



January 25, 2008

Mr. Frank Foote  
Director  
Regulations and Rulings Division  
Alcohol and Tobacco Tax and Trade Bureau  
Attn: Notice No. 73  
1310 G Street, N.W.  
Washington, DC 20005  
P.O. Box 14412  
Washington, DC 20044-4412

Re: TTB Notice Number 73: Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

Dear Mr. Foote,

The Brewers Association is pleased to submit the following comments in response to TTB Notice No. 73, *Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages* (“Notice 73”), 72 Fed. Reg. 41860 (July 31, 2007). TTB extended the comment period to January 27, 2008 in Notice No. 75, 72 Fed. Reg. 53742 (Sept. 20, 2007). The Brewers Association appreciates this opportunity to contribute the perspective of America’s small breweries to the process of labeling and advertising decision making.

*The Brewers Association was established in 2005 by a merger of the Association of Brewers and the Brewers' Association of America.*

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The Brewers Association was established as the successor organization to the Brewers Association of America and the Association of Brewers by a merger in January 2005. The Brewers Association's predecessor organizations collectively served the interests of small American brewers for a combined total of eighty-eight years.

The Brewers Association represents the approximately 1,400 small brewers located in every American state and the District of Columbia and thousands of homebrewers and beer enthusiast consumers around the nation. All small breweries producing less than two million barrels of beer per year can become full brewery members of the association, and larger brewers, beer wholesalers and suppliers may join as associate members, wholesaler members and allied trade members, respectively. In addition, homebrewers and individuals may join the Brewers Association through its American Homebrewers Association division. Today, the Brewers Association has 1,086 brewery members, 3 associate members, 229 allied trade members, 109 wholesaler members, 277 professional individual members, 122 retailer members and 14,214 American Homebrewers Association members.

### **Overview of Brewers Association Comments to Notice 73**

The Brewers Association recognizes the forward steps TTB is making in requiring alcohol beverage manufacturers to provide more information about alcohol beverages to consumers. The Brewers Association anticipates that TTB will be mindful

of the burden the new rule will have on small businesses. Compliance with the proposed regulations will come at great cost and staff burden to small breweries, and the result will likely be fewer products in the marketplace.

The requirement of a **servicing facts panel** would force many brewers to incur large costs such as a new back labeler, cease bottling and/or cease operation. TTB has the opportunity to decrease the burden on small breweries by allowing a linear display of servicing facts information rather than requiring a servicing facts panel. TTB has asked for comment in this area, and the Brewers Association has provided detailed survey data to show the cost difference between a servicing facts panel and a linear display of servicing facts information. The data clearly indicates that a linear display would be important to most, and critical to some, of the smallest breweries in the country.

The **reference servicing sizes** proposed in Notice 73 are accurate for beers under 10 % alcohol by volume (ABV), but should be altered for beers from 10-20 % ABV to 6 ounces, and 2 ounces for beers over 20 % ABV to allow for current marketplace realities and the potential of scientific advancements in yeast tolerance that have already seen beers fermented to far greater alcohol contents than typical 15 years ago.

The new **laboratory testing** burden may also increase costs and staff hours needed for brewers to determine the servicing facts information. The Brewers Association further recommends that TTB broaden the tolerances for alcohol, caloric, carbohydrate, fat and protein content. Particularly in the case of materials that most beers contain at very low levels (*e.g.*, fat and protein), a greater range is necessary to avoid inadvertent violations by brewers.

**Alcohol content** should be expressed as alcohol by volume. It is the language that alcohol beverage consumers are accustomed to and it should be consistent for all beer, wine and spirits. As such, an optional statement of absolute alcohol would be confusing to consumers and counterproductive to providing useful information that allows educated purchasing and consumption decisions.

The Brewers Association applauds the TTB for removing the equivalency/difference graphic from beer labels. Beer is consumed differently from wine or spirits and there is too much variation in alcohol content within each beverage class to make broad generalizations that are accurate or even helpful to consumers.

#### **Summary of Main Brewers Association Points**

- 1. A linear display of serving facts information will be significantly less burdensome on small brewer businesses by a total industry amount of over \$15.1 million versus a serving facts panel.<sup>1</sup>**
- 2. The reference serving sizes proposed for beer should be expanded and amended to account for consumer and marketplace practices and beers of high alcohol content.**
- 3. Greater tolerances on alcohol, caloric, carbohydrate, fat and protein measurements will also help ease the burden on small brewers.**
- 4. Alcohol content should be expressed as a percentage of alcohol by volume only.**

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<sup>1</sup> Based on Brewers Association count of operating craft breweries in 2006. The data from the survey in Appendix A were extrapolated to extend to all packaging small brewers. The \$15.1 million is based on the total extrapolated expected cost of a serving facts panel minus the total extrapolated expected cost of a linear display.

5. **There are vast differences within wine, beer and spirits that make any graphic depiction of equivalency incorrect and misleading.**

### **Areas of Comment Requested by TTB in Notice 73**

TTB has requested comments and asked questions in five major topic areas:

1. Proposed serving size reference amounts.
  - a) Are the figures accurate?
  - b) If not, what data or information would give an indication of the amount customarily consumed?
  - c) Are the proposed amounts better than 1.5 ounces for spirits, 5 ounces for wine and 12 ounces for beer? Why or why not? Should TTB instead retain the serving sizes set forth in ruling 2004-1?
2. Proposed elements of the serving facts panel.
  - a) Do the elements of the serving facts panel provide customers with adequate information?
  - b) Should the panel have additional elements?
  - c) Should elements be required only at certain thresholds? Why or why not?
  - d) Would it be confusing for consumers to see protein and fat content on some labels but not on others? Why or why not?
3. Linear display option.
  - a) Should a linear display of serving facts information be permitted on all container sizes? Why or why not?
  - b) Would a linear display option reduce compliance costs?

4. Expected economic impact of proposed rule, especially on small businesses.
  - a) Does the three-year effective date suffice to limit the negative impact on small businesses, while ensuring that consumers are protected?
  - b) How many small businesses would be impacted by the proposed rule and what would be the economic impact on these small businesses? Please explain in detail and provide specific cost data.
5. All other issues presented in the notice.

### **Brewers Association Responses to TTB Questions**

1. Proposed serving size reference amounts.
  - a. Are the figures accurate? The proposed reference serving size for beer of 12 ounces for beers under 10 % ABV is accurate. These types of beers are often consumed from a 12-ounce bottle or can and this would also be a standard serving size in on-premise sales environments. The proposed reference serving size of 5 ounces for beers over 10 % ABV is close to accurate, but could use some improvement to reflect the responsible enjoyment in the marketplace. The Brewers Association also believes another reference serving size range is appropriate for beers over 20 % ABV which will account for beers currently in the marketplace and beers yet to be developed that may push beyond the upper end of alcohol by volume for a fermented beverage.

- b. If not, what data or information would give an indication of the amount customarily consumed? For beers over 10 % ABV, The Brewers Association believes the most common serving size for these beers is 6 ounces. A beer of this higher strength is often served at an occasion and shared among two people who responsibly enjoy the camaraderie of the occasion. The Brewers Association recommends that beers between 10 and 20 % ABV have a 6 ounce reference serving size. Beers that are over 20 % ABV are very strong in alcohol and flavor and it is appropriate to have a third reference area that is 2 ounces. One reason that a third reference serving size is appropriate is that modern brewing technology as of January 2008 allows for malt beverages to be fermented over 27 % ABV, and the TTB should allow for the possibility that fermentation technology may increase what the potential upper limit will be in the future. A brewer that wants its beers to be responsibly enjoyed may feel that a serving size over 2 ounces may not be in keeping with responsible enjoyment of their product. The TTB should not be in the position of recommending greater consumption of alcohol than a brewer feels to be responsible. It is for this reason that the Brewers Association believes a third reference serving size is appropriate for beers of alcohol content over 20 % ABV.
- c. Are the proposed amounts better than 1.5 ounces for spirits, 5 ounces for wine and 12 ounces for beer? Why or why not? Should TTB instead retain the serving sizes set forth in ruling 2004-1? The proposed reference

serving sizes are better than those set forth in ruling 2004-1, because they better reflect consumer drinking patterns and typical serving sizes. As stated above, the TTB has an opportunity to better reflect consumer and marketplace behavior by developing a third reference serving range for beers over 20 % ABV.

2. Proposed elements of the serving facts panel.

- a. Do the elements of the serving facts panel provide customers with adequate information? Yes.
- b. Should the panel have additional elements? At the present time, the Brewers Association believes that the elements are comprehensive with what an alcohol beverage drinker would seek in order to make an educated decision about a product and know what she or he is consuming.
- c. Should elements be required only at certain thresholds? Why or why not? A consistent listing of elements would have value, whether they are or are not at threshold levels. It is reasonable to assume that most consumers will not know what threshold levels are and the absence of a listing could lead to confusion and doubts that the information is complete. Indeed, if listing measures for certain nutrients that do not meet or exceed a certain threshold is misleading, as some assert, then TTB's longstanding light beer policy and many of the labeling requirements administered by the Food & Drug Administration are also subject to the same criticism. TTB has wisely rejected a position that would treat its serving facts rule

differently than the rules applied to most of the food products sold in the United States.

- d. Would it be confusing for consumers to see protein and fat content on some labels but not on others? Why or why not? A consistent listing of elements would have value. It is reasonable to assume the presence of protein and fat content on some beverages but not others could lead consumers to various conclusions—there isn't any, there is not enough for thresholds or it isn't tested for.

3. Linear display option.

- a. Should a linear display of serving facts information be permitted on all container sizes? Why or why not? Yes. A linear display is a possibility that may prevent labeling requirements from having a devastating impact on many of the smallest brewers. Many of these companies do not currently have the type of labeling equipment that would allow the brewer to provide for a larger front label or a front and back label needed to fit the serving facts, government warning, alcohol percentage, company information and other elements critical to a company's ability to responsibly communicate information to the consumer. A linear display has been used effectively on light beer labels for three decades and can easily be extended to all labels and the public would be informed of all the required serving facts information. To our knowledge, consumers have accepted and not found inadequate the size and format of the statement of

average analysis on light beer labels. This consumer acceptance is particularly significant as light beer, unlike other beer products, is marketed in a manner that makes information about calories, carbohydrates and the like particularly material to consumers of such products. We accordingly believe that consumers would find a linear display sufficient on the labels of other beers.

- b. Would a linear display option reduce compliance costs? Yes. The Brewers Association surveyed its packaging brewery members to determine the cost of the proposed rules on small brewers and the difference in costs between a serving facts panel and a linear display. In regard to the linear display versus serving facts panel specifically, the Brewers Association member survey conducted during November 2007 yielded the following data based on brewery size.

Brewery Size	Respondents	\$ Cost of Panel Compliance	\$ Cost of Linear Display
Under 1,000 bbls	29	\$17,500	\$10,925
1,000-9,999 bbls	73	\$68,582	\$25,900
10,000-20,000 bbls	20	\$93,121	\$38,395
20,001-100,000 bbls	17	\$134,107	\$72,067
Over 100,000 bbls	7	\$352,857	\$163, 571

When the average data is extrapolated to all of the small (under 2 million barrels) brick-and-mortar breweries (contract companies not included) in

the United States, the result is a total cost of compliance for final rules with a serving facts panel of \$27,878,106. The total cost of compliance for final rules with a linear display is \$12,720,764. **If TTB decides to allow a linear display for small brewers, the difference in compliance costs between a linear display and a serving facts panel would be \$15,157,432 less for a linear display.** This difference in compliance costs assumes that all small brewers would comply rather than limit or cease business operations.

Additional survey data reveals that 140 of 146 respondents believe that a serving facts panel would necessitate a significant change in labeling equipment, supplies and/or labeling process. One hundred thirty-two (132) of 146 respondents stated they would prefer a linear serving facts display over a serving facts panel. Full survey data is contained as Appendix A.

4. Expected economic impact of proposed rule, especially on small businesses.
  - a. Does the three-year effective date suffice to limit the negative impact on small businesses, while ensuring that consumers are protected?

The three-year effective date will reduce costs related to destruction of old label stock, but will not reduce the expense for new labeling equipment if a serving facts panel is required. Small brewers do not customarily change their labels more frequently than every three years as a matter of practice. The appended survey shows that only 24 of 146 (16.4 percent) brewers replace labels every three years or sooner.

- b. How many small businesses would be impacted by the proposed rule and what would be the economic impact on these small businesses? Please explain in detail and provide specific cost data.

One hundred (100) percent of small breweries will be affected by the proposed rule. Thirty-eight (38) percent of responding breweries under 1,000 barrels indicated they would cease bottling operations if a serving facts panel is required. Many of these smallest brewers are not profitable or barely profitable, and the proposed serving facts panel would require equipment investment that many of the smallest brewers cannot afford. The serving facts information will also be a major burden on small brewers. Small brewers will need to conduct or contract for extensive lab testing, because not every batch comes out exactly the same and the same brand may need to be tested each time it is brewed to ensure compliance with the acceptable tolerances for alcohol by volume, calories, protein or carbohydrates, printed on existing label stock. The following panel is the **average annual cost** per small brewery for testing and complying with proposed regulations dealing with the serving facts panel and the number of staff hours preparing for or conducting lab tests of beer samples.<sup>2</sup>

Brewery Size	Respondents	Panel Compliance	Lab Testing (Hours)
Under 1,000 bbls	29	\$17,500	57
1,000-9,999 bbls	73	\$68,582	129

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<sup>2</sup> The November 2007 survey replaces the preliminary survey data used in the August 2007 Brewers Association comment submission to the Office of Management and Budget on brewery staff hours and data collection expenditures for the laboratory testing requirements for TTB Notice 73.

10,000-20,000 bbls	20	\$93,121	86
20,001-100,000 bbls	17	\$134,107	270
Over 100,000 bbls	7	\$352,857	930

Additionally, the Brewers Association members believe the economic impact from laboratory testing and laboratory sample preparation will be significantly higher than TTB’s claim (at 72 Fed. Reg. 41873) that laboratory analysis costs would be small – just \$250 per formulation. Variations in recipes and ingredients would require rather frequent testing, not simply one test per brand of beer. The Brewers Association filed comments in this area to the Office of Management & Budget (with TTB copied) in August 2007.

5. All other issues issues presented in the notice.

The requirement of label information for alcohol, caloric, carbohydrate, fat and protein contents on beverage labels present costly challenges with the batch-to-batch variation inherent in the brewing process (and winemaking process). The tolerance for alcohol content is 0.3% above or below the stated alcohol content. The tolerance for caloric content is +5 to -10 the stated caloric content. The carbohydrate and fat content are acceptable “within a reasonable range below the labeled or advertised amount...but must not be more than 20 % above the labeled or advertised amount” (TTB Procedure 2004-1). The protein content is acceptable “within a reasonable range above the labeled or advertised amount...but must not be more than 20 % below the labeled or advertised amount” (TTB Procedure 2004-1). The use of a tolerance that has the phrase “reasonable range” is not

sufficient for industry because what is reasonable to one person may not be reasonable to another. Subjective standards should be replaced by clear objective standards. The tolerance levels in TTB Procedure 2004-1 were adopted without the benefit of public input, and therefore do not deserve any particular deference. There is slight batch-to-batch variation in the brewing world due to variables such as malt specifications or water pH variation. A brewer may not be able to achieve such brand exactness of lab results to be able to use the same label stock for each batch of the same brand. If the brewer is out of the tolerances for any of these items, the brewer would need to apply for a new label or blend the beer. In either case unique character and freshness could be compromised. The Brewers Association believes that the tolerance ranges should be widened for alcohol, caloric, fat, carbohydrate and protein. The Brewers Association recommends a tolerance for alcohol content is 0.5% ABV above or below the labeled amount. The Brewers Association recommends a tolerance of 5 percent over or 10 percent under the labeled caloric content. The Brewers Association recommends carbohydrate and fat content of 10 percent below or 25 percent above the labeled carbohydrate and fat contents or 1 gram below or above the stated fat content, whichever is greater. The Brewers Association recommends protein content of 25 percent below or 10 percent above the labeled protein content or 1 gram below or above the stated protein content, whichever is greater. The Brewers Association does not believe the option of an absolute alcohol provision benefits the consumer. Consumers have become accustomed to seeing alcohol content on wine labels and many beer labels expressed as % ABV, they

have learned to think about alcohol in these terms. The absolute alcohol provision would be confusing to many consumers, and a “second language” of alcohol content is counterproductive to clear consumer understanding.

While the concept of providing more information for the consumer is a positive in many ways, there are aspects of the rule which will have a negative impact on consumers by reducing the number of offerings and variety of beer styles in the marketplace. There is also an economic impact. The additional costs for putting an individual brand in the marketplace increase under these rules, and many brewers may reduce the number of different offerings and be less interested in doing small-batch, one-off beers for special occasions, such as a brewery anniversary or a seasonal beer. Other brewers may not be able to absorb the added laboratory testing burden and will stop production or sale in certain states. The consumer loses out by having a reduced range of choices.

Finally, the Brewers Association agrees with TTB that an equivalency/difference graphic is inappropriate for alcohol beverage labeling and advertising. Beers range from under 0.5% ABV to over 27 % ABV. Wines have a range not nearly as broad within the range of beer. Spirits have a range that overlaps the beer and wine classes and extends far beyond. Any attempt at equalizing these in a graphic depiction begs the question which beer, which wine and which spirit? The graphic is simply inaccurate as a generalization and could only possibly be accurate for a specific wine measured against a specific beer measured against a specific spirit.

The Brewers Association appreciates the opportunity that TTB has offered to comment on Notice 73. Our members appreciate the chance to have their voice heard in the regulatory process as we work together to protect public safety and educate the public with accurate information which helps enable the consumer to enjoy alcohol beverages in a responsible manner and allows small brewers and small businesses to remain in business and serve their customers.

Sincerely,

A handwritten signature in black ink that reads "Charlie Papazian". The signature is written in a cursive style with a horizontal line at the end.

Charlie Papazian

President

Brewers Association

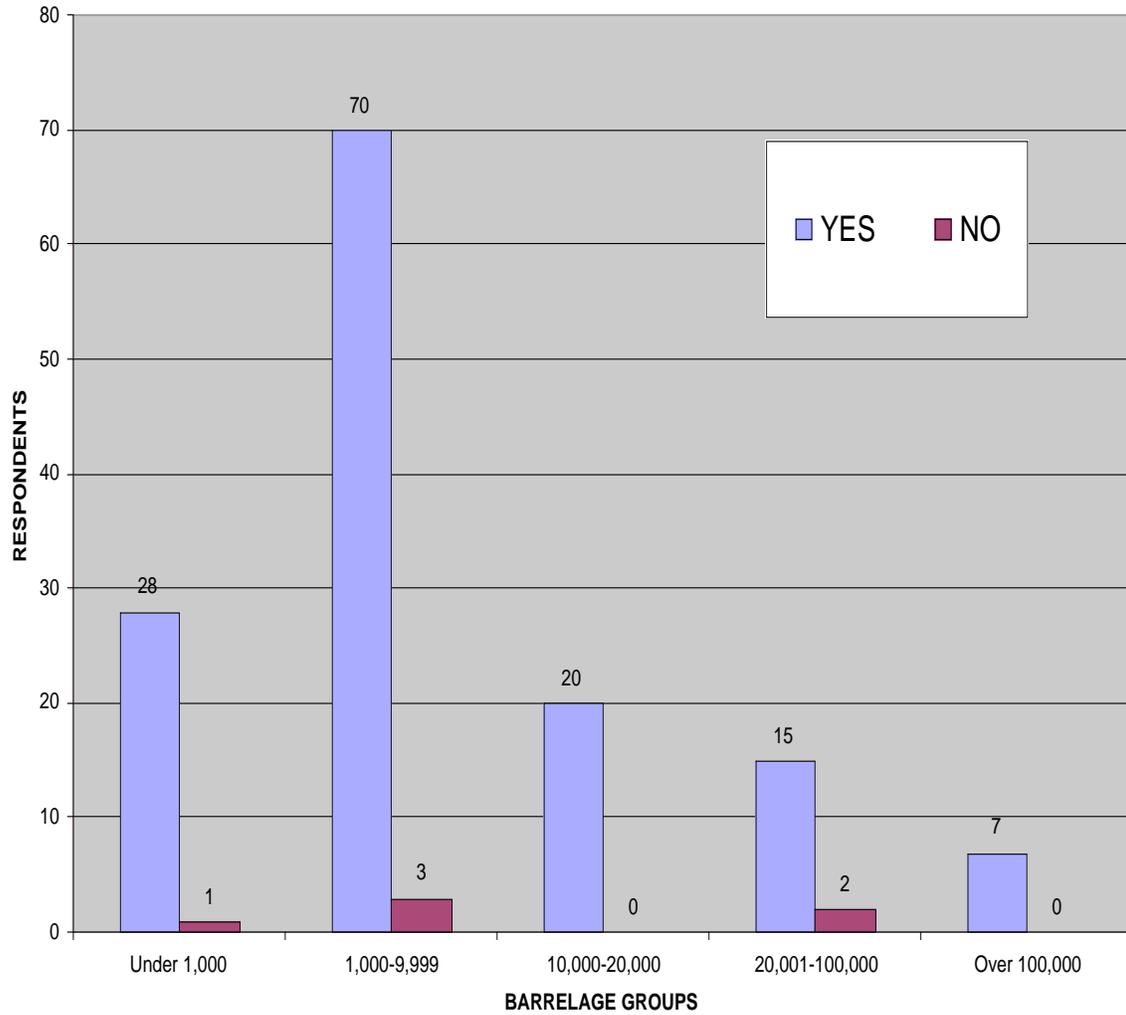
## **Appendix A**

### **Brewers Association Member Survey**

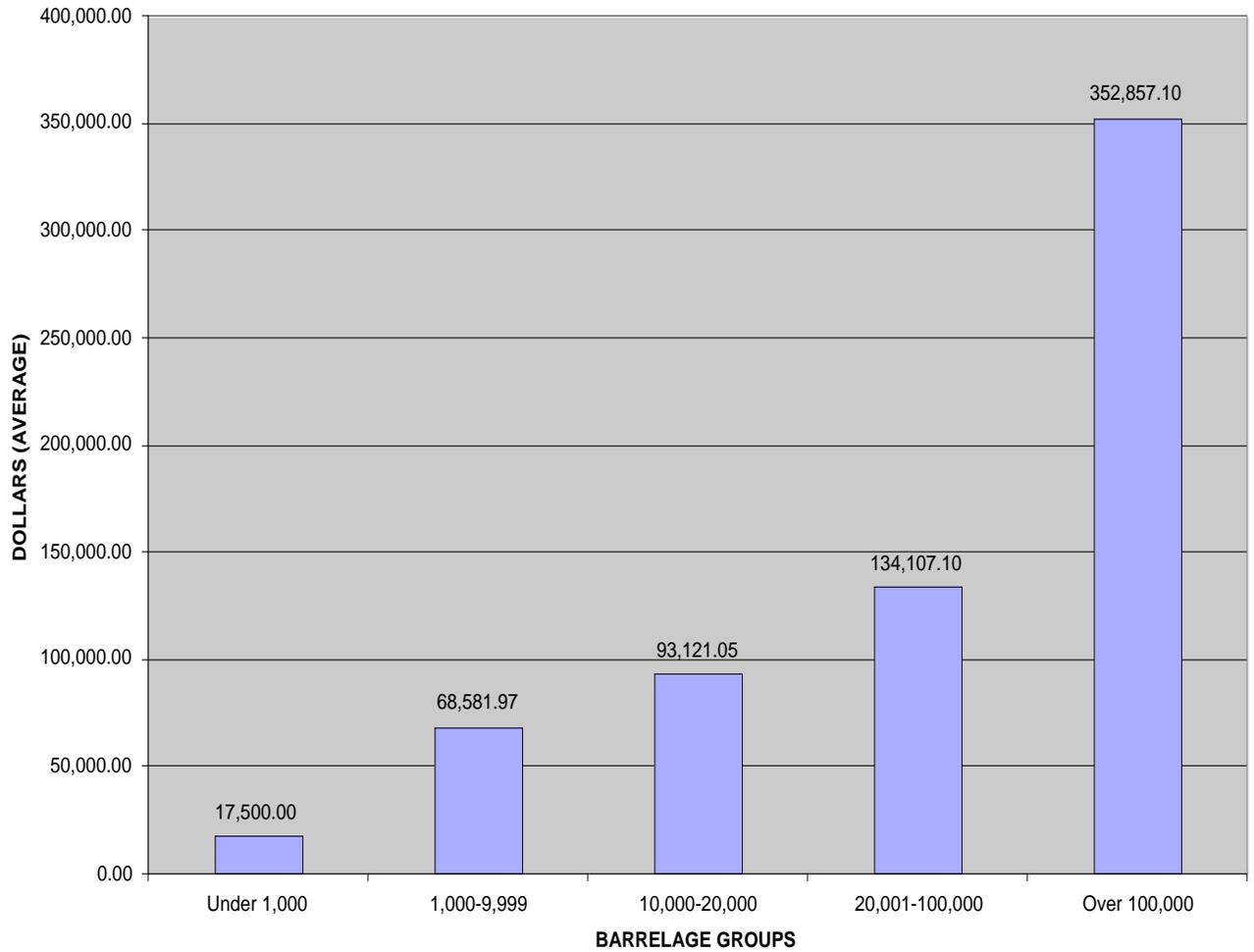
**November 2007**

**Methodology:** This survey of small U.S. brewery members of the Brewers Association was conducted between November 6, 2007 and November 27, 2007. Brewery members were asked to complete the survey through an HTML email and through a message on the Brewers Association Forum. Survey completion and data collection was managed through a service provided by Survey Monkey, an independent online survey company. No brewers were provided with information about individual responses to the survey.

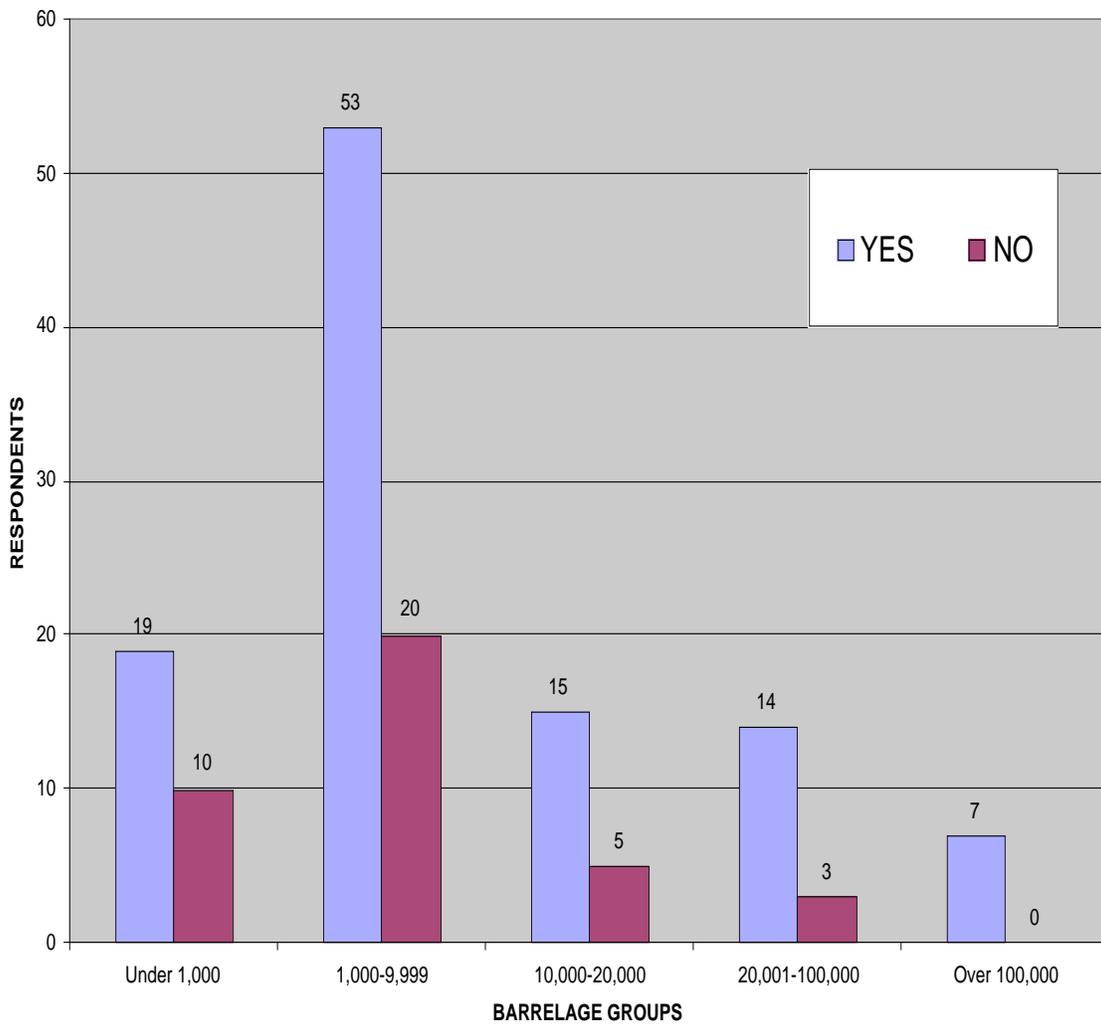
***Q5 Would the inclusion of a Serving Facts panel necessitate a significant change in your labeling equipment, supplies and/or labeling process (e.g. adding a back label or moving to a 180 degree or wrap around label)?***



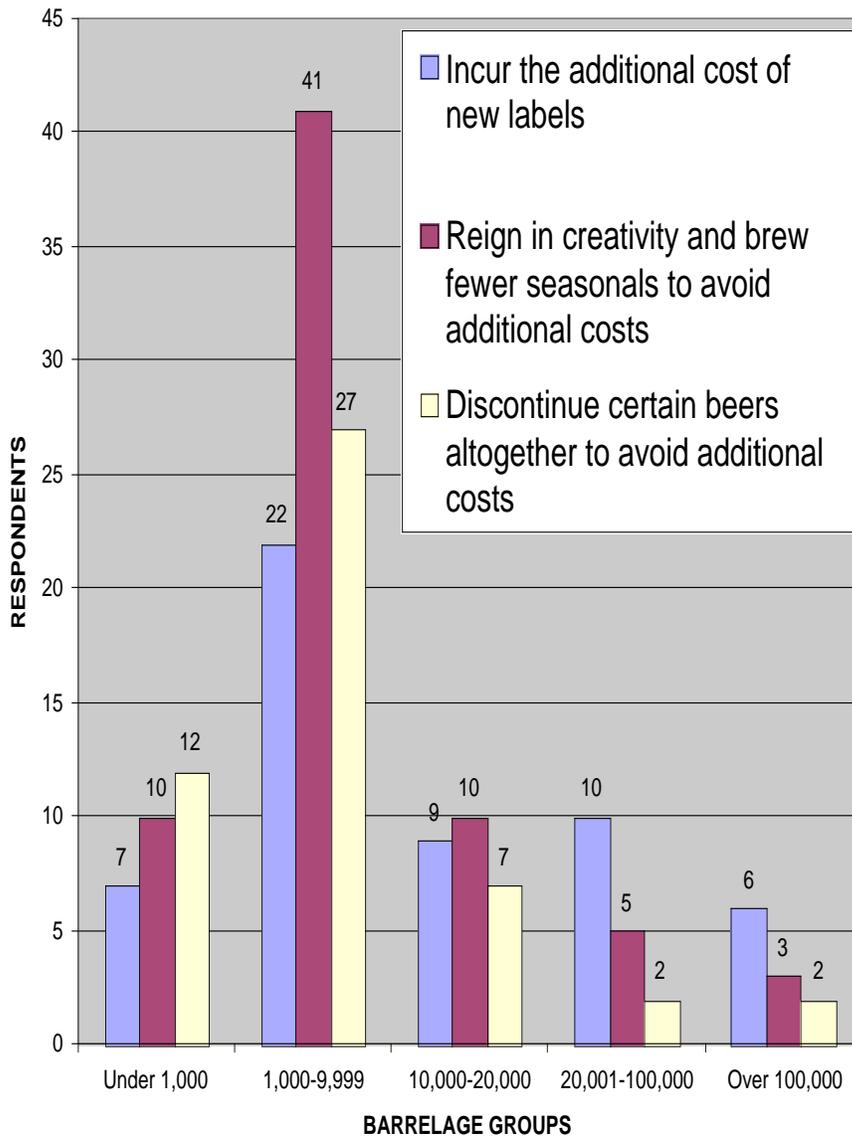
***Q6 Total cost to comply with Servings Facts panel option:***



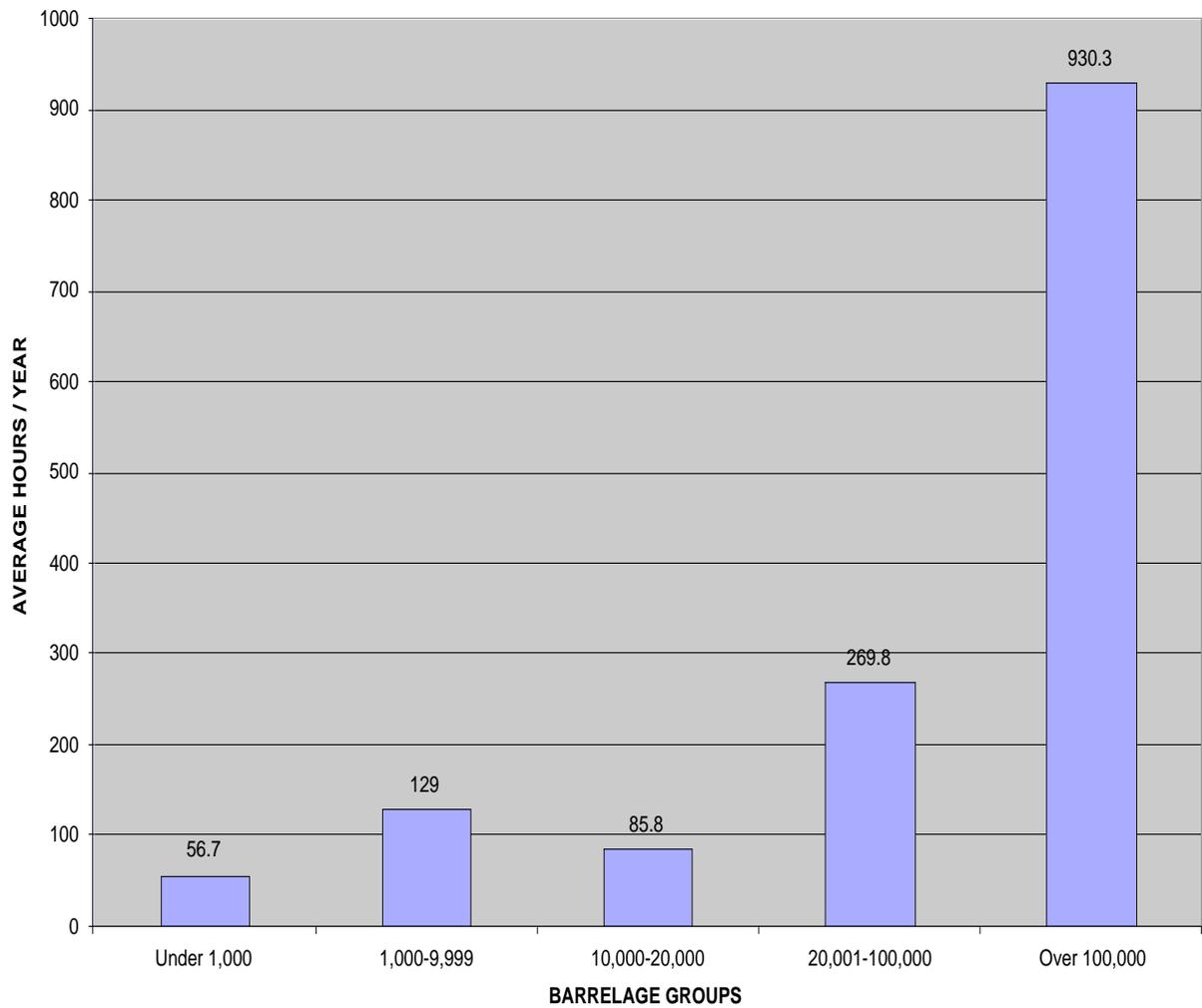
**Q7 Do you now (or plan to) make beer with a single label but which varies annually in any one or all of the following, thus requiring new labels each year?: A. Alcohol by Volume (varies by at least 0.3% abv) B. Calories (tolerance of +5/-10) C. Carbohydrates (not more than 20% above labeled amount) D. Fat E. Protein**



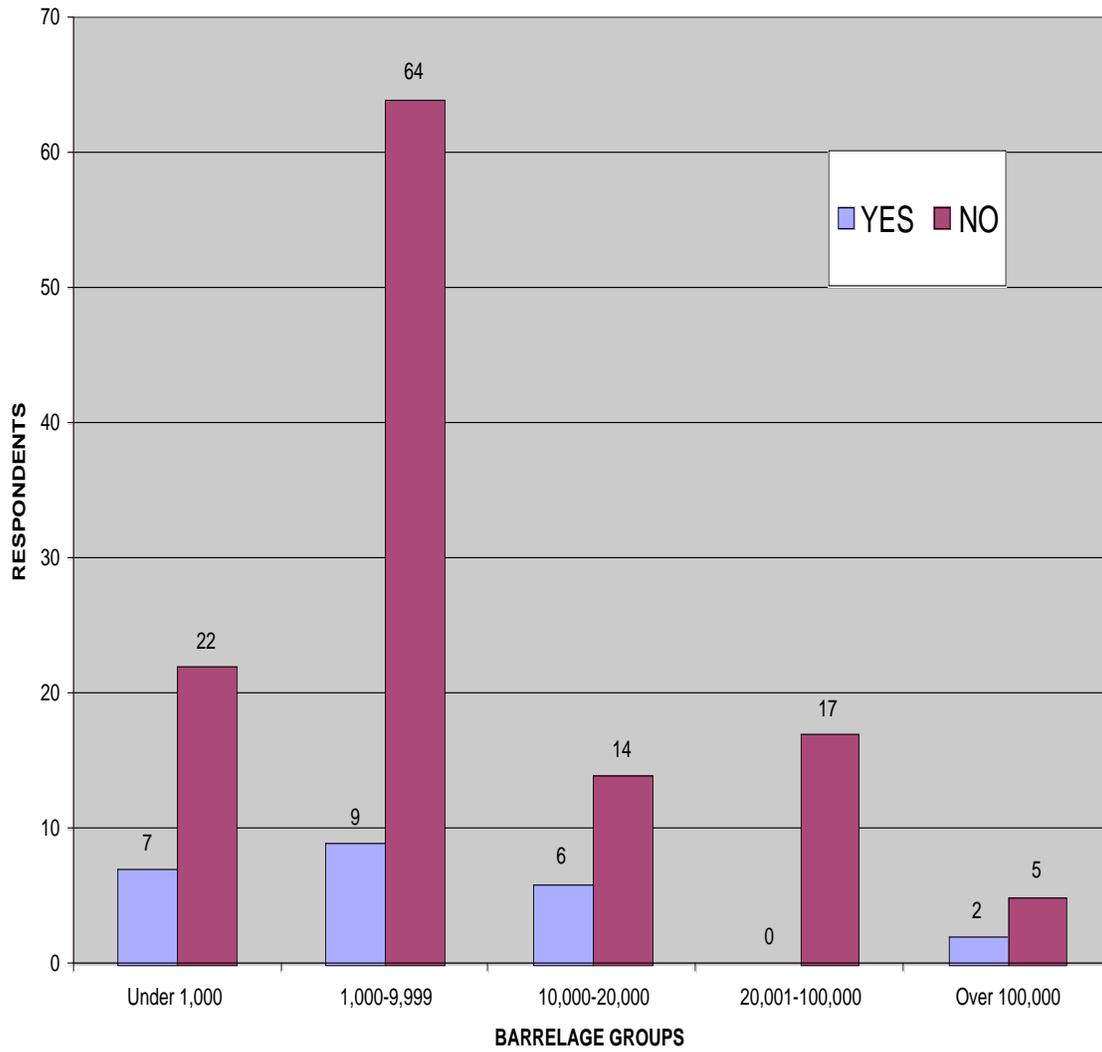
***Q8 If you answered "Yes" to any of the choices in Question 7, how would you respond if this rule went into effect (check all that apply):***



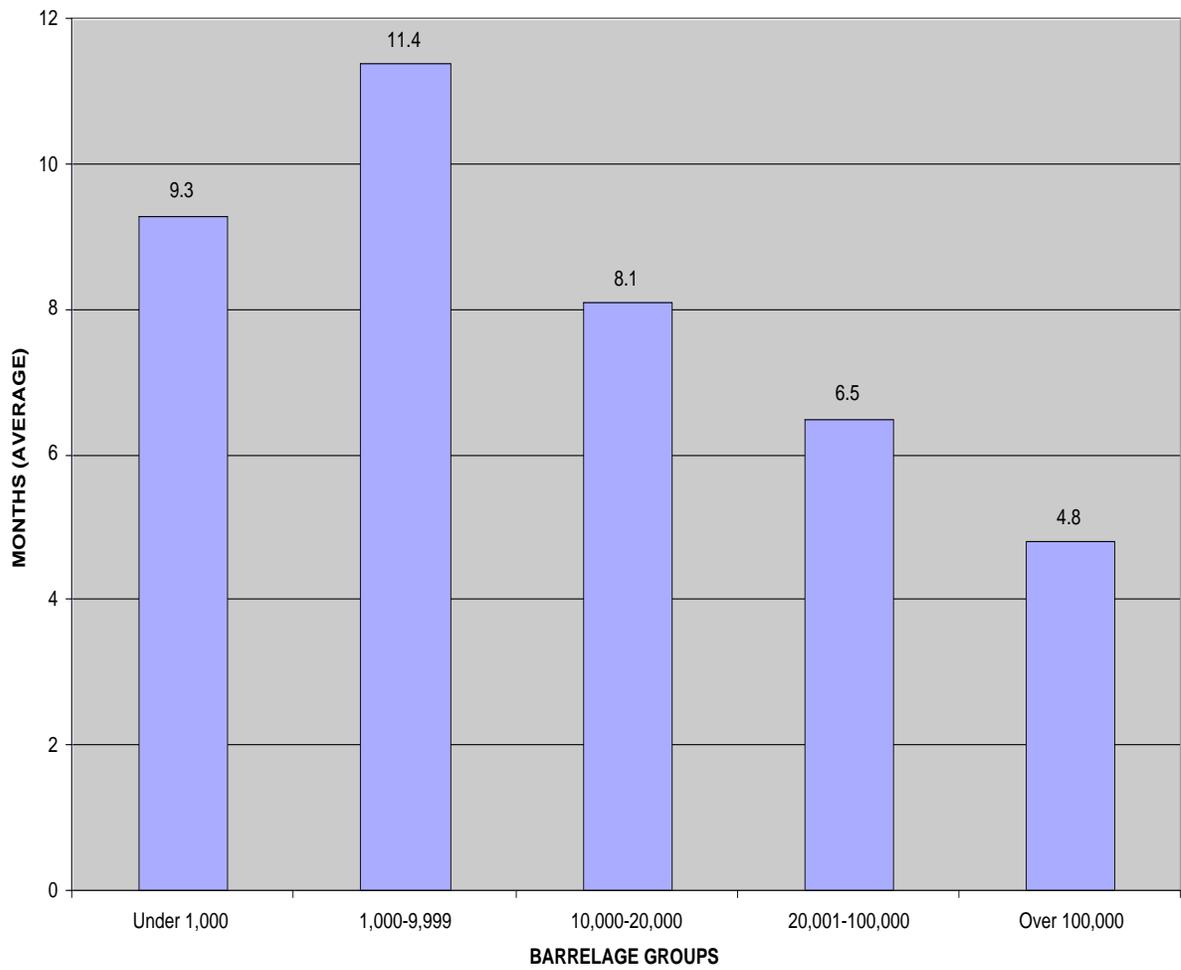
***Q9 Estimate the time it would require annually (in hours) to test your beer to determine calorie, carbohydrate, fat, and protein content (whether you do testing in-house or by contracting it out):***



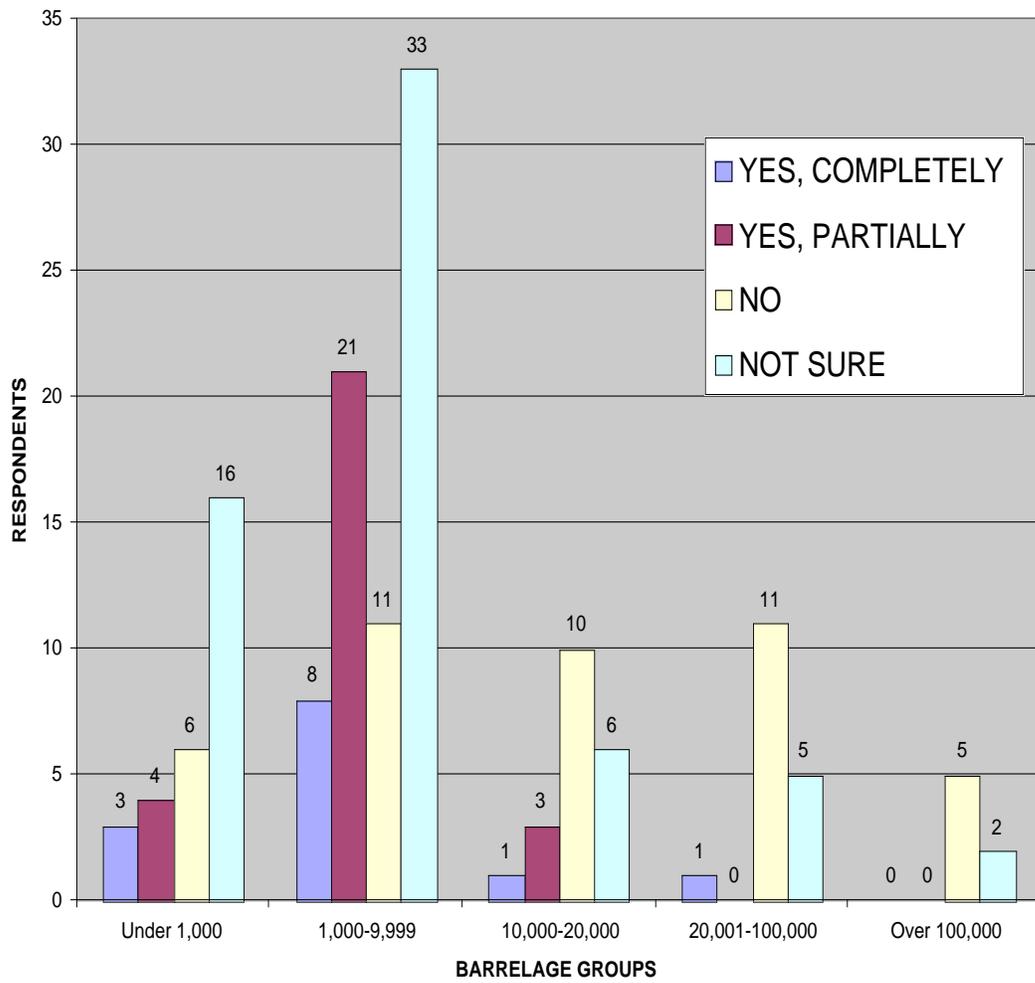
*Q10 Is it your practice to change the label on any given beer every 3 years?*



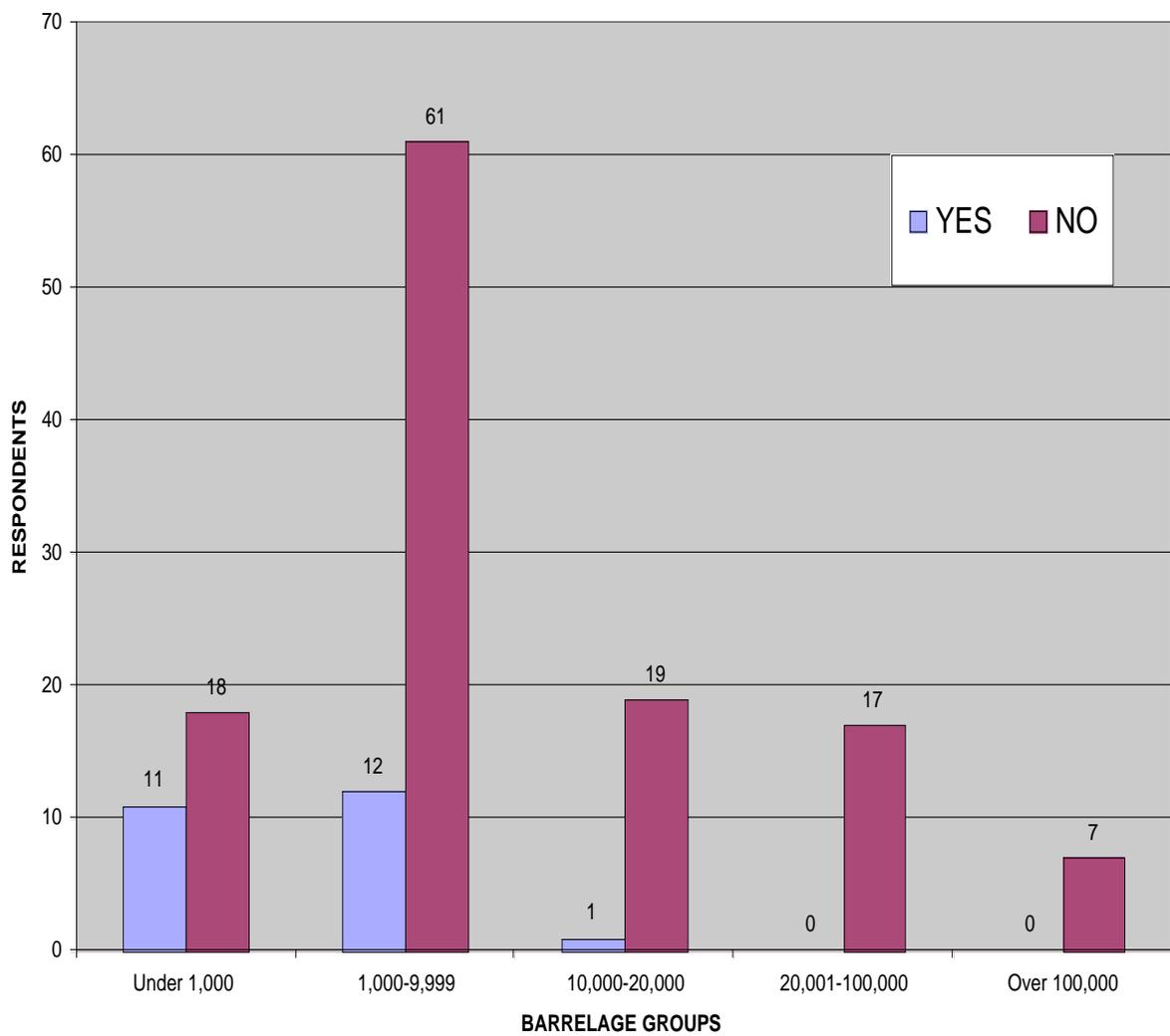
*Q11 How many months of label stock do you order at one time?*



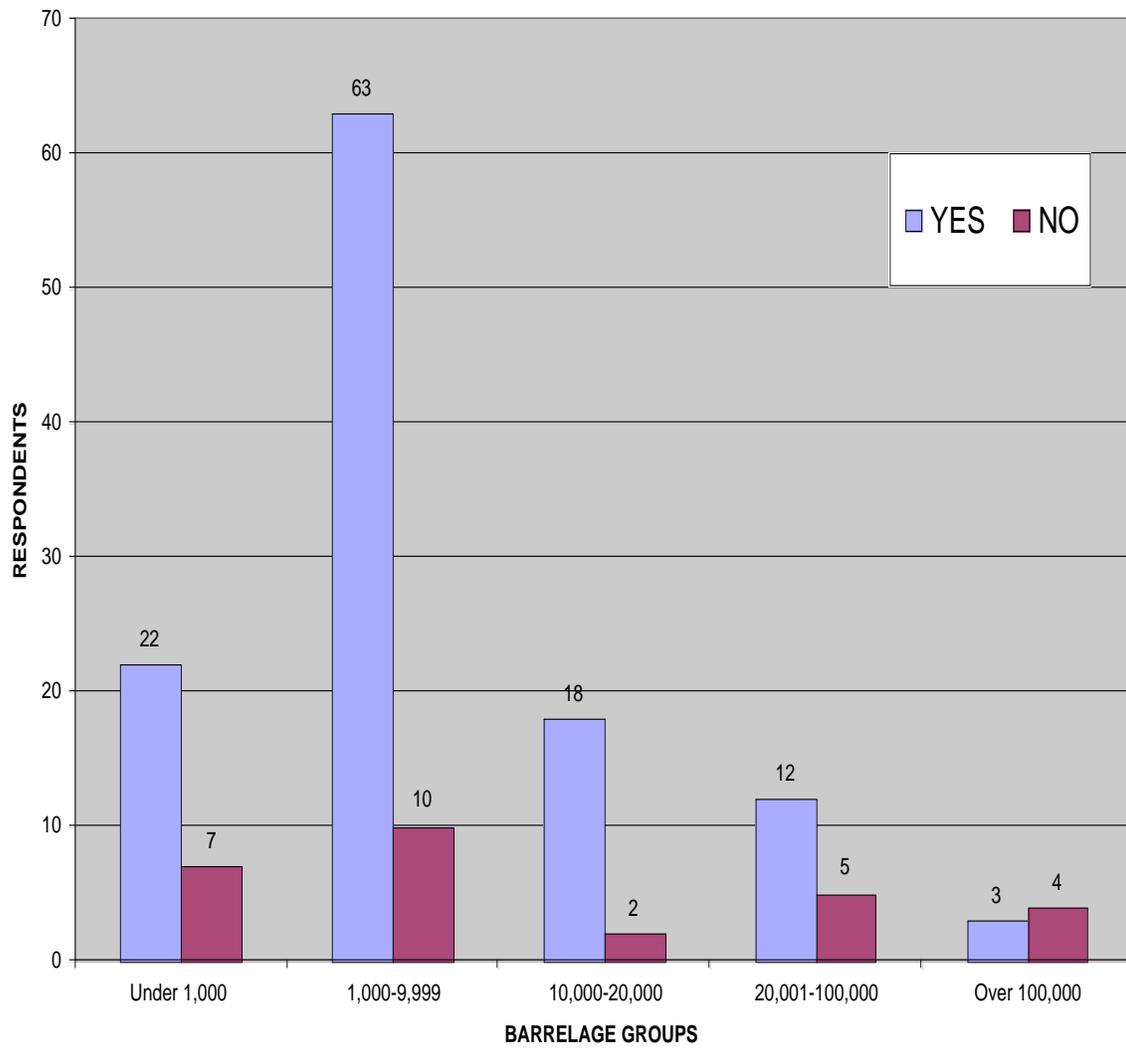
**Q12 Would these labeling requirements cause you to withdraw from interstate sales?**



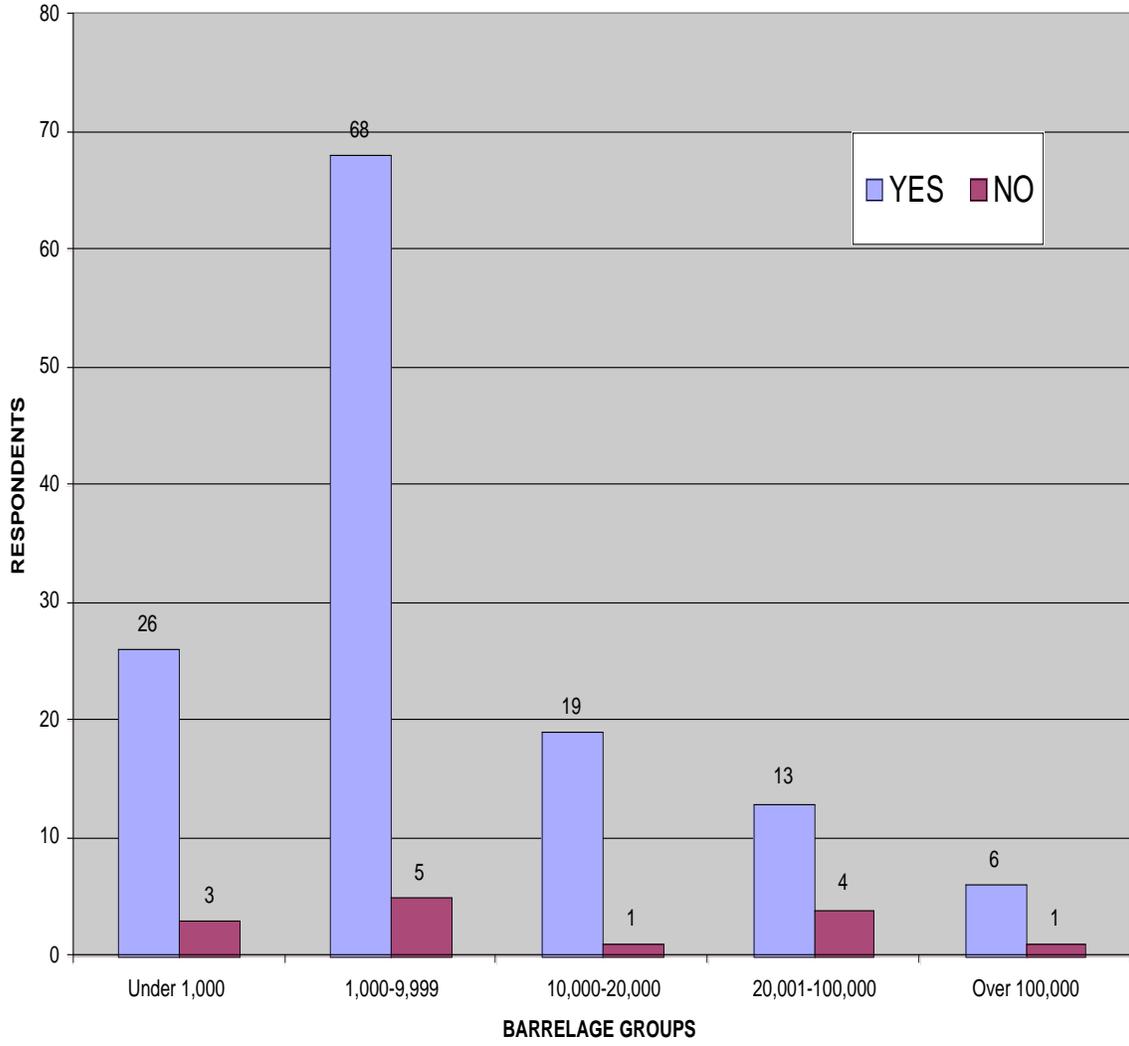
***Q13 Would the additional costs attributable to a Serving Facts panel format labeling requirement cause you to cease bottling operations?***



***Q14 Do you believe a linear depiction of this information could more easily be incorporated into your existing labels and at less cost than the Serving Facts panel?***



*Q15* Would you prefer this linear option over the panel depiction?



***Q17 What would your total cost to comply be under the linear depiction option?***

