

Mistakes Happen: The Ins and Outs of Label Use-Ups

By Sara Schorske and Alex Heckathorn

For protection from labeling slips, use-ups are a good safety net. But it's not a good idea to rely too heavily on use-ups (or temporary label approvals). Why not?

First, as explained in the last issue, a winery obtaining a use-up may avoid the heavy costs of relabeling, but it may still incur the extra expense of early payment of taxes, in order to remove the conditionally labeled wine before the temporary approval expires. Second, while ATF grants the majority of use-up requests it receives, not all label problems are eligible for conditional approval. And third, the more often a winery requests use-ups, the less lenient ATF is likely to be in granting the favor.

This article explains when you can expect conditional approval, when you are probably out of luck, and some tips for avoiding the need for a use-up, even in this imperfect world.

Not All Label Problems Are Created Equal

Common problems that are routinely granted use-ups include inaccuracies on labels due to ordinary business transitions, such as the trans-

fer of brands from one permittee to another, or the relocation of a winery. For example, when a brand changes ownership, the new owner may wish to deplete inventories of previously labeled product even though the permittee name and/or address on the older labels is out of date (this situation applies particularly in the case of imported products).

Conditional approval is also frequently granted for many kinds of minor labeling mistakes, as long as the erroneous label information does not mislead the consumer about the nature and quality of the product, and ATF's ability to identify the responsible permittee is not impaired.

Examples of other minor mistakes eligible for use-ups include errors in the trade name or winery address shown in the mandatories, and technical mistakes such as:

- varietal percentages listed on the label don't add up to 100%
- varietals were not listed in descending order of predominance
- late harvest wines with inaccurate or missing statements of sugar content at harvest and residual sugar.

Even Typos Are Not Created Equal

Typographical errors and incorrect type sizes are another category of mistakes for which use-ups are routinely granted. However, whenever legibility is significantly impaired by small type size or insufficient contrast with the background, conditional approval may be withheld.

The government warning is a sensitive area when it comes to use-ups. The exact text and format of the government warning is specifically prescribed in the statute that established

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the requirement. This limits ATF's ability to be lenient about deviations. Therefore, although a punctuation error or a small variance in the type size may be allowed on a use-up basis, misspelled or missing words or the lack of a contrasting background may send you back to the printer for a new run.

You May Get By with these Technical Mistakes

Use-ups are usually granted when a label is rejected because it violates an "unwritten" ATF labeling policy. (Many of these "unwritten" policies may have been printed in circulars, rulings, newsletters, etc., but they are less well known because they are not found in the actual labeling regulations, 27 CFR Part 4.)

For example, if your brand name contains the word "vineyard" or "vineyards," and your bottling trade name does not, ATF considers the wine vineyard designated. Hence, the label is illegal unless 95% of the volume of the wine comes from the named location. Nevertheless, ATF may allow a use-up if this policy results in significant economic hardship for a new winery that was unaware of the policy.

Similarly, according to another lesser-known ATF labeling policy, when the brand name contains the word "estate" and the label refers to the vineyard location, the wine is considered to be estate bottled even if the words "estate bottled" are not stated anywhere on the package. In such a case, it is forgivable if the label does not meet the strict estate bottling standards (such as a viticultural area appellation that includes both the winery and the vineyard, or 100% of the grapes originating in vineyards owned or controlled by the bottling winery). However, ATF is unlikely to give a use-up for a label which explicitly states the wine is "estate bottled," when the wine does not meet the production standards for estate bottled wine.

If a label has an actual vineyard designation but less than the required 95% of wine originated from the stated vineyard, ATF might grant a use-up, depending on the size of the discrepancy. A bottle containing no wine from that vineyard would have no chance of a label use-up, but a wine which missed the mark by just a few percentage points is likely to be granted temporary approval.

The same rule of thumb would apply to a mistake in the stated vintage year. If the wine contained no wine from the year stated on the label, a use-up would not be given, but if a blending mistake resulted in only a small variance from the 95% requirement, a use-up is likely to be approved.

Errors frequently occur in labels supplied by custom crush customers, especially when the customer is not a vintner, and therefore not regulation-savvy. Many grape growers will proudly design a label that states "Grown, produced and bottled by [name of grower]," and, having given the winery permission to adopt the grower's trade name for labeling purposes, see nothing wrong with that picture. Unfortunately, that label is not legal, because technically, the mandatory bottling statement refers not to the owner of the wine but to the winery which did the producing and the bottling, and in the case of a custom crush arrangement, the bottling winery did not grow the grapes.

Wineries themselves may sometimes make mistakes in the production statement on a label. For example, a label may mistakenly say "produced and bottled by [winery trade name]" when more than 25% of the wine was purchased in bulk. Under certain circumstances, ATF may grant a use-up for such mistakes.

An entirely different category of forgivable mistake is what we might call the "innocent mistake." ATF is more lenient with wineries which are relatively new, because of their lack of experience. Their smaller production also means their mistakes have less impact in the marketplace. On the flip side, ATF is likely to be more strict with a winery which has been in business for years or has made the same mistake before. In both these cases, ATF feels that such a winery "should know better."

A Special Case: Errors in Stated Alcohol Content

The alcohol content of the wine is supposed to appear on the front 40% of the circumference of the bottle. If the alcohol content statement has been printed too far off to the side, conditional approval may be granted if the statement is otherwise prominent. Errors in punctuation or in abbreviations in the alcohol statement are also likely to be granted a use-up.

When the alcohol content of the wine differs from the alcohol content

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stated on the label by more than the permitted tolerance, or if the wine falls into a different tax class than is shown on the label, a use-up should be applied for. For wines under 7% alcohol, the tolerance is $\pm 0.75\%$; for wines over 7% and up to 14%, the tolerance is $\pm 1.5\%$; and for wines over 14%, it is $\pm 1\%$. However, a wine must be labeled with the correct tax class no matter how small the discrepancy is otherwise. For example, if a wine is labeled as 13.8% alcohol, but is actually 14.2% alcohol, then a use-up would be required, even for a difference of less than half a percent, since the wine is in a different tax class than the label indicates.

While a use-up for misstated alcohol is likely to be granted (unless the discrepancy is quite large), the winery will always be required to pay tax on the wine at the correct rate, and in the past, ATF has requested that the tax be paid promptly. ATF will also require that any marketing materials or other information provided about the wine state the correct alcohol content.

Some Mistakes Are Not Likely to Get a Use-Up

Since mistakes in the varietal type and appellation are significantly misleading to consumers, ATF is very unlikely to approve a use-up for such errors. In one such case, a winery used "Sonoma" instead of "Sonoma County" as the appellation on a chardonnay label, and didn't discover the mistake until the bottles had already been labeled. ATF refused to approve a use-up, so the resourceful winery got the missing word, "County," specially printed as rub-on lettering that matched the style and color of the type on the label, and literally added the word "County" by hand to every label. That course was chosen because the cost of the custom-made rub-on lettering and the work to apply it was significantly less than reprinting labels, soaking off the old labels, and reapplying new labels.

ATF requires that the varietal type and appellation appear on the same label. Since this current interpretation of "direct conjunction" is much more relaxed than the previous one (which required varietal and appellation to appear on the same line or consecutive lines), it is very unlikely that a use-up would be given where the varietal type and appellation appeared on different labels.

Tips for Avoiding the Need for Use-Ups

Mistakes do happen, and in many instances there is no viable choice except to ask for a conditional approval. However, there are some situations in which a little planning ahead can either eliminate the need for a use-up, or reduce the hassle and stress involved.

Avoiding the tax class identity crisis: To avoid potential problems with wines that may be on the cusp of a different tax class, the winery could

get label approval for the wine in both tax classes. It may be less costly to print two batches of labels (especially when they are printed at the same time), than to have to prepay your taxes when your temporary label approval expires.

Strip labels to the rescue: If a strip label merely adds missing information without contradicting other information appearing on the original label, it is possible to save the day with a strip label. However, if the information on the strip label conflicts with the information on the label, then a strip label

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would not work. There's not much you can do about such inconsistencies except get a use-up, because ATF frowns on the use of anything that obscures or obliterates information on the existing label.

Buying time—for free! As we have pointed out earlier, use-ups are generally limited in duration to very brief periods of time; in no case will conditional approval extend beyond a year. And the wine must be removed from bond before the use-up expires, even if it is not yet ready for sale.

One way to "buy some time" is to delay requesting the use-up until closer to the wine's release date. Here is a clever, and perfectly legal, way to do that.

Every wine must be covered by a valid certificate of label approval at the time of bottling. The winery is free to later use a different label on that wine, but the important thing is to have an approved label at the time of bottling that could legally be used on the wine.

Every winery would always be assured of meeting this requirement if it obtained a few "generic" label approvals. We recommend having on hand an approved label for at least a red wine

and a white wine, and if your wines sometimes finish over 14%, get a set in both tax classes. Of course, if you produce sparkling wine or rosé, get generic labels for those wine types as well. That way, if an ATF inspector ever asks to see the label approval covering any wine, the winery can legitimately point to a generic label approval—even if the wine is already labeled with a different label or has no label at all. Sure, the actual label will eventually need to be approved, but the winery is not legally obliged to get that approval until the wine is removed from bond—as long as the bottling of the wine was covered by another, approved label.

Exemption from label approval:

If you can't get a use-up for whatever reason, then you may have the option of getting an exemption from label approval to sell the wine in your home state only. A wine with an approved exemption from label approval is excused from all the requirements of the labeling regulations in Part 4, and must meet only the much more minimal labeling requirements stated in Section 24.257 of the wine production regulations. That section requires only:

- type of wine ("white wine," "red wine," varietal, etc.)
- alcohol content by volume
- name and address of the bottling winery
- brand name, if different from the winery name and for a wine with less than 7% alcohol by volume, the word(s) "wine" or "carbonated wine" as part of, or in direct conjunction with, the brand name
- net contents

The labeling regulation in Part 24 makes no mention of type sizes, appellations, and many other specific requirements found only in Part 4. However, please note: The requirements of the government warning must still be met.

The process of getting a certificate of exemption from label approval is similar to getting a certificate of label approval. You still must submit the COLA form in duplicate, but for an exemption from label approval, you check the "exemption" box rather than the "approval" box in Item 16 on the form and insert your state abbreviation.

There is one significant disadvantage to this system, however: the wine is supposed to actually be labeled "for sale in [the winery's home state] only." In the past ATF has allowed a winery to use a colored dot or some other sticker on the label to imply "for sale within the winery's state only," but in recent conversations with ATF this alternative no longer appears to be acceptable. Most wineries feel that if they have to add "for sale in ____ only" to the package, it might be worth relabeling the wine instead.

More Questions?

To err is certainly human, but fortunately, as long as the core purposes of labeling are not compromised, ATF is willing to excuse many mistakes. As we said in Part One, it is better to ask for permission when you make a labeling blooper, than to ask for forgiveness after the illegal label is discovered in an ATF audit. With this primer in hand, you now know how and when to use conditional approvals for relief from that touchy situation.

You still may encounter a circumstance, someday, that hasn't been addressed here. If you have any other questions about labeling and use-ups, contact your compliance advisor or ATF. The Alcohol, Labeling, and Formulation Division can be reached by phone at (202) 927-8140, or by e-mail at alfd@atfhq.atf.treas.gov.

GORDON GRAPHICS: LABEL ANALYSIS

FILE N° 006

VENTANA VINEYARDS
1998 MEADOR ESTATE SYRAH

This two-piece pressure sensitive label is treated to black and copper colored foils as well as embossing and die-cutting. Three color process lithography is used to create a background texture to complement the uncoated stock, with two additional PMS colors to support the finished piece.

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