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CRAIG WOLF, PRESIDENT AND CEO

December 15, 2015

Mr. John Manfreda  
Administrator, Alcohol and Tobacco Tax and Trade Bureau  
U.S. Department of the Treasury  
1310 G Street, N.W.  
Washington, D.C. 20005

Re: Kroger Single Source Program

Dear Administrator Manfreda:

On behalf of the Wine & Spirits Wholesalers of America, whose members together represent over eighty (80%) percent of all wine and spirits distributed in the United States, I am writing to request that the Alcohol and Tobacco Tax and Trade Bureau (TTB) conduct a formal review of the "Dedicated Single Source Retail Service Providers" program that Kroger is implementing across the country. WSWA has serious concerns that the Single Source program may result in violations of the Federal Alcohol Administration Act (FAA Act) by wholesalers who may participate in that program.

In an October 21, 2015 memo circulated to "Adult Beverage Distributors, Manufacturers and Suppliers," Kroger announced plans to implement what they referred to as a "Dedicated Single Source Retail Service Program" (Single Source Program). See Kroger October 21, 2015 Memorandum attached to this letter as Exhibit 1. While that memo was somewhat short on details, Kroger later disseminated a document entitled "Town Hall" on November 3, 2015, which went into more detail concerning the Single Source Program. See Kroger "Town Hall" document dated November 3, 2015 attached to this letter as Exhibit 2. Kroger also provided a related PowerPoint presentation on or about November 4, 2015. See copy of Kroger PowerPoint presentation attached to this letter as Exhibit 3.

According to the attached exhibits, the Single Source Program will require payment by wholesalers to merchandisers selected by Kroger to handle the placement of beverage alcohol product on Kroger shelves across the country. In other words, unlike under current category management practices where wholesalers employ their own people to assist with merchandising of the products they represent/sell, this would constitute a direct payment to Kroger-selected merchandisers for the merchandising of all beverage alcohol product purchased by Kroger, which would directly benefit Kroger.

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27 U.S.C. § 205 proscribes as “Unfair Competition and Unlawful Practices” certain “Tied House” practices. Specifically, that section prohibits the inducement of retailers by wholesalers through “furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection.”

27 C.F.R. § 6.41 states that the “furnishing, giving, renting, lending, or selling any equipment, fixtures, signs, supplies, money, services, or other things of value to a retailer constitutes a means to induce within the meaning of the Act,” and 27 C.F.R. § 6.42 explains that there is no distinction between providing such things of value directly to the retailer or to a third party “where the benefits resulting from such things of value flow to individual retailers.”

Subpart D (27 C.F.R. §§ 6.81-6.102) lists a number of exceptions to the general prohibition on unlawful inducements, including 27 C.F.R. § 6.99, which permits wholesalers to “stock, rotate and affix the price to distilled spirits, wine, or malt beverages which they sell, provided products of other industry members are not altered or disturbed.” That exception does not allow for the “rearranging or resetting of all or part of a store or liquor department.”

Certain unlawful inducements can have the effect of putting retailer independence at risk. 27 C.F.R. § 6.152 enumerates several of those practices, including “resetting stock on a retailer’s premises (other than stock offered for sale by the industry member),” and “purchasing or renting display, shelf, storage or warehouse space (*i.e.* slotting allowance).”

Given the proscriptions and definitions noted above, wholesaler engagement in the Kroger Single Source Program could constitute an unlawful inducement which places a retailer’s independence at risk.

In Industry Circular 2012-01, dated January 11, 2012, TTB provided guidance on what types of activities by wholesalers or suppliers would be considered permissible or impermissible under Subpart D. While not directly on point, that Circular’s guidance is instructive. It noted that “Neither Subpart D nor any other regulations in Part 6 authorize industry members to provide monetary promotional support (*i.e.*, funds) directly to a retailer,” and that payments to a third party company “owned, created, operated, or controlled by the retailer or is in any way acting on behalf of the retailer,” could constitute “an indirect means to induce the retailer.”

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Among the myriad of questions raised by the Kroger Single Source Program are:

- Does the payment by a wholesaler of money to a merchandiser selected by a retailer constitute an unlawful inducement, directly or indirectly?
- Does the payment by a wholesaler of money to a merchandiser selected by a retailer constitute an unlawful slotting fee?
- Does the payment by a wholesaler of money to a merchandiser selected by a retailer violate regulations prohibiting merchandising of a competitor's product?
- If a failure by a wholesaler to pay a fee paid by other wholesalers for the Single Source Program leads to the exclusion of that wholesaler's product, could other participating wholesalers be held liable for that exclusion?
- To what extent could suppliers be found to be engaging in impermissible conduct under the FAA Act as a result of their role in being the conduit for the wholesaler payments required by Kroger for management of the Single Source Program?
- Who manages/provides direction to the third party merchandisers selected by Kroger pursuant to the Single Source Program?

The FAA Act was enacted at a time when memory of pre-Prohibition excesses associated with tied-houses was still fresh in the minds of the Members of Congress. It was designed to ensure the independence of the tiers in order to prevent a recurrence of the problems associated with an unregulated trade in beverage alcohol. That legislation, and similar legislation enacted at the state level, have worked to create and sustain the safest and most responsible system of distribution of beverage alcohol in the world today.

The members of WSWA believe that maintaining the independence of each tier within the three-tier system is absolutely essential and that engagement in the Kroger Single Source Program could expose wholesalers to sanctions under the FAA Act. For those reasons, WSWA requests that TTB conduct an in depth formal review of the Kroger Single Source Program.

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Thank you for your consideration of our request. I would be happy to meet with TTB staff to provide additional information and further elaboration of our concerns.

Sincerely,

A handwritten signature in black ink that reads 'Craig Wolf'. The signature is fluid and cursive, with the first name 'Craig' and the last name 'Wolf' clearly distinguishable.

Craig Wolf  
President and CEO

Attachments

cc: Robert M. Angelo

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