Comments by the National Milk Producers Federation
And the U.S. Dairy Export Council
Regarding the National Trade Estimate Report on Foreign Trade Barriers
Docket Number USTR–2013–0027
October 22, 2013

Our organizations submit these comments in response to the notice of request for public comments concerning the National Trade Estimate Report on Foreign Trade Barriers (Docket Number USTR-2013-0027). The National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) appreciate the opportunity to present their views on this important annual report.

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.

Listed here are some of the major trade barriers confronting our industry which are not SPS or standards-related. Many of the major barriers facing U.S. dairy exports fall into those categories and will be detailed in our input for those reports. This is not an exhaustive list of ongoing issues nor of border measures (e.g. tariffs, TRQs, etc) that are of concern to our industry. Rather, it is a summary of the highest priority issues we face in key markets, with an emphasis on those with which the U.S. has an opportunity to pursue changes given the negotiation of a trade agreement.

Canada

Tariff Levels

USDEC and NMPF believe it is essential to secure comprehensive market access across the full range of U.S. dairy products into Canada through TPP. Canada's market for imported dairy products is tightly restricted in virtually all product areas. For virtually all dairy products, Canada's over-quota tariffs range from approximately 200% to slightly below 300%. In addition, Canada has WTO authorized safeguards on many dairy products in order to additionally ensure controls on these imports.

Despite these excessive restrictions, Canada has repeatedly worked to undermine even the limited amount of access it has already agreed to provide through its WTO commitments. In one of the most troubling episodes of evasion of WTO commitments, Canada obligated itself to provide a TRQ to allow access for 64,500 MT of fluid milk (0401.10.1000) but then banned commercial shipments from making use of this TRQ. Instead, Canada simply asserts that

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cross-border shoppers between the U.S. and Canada fill this TRQ. Our industry continues to believe this is a grievous distortion of the access Canada committed to provide for fluid milk. Similarly, in the case of the access provided for ice cream (2105), Canada restricted the entire 484 MT TRQ it established for ice cream as eligible to be filled solely by ice cream in retail containers, thereby prohibiting access for any bulk/ingredient ice cream products. Given this history, it is vital to explicitly establish that all new access negotiated for any U.S. dairy products into Canada must be fully open to any form of commercial shipments that meet the current applicable tariff code definition.

Despite Canada's exorbitant tariff barriers, it is still our second largest export market. A large portion of those exports, however, are in the form of the few product categories that face low (i.e. less than 10%) WTO tariff rates and for which the U.S. enjoys a 0% tariff under NAFTA. These instances, limited though they are in the Canadian dairy schedule, account for a large percentage of our exports to Canada on a value basis. Another significant avenue for U.S. exports of dairy products to Canada (particularly fluid milk products in the 0401 tariff schedule category) is Canada's Import for Re-Export Program (IREP). Under that program, Canadians processors are permitted to import certain products provided that the final product is then exported from Canada. In this sense, the exports are not as meaningful since sales under IREP do not ultimately remain in Canada and many may eventually re-enter the U.S. as processed products or enter other foreign markets where they then compete directly against U.S. dairy exports. Given this, the industry does not view use of Canada's IREP as genuinely providing open market access opportunities for our dairy industry.

In TPP discussions with Canada, we urge USTR to focus strongly on the need to phase out Canadian tariffs on dairy products.

Non-Tariff Market Access Considerations

Canada has a long-standing history of employing non-tariff "definitions" and regulatory measures to effectively limit imports of dairy products. Through TPP we urge USTR to include measures aimed at ensuring that the dairy market access the U.S. negotiates with Canada is truly fully implemented. Necessary elements of this approach are: 1) a clear prohibition on any additional tariffs being applied to U.S. dairy imports beyond those clearly specified in the U.S.-Canada TPP dairy market access schedule, including both during the tariff phase-out period and after the tariffs are eliminated; 2) full recognition of each other's dairy regulatory and oversight systems; and 3) agreement that no changes in product standards for any dairy product will be allowed if the change would have the effect of restricting trade (in either the final good or dairy component ingredients) or would result in preferential treatment for domestic product.

We should note that no health certificate is currently required for the shipment of dairy products to Canada and that Canada has recognized the safe animal health status of the U.S. dairy herd through a specific notation in its Health of Animals Regulations (http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._296/page-8.html#h-17). It will be important in

TPP to secure an understanding that these conditions will remain in place moving forward (subject only to revision in the case of a significant new dairy-related food safety development or relevant animal disease status change). We must ensure that new barriers are not erected through use of unjustified certificate language requirements, as our industry has seen be done by other countries. Finally, it is important to ensure that we have a clear approval of the robustness of the U.S. food safety system in order to help significantly to forestall future possibilities for Canada to attempt to impose new and unjustified import requirements on U.S. dairy products.

Creation of New Milk Classes Specifically in Order to Thwart Imports

One of the more troubling developments in the past few years has been an increasing level of creation of new special milk classes that are specifically targeted and designed to compete against imports of products that have made in-roads into the Canadian market. These special pricing classes are put in place by the Canadian Milk Supply Management Committee (CMSMC), whose voting members are provincial boards and provincial governments and which is responsible for policy determination and supervision of the provisions of the National Milk Marketing Plan. Use of these pricing classes has been wielded to the detriment of U.S. suppliers of preparatory pizza toppings (which include mozzarella cheese) and is under discussion with respect to creating a class to compete against U.S. exports of ultra-filtered milk. We encourage USTR to stress the inappropriateness of these actions that are specifically implemented in order to thwart imports and impair the value of concessions to trading partners, including to the U.S. under NAFTA.

European Union

Use of Geographical Indications (GIs) to Limit U.S. Competition

For the past few years, the European Union has been pursuing an increasingly aggressive bilateral strategy to restrict the use of common cheese names by non-EU producers through FTA negotiations and bilateral Intellectual Property discussions. The EU's heightened bilateral focus has been a response to its limited progress in the context of the WTO (thanks in large part to successful U.S. on a multilateral basis in the WTO talks to resist the EU's excesses in this area).

The EU's clear goal is to advance their own commercial interests for food products through advocating for wider use of GIs, beyond the realm of appropriate protection of product niches in order to try to appropriate 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. The EU's objective is to reach international agreements that restrict use of the common trade names to EU product only.

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, particularly in third country markets, to other terms that form part of a compound (i.e. more than 1 word) GI such as provolone, emmental, brie, cheddar, mozzarella, camembert, ricotta, romano, pecorino and others.

If successful, the EU's efforts will significantly impair current U.S. cheese exports and will also greatly limit the future global potential for the U.S. industry. The U.S. industry appreciates the attention the Administration has paid to this issue and stresses how critically important it is for the Administration and industry to work together in a very concerted manner to ensure that the customary use of common cheese names can continue in foreign markets. Furthermore, the potential degree of impact would be magnified many times over if the EU were to be successful in its efforts to abuse the very concept of a trade agreement by imposing these types of restrictions on the U.S. market itself through TTIP.

According to USDA's NASS report, there are roughly 500 cheese plants in the U.S. Roughly $21 billion in U.S. cheese production utilizes European-origin names. Last year over $1 billion in U.S. cheeses were exported. Cheese exports are a particular growth opportunity for our industry, registering a six-fold increase over the past 10 years. The extent of the damage to U.S. exports will depend on the degree of EU success in limiting our ability to label these products with names customers know and look for at the market.

We are already facing bans on exports of asiago, feta, fontina and gorgonzola into South Korea, despite the U.S.-Korea FTA. In 2013 many Latin American countries such Honduras, Nicaragua, Panama, Peru and Colombia approved multiple GIs that if left standing as they currently exist could block U.S. exports of additional varieties of products to these FTA partners as well. The EU also continues to negotiate with Canada and many Asian countries – insisting in each case on the importance of granting its producers a monopoly over names that have wide-spread international commercial importance. In many cases, U.S. producers have joined with local producers to protest the EU's tactics. Long-standing and extensive local production has not been enough to insulate those producers, particularly in developing countries, from facing pressure to abandon their right to use names of products for which they are the ones who have built the market demand in their own countries.

We look forward to continuing to work with the U.S. government and others against the EU's efforts impose restrictions on competition for products that long-ago entered into common use in the U.S. and many other countries around the world. For the EU to seek to now monopolize those terms solely for its own benefit under the guise of intellectual property provisions is simply a disguised barrier to trade.

Import Measures (Tariffs and Import Licensing)

EU tariffs for dairy products are quite high in many cases. We welcome the opportunity to eliminate these rates in TTIP, in concert with removing non-tariff barriers to trade, in order to create a more level playing field across the Atlantic.

Even more daunting than the level of the tariffs, however, is the complexity of many of the related import measures. For instance, 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. In addition, the EU's system of variable duties for processed products adds another layer of complexity and uncertainty to shipping to the EU. We have provided detailed information to USTR in response to requests for comments on input related to TTIP and we stand by our concerns relating to that full range of issues. Below are several trade impediments of particular concern that may be judged to fall outside the scope of SPS and TBT measures:

- Tariff Form: Inconsistent Duties for a Given Tariff Code

The EU's system of variable duties for processed products adds another layer of complexity and uncertainty to shipping to the EU. Although ultimately elimination of tariffs is the goal (as detailed above), that is likely to take place over a period of years. In the meantime, we would like to see greater predictability by moving away from the EU's use of its Meursing Code to determine a total tariff for various composite/processed products. This complex method of determining the total tariff on numerous composite goods is 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.

- Port Inspection Issues

Inconsistent inspection practices across the EU's border inspection personnel (BIPs) have caused difficulties in the trade of dairy products. We would expect BIPs to sample products in a way that leaves their integrity intact, but we this in not always be the case. Instead of making a small slit in a bag of dried dairy products and covering that slit in its entirety with a BIP sticker, some BIPs rip open the bag and then attempt to seal it by wrapping the entire bag in tape. When the customer reaches the shipment, he or she may reject the bag because it is not properly sealed and the product may be contaminated. We urge consistent inspection practices that ensure that any BIP sampling does not compromise the integrity of imported products.

- Inconsistent use of Tariff Codes on Dairy Certificates

The EU uses two different dairy certificates – "HTB" for countries free of FMD and "HTC" for countries at risk of FMD. (The HTB certificate requires pasteurization of dairy products, whereas the HTC certificate lists the heat treatment options noted for countries at risk of FMD.) As a FMD-free country, the United States issues only the HTB certificate. The difficulty that exporters and EU BIP officials face is that the EU determines which product falls under which certificate by the HS code, and there is inconsistency among the HS codes on the HTB and HTC certificates. This inconsistency in the HS codes included in the notes to these certificates has caused problems at certain ports. We would like to see the EU update its tariff code guidance to ensure all eligible dairy products are included on the HTB certificate as well.

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 Euro a year on dairy export subsidies: 724 million on other dairy products, 346 million on cheese, and 298 million on skim milk powder. Use of these government subsidies makes it more difficult for U.S. exporters to compete in global markets.

We should seize the opportunity TTIP offers to secure a commitment to abandon their use entirely, regardless of market. In the context of the Doha WTO negotiations, the EU was already prepared to forego use of its export subsidies by the end of this year, 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 the TTIP. This would be a significant achievement on a bilateral basis but also a symbol of how direct U.S.-EU trade talks can benefit the global trading system at large as well.

Japan

Tariff Levels

USDEC and NMPF have an interest in seeing improved and comprehensive market access across the full range of dairy products into Japan. Japan's market for imported dairy products is tightly restricted in most product areas. Japan's out-of-quota tariffs for key trade staples such as nonfat dry milk, whey and butterfat are particularly high. In addition, Japan maintains a complicated quota system for these and other dairy products which it uses to allocate its in-quota quantities according to designated uses.

For certain key product TRQs, Japan's Ministry of Agriculture, Forestry and Fisheries appoints the Agriculture & Livestock Industries Corporation (ALIC), a state-trading enterprise owned by the government, with the sole responsibility to decide and control which dairy items should be imported at various quantities and when by examining the market situation. It is our understanding that ALIC accepts bids from importers in the commercial sector and decides which importer to eventually allocate the quota to in a process that appears dramatically influenced by which bids will generate the highest mark-up, a result that raises costs to end-users and consequently blunts demand.

Additionally, Japan also makes active use of its World Trade Organization sanctioned safeguards to restrict access for certain products not sufficiently protected by the tariff levels alone. These WTO safeguards are often triggered at astonishingly low levels of imports by volume and add an additional barrier to accessing the Japanese market.

In summary, Japan's dairy tariffs as a whole are high and its system of specific tariffs, tariff-rate quotas, quotas for specific uses, and safeguards results in a situation where accessing the Japanese dairy market is extremely difficult. It is very challenging for many exporters to make sense of the Japanese dairy market restrictions and how they all interact with one another. Japan's decision to the TPP negotiations offers an excellent, and perhaps the only, opportunity to expand access for dairy product to the Japanese market by establishing an import regime that is significantly less complicated than the current system. This is a high priority for NMPF and USDEC.

Despite Japan's significant tariff barriers, it is still our fifth largest export market, totaling a record high $284 million in 2012. The strongest current export category is cheese. Our cheese exports accounted for over 40% of total U.S. dairy exports to Japan last year. Not only are tariffs and other forms of protection lower for cheeses, but they are also dramatically less complicated than Japan's tariffs for most other dairy products. Bound cheese tariffs are simple ad valorem rates ranging from 22.4% to 40% depending on the type of cheese. In addition, there has been a TRQ permitting 65,900 MT at 0% tariff applied for tariff lines 0406.10.010, 0406.40.010 and 0406.90.010 for use in processed cheese-making. Given these advantages, U.S. exports of cheeses have set records in each of the last three years and totaled $123 million in 2012. It is worth highlighting, however, that despite this growth, sales in these tariff lines are for lower-value inputs. The tariff on processed cheese itself (0406.30) is a much higher 40%, thereby significantly inhibiting U.S. access to this higher value cheese category.

USDEC and NMPF hope to build upon the situation that exists now to further expand cheese sales as part of the TPP negotiations.

Israel

Expansion of Free Trade Agreement

The United States and Israel remain engaged in protracted negotiations designed to deepen the agriculture portion of the U.S.-Israel Free Trade Agreement (Agreement on Trade in Agricultural Products, or ATAP). These negotiations have made very little headway in recent years, however, and most U.S. dairy products under the FTA remain constrained by small tariff rate quotas (TRQs) and high out-of-quota duties. Many of these TRQs are filled or come close to being filled during the quota year. It is time for the U.S- Israel FTA to be revisited and developed into the type of high quality agreement with few, if any, exceptions, which is the signature of all other U.S. FTAs. As part of the negotiations on ATAP, Israel should finally agree to provide fully free market access for dairy imports from the United States. This objective was included in the original U.S.-Israel FTA. The market potential for U.S. exports of cheese to Israel is particularly strong, but many other U.S. dairy product exports would increase significantly, as well, if the FTA allowed for duty free trade. We urge our trade negotiators to push strongly for a genuine and full FTA with Israel during these negotiations.

New Zealand

Monopoly Structure of Dairy Industry

The monopolistic structure of New Zealand's dairy industry, where one company controls approximately 90% of the milk produced in that country, poses a significant concern to the U.S. dairy industry. Both producers and a number of processors believe this situation poses a serious challenge to fair trading relationships both between the U.S. and New Zealand and in dairy markets throughout the world. This monopolistic structure grants an immense advantage of New Zealand dairy product exports. Moreover, very few companies in any economic sector have the level of market share that New Zealand has obtained through domestic policies. Such concerns present a serious challenge to our industry as we strive to compete against this international dairy power-house in world markets.

The deeply concerning policies at play in the New Zealand dairy sector have been detailed in an extensive confidential report provided to USTR last year as well as in Congressional testimony this year and ample other public record submissions. The U.S. dairy industry is insistent upon the need to make use of the ongoing TPP negotiations to finally address this concern by pursuing reforms that will ultimately lower the level of market concentration afforded to one company in New Zealand.