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MCDERMOTT, WILL & EMERY

January 27, 2004

***By Hand Delivery***

William H. Foster  
Chief, Regulations & Procedures Division  
Alcohol & Tobacco Tax & Trade Bureau  
Department of the Treasury  
1310 G Street, N.W.  
Washington, DC 20005

BF  
1/28/04

**Re: Correction Request Under the Federal Data Quality Act**

Dear Mr. Foster:

I write in reply to your December 23, 2003 letter responding to my October 21, 2003 information request submitted on behalf of Diageo North America, Inc. ("Diageo").

Diageo's request, filed under the Federal Data Quality Act ("FDQA"), Public Law 106-554 § 515, relates to TTB Notice Number 4, a notice of proposed rulemaking regarding flavored malt beverages and related proposals ("Notice 4"). Notice 4 makes several unsupported assertions about supposed consumer confusion arising from the labeling of flavored malt beverage products. Diageo's letter requested that TTB either: (1) publish the data supporting Notice 4's assertions of consumer confusion, if any, and give Diageo and the public a meaningful opportunity to submit comments on the data; or (2) withdraw the assertions.

Your recent response to Diageo's FDQA request states that "TTB has concluded that the issues . . . raised are inextricably linked to [Notice 4]." Thus, TTB has "concluded that it would be appropriate to address [Diageo's] concerns through [Administrative Procedures Act ("APA")] mechanisms, rather than the procedures provided by the [FDQA]."

Subject to the reservations set out below, Diageo accepts TTB's assurances that any final rule arising from Notice 4 will address the issues raised in the FDQA request. Diageo accordingly will not request reconsideration of your letter at the present time. Diageo expressly reserves all its rights under the FDQA, including the right to challenge a final rule as inconsistent with FDQA requirements. In that connection, we respectfully disagree with your claim that the FDQA is not legally enforceable and does not affect judicial review of agency actions.<sup>1</sup>

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<sup>1</sup> In spite of agency claims to the contrary, many legal scholars believe the FDQA does create substantive legal rights. See, e.g., James T. O'Reilly, *The 411 on 515: How OIRA's Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions*, 54 *Administrative Law Review*, Vol. 2, 835, 851 (2002). We are not

Diageo also reserves its right to seek a reconsideration of your letter if "unusual circumstances" arises that would require an earlier resolution under the standards of Section 14.5.3(C) of the Treasury Guidelines.<sup>2</sup> See *Subdivision of Treasury Information Technology (IT) Manual* ("Treasury Guidelines"), Ch. 14: Information Quality. Future actions by state regulators or other third parties may demonstrate that Diageo faces "a reasonable likelihood of suffering actual harm" arising from the unsupported assertions of consumer confusion contained in Notice 4. If such actions arise before TTB's promised remedy, the Treasury Guidelines require that TTB act prior to any final rule in order to protect Diageo from the actual harm flowing from misstatements contained in Notice 4.

Finally, we feel compelled to point out that the position taken in your letter compels TTB to withdraw the challenged assertions of confusion contained in Notice 4. In spite of ample opportunities to provide data in support of its consumer confusion claims, TTB has not provided any evidence in Notice 4, in response to Diageo's FDQA request, or in response to Freedom of Information Act requests submitted by Diageo and others. TTB can not belatedly attempt to justify Notice 4 by creating data for the final rule, as the APA — upon which you base your response to Diageo's FDQA request — does not permit an agency to promulgate rules in reliance on data kept secret from the interested public. See, e.g., *Fla. Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988); *Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561 (11th Cir. 1985). Nor can TTB assert "administrative expertise" as a basis for its claims, as the law unequivocally demands more when it comes to assertions of consumer confusion. See, e.g., *Ibanez v. Florida Dep't of Bus. & Prof Reg.*, 512 U.S. 136, 143 (1994); *Cabo Distribution Co. v. Brady*, 821 F. Supp. 601, 612 (N.D. Cal. 1992). As TTB no doubt is aware of these well-established principles, we can only assume that the Agency will withdraw its assertions of consumer confusion in order to avoid violating both the APA and the FDQA.

Diageo thanks you and your colleagues in advance for your efforts to correct the unsupported assertions contained in Notice 4. We look forward to those corrections in any final rule.

Sincerely,



Marc E. Sorini

cc: John Blood (by fax)  
Carolyn Panzer (by fax)  
Jason A. Carey

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aware of any court decision on whether the FDQA creates separately enforceable legal rights or affects judicial review under other statutes such as the APA.

<sup>2</sup> TTB should not construe our citation to the Treasury Guidelines as a concession that those Guidelines accurately fulfill the requirements of the FDQA. Indeed, Notice 4 meets the OMB definition of "information" that underlies the Treasury Guidelines, see 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002) (Section V.5.), and the OMB's information quality guidelines to all federal agencies expressly included the publication of information in a notice of proposed rulemaking as an example of information subject to the FDQA, see *id.* at 8457.