

**BEFORE THE AGRICULTURAL MARKETING SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE**

DAIRY PRODUCT MANDATORY REPORTING)	
Interim Final Rule and Opportunity for)	Doc. AMS-07-0047
Submitting Comments)	
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BEHALF OF DAIRYAMERICA, INC.

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I. SUMMARY OF SUPPLEMENTAL COMMENTS

These comments are submitted on behalf of DairyAmerica, Inc. in response to the November 2, 2007 Federal Register publication by the Agricultural Marketing Service (“AMS”), an agency of the United States Department of Agriculture (“USDA”), of an Interim Final Rule – reopening of comment period – regarding Dairy Product Mandatory Reporting regulations. DairyAmerica stands by its submission dated September 4, 2007 and incorporates those comments herein by reference and will not, to the extent possible, repeat them.

The primary focus of these supplemental comments is on the portion of the Interim Rule (and request for additional comments) that addresses the reporting of nonfat dry milk and in particular, but not exclusively, the issue of which sales of nonfat dry milk (“NFDM”) should be reportable and which sales should be excluded in reporting to USDA’s National Agricultural Statistics Service (“NASS”). These supplemental comments support inclusion in AMS’ mandatory reporting to NASS of: (1) most Kosher nonfat dry milk products; (2) additional fixed price contracts in the international market for NFDM; (3) indexed contracts for dairy products;

(4) products sold through the Dairy Export Incentive Program (“DEIP”) and other programs with similar nationwide benefits; and (5) sales of product to the Commodity Credit Corporation (“CCC”). Other less critical issues are also discussed, but these comments do not cover the issues of how to treat rbST free dairy products or “lot sizes”. The most critical issues revolve around the fact that real world economic circumstances cannot be ignored by “one size fits all” regulation for maintaining workable, real world rules regarding dairy product price reporting. Product price reporting most critically must reflect, not alter or manage, how the market functions because the latter is not true product price reporting, but rather product price management not supported by the authorizing statute, administrative regulation, or case law.

II. NON-SPECIALLY SUPERVISED KOSHER NFDM MUST BE REPORTABLE

AMS specifically requested comments on the reportability of Kosher dairy products. This request is not surprising since AMS briefly posted guidance that no Kosher dairy products should be reported.¹ This particular guidance caught DairyAmerica (and we suspect any other manufacturer of NFDM) by surprise since nearly 100%, if not 100%, of the NFDM sold by U.S. manufacturers is Kosher. Indeed the Chicago Mercantile Exchange (“CME”) by Rule requires that NFDM product sold on that exchange be Kosher.² Upon reviewing the guidance, DairyAmerica promptly advised AMS of the fact that virtually all NFDM sold by U.S. manufacturers is Kosher. The ultimate upshot was that subject to the new comment period, all Kosher dairy products, whether NFDM or not, are presently reportable.

¹ DairyAmerica acknowledges with appreciation USDA’s posted answers to frequently asked questions and answers.

² See <http://dairy.cornell.edu/CPDMP/Pages/Publications/Pubs/M12.pdf> - see Chart 4

This is a clear example where additional industry input should assist AMS; the real world should govern -- the mandatory reporting rules should reflect the market rather than alter it. To begin with, perhaps there is some confusion as to the use of the term “Kosher” – just as there appears to be repeated industry confusion over the terms NFDM and Skim Milk Powder (“SMP”) (as discussed in DairyAmerica’s September 4, 2007 comments, there is a difference between NFDM and SMP). As to the term “Kosher” there is simply “Kosher” and then there is “specially supervised Kosher,” technically in Hebrew “Cholov Yisroel.” Cholov Yisroel product supervision requires more and is a very costly item for which at least one member of DairyAmerica charges a premium because of the added cost related to the product – including rabbinical supervision from the farm throughout processing at the plant. The milk is kept segregated and the dryer and related equipment (not the whole plant) has to be shut down for a 24 hour period prior to running the nonfat. For this one DairyAmerica member “Cholov Yisroel” NFDM is a relatively low volume and could be what AMS intended when it first excluded all Kosher product reporting. Lack of industry input may have contributed to any confusion at the agency.

As to NFDM, non “specially supervised” Kosher product is the standard, not the exception. As to NFDM, this Kosher product is demanded by CME Rule, unlike for cheese. Obviously if mandatory product price reporting is to have any meaning (and any use for AMS’ Federal Milk Order minimum pricing purposes), Kosher NFDM (that is not specially supervised) must be reportable to NASS. “Cholov Yisroel” NFDM should either not be reportable or the extra cost element for special supervision pulled out. Since the volume of this product is relatively small it would make administrative sense to simply exclude it.

This area is also a clear example of how AMS should be careful to craft the mandatory product rules so as to fit how the existing market behaves. Since DairyAmerica does not market other dairy products, we do not comment on reportability of non-specially supervised Kosher cheese or non-specially supervised Kosher butter, except to note that if such product does not predominate in any category, the question of added costs for Kosher compliance and certification should be considered in the calculus of whether or not the product should be reported, and if so at what price level. Kosher NFDM, DairyAmerica believes, is unique as distinguished from cheese and butter in that virtually all NFDM produced in the U.S. is Kosher. Thus, any added cost for non-specially supervised Kosher compliance and certification is already built into virtually 100% of the NFDM product. Thus reporting of Kosher NFDM, far from overstating the value of NFDM, states the true value of NFDM. Since these reported prices are then used by AMS to set minimum federal order prices, requiring reporting of Kosher NFDM reflects real world values and thus proper minimum price economic signals. This may not be true of other products and AMS should carefully examine the record for the purpose of making a product by product decision.

III. LONGER-TERM FIXED PRICE CONTRACTS

Since September 4, 2007 there has been a significant development with respect to reporting of long-term fixed price contracts. The California Department of Food & Agriculture (“CDFA”) after a formal rulemaking process (including witness testimony submitted under oath) concluded that while unlimited fixed price contracts should not be always reportable, “fixed price long-term contracts within 150 days of the first shipment” should be reportable for California Weighted Average Price (“CWA”) purposes. The Hearing Panel Report is published

and available online at the CDFA website.

<http://www.cdfa.ca.gov/dairy/pdf/hearings/2007/August28FinalPanelReport.pdf>

and <http://www.cdfa.ca.gov/dairy/pdf/hearings/2007/August28HearingDetermination.pdf>.

Without endorsing the specific result of the CDFA decision and without repeating what is found there, we respectfully suggest that the discussion found on pages 15-18 of that decision be incorporated by reference. Special note is take of the following statements found all on page 17 of the CDFA Hearing Panel Report:

Moreover, export contracts are typically a future commitment and not based on inventory, and these exports require a considerable amount of paperwork. The majority of the long-term fixed price contracts, therefore, do not even start shipment of their obligations within a month of the agreement.

The Panel has concluded that exclusion of long-term contracts to a relatively short time period places additional risk on California NFDMM manufacturers, making them more reluctant to commit to export sales.

* * *

The panel believes that the testimony for 30- or 90- day time limits was too subjective to be a basis for making this critical decision.

CDFA's statements can be applied to the NASS situation and have national implications. Sworn testimony and evidence convinced the hearing panel that export contracts take longer than 30 days to complete. The majority of export contract volumes do not even begin shipment within the 30 day period imposed by the Interim Rule. Thus the Interim Rule ignores the real world. The second quoted statement is precisely what DairyAmerica indicated was true in its September 4, 2007 submission. On a national level plants are unwilling to engage in a market where a majority of the sales do not even begin until after 30 days when AMS imposes a rule that makes fixed price contracts of this nature unreportable to NASS. As CDFA said, this places

the risk on NFDM manufacturers (nationally) because a non-reportable transaction is one that does not figure into the calculation of “**minimum**” federal order values. Finally, arbitrary time limits when it comes to export transactions are just that – “subjective” in the words of CDFA.

DairyAmerica certainly does not suggest that CDFA’s position is dispositive. AMS certainly should not slavishly follow any state’s program. But here, CDFA’s CWAP program with its long successful history and the logic behind its decision simply cannot be ignored. We urge AMS to study and consider the CDFA Hearing Panel Report.

Some commenters, as expected, opposed longer than 30 day fixed price contracts on “lack of transparency” grounds. DairyAmerica addressed this issue in its September 4, 2007 comments. It must be remembered that the minimum price program adopted by the Federal Milk Order system is designed to permit milk manufactured into lowest product classification items to sell at market clearing prices. To ignore market clearing prices of the volume represented by long-term fixed price contracts of NFDM is to ignore the Secretary’s own rulemaking decisions on such minimum pricing. Moreover, transparency can be gained through other means if it is necessary or desirable – separate reporting of volumes and lengths for fulfillment and prices (so long as confidentiality is of course protected through “three or more” reporting rules).

Indeed the International Dairy Foods Association (“IDFA”) this year in its Brief regarding make allowances, yield factors and wholesale dairy product prices – Docket Nos. AO-14-A77, et al.; DA-07-02 made the following argument on page 4 its Brief (available at http://www.ams.usda.gov/dairy/class_III_IV_pr_formulas/hearing_briefs/IDFA.pdf):

II. USDA must adopt values for the make allowances, yield factors and wholesale dairy product prices in the product price formulas which represent actual industry data, encompass the entire industry, from the most recent time period available, all the while in keeping with the fact that the product price

formulas are used to determine minimum regulated farm milk prices.

Yonkers noted the critical need for a make allowance that covers the total costs of turning raw milk into a finished dairy product, because the make allowance provides the only source of funds available to the processor. Without an adequate level of make allowance, a manufacturing plant could not continue to operate, as it would have insufficient funds available to pay the vital costs necessary for operating the plant. In addition, Yonkers noted that exactly the same problems are created if USDA uses incorrect data or assumptions in determining the product price paid for the finished products, or the yields that a manufacturer is assumed to achieve in turning raw milk into a finished product (Tr. 2569).

The argument found in these paragraphs quoted above is identical to DairyAmerica's argument that a number of contracts longer than 30 days in duration with fixed price elements need to be included in the NASS. Taking from the IDFA brief, one can just as validly say – “[w]ithout [permitting reporting of additional NFDM export contracts], a manufacturing plant could not continue to operate, as it would have insufficient funds available to pay the vital costs necessary for operating the plant [when resulting NASS prices are higher than export values].

IV. CONTRACT PRICE INDEXING SHOULD REMAIN REPORTABLE

At least one commenter opposed the reporting of contracts longer than 30-days with indexed pricing. In these long-term contracts, the price is not truly fixed but varies with and based upon an index directly related to the market. Leaving aside the need to be able to report longer-term fixed price contracts as discussed in Part III above, these contracts are presently reportable and should remain reportable. DairyAmerica is unaware of any buyer of NFDM who opposes these contracts or indeed or who opposes reportability to NASS. Just the opposite is true.

Indeed the principle opponent of indexed contracts does not to DairyAmerica's knowledge purchase or sell NFDm. This is important because the comment simply ignores the necessity to be able to peg a price to something for both sides. The only alternative, and clearly the one favored by that commenter who opposes indexed contracts, is to go to a strictly cash/spot market basis. This is not only undesirable, it is counterproductive. First, buyers don't want a spot price for all of their product. Second, as discussed in the original DairyAmerica comments at pp. 11, 25-30, a spot market does not represent the true value of NFDm for minimum price calculation purposes. It is not the last pound of NFDm sold at the highest price that sets the value, it is all the NFDm sold in various ways – spot, short-term contracts, longer-term price, indexed contracts, and (especially for exports) longer-term, fixed price contracts.

The request to exclude indexed price contracts is ill advised and economically unsound.

V. DEIP AND OTHER PROGRAMS DESIGNED TO CLEAR THE MARKET SHOULD BE REPORTABLE

At least one commenter opposed the inclusion of sales under DEIP if the sales contract was longer than 30 days. Again this appears to be an entity with no actual experience selling product under the DEIP. In addition to all of the normal export time constraints discussed in the September 4, 2007 DairyAmerica comments, DEIP transactions by their very nature add in the not-insignificant time involvement of the government's role in a DEIP transaction. The idea that these contracts can be entered into, finalized under DEIP, meet export deadlines and ship all within 30-days of signing the contract is quite simply preposterous.

Moreover, if anything, the DEIP exception to any long-term price contract reporting rules restriction should actually be expanded to include sales through the Cooperatives Working Together ("CWT") program. www.cwt.coop. Under this program, private parties may in lieu of

taxpayers choose to make export transactions, otherwise uneconomical, desirable. *See* “Attachment A.” Again if longer-term, fixed price contracts are to be limited contrary to DairyAmerica’s comments, shouldn’t AMS permit these contracts to be fully reportable (including value of any CWT contribution in the price) as a matter of inherent logic? Indeed wouldn’t the U.S. taxpayer benefit from such an opportunity to use privately raised funds to achieve the same goals as DEIP?

At a minimum DEIP and CCC sales must remain reportable; the alternative discourages the use of these Congressionally authorized and encouraged tools because non-reportability will simply discourage use under federal minimum price rules as discussed in the DairyAmerica September 4, 2007 comments.

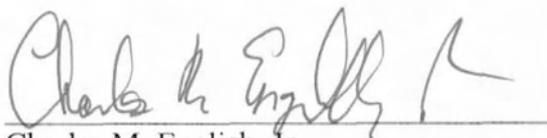
VI. OTHER

DairyAmerica notes that the CDFA Hearing Panel Report on page 15 rejected a limitation on reporting for NFDM product based upon product age. CDFA found such a rule to be administratively problematical. DairyAmerica suspects, without knowing, that NASS 180-day age non-reporting rule flows from the CME. But the reason for the rule affecting reportability of product sales is unclear to DairyAmerica. The restriction adds to administrative costs of reporting without obviously adding statistical validity to the NASS report. DairyAmerica has not adopted a position on this issue, but urges AMS to make a more critical analysis of the issue.

VII. CONCLUSION

DairyAmerica urges prompt review and action on the Interim Rule. There are very real world consequences to NASS reporting rules that inhibit the functioning of the market based solely on what is reportable and what is not reportable. The negative economic consequences of NASS reporting rules that interfere with the market cannot be overstated or overlooked. Industry should not throw stones at industry players who must, looking to real world economics, make real world choices for selling products based upon decisions affected by whether or not a particular sale is reportable or not. The DairyAmerica September 4, 2007 Comments and these Supplemental Comments stand for a consistent real world, economic approach that, especially in light of CDFA's CWAP decision, should lead to revised Mandatory Reporting Rules that should be adopted immediately consistent with these Comments.

Respectfully submitted,



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News Release



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CWT ACCEPTS EXPORT ASSISTANCE BID FOR POWDER

ARLINGTON, VA – Cooperatives Working Together announced today that it accepted an export assistance bid last week for the sale of whole milk powder.

The bid was from Land O'Lakes of Arden Hills, MN, for the export of 60 metric tons (132,000 pounds) of whole milk powder to Trinidad. CWT will pay an export bonus to the bidder, only when delivery of the product is verified by the submission of the required documentation.

This accepted bid increases CWT's total 2007 export obligations for whole milk powder to 860 metric tons (1.89 million lbs.). In addition, CWT's YTD export obligations for cheese are 5,595 metric tons (12.3 million lbs.), its YTD anhydrous milkfat export obligations to 4,385 tons (9.6 million lbs.), and its YTD export obligations for butter to 10,975 metric tons (24.1 million lbs.).

Through CWT's Export Assistance program, transactions occur as overseas buyers are found for the products, and as CWT's members bid to be compensated for selling cheese, butter, anhydrous milkfat and whole milk powder to those importers. CWT's export assistance program has helped export dairy products to 51 countries on four continents.

Cooperatives Working Together is being funded by dairy cooperatives and individual dairy farmers, who are contributing 10 cents per hundredweight assessment on their milk production through December 2007. The money raised by CWT's investment is being apportioned between two supply management programs that strengthen and stabilize the national all milk price. For more on CWT's activities, visit www.cwt.coop.