

COMMENTS ON DRAFT QUOTA IMPLEMENTATION PLAN

by California Dairies, Inc., Dairy Farmers of America, Inc., and Land O' Lakes, Inc.

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I. Introduction

California Dairies, Inc. (“CDI”), Dairy Farmers of America, Inc. (“DFA”), and Land O’Lakes, Inc. (“LOL”) (collectively, the “Cooperatives”), provide the following comments on the proposed Draft Quota Implementation Plan published by the Secretary of the California Department of Food and Agriculture (“CDFA”) on July 26, 2017 (“Initial Quota Plan”), and as modified and published on August 7, 2017 (“Revised Quota Plan”), related to the continuation of the long-standing California quota program following the promulgation of any Federal Milk Marketing Order (“FMMO”) in California by the United States Department of Agriculture (“USDA”).

At the outset, the Cooperatives extend their appreciation and commendation to the Secretary and the staff of CDFA for their significant efforts over the past several months following USDA’s issuance of its February 14, 2017 “Recommended Decision and Opportunity to File Written Exceptions on Proposal to Establish a Federal Milk Marketing Order” (“Recommended Decision”) on an FMMO for the State of California. In the Recommended Decision, USDA left it to CDFA to determine how to continue administering the California quota program in conjunction with an FMMO so as to recognize quota value. CDFA then promptly took steps to obtain feedback and information from the dairy industry in California, to enact legislation to solidify the Secretary’s authority to continue administering the quota program alongside an FMMO, to convene the Producer Review Board for three public meetings to discuss and deliberate on the continuation of the quota program in this new context, and to prepare draft regulations reflecting the deliberations of the Producer Review Board. These significant efforts have proved essential to clearly effectuating the continued administration of the California quota program.

California producers are now nearing that critical moment of voting on a standalone quota plan that will take effect if and when an FMMO is implemented in California. The Cooperatives suggest and respectfully request that CDFA take additional steps to ensure all producers eligible to vote in a referendum on the final proposed standalone quota plan be provided ample information about the mechanics of such plan in advance of any vote. While the Producer Review Board meetings have been educational and informative, they have not been widely attended, and they have been a forum for dialogue and debate amongst members of the California dairy industry where multiple viewpoints about various aspects of quota regulation have been presented. The Cooperatives thus believe that educational sessions explaining in plain, unbiased terms the mechanics of the final proposed standalone quota plan would be valuable to individual producers and provide them with the foundation necessary for an informed vote in the referendum. In advance of such educational sessions, CDFA could further solicit “frequently asked questions” to guide the presentation. In addition, the Cooperatives suggest that CDFA provide with the referendum ballots a summary cover letter that generally describes the standalone quota plan and the timing and circumstances under which it may come into effect.

II. General Comments Regarding Importance of Quota Program to California Dairy Industry and Critical Need for its Continued Administration in a California FMMO

The uninterrupted continuation of the quota program following the promulgation of a California FMMO is viewed as critical by dairy farmers throughout the state. This sentiment was reflected in the testimony and evidence presented over several weeks during USDA’s hearing on the proposed California FMMO, as well as through the deliberations of the Producer Review Board and public comments expressed during its meetings. The value of quota to producers cannot be understated—as both a premium on their milk check and an asset on their balance sheets for lending purposes. Indeed, the value of quota as an asset has been established

by expert testimony as \$1.2 billion. Further, as additional testament to the industry-wide support for the continuation of the quota program, its value and importance are recognized by even those dairy farmers who do not own quota themselves.

These strong sentiments led USDA to provide in its Recommended Decision for the continued administration of the California quota program within the proposed California FMMO. While USDA's Recommended Decision left such continued administration to CDFA, in its proposed California FMMO, USDA expressly defined and referenced the "California Quota Program" (*see* Recommended Decision, §1051.11) and expressly allowed for handler deductions for quota payments (*see* Recommended Decision, §1051.73(a)(2)(viii)). Via these provisions, USDA demonstrated its intent to "recognize quota value" as Congress intended.

Throughout the long process of seeking an FMMO for California, it has been the Cooperatives' position, on behalf of their dairy farmer members, that entry into the FMMO system must not diminish or disturb, in any way, California quota value. USDA's efforts described above were the first step toward accomplishing this goal. CDFA's efforts, with the invaluable input and insight of the Producer Review Board, are the second critical step toward achieving this goal. The Cooperatives, on behalf of their members, wholly support the Secretary and CDFA staff members' efforts to bring to fruition standalone regulations to govern the continuation of the quota program within a California FMMO. The Cooperatives further concur with CDFA's statements that the Secretary has the authority, as conferred by the California legislature, to continue administering the quota program after the promulgation of a California FMMO. Ample authority for the Secretary's administration of the quota program even after an FMMO is implemented exists in the California Food and Agricultural Code, for example,

Sections 62703, 62704, 62718, and the recently-enacted 62757, which expressly authorizes the Secretary to establish a standalone quota plan when an FMMO is established in California.

III. Comments Regarding Specific Revisions Made to CDFA's Draft Quota Implementation Plan During or After the August 2, 2017 Producer Review Board Meeting

In advance of the August 2, 2017 Producer Review Board meeting, CDFA published its "Draft Quota Implementation Plan" ("Initial Quota Plan"), for review by the Producer Review Board. During the August 2, 2017 meeting, revisions were made to the Plan in real time, based on comments and discussion during the meeting. Following the meeting, CDFA published a new version of the "Draft Quota Implementation Plan" ("Revised Quota Plan"), incorporating revisions suggested and made during the August 2, 2017 meeting. The Cooperatives provide the following comments regarding the revisions made in the Revised Quota Plan.

1. The Cooperatives concur with comments at the August 2, 2017 meeting of the Producer Review Board requesting removal of references to "production base" and "pool quota" as obsolete given the changes to the structure of the California quota program in the context of a California FMMO. The Cooperatives thus concur with the corresponding revisions made by CDFA and reflected in the Revised Quota Plan.

2. The Cooperatives concur with comments at the August 2, 2017 Producer Review Board meeting that the definition for "market milk" be revised consistent with the definition for "manufacturing milk." For consistency, however, the Cooperatives recommend that the definition of "market milk" be revised slightly to read as follows: "Market milk" means milk, cream, or skim milk that is produced in conformity with applicable regulations of the appropriate public regulatory or health authority for disposition as market milk.

3. The Cooperatives concur with comments at the August 2, 2017 Producer Review Board meeting that the Secretary include language confirming that all existing quota held by

California producers be maintained upon the implementation of a California FMMO and the corresponding standalone quota plan. The corresponding language proposed by CDFA in the Revised Quota Plan appears in the definition of “quota” and reads: “The quota owned by each producer prior to the implementation of this Plan shall remain the same after its implementation.” To more precisely address this point, however, the Cooperatives suggest that the corresponding language instead read as follows: “Nothing in this Plan is intended to affect the amount of quota owned by producers as of the date of implementation of this Plan.”

4. The Cooperatives concur with CDFA’s revisions in Article 2, Section 201 of the Revised Quota Plan regarding the limits of a new producer’s initial quota allocation.

5. The Cooperatives concur with the revised internal section references in Article 4, Section 400 of the Revised Quota Plan, in light of modifications to and deletions of certain provisions related to production base within that Section, as noted in paragraph 1 above.

6. The Cooperatives concur with all clarifications in the Revised Quota Plan changing “Board” to “Producer Review Board.”

7. As was noted at the August 2, 2017 Producer Review Board meeting, the Cooperatives take issue with the Initial Quota Plan’s failure to incorporate the currently operative language in Section 502 of the Pooling Plan, which reads: “The production base and the pool quota of active member producers of a cooperative association shall belong to the individual producer, but shall be assigned to the custody and control of the cooperative association. A cooperative association may combine the bases and quotas assigned to it by members and nonmembers into one base and one quota for purposes of accounting for milk marketed under this Plan, provided that the bases and quotas of the nonmembers may be so combined only if such cooperative association accounts to the nonmembers on a patronage

basis.” This provision in the Pooling Plan is legislatively derived from Food and Agricultural Code Section 62710, which reads: “The production base and the pool quota for milk shipped through a cooperative association shall belong to the individual producer but shall be assigned to the custody and control of the cooperative association and the production base and pool quota may be transferred only in accordance with the articles of incorporation, bylaws, or marketing agreements of such association. The cooperative association shall continue to be treated as a single producer, both for producer payment purposes and for pool settlement purposes.”

While the Revised Quota Plan, at Article 7, Section 701, now includes some of the language from Section 502 of the current Pooling Plan, it inexplicably does not include the first sentence from Section 502. Accordingly, the Cooperatives recommend that the entire Section 502 of the current Pooling Plan be included in Section 701 of the Revised Quota Plan, edited only to remove references to “production base,” consistent with previous comments. The proposed language should thus read as follows: “The quota of active member producers of a cooperative association shall belong to the individual producer, but shall be assigned to the custody and control of the cooperative association. A cooperative association may combine the quotas assigned to it by members and nonmembers into one quota for purposes of accounting for milk marketed under the applicable marketing order, provided that the quotas of the nonmembers may be so combined only if such cooperative association accounts to the nonmembers on a patronage basis.”

8. The Cooperatives concur with the revisions to Article 9, Section 901 made during the August 2, 2017 Producer Review Board meeting. Like many others at the August 2, 2017 meeting, the Cooperatives take issue with the Initial Quota Plan’s mandatory referendum that would be triggered by any fluctuation of \$0.0500 for the quota assessment in Article 9, Section

901. As was spoken to by a number of producers, trade association spokespeople, and Producer Review Board members, a mandatory referendum trigger will lead to instability in the California quota program, signals a lack of faith in the program, and poses a likely insurmountable obstacle to implementation of new quota regulations in connection with a California FMMO. The Cooperatives thus concur with CDFA's removal of such language from the Revised Quota Plan.

9. Likewise, the Cooperatives concur with the further revisions to Article 9, Section 901, which, as revised, gives the Secretary discretion to review and/or adjust the quota premium rate as needed (emphasis added). The prior language in the Initial Quota Plan requiring the Secretary to adjust the quota premium assessment rate every three months was unreasonable, destabilizing, and wholly unmanageable. The discretionary grant set forth in the Revised Quota Plan will better serve the California dairy producers and ongoing stability in the California quota program than any mandatory obligation.

10. The Cooperatives concur with the changes recommended by the public and agreed to by the Producer Review Board, to Article 9, Section 901, to direct the Secretary to use the prior twelve (12) month period to evaluate the quota premium assessment rate.

11. The Cooperatives concur with the correction to the date of Handler payments to the Secretary in Article 10, Section 1003, from the nineteenth (19th) of the month to the sixteenth (16th), so as to align with the schedule set forth in USDA's Recommended Decision on a California FMMO.

IV. Additional Comments Regarding the Revised Quota Plan

The Cooperatives provide the following additional comments regarding other aspects and provisions of the Revised Quota Plan.

12. The Cooperatives respectfully request the Secretary reconsider the title, "Quota Implementation Plan," so as to more accurately reflect that the regulations do not newly

implement a quota program but, rather, they constitute the governing regulations for the continued operation and administration of the California quota program in the context of an FMMO promulgated by USDA. While the Cooperatives recognize that there are some differences between the quota program currently in operation and that proposed in the Revised Quota Plan, the term “implementation” connotes a brand new system governing quota ownership, which is simply not the case. In fact, as the proposed regulations set forth, producers who own quota the day before the regulations are implemented will own the same quota the day after the regulations are implemented. The Cooperatives thus recommend the title of the proposed regulations be changed to: California Quota Plan.

13. The Cooperatives recommend that the effective date of the Revised Quota Plan, which is currently identified as January 1, 2018, be revised to reflect that the Revised Quota Plan will only come into effect if and when an FMMO is implemented in California. Indeed, the Revised Quota Plan will only be necessary, and thus effective, upon promulgation of a California FMMO after referendum of California dairy producers. Thus, the effective date must be temporally linked to that event, rather than some fixed date that could be too early or too late based on the effective date of a California FMMO.

14. As was discussed at the August 2, 2017 Producer Review Board meeting, the Revised Quota Plan’s reference, at Article 11, Section 1100, to a mandatory survey of producers on the California quota program every five (5) years raises a number of complications. First, there is no language identifying the nature of the issues to be covered by the survey. This broad reach will lead to confusion about what topics can be subject to survey. Furthermore, as currently phrased in the Revised Quota Plan, the provision suggests the survey could serve as a mandatory, mini-referendum on the California quota program every five (5) years. As was noted

in paragraphs 8 and 9 above, and by numerous commenters before the Producer Review Board, that kind of constant peril will destabilize the California quota program and diminish producers' long term faith in its reliability, and thus its overall value. As such, the Cooperatives suggest that the determination of whether to conduct such a producer survey at any point in time be a subject for consideration by the Producer Review Board in the first instance, which may then make recommendations to the Secretary as it deems appropriate. Further, the Cooperatives request that Section 1100 be revised to reflect the issues discussed at the Producer Review Board meeting, to include that the survey may touch issues of process, staff concerns and implementation issues, and program improvements, and not the polarizing inquiry into whether or not the California quota program should continue.

15. As discussed during the August 2, 2017 Producer Review Board meeting, the Food and Agricultural Code contains provisions within the Stabilization and Marketing Act and the Pooling Act that specifically contemplate the possible adoption of an FMMO in California, and provide for the suspension of any Code provisions that are “in conflict with such federal order, or which [are] unnecessary or [are] a duplication thereof” “during the existence of such federal order.” (Food & Agric. Code §§ 61893, 62726.) Because the Stabilization and Marketing Plans and the Pooling Plan are promulgated pursuant to the legislative authority of the corresponding Stabilization and Marketing Act and Pooling Act, the suspension provisions referenced herein similarly apply to any conflicts, lack of necessity, or duplication between an adopted FMMO and said Plans. Further, these Code provisions provide for the Secretary to “take such steps and procedures as are necessary to wind up and conclude the administration and enforcement of the provisions of this chapter.” (*Id.*) Notably, these provisions simply provide for “suspension” of those milk pricing and pooling laws that conflict with, are in duplication of,

or are not necessary to an FMMO, and the winding up of their administration. Further, key Food and Agricultural Code provisions, such as those conferring requisite authority on the Secretary and Section 62750 regarding the quota premium, that are not conflicting, duplicative, or unnecessary, remain fully intact and in effect following implementation of an FMMO and any standalone quota plan.


CDFA indicated during the August 2, 2017 meeting that it would be providing its analysis of which legislative and regulatory provisions of the Stabilization and Marketing Act and Plans and the Gonsalves Pooling Act and corresponding Pooling Plan will be suspended upon the implementation of any FMMO in California, pursuant to operation of law. As of the date of this submission, CDFA's analysis in this regard has not been published. To the extent that such analysis has any impact on the comments herein, or the legal validity or efficacy of the Draft Quota Implementation Plan, the Cooperatives reserve the right to supplement these comments.

16. Finally, the Cooperatives' comments herein remain subject to any further information, data, or analysis provided or published by CDFA before the September 12, 2017 Producer Review Board meeting.

V. Conclusion

The Cooperative again express their appreciation to the Secretary, the staff of CDFA, and the Producer Review Board members for their time and efforts in bringing to fruition a standalone quota plan for the California dairy industry. These efforts are critical to the successful implementation of an FMMO in California, and their value cannot be understated. Thank you for your thoughtful consideration of these comments.

Respectfully submitted,



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