DISTILLED SPIRITS COUNCIL
OF THE UNITED STATES

April 28, 2020

Edward Gresser
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Submitted electronically via http://www.regulations.gov

Re: Request for Comments on Negotiating Objectives for a U.S.-Republic of Kenya Trade Agreement (USTR-2020-0011)

Dear Mr. Gresser:

On behalf of the Distilled Spirits Council of the United States, Inc. (DISCUS) and its member companies, I am writing in response to your request for written submissions (85 Fed. Reg. 16450 (March 23, 2020) and 85 Fed. Reg. 20562 (April 13, 2020)) on negotiating objectives for a U.S.-Republic of Kenya trade agreement. DISCUS is the national trade association representing the leading producers and marketers of distilled spirits in the United States (Harmonized Tariff Schedule (HTS) headings 2208 and 2207.10.30). In 2019, U.S. exports of distilled spirits worldwide were $1.5 billion; direct U.S. spirits exports to Kenya totaled just $8,500 (USITC Dataweb). Kenyan imports of U.S. distilled spirits as reported by the Kenya National Bureau of Statistics totaled $2.7 million in 2019 (Global Trade Atlas).

DISCUS and its member companies welcome and support the Administration's intention to pursue an FTA with Kenya. An agreement with Kenya can serve as a model for additional agreements across Africa and lead to a network of agreements providing new markets for U.S. spirits. We appreciate this opportunity to submit the U.S. spirits industry's specific objectives for the proposed U.S. – Kenya FTA which are detailed below.

I. Elimination of Kenya's Tariff on U.S. Spirits Imports

Kenya is one of six members of the East African Community (EAC) (including Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda) which is an intergovernmental organization and a customs union with a single common external tariff. Kenya applies the EAC's common external tariff of 25% *ad valorem* on imports of all distilled spirits. As a participant in the "zero-for-zero" agreement on distilled spirits, which was launched during the Uruguay Round, the United States has already eliminated on an MFN basis its tariffs on nearly all imported distilled spirits products.

Accordingly, the U.S. spirits industry's primary objective in the proposed FTA is to secure the immediate elimination of Kenya's tariffs on all distilled spirits imports from the U.S.

II. <u>Secure Distinctive Product Recognition for "Bourbon," "Tennessee Whiskey," "American Rye Whiskey," and "American Single Malt Whiskey"</u>

DISCUS urges the U.S. government to seek a commitment from Kenya in the FTA negotiations to provide explicit recognition of "Bourbon," "Tennessee Whiskey," "American Rye Whiskey," and "American Single Malt Whiskey" as distinctive products of the United States.

"Bourbon" and "Tennessee Whiskey" are recognized as distinctive products of the U.S. by 44 countries, and in the U.S.-Mexico-Canada Agreement (USMCA) Mexico has committed to begin the process to recognize "American Rye Whiskey."

Over the past decade, "American Rye Whiskey" and "American Single Malt Whiskey" production have experienced phenomenal growth in the U.S. Today there are over 100 American Rye Whiskey brands on the market as U.S. sales in supplier revenue have increased nearly 1,500%, from slightly over $15 million in supplier revenues in 2009 to over $235 million in 2018. The USITC established a new export code for bottled American Rye Whiskey (2208.30.90.25), which went into effect on July 1, 2017. In 2019, American Rye Whiskey exports reached $2.6 million and was exported to 31 countries, up from 20 countries in 2017.

The "American Single Malt Whiskey" category is growing at a pace similar to "American Rye Whiskey." Over the past five years, the category has experienced a renaissance, with over 30 brands now on the market, up from 10 in 2014. Nearly 100 distilleries located across the U.S. are producing and aging it. The vast majority of brands already use the "American Single Malt Whiskey" designation. While there is no export code for the category, anecdotal information suggests it is exported.

Since 2014, the EAC has been working on technical regulations detailing product definitions and labeling requirements for distilled spirits, including whiskey. However, the status of the technical regulations remains unclear. In July 2016, Kenya notified the proposed EAC standards for whiskey, brandy, neutral spirit, gin, vodka, and rum to the WTO's TBT Committee July 2016[1] and March 2017[2]. In response, DISCUS submitted comprehensive comments in August 2016 and May 2017 and in October 2018 DISCUS received a response from the Kenya's Bureau of Standards in which Kenya committed to recognize "Bourbon" and "Tennessee Whiskey" as distinctive products of the U.S. under its Intellectual Property law. However, it is unclear if Kenya followed through with its commitment.

Accordingly, Kenya should not permit the sale of any product as "Bourbon," "Tennessee Whiskey," American Rye Whiskey," or "American Single Malt Whiskey" unless it has been produced in the United States in accordance with the laws and regulations of the United

States, nor permit the use of these terms for any product that is not “Bourbon,” “Tennessee Whiskey,” American Rye Whiskey,” or “American Single Malt Whiskey”.

III. Ensure Technical Regulations Do Not Unnecessarily Block U.S. Distilled Spirits

As noted above, the EAC has been developing rum, whiskey, vodka, brandy, neutral spirit, and gin standards and labeling requirements since 2015. In March 2017, the EAC issued revised proposed standards which Kenya notified to the WTO. DISCUS previously submitted comprehensive comments on the EAC standards in 2015, 2016, and 2017 when they were notified by Kenya, Tanzania and Uganda. However, the status of the standards remains unclear.

In October 2018, Kenya responded to DISCUS’ submissions and agreed to make a number of positive changes. For example, Kenya agreed to recognize “Bourbon” and “Tennessee Whiskey” as distinctive products of the U.S. under its IPR law, revise its definition of brandy, and clarified that companies may use abbreviations for “alcohol by volume” on product labels. Our priority outstanding concerns with the technical regulations relate to the use of analytical parameters in spirits definitions, prohibiting the use of neutral spirits in rum for blending, a maximum ethyl alcohol content requirement for all product categories, a prohibition on the use of plastic containers, and the use of stickers and lot codes.

In sum, the EAC standards for spirits include numerous provisions which are inconsistent with U.S. standards and international practices for the labeling and classification of distilled spirits. Accordingly, we seek the U.S. government’s support in urging Kenya to refrain from adopting or amending its technical regulations which would unnecessarily prohibit the importation of U.S.-produced distilled spirits into Kenya and the EAC marketplace.

IV. Adopt Best Practices for the Labeling and Certification of Distilled Spirits Products

The Kenya agreement negotiations are an excellent forum for advancing reasonable, science-based regulation of beverage alcohol in Kenya and around the world. To that end, we propose the inclusion of a section detailing regulatory best practices for distilled spirits with regard to labeling and certification requirements similar to the Annex on Alcohol in the USMCA.

As noted above, Kenya and its partners in the EAC have been working on distilled spirits technical regulations which include some potentially problematic provisions which could unjustifiably block internationally traded U.S. distilled spirits from the market.

Securing these commitments on labeling and certification which were included in the recently concluded USMCA would address some of the challenges in the market and will ensure a U.S.-Kenya agreement is a model 21st-century trade agreement for the distilled spirits industry. Doing so will reduce potential barriers to trade by providing greater certainty, transparency and efficiency for distilled spirits producers, importers and exporters in both countries.

V. Secure Rules of Origin That Were Included in the USMCA

To ensure an agreement with Kenya facilitates trade in goods manufactured in each country, the DISCUS urges the U.S. to secure the rules of origin that were included in the USMCA. Adopting rules of origin consistent with other U.S. trade agreements will help reduce costs and provide certainty that products currently exported from the U.S. under existing U.S. trade agreements will, in fact, be able to benefit from an agreement with Kenya.

In addition, the USMCA included important new rules concerning transshipment which provides for minor processing in third-party countries. Specifically, it provides for unloading, labeling, marking, reloading etc. This would further facilitate trade by allowing U.S. spirits exporters to ship their products to an intermediate location where the shipment may undergo minor processing and retain its preferential treatment under the agreement.

VI. East African Community

Finally, we encourage the Administration to consider including the EAC in this negotiation or to also launch parallel negotiations with the EAC as soon as possible. In our view, pursuing an FTA with the EAC provides the U.S. distilled spirits industry the best opportunity to seek the immediate elimination of the region's import duties on spirits, as well as to secure more certain protections for "Bourbon," "Tennessee Whiskey," American Rye Whiskey," and "American Single Malt Whiskey" as distinctive products of the U.S. Moreover, since the EAC governs food standards and labeling across all six countries, it is prudent to engage the EAC governments to address the concerns of the distilled spirits industry and other industries regarding standards and geographical indications.

Conclusion

In sum, DISCUS and its members firmly believe that Kenya and the broader African market have enormous potential for U.S. spirits exports. However, several barriers to trade are impeding the ability of U.S. spirits exporters to gain a significant market share in Kenya. The proposed FTA provides an important opportunity to liberalize the market for U.S. spirits exports. As detailed above, the U.S. spirits industry's goals for an eventual trade agreement with the Kenya are to:

- secure the immediate elimination of all tariffs on U.S. distilled spirits;
- secure distinctive product recognition for “Bourbon,” “Tennessee Whiskey,” “American Rye Whiskey,” and “American Single Malt Whiskey.”
- ensure Kenya’s technical regulations for spirits do not unnecessarily block U.S. spirits imports;
- secure commitments on regulatory best practices for the labeling and certification of distilled spirits, similar to the USMCA;
- secure rules of origin and transshipment rules provided for in the USCMA; and
- to consider including the EAC in this negotiation or to also launch parallel negotiations with the EAC as soon as possible.

Thank you for this opportunity to provide input and we look forward to working with you. Please do not hesitate to contact us should you require any additional information.

Sincerely,

Robert Maron
Vice President
International Issues and Trade