U.S. Dairy Export Council
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NATIONAL MILK PRODUCERS FEDERATION

Comments by the National Milk Producers Federation
And the U.S. Dairy Export Council
Regarding the Promotion of U.S.-EC Regulatory Compatibility
Docket Number USTR-2012-0028
October 31, 2012

Our organizations submit these comments in response to the notice of request for public comments concerning the Promotion of U.S.-EC Regulatory Compatibility (USTR-2012-0028). The National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) appreciate the opportunity to present their views on this important issue.

NMPF is the national farm commodity organization that represents dairy farmers and the dairy cooperative marketing associations they own and operate throughout the United States. USDEC is a non-profit, independent membership organization that represents the export trade interests of U.S. milk producers, proprietary processors, dairy cooperatives, and export traders. The Council's mission is to build global demand for U.S. dairy products and assist the industry in increasing the volume and value of exports.

We welcome a careful and very thorough examination of the regulatory issues that play such a significant role in the U.S.-EU trading relationship. Surely any trade agreement that neglected the critical importance of unjustified regulatory barriers would be seen as falling far short of true trade liberalization in this major economic relationship. To do less is to simply remove barriers of a tariff nature while leaving in place the very real barriers of a regulatory nature – whether they relate to unjustified sanitary and phytosanitary (SPS) requirements, labeling requirements or other types of regulations. Particularly in agricultural trade between the U.S. and the EU, it is often the regulatory requirements that hinder trade to a far greater extent than the tariffs.

To truly tackle this issue fully, it is vital that there be a clear-eyed recognition of the impact of many long-standing policies on U.S. exports and an assessment of the best method for truly resolving them. The fundamental goal of pursuing regulatory compatibility must be a means towards expanding trade opportunities for each partner.

Too often in trade matters, whether bilaterally with the U.S. (e.g. somatic cell count demands in the dairy industry) or internationally (e.g. within Codex discussions such as the recent ractopamine debate), the EU's approach appears to be designed to ensure that others essentially adopt its own regulations, which tend to be more restrictive than necessary. Regulatory compatibility must not be solely an examination of where U.S. and EU regulations could be harmonized, converge or deemed equivalent. It is critical that the driving goal of such an undertaking be to address underlying barriers to trade. With that understanding in mind, our organizations offer the following issues of concern in the U.S.-EU dairy trade context.

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Geographical Indications (GIs) Wielded as a Tool to Limit U.S. Competition
Restrictions on the Use of Product Names, Masquerading as Intellectual Property Protection, Threaten to Hinder U.S. Sales in Both the U.S. and Export Markets.

The structure of discussions on this issue is absolutely critical to a successful outcome in this area that could hold the prospect for beginning to address the barriers the EU is working to expand globally against U.S. products through an excessive approach to GI policies.

The U.S. dairy industry is well aware of the high level of pressure by the European Union to include discussions on Geographical Indications (GIs) as part of any broader trade undertaking with the U.S. It defies credibility to think that a trade agreement could actually make it more difficult for our producers to market their products both domestically and internationally, yet that seems the direct goal of the EU's approach on GIs.

Our industry has already been grappling with the negative trade impact caused by an overly aggressive EU policy on GIs that does not take into account the common usage nature of many terms included in certain European GIs. Because of these struggles, we would welcome bilateral discussions on GIs with the EU, provided that this is done in a separate undertaking designed to truly address the legitimate concerns of both sides.

This was the approach taken in the U.S.-EU wine agreement, which successfully resulted in an agreement welcomed by both sides as an improvement on a long-standing area of deep regulatory divergence. That type of agreement was only possible because these talks occurred in an issue-specific forum which forced the EU to address some of the very significant trade concerns of the U.S. industry, rather than merely insist upon further pressure to adopt the EU approach, as has been the case in each of the EU's other FTAs. We believe such an outcome may also be possible on food-related GIs, but only if discussions in this area are given the same opportunity to find a balanced middle ground on this highly controversial issue.

Discussions in this separate forum must similarly follow the same approach taken in the wine agreement – although talks could be launched simultaneously with broader EU-U.S. trade negotiations, any GI-specific discussion must be a fully separate undertaking without a mandate to conclude should the EU prove unwilling to work to address U.S. trade concerns as part of that process. (Such talks on food GIs may prove more difficult, however, since a successful strategy in the wine industry was to replace terms banned by the EU with varietal names. This preserved the ability to refer to a category of product in a uniform manner which assists in maximizing collective marketing efforts. Such an option does not exist in most food sectors.)

This approach of separate discussions would hold out the prospect of achieving a different outcome from that seen in every other FTA the EU has negotiated in the past few years. Even with Canada, a long-time ally of the U.S. on the GI issues, the FTA talks with the EU reportedly have progressed

extremely far in the GI arena and Canada seems poised to potentially accept commitments that approximate those contained in each of the EU's other recently negotiated trade agreements.

We believe it is important to clarify that in our view GIs are not inherently problematic; the U.S. has several GIs that are not creating international trade problems. The EU too has already registered several GIs in the U.S. through our trademark system, a process that remains entirely open to them provided they seek good faith usage of terms.

Rather, the problem is the way in which the EU has pursued its brand of GI policies. This approach is in many cases harmful to U.S. farmers and companies. The EU's approach to GIs is designed to outlaw internationally the use of many generic terms. Although the EU recognizes a limited number of important product names as generic within its own territory, past EU GI decisions (e.g. on feta and parmesan) indicate that the standard for what constitutes a generic term appears to be whether the historic origin of a product is entirely forgotten by consumers – a near impossibility in a country of immigrants such as the U.S. where it is part of the standard commercial practice to reference the historic roots of products while still clearly identifying where the product is actually produced. Will the EU next propose banning the display of Italian flags in any pizzeria around the world in order to avoid "consumer confusion"?

In many cases, these names are ones that have long been used by large numbers of producers outside of the historical European country of origination. This is due in large part to waves of emigration from Europe around the world, but particularly to "New World" countries over the past century. This trend benefited European producers by helping to globally spread recognition of and demand for many historically European products. Despite this evolution over generations, the EU's clear goal now is to advance their own commercial interests for food products through advocating for wider use of GI policies that would help them claim for their sole usage many cheese names that are commonly used around the world, including in international trade, and considered to be generic in the U.S. and many other major dairy countries.

Names that have been directly targeted by the EU for monopolization include ones such as feta, parmesan, asiago, gorgonzola, fontina, gruyere, munster and others. In addition to these direct attacks on commonly used names, the EU's policies also make unclear what may happen in third country markets to other terms that form part of a compound (i.e. more than 1 word) GI such as cheddar, mozzarella, gouda, provolone, emmental, grana, brie, camembert, ricotta, romano, pecorino and others. This approach has even gone so far as to propose bestowing on Danish producers the sole right to use a term that has long had an internationally-recognized Codex standard.

The use of these product names is part of our country's heritage as a nation of immigrants. Any suggestion that use of them has been inappropriate or "counterfeit," as European producers have at times suggested, is offensive to the hundreds of cheese makers – most of them small or medium-sized businesses – that regularly use these terms to help market their products in the U.S. and abroad.

This issue has significant economic ramifications for America's dairy industry – both for current production and future growth. According to USDA's NASS report, there were over 500 cheese plants in the U.S. last year. Roughly $21 billion in U.S. cheese production utilizes European-origin names. Last year almost $1 billion in U.S. cheeses were exported. Cheese exports are a particular growth opportunity for our industry, expanding by approximately 30% a year on average over the past five years.

The following is a snapshot of one of the more famous and contentious GI issues: Parmesan.

- The U.S. is estimated to produce more than 1/3 of global "parmesan" production with EU "parmesan"/"Parmigiano Reggiano" production totaling a bit less than 40% of the global quantity. Major dairy producing developing countries (largely in Latin America) are estimated to make approximately 1/4 of global "parmesan"/"parmesao" production.
- U.S. parmesan production was 126,000 MT in 2011 – a growth of 18% over 2010. (By way of comparison, Italy produced just slightly more Parmigiano Reggiano - 133,436 MT in 2011.)
    - 44% of U.S. parmesan is made in Wisconsin with the rest spread across the country, particularly in major dairy production areas.
- U.S. parmesan exports in 2011 were estimated to be approximately 10,000 MT, equating to approximately 8% of total U.S. parmesan production.
    - In the USDEC-commissioned Global Commodity Cheese Varietal Demand Study, parmesan was cited as one of the top cheese varieties with the strongest export growth potential.

A GI-specific discussion between the U.S. and the EU offers us at last the opportunity to seek a reasonable and common-ground path forward on the issue of food GIs. But we cannot stress enough that such an outcome requires following the successful model of U.S.-EU wine negotiations through use of an entirely separate forum to truly create an opportunity for a win-win outcome on this long-standing issue. The following are a few of the issues our industry would like to see addressed in that context:

- Remove the barriers to the sale of U.S. "parmesan" and "feta" (labeled as such) to the EU.
- Ensure that no new limitations as a result of the U.S.-EU discussions are placed on usage in the U.S. market of terms currently recognized as generic within the U.S.
- Establish a way to effectively address third-countries' trade-negotiated restrictions on sales of products bearing names recognized as generic within the U.S. and other areas around the world.

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NTBs and SPS Regulations

Restrictions on U.S. Dairy Exports Due to EU Regulations and/or Policies Other than Tariff Levels

Despite the U.S.'s status as one of the world's largest dairy exporters, the EU currently enjoys a dairy trade surplus with the U.S. of approximately $1 billion. Our industry believes that the EU's use of multiple regulatory and policy measures (aside from the specific level of tariffs) limit greater U.S. access of dairy products to the European market. We believe that opportunity exists to find a compatible regulatory approach in these areas if there is truly a desire to do so on both sides.

Political Interference in Scientific Findings

Our organizations recognize that countries must maintain the ability to conduct their own scientific assessments of issues relating to plant, animal and human health. What is deeply concerning about the EU's overall approach to SPS issues, however, is that its political body is frequently given the ability to override the EU's own scientific authority's findings to instead establish restrictions on products based typically on animal welfare or consumer preferences. While it is naturally the right of the EU to do so with respect to domestic production, WTO commitments do not permit such restrictions for imported products yet this remains a persistent problem with many EU policies.

Resolution of this issue would represent a fundamental shift in the EU's approach to SPS issues. As such, it is a challenging goal. Yet it is also an essential one if the U.S. hopes to systemically address the underlying problems plaguing such a wide swath of U.S. agriculture exports to the EU and to anticipate avoidance of future such barriers. It would serve little use to pour tremendous energy into resolving a handful of known and long-standing SPS barriers to U.S. exports only to have a new form quite swiftly arise shortly after the agreement is implemented. Without some method for fundamentally addressing the consistent EU insistence of imposing animal welfare and consumer preference requirements on imported products – in conflict with WTO obligations – there is little hope of truly opening the EU market to U.S. agricultural products.

Two ongoing issues impact trade in U.S.-EU dairy products in particular.

1. One relates to the potential imposition by the EU of limitations on imported products derived from the offspring of cloned animals. Such offspring are reproduced in the typical manner (i.e. are not clones themselves) and the EU's scientific body has found them to not pose any elevated risk to consumers. In addition, the offspring of cloned animals are already present in the EU farm system and have not been tracked. This means that the EU does not have a method for knowing which animals are the offspring of cloned animals.

Despite this, the EU continues to consider imposing restrictions on imported products that may be derived from the offspring of cloned animals.

On the issue of cloned animal policies specifically, FDA and EFSA have reached similar scientific findings on the topic of the marketing of products derived from the offspring of cloned animals. As such, it would appear to be a very good area for regulatory compatibility, provided that the outcome is in keeping with the underlying scientific findings. Until a clearer view emerges of how to best deal with this issue in a way that will minimize negative trade impacts, our organizations continue to support the U.S. voluntary moratorium on the marketing of milk and meat from cloned animals.

The issue of trade policies for products from the offspring of cloned animals is itself a concern and holds the significant potential to negatively impact U.S. exports to the EU. Yet it is simply another example of a broken SPS process in the EU whereby politics all too frequently are permitted to trump science. It is our hope that an exploration by our regulators could find a better way forward on this over-arching issue.

2. EU somatic cell count (SCC) requirements for a limit of 400,000 somatic cells per mL at the farm level impose regulatory restrictions based on a parameter that is a quality measure, not one related to food safety. Although in 2012 the U.S. implemented a program designed to foster compliance with this requirement, that program is extremely burdensome from a record-keeping standpoint and raises the prospect of farms being prohibited from shipping their milk to a supplier due solely to a foreign country's quality measure.

   As stated above, countries certainly have the right to put in place quality measures in their own countries. However, this should be an area where our regulators should be able to agree that it does not impact food safety and therefore should not be a relevant factor in U.S.-EU trade.

<u>Equivalence in U.S.-EU Dairy Products</u>

It is our understanding that the EU would like to establish equivalence with the U.S. for its dairy products, including Grade A products. Given the widely inconsistent food safety systems throughout the whole of the EU and the lack of an effective mechanism to truly enforce adherence to even EU-level regulations in a uniform manner throughout the whole of the EU (let alone ensure full equivalence with U.S. Grade A requirements), it seems difficult to believe that the actual application of EU dairy regulations is equivalent to that for U.S. Grade A products.

Grade A products in the U.S. are the focus of the detailed National Conference on Interstate Milk Shipments (NCIMS), which commits each of the 50 states to carry out regulations in a similar manner to ensure that U.S. regulations are enforced in a uniform way throughout the whole of our territory. This approach is then overseen at the federal level by the FDA. We are not aware of a comparable mechanism within the EU. Moreover, it is important to note that NCIMS is an open process that specific allows for foreign countries or political subdivisions to join as a full participant. This process allows any individual EU member to participate in the Grade A process. This would be the smoothest route to regulatory compatibility in the Grade A area.

With respect to the option of establishing full equivalence with specific EU member states, our industry would expect FDA to undertake its standard meticulous review of the regulations and their actual application in those member states to ensure that both are truly fully equivalent to U.S. Grade A requirements. Moreover, if equivalence is considered, it is critical that it be a two-way street. Given the dairy trade imbalance between our two major dairy exporting nations, considerable work is required to address the many regulatory barriers hindering greater U.S. dairy opportunities in the EU market. Our industry wants to tackle existing barriers and also ensure we are able to continue to ship our products to the EU without the imposition of additional certificate requirements or new regulatory barriers.

Export Certificate Requirements re: Container/Seal Number and Sailing Date

The EU requires health certificates to be dated prior to the date of shipment. In addition, Commission Implementing Regulation 194/2011 (food) and Commission Regulation 142/2011 (feed) both state in the notes to the certificates that the container and seal numbers should be included on the health certificate. In the U.S., however, the container and seal numbers are only available at the time the products are physically loaded onto an ocean container at the manufacturing facility and/or warehouse. Therefore, exporters cannot fully complete the health certificate until the product is physically loaded and en route to the port. There are some cases where the vessel sails within a few days of the shipment loading, but it can take up to 5 business days for AMS to process health certificate requests. Given these 2 requirements, U.S. exporters are challenged with providing all the required information on the certificate and meeting the EU's requirement to have the certificate dated prior to the vessel's sailing date.

In countries where there is a government official physically located in the plant to issue the certificate, this certificate date requirement seems logical. However, the U.S. issues dairy certificates based on an ongoing monitoring and inspection program. There are no USDA officers present to visually inspect the loading of dairy products for export. Instead, exporters

apply to USDA headquarters in Washington, DC for a certificate, and AMS will issue a certificate as long as the plant is current on the EU-approved list.

Since the U.S. issues certificates based on a monitoring program, the date of the certificate should be irrelevant. However, we have seen numerous instances where the health certificate was issued after the sailing date and the port health authorities rejected the consignment. This puts U.S. exporters at risk for rejected shipments based on clerical errors and other non-food safety concerns due to this cumbersome regulatory requirement.

The EU already allows New Zealand dairy certificates to be dated after the date of export so this is not an unprecedented request. There does not appear to be a specific EU concern with U.S. dairy system food safety that is driving this requirement. No such requirement exists on the U.S. side. As such, employing a common approach on this issue that takes into account the recognition of the fundamental safety of each others' systems (established already by the Veterinary Equivalence Agreement between the U.s. and the EU) would seem an achievable area of regulatory compatibility.

Import Measures (Tariffs and Import Licensing)

Although tariffs and import licensing may become irrelevant issues if a true FTA is negotiated that eliminates tariffs entirely upon, our industry recognizes that this is not the only option under consideration by the HLWG. Furthermore, we recognize that even in the case of an FTA that eliminated tariffs, such an outcome would likely be after a lengthy phase-out period. Therefore, our industry believes it relevant to highlight the negative impact caused by certain EU regulatory measures with respect to how tariffs and import licenses are applied.

The EU's import licensing procedures have proven to be unduly burdensome and complex, thereby inhibiting companies from taking advantage of even in-quota opportunities that do exist in the U.S.'s dairy tariff schedule. It would be useful to explore whether a common approach could be employed in this area that would yield a more trade-friendly approach.

In addition, the EU's system of variable duties for processed products adds another layer of complexity and uncertainty to shipping to the EU. The U.S. does not use a variable duty system. We recognize that the level of tariffs is an issue to be dealt with through negotiations on that issue specifically but believe that the manner in which a particular level of duty is applied could be considered as part of a regulatory undertaking.

If variable tariffs are not exchanged for a more predictable method of assessing a given tariff level, then we strongly urge an examination of the method of calculating these tariffs on

processed dairy products. A change to the current EU system is needed to ensure that tariffs are fairly assessed based on the actual composition of the product.

The EU uses a complex method of determining the total tariff on numerous composite goods based on the amount of four compositional parameters: milk fat, milk proteins, starch/glucose, and sucrose/invert sugar/isoglucose. The duty charged in the EU on the composite product depends on the ranges of these products in the EU's Meursing Code. The challenge is that the test method established in Commission Regulation 900/2008 for determining the milk fat in the final product may not generate accurate results when there is more than one type of fat present. This regulation uses a factor of 25, which is the equivalent to assuming that milk fat has a butyric acid content of 3.45%. The same factor is applied to any dairy product, yet in reality butyric acid levels vary considerably.

Further regulatory discussion with the EU on this point is warranted to ensure that test methods used will accurately calculate the amount of milk fat in composite products so that if EU-US tariffs are not fully eliminated in a swift manner, U.S. exports are not hit with excessive tariffs based on faulty calculations. Given that this is a correction to a faulty methodology, work to resolve this issue could begin at any stage.

Export Subsidies

Over decades and most recently in 2009, the EU has made use of its massive export subsidy allowances to tremendously distort world dairy markets. Under its WTO commitments, the EU is permitted to spend over 1 billion Euros a year on dairy export subsidies: 724 million on other dairy products, 346 million on cheese, and 298 million on skim milk powder. When activated, use of these government subsidies makes it more difficult for U.S. exporters to compete in global markets.

In recent U.S. FTAs, the use of export subsidies has typically been prohibited between the U.S. and its partner country (i.e. in each others' markets). Our industry has supported these provisions. We believe it is entirely appropriate to continue this model in any U.S.-EU trade agreement and thereby prohibit the use of export subsidies in each others' markets.

Moreover, we should seize the opportunity to make use of a trade agreement between two of the major users of direct export subsidies by securing a commitment to abandon their use entirely. In the context of the Doha WTO negotiations, the EU was already prepared to forego use of its export subsidies by the end of 2013, as was the U.S. We should capitalize on this willingness to abandon use of export subsidies by both major players in this area and include such a commitment as part of a U.S.-EU trade agreement.

Conclusion:

The U.S. dairy industry welcomes the prospect of truly finding meaningful ways to address the full range of regulatory barriers plaguing the U.S.-EU dairy trade relationship currently. As stated above, full resolution of these issues is absolutely critical both to address current trade challenges and to ensure that any market access expansion that results from a possible EU-U.S. trade agreement truly opens the market for our exports to the EU in reality and not in name only.

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