

September 30, 2020

The Hon Peter Dutton
Minister for Home Affairs
Parliament House
CANBERRA

The Hon Jason Wood
Assistant Minister for Customs, Community Safety and Multicultural Affairs
Parliament House
CANBERRA

Re: Protection for “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” as Distinctive Products of the U.S.

Dear Minister Dutton and Assistant Minister Wood:

On behalf of the Distilled Spirits Council of the United States, Inc. ("DISCUS") and its member companies, I am writing to raise some concerns about the importation and sale of certain American Whiskeys. DISCUS is the national trade association representing the leading producers and marketers of distilled spirits in the U.S. DISCUS' member companies export spirits products to more than 130 countries worldwide, including Australia.

DISCUS and its member companies strongly supported the negotiation and implementation of the U.S. - Australia Free Trade Agreement (FTA). Since tariffs were eliminated under the FTA in 2005, total U.S. spirits exports have grown by nearly 34%, from \$77 million to \$102 million in 2019. American Whiskey exports to Australia increased by approximately 44%, from \$58 million in 2005 to \$84 million in 2019. Australia now ranks as the industry's fourth-largest market for total U.S spirits and American Whiskey exports.

As detailed below, we understand that there are some products that may be offered for sale as “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” in the Australian market that are not, in fact “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” produced in accordance with U.S. laws and regulations. We are writing to alert you to our concerns and remind Australia of the important provisions in the U.S.-Australia Free Trade Agreement (FTA) to ensure products that are labeled as “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” must be produced in accordance with U.S. laws and regulations. In addition, we are writing to urge that “American Rye Whiskey” and “American Single Malt Whiskey” be afforded similar distinctive product recognition.

I. Bourbon and Tennessee Whiskey: Distinctive Products of the United States

As you may be aware, as part of the FTA, Australia agreed in an exchange of letters to recognize “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” as distinctive products of the United States. This recognition ensures that products sold in Australia as “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” are produced in the U.S. in accordance with U.S. laws and regulations. In the exchange of letters:

To the extent contemplated in the Code, Australia shall not permit the sale of any product as Bourbon Whiskey and Tennessee Whiskey, unless it has been manufactured in the United States according to the laws of the United States governing the manufacture of Bourbon Whiskey and Tennessee Whiskey and complies with all applicable U.S. regulations for the consumption, sale, or export as Bourbon Whiskey or Tennessee Whiskey.

Under the U.S. standards of identity for “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey”, to be labeled as a “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” it must be stored, for an undefined period, in new charred oak barrels. However, “Bourbon Whiskeys/Bourbons” and “Tennessee Whiskey” aged for a period of 2 years or more may optionally be designated as “straight.” Thus, “Bourbon Whiskeys/Bourbons” and “Tennessee Whiskey” may be aged for less than two years. Accordingly, “Bourbon Whiskeys/Bourbons” and “Tennessee Whiskey” do not need to meet the current two-year aging requirement for whiskey, because that requirement does not apply to “Bourbon Whiskeys/Bourbons” and “Tennessee Whiskey” – since the distinctive product recognition refers to the U.S. standards of identity.

We have recently become aware that certain products that may be offered for sale in the Australian market as “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” that are not produced in accordance with U.S. laws and regulations. The U.S. standards of identity prohibit the addition of any colorings, additives, flavorings or neutral spirits to “Bourbon Whiskey/Bourbon” and “Tennessee Whiskey.” If such are added to lawfully imported “Bourbon Whiskey/Bourbon” and “Tennessee Whiskey,” the adulterated product may no longer be labeled as a “Bourbon Whiskey/Bourbon” or “Tennessee Whiskey” in Australia as they are no longer produced in accordance with applicable U.S. laws and regulations for the consumption, sale or export of these products.

An example of such an *ersatz* product that is currently being sold in Australia as a Bourbon Whiskey is Old Number 15, which is bottled in Australia by the Edgemill Group in

Laverton, Victoria. Two separate samples of this product were tested from bottles obtained in Australia by Laboratories certified by the Alcohol and Tobacco Tax and Trade Bureau (TTB), U.S. Department of Treasury, the U.S. government agency which is responsible for regulating the beverage alcohol industry in the U.S. These two tests identified the presence of caramel and between 62-73% neutral spirit, both of which are inconsistent with the U.S. standards of identity for “Bourbon/Bourbon Whiskey.” Notwithstanding approaches to the Edgemill Group pointing these facts out, they continue sell the product as a “Bourbon Whiskey.”

Another example of a product mistakenly being sold in the Australian marketplace as a “Bourbon” is Black Widow Bourbon, produced by Bluestill in Young, New South Wales. This product claims in its labelling and advertising to be a Bourbon produced in Australia, which patently contradicts U.S. laws and is inconsistent with the protections afforded to Bourbon/Bourbon Whiskey as distinctive products of the U.S. in the FTA. Notwithstanding approaches to Bluestill and the Australian Tax Office pointing these facts out by the Spirits and Cocktails Australia, they continue to label and sell this product as Bourbon.

Finally, we would like to highlight the actions of the D’Acquino Group/Fernbrew. They were known purveyors of *ersatz* GI beverage alcohol products in the Australian marketplace for decades prior to their recent liquidation. See, e.g. Riley Stuart and Greg Miskelly, *Fake scotch and tequila are being sold in liquor stores, and you don’t need to look far to find it*, 17 Jun. 2018, (available at <https://www.abc.net.au/news/2018-06-18/fake-alcohol-brands-being-sold-in-australian-bottle-shops/9845350>) (reporting on evidence of *ersatz* Scotch Whisky and Tequila sold in Australia by D’Acquino). DISCUS also had suspected these firms of selling counterfeit Bourbon products and pursued various trademark applications of theirs over the last 15 years, such as Harley’s Bourbon, Kentucky Club Bourbon, and Twin Chiefs Bourbon where D’Acquino either withdrew their trademarks or signed a settlement agreement pledging to only use genuine Bourbon produced in the United States. Due to news reports such as the one highlighted above and our prior history with this firm, DISCUS took action as a result of their liquidation to ensure none of their remaining stock would be sold in the marketplace as Bourbon.

We respectfully request that the appropriate regulatory agency increase its enforcement activities to ensure that only “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” sold in the Australian market are produced in accordance with the U.S. standards of identity. Any adulterated “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” not produced in accordance with the U.S. standards of identity should immediately be removed from the market.

II. Australia Should Extend Distinctive Product Recognition to “American Rye Whiskey” and “American Single Malt 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, including Australia, up from 20 countries in 2017.

In the recently implemented U.S.-Mexico-Canada Agreement (USMCA), Mexico has committed to begin the process of recognizing “American Rye Whiskey” as a distinctive product of the U.S.

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.

DISCUS respectfully requests that Australia extend distinctive product recognition to “American Rye Whiskey” and “American Single Malt Whiskey” and not permit any product to be sold as such unless it has been produced in the U.S. in accordance with the laws and regulations of the U.S.

III. Conclusion

The U.S. distilled spirits industry has benefitted significantly from the U.S.-Australia FTA and the important protections it affords to “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey.” Strong enforcement of these important protections in the Australian market and extending such protections to “American Rye Whiskey” and “American Single Malt Whiskey” will be the key to continued growth in the market. In sum, we respectfully:

- remind Australia of the important protections distinctive product recognition already affords to “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey;”



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- request increased enforcement of the protections provided to “Bourbon Whiskey/Bourbon” and “Tennessee Whiskey;”
- request the immediate removal of products labeled as “Bourbon/Bourbon Whiskey” and “Tennessee Whiskey” not produced in accordance with the U.S. standards of identity from the Australian market; and
- urge that distinctive product recognition be extended to “American Rye Whiskey” and “American Single Malt;” and

Thank you again for the opportunity to provide our views. Please advise if you require any additional information or clarification.

Sincerely,

Robert Maron
Vice President
International Issues and Trade