

**June 18, 2009**

**Comments by the National Milk Producers Federation  
to the  
U.S. Department of Agriculture  
Regarding the Proposed Amendments to the  
Dairy Promotion and Research Order**

The National Milk Producers Federation (NMPF) appreciates the opportunity to provide comments to the U.S. Department of Agriculture regarding the proposed amendments to the Dairy Promotion and Research Order. Our Arlington, VA-based organization develops and carries out policies that advance the well-being of U.S. dairy producers and the cooperatives they collectively own. The members of NMPF's 31 cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of nearly 50,000 dairy producers on Capitol Hill and with government agencies.

National Milk Producers Federation urges the Secretary to swiftly consider comments submitted regarding implementation of the amendments to the rule, and to move as quickly as possible to publish a final rule. It is time – indeed, the time is long overdue -- to implement the changes in the Dairy Research and Promotion Order that were mandated by Congress in both the 2002 and 2008 Farm Bills.

NMPF notes that in both of those Acts, Congress granted authority to the Secretary to promulgate changes to the rule without having to conduct a notice-and-comment proceeding. The Congressional mandate to require an assessment on both domestic production and on imported dairy products has been a matter of law in the United States for seven years and there is no reason to delay implementing this mandate any longer.

Most of the changes being implemented in the proposed rule are required as a matter of statutory law, and so there is no guidance that public comment can provide on those issues that is necessary for the actions the Secretary proposes to take. With respect to the two issues on which the Secretary has specifically sought public comment – the designation of imported products to be assessed under the Order, and the method of assessment – NMPF believes that those are issues about which AMS has significant technical expertise, and that can be resolved quickly. In any event, the Secretary had already been given the latitude under the statute to promulgate a final rule without having to conduct notice-and-comment, and so should publish a final rule as quickly as possible.

**Background:**

Amendment of the Dairy Research and Promotion Order to implement the Congressional mandate to extend the national assessment to imported dairy products was initially enacted in the 2002 Farm Bill, but has been delayed now for seven years principally because of debate over

consistency of the congressional direction with the international trade law obligations of the United States.

The concern was raised that because domestic assessments did not include assessments on dairy producers in Alaska, Hawaii, Puerto Rico and the District of Columbia (an extremely small group of producers that did not, in any case, actually participate in the continental U.S. market), the 2002 Farm Bill mandate might somehow be construed as constituting a technical violation of U.S. obligations under the World Trade Organization (WTO) agreements, and in particular the “national treatment” provisions of Article III of the General Agreements on Tariffs and Trade (GATT-1994).

NMPF disagreed and has contended that the 2002 Farm Bill mandate could have, and should have, been implemented in a manner consistent with those obligations. That is now history and what matters at this stage is the more recent legislation. Whatever the merits of earlier arguments, Congress took subsequent action in the 2008 Farm Bill to allay these concerns. The revised congressional mandate now puts the national debate over these issues to rest. It can no longer be contended that the extension of the dairy promotion assessment to imported product treats imported product any less favorably than domestic product; if anything, imported product is treated more favorably.

Domestic assessments have been extended to the few dairy producers in Alaska, Hawaii, Puerto Rico and the District of Columbia so that all U.S. producers are financially supporting the promotion program. In addition, pursuant to the 2008 Farm Bill provisions, the assessment on imported products has been reduced to 7.5 cents/cwt on a milk-equivalent basis. This is one-half of the 15 cent/cwt assessment that is paid by domestic producers. Imported product has been given representation on the Dairy Board and the Secretary will periodically assess the relative volumes of domestically-produced milk, imported dairy products in the market, and make whatever adjustments are necessary to ensure that importers are fairly and proportionally represented. The mandate of the promotion program has been reworded to make clear that all dairy products, domestic and imported, are to be promoted. Importers have the option of developing their own promotion programs and dedicating a proportion of their assessments to that purpose, and are not required to provide any greater assessment to the overall promotion program than are domestic producers.

In both the 2002 and 2008 Acts, Congress directed that the Secretary implement the new assessment on imported products in a manner consistent with U.S. international obligations. The Secretary has consulted with the Office of the United States Trade Representative in this regard and USTR has confirmed that the proposed rule complies fully with U.S. obligations. Given this very clear direction from the agencies charged with ensuring U.S. trade compliance, there is no legal or policy reason for any further delay.

Indeed, dairy imports have for decades benefited from U.S. dairy promotion efforts without paying any of their fair share. Now they will continue to benefit, even while paying a much lower assessment than their U.S. counterparts do. There can be no question that imported product is being treated “no less favorably” than domestic product, and that U.S. statutory law, and the proposed implementing regulations, are fully consistent with U.S. trade law obligations.

## **Final Rule Considerations Requiring Further USDA Consideration:**

The following issues are some that USDA must include in the implementation of the final rule:

- New HTS Codes

The Proposed Rule designates a comprehensive list of products for assessment. Products to be assessed are listed by HTS code. It is possible that additional HTS codes will be created, covering products, which should be assessed. However, absent action by USDA, since the codes are created subsequent to amendment of the Dairy Order, such codes would not appear in the Dairy Order, and therefore the products falling there under would not be subject to assessment. Therefore, the Order must be amended in a manner in which captures assessments for products falling under HTS codes, which currently do not exist.

- “National” Qualified Organizations

The Proposed Rule provides for a credit for contributions to “qualified national, regional or State dairy product promotion, research or nutrition education programs. The Dairy Act provides for credit to a producer or a producer's cooperative for participation in "ongoing qualified State or regional dairy promotion or nutrition education programs." In other words, there is no mention of national qualified programs under the Act, and it is therefore unclear whether the authority to give credit to qualified national organizations of importers exists under the Order. We proposed that USDA revisit this section to comply with the Dairy Act that allows only for Regional or State qualified promotion programs.

- Default Rate

The Proposed Rule proposes to assess products either at a default rate or, if the importer has sufficient documentation, at a rate of \$0.01327 per kg of milk solids. It is possible that an importer may choose to pay the default rate at the time of assessment, and then later determine that the product could have been assessed at a lower rate than the default rate based on the product’s milk solid content. An amendment to the Order must be sure to address this concern. Importers must know in advance whether they will present all the necessary documentation to pay a lower rate or simply pay the full amount. USDA should make clear in its final rule that the alternative lower rates available through the provision of documentation can only be granted at the time of entry with the necessary documentation.

- Regular and Annual Reporting

It is imperative that USDA provide the Dairy Promotion Programs an actual report on a regular basis of the imported products and the assessment that those imports have paid.

Furthermore, imports must fulfill all requirements to determine the level of assessment. Active assessment of whether these requirements are being met in full and reporting to that effect should be mandated under the amended order.

### **Calculation of Assessment Rate on Imported Products**

The proposed rule translates the mandatory assessment rate of 7.5 cents per hundredweight of milk into the equivalent thereof on dairy products imported into the United States. The rule establishes this equivalent assessment rate at \$0.01327 per kilogram of milk solids content of imported dairy products, based on an average milk solids content of 12.45 pounds per hundredweight of U.S. producer milk.

The average milk solids content is based upon an average butterfat content of 3.68 percent and an average nonfat solids of 8.77 percent in U.S. producer milk, based on data from January 2006 through December 2007, as reported by the National Agricultural Statistics Service (NASS) in its publication Dairy Products 2007 Annual Summary (April 2008). NASS Dairy Products 2008 Annual Summary, released on May 28, 2009, provides corresponding data on the composition of U.S. producer milk for the period January 2007 through December 2008 (pages 50 and 51). This more recent data shows an average butterfat content of 3.68 percent, an average nonfat solids content of 8.78 percent, and therefore an average milk solids content of 12.46 pounds per hundredweight of U.S. producer milk.

This would result in an assessment rate on the milk solids content of imported dairy products of the following:

$$\begin{aligned} \$0.075 / 12.46 \text{ lb. milk solids per cwt. of milk} &= \$0.006202 \text{ per pound, or} \\ \$0.006202 \text{ per pound times } 2.204623 \text{ pounds per kg.} &= \$0.01327 \text{ per kg.} \end{aligned}$$

This provides further support of the correctness of the methodology in the proposed rule for converting the mandatory assessment rate of 7.5 cents per hundredweight of milk into the equivalent thereof for the milk solids content of dairy products imported into the United States.

Additionally, the rule provides a table of equivalent default assessment rates per product volume for individual HTS codes subject to the assessment. The individual HTS codes proposed in the rule are selected from a larger set of HTS codes for dairy-related items based on a set of exclusion criteria specified on page 23 of the rule. Default assessment rates are calculated for the individual HTS codes that are included based generally on the estimated maximum milk solids content of each such code.

The method for making such estimates is specified on page 20 of the rule and is further explained and documented in the supplemental paper *Proposed Default Import Assessment Rates for the National Dairy Promotion and Research Program*. This paper reports the estimated milk solids content of dairy products imported under each of the selected HTS codes, for the purpose of calculating default rates for the import assessment. Each of these rates is documented based

on a comprehensive set of ten listed reference sources for information on the composition of imported dairy products.

Three examples of this methodology are as follows:

1. The supplemental paper *Proposed Default Import Assessment Rates for the National Dairy Promotion and Research Program* lists the USDA Agricultural Research Service *Nutrient Database for Standard Reference* as the reference source for the default assessment rate for tariff code 0401.10.0000, Milk and Cream, Not Concentrated, Not Sweetened, Fat Content Not Exceeding 1% by Weight. A search through the various products listed under nonfat fluid milk in the ARS *Nutrient Database* reveals that Milk, nonfat, fluid, protein fortified, with added vitamin A (fat free and skim) shows the lowest water content, 89.36 percent, with the remainder consisting of milk solids, of all nonfat fluid milk products in this *Database*. The proposed rule accordingly establishes a default milk solids percent of  $100\% - 89.36\% = 10.6\%$  for this tariff code, and consequently a default assessment rate of  $.106 \text{ times } \$0.01327 \text{ per kg. of milk solids} = \$0.001 \text{ per kg. of product under tariff code } 0401.10.0000$  (rounded to the nearest tenth of 1 cent).
2. The referenced supplemental paper lists the Customs and Border Patrol rulings as the reference source for the default assessment rate for tariff code 0404.90.1000, Milk Protein Concentrates, Whether or Not Sweetened. A search through the various rulings for this tariff code reveals that ruling NY K88864, dated September 17, 2004, on the tariff classification of a milk protein concentrate from Canada, shows the lowest moisture content, 1.9 percent, with the remainder consisting of milk solids, of all rulings for this tariff code. The proposed rule accordingly establishes a default milk solids percent of  $100\% - 1.9\% = 98.1\%$  for this tariff code, and consequently a default assessment rate of  $.981 \text{ times } \$0.01327 \text{ per kg. of milk solids} = \$0.013 \text{ per kg. of product under tariff code } 0404.90.1000$  (rounded to the nearest tenth of 1 cent).
3. The referenced supplemental paper lists the HTS article description as the reference source for the default assessment rate for tariff code 1806.20.2090, Chocolate in Blocks, Slabs or Bars Weighing 4.5 Kg or More Each, Containing Butterfat of Other Milk Solids. The HTS article description for tariff code 1806.20.2090 specifies that articles classified under this tariff code contain not more than 32 percent by weight of butterfat or other milk solids. The proposed rule accordingly establishes a default milk solids percent of 32% for this tariff code, and consequently a default assessment rate of  $.32 \text{ times } \$0.01327 \text{ per kg. of milk solids} = \$0.004 \text{ per kg. of product under tariff code } 1806.20.2090$  (rounded to the nearest tenth of 1 cent).

Clearly, USDA has skillfully based its calculations on a wealth of documentation and available supporting analyses. Based upon its own detailed analysis, the National Milk Producers Federation strongly agrees with the methodology in the proposed rule for converting the mandatory assessment rate of 7.5 cents per hundredweight of milk into the equivalent thereof on dairy products imported into the United States and considers the resulting default rates proper and appropriate for implementing the mandatory assessment.

In particular, NMPF supports and considers proper and appropriate:

1. the proposed method of converting the mandatory assessment rate per hundredweight of milk into an equivalent rate per kilogram of imported milk solids,
2. the criteria for selecting individual HTS codes to be subject to the import assessment and the individual HTS codes thereby selected, and
3. the method for estimating the milk solids content of the selected HTS codes and the resulting default assessment rates determined for each.

The proposed rule determines default import assessment rates for the individual HTS codes selected but permits importers to calculate and pay the assessment based on the milk solids content of imported products if the importer has sufficient documentation to determine that content. The National Milk Producers Federation considers the proposed system of providing default assessment rates for individual HTS codes while also providing for calculating and paying the assessment based upon sufficient documentation of the milk solids content of the import products to be both proper and appropriate, given that the milk solids content can vary for individual products imported under several of the individual HTS codes subject to the assessment. NMPF recommends, however, that any documentation to support calculation and payment of assessment rates other than the default rates be truly adequate for this purpose and should include the provision of samples, if requested by CBP and or USDA.

**In Closing:**

NMPF is pleased to have had the opportunity to provide comments on this issue of essential fairness and adequate promotional funding for dairy producers. As stated above, we urge USDA to move swiftly to issue a final rule, after taking into account the issues raised in the comments here that merit further attention.