike the failed tobacco labeling, however, the addition integrated seamlessly

150. *Family Smoking Prevention and Tobacco Control Act- An Overview*, FDA, <https://fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview> [https://perma.cc/V7TM-Q3HV].

151. *Id.*

152. *The Facts on the FDA's New Tobacco Rule*, FDA, <https://fda.gov/consumers/consumer-updates/facts-fdas-new-tobacco-rule> [https://perma.cc/PRH9-KAU7].

153. *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 268 (D.D.C. 2012).

154. *Id.*

155. *Id.* at 275.

156. *Id.*

157. Ferdman, *supra* note 142.

158. Colleen Smith, *A Spoonful of (Added) Sugar Helps the Constitution Go Down: Curing the Compelled Commercial Speech Doctrine with the FDA's Added Sugars Rule*, 71 FOOD & DRUG L. J. 422, 473 (2016).

with nutrition labels to which consumers were already accustomed. While the amount of added sugar in products can be shocking,¹⁵⁹ this information is likely less of a deterrent to behavior than prominent pictures of decaying organs.¹⁶⁰ And while early estimates claimed the new added sugar labeling could prevent up to a million cases of cardiovascular disease and type two diabetes,¹⁶¹ studies show that this change in fact does little to impact consumers' choices.¹⁶² Because the FDA's added sugar labeling is in line with the agency's overall purpose to educate consumers,¹⁶³ the compulsory speech argument failed—the information is not listed to specifically deter consumers' purchases, but rather is a necessary part of well-rounded information disclosure.¹⁶⁴

My proposal for mandatory ingredient labeling for alcoholic beverages benefits public health. While producers can argue that my proposal is an impermissible form of compulsory speech, disclosing ingredients is exactly the kind of purely factual and uncontroversial information that survives a First Amendment analysis.¹⁶⁵ Furthermore, the government has a compelling interest in mandating ingredient disclosure—the most common allergens impact the lives of more than 32 million Americans.¹⁶⁶ In fact, labeling ingredients could empower consumers who suffer from allergies to purchase items they traditionally avoided. And because my proposal will be in a familiar format for consumers, producers stand to benefit from this labeling. Rather than avoiding certain products because an allergen is also a descriptor of an alcoholic beverage, such as a “nutty brown ale,”¹⁶⁷ consumers with allergies will avoid alcoholic beverages because of the actual and known presence of an allergen.

CONCLUSION

My proposal for mandatory labeling of ingredients in alcoholic beverages protects consumers and producers from the risks of non-disclosure. If consumers know what is in their glass and how it was

159. *See, e.g.*, Seidenberg, *supra* note 140 (stating that one tablespoon-sized serving of Heinz ketchup has four grams of sugar).

160. The FDA-proposed cigarette labels depicted decaying lungs. R.J. Reynolds Tobacco Co., 845 F. Supp. 2d at 268.

161. AM. HEART ASS'N NEWS, *supra* note 137.

162. Khandpur et al., *supra* note 137, at 45.

163. Smith, *supra* note 158, at 473, 477.

164. *Id.* at 473–74.

165. Nigel Barrella, *First Amendment Limits on Compulsory Speech*, 71 FOOD & DRUG L.J. 519 (2016).

166. FOOD ALLERGY RES. & EDUC., *supra* note 50.

167. *See, e.g.*, PEAK ORGANIC BREWING CO., *supra* note 97.

produced, they will feel empowered to make choices in line with their health and personal concerns. And, while ingredient labeling may cause some consumers to forgo certain products, studies show that changes in food labeling do not necessarily impact consumer choices. Furthermore, my proposal provides options for producers to choose how to disclose their ingredients and processing agents. Under my proposal, a producer can decide between disclosing the product's ingredients in either a standard ingredient label or a "produced-using" label.

While disclosing ingredients can put trade secrets at risk, my proposal protects the proprietary aspects of alcoholic beverage production. Additionally, the risk of consumers opting-out from purchasing alcoholic beverages is low, as studies show that more product information does not necessarily impact consumer choices. Because of this, it is unlikely producers will lose any meaningful revenues with the introduction of ingredient labeling. Finally, while producers can claim my proposal is compulsory speech, the type of information being provided is purely factual and not intended to discourage consumer behavior. My proposal is designed to minimize threats to producers' interests while still informing and empowering consumers.

Under my proposal, a consumer enjoying a hefeweizen can readily identify what is in their glass. While the flavors of banana and bubblegum are clear, their exclusion from the drink's ingredient list will assure the drinker that the flavors are nothing but an illusion. And while a consumer may still not realize that these flavors are the result of yeast or hops, this does not necessarily matter to most consumers. What does matter, however, is a consumer's confidence as to what exactly they are drinking—and my proposal allows a consumer to know, with certainty, what is in their glass.