in Alaska, the District of Columbia, Hawaii, and Puerto Rico, and any interested importer as defined in section 1150.121.

(c) The final rule will not become effective unless ratified by a majority of domestic fluid milk producers and importers affected thereby.

b. Assessment Rates and Default Maximum Assumption

Section 1150.152 Assessments

As noted in Part II(1), the Alliance recommends that the default milk solids content for a given product be set at the typical milk solids content for that product, instead of the "maximum" milk solids content as currently specified in the Proposed Rule.

AMS has established a standard rate of assessment per unit of milk solids in an imported product of $0.01327 per kg of milk solids (which equals $0.00602 per pound), based on the average milk solids content per hundredweight of U.S. raw milk during 2006-2007 (12.45 pounds). For default rates, the Proposed Rule states that "[f]or most products, the default assessment rate for each HTS code would be based upon maximum milk solids content...In cases where maximum milk solids content is not stated in the HTS and cannot be estimated, a typical milk solids content is used, if available."[1] In cases where no information is available, other than a minimum requirement stated in the HTS, the minimum milk solids content stated in the HTS is used.

Thus, by its terms, the Proposed Rule uses the "maximum" milk solids to calculate the assessment for "most" imported products. It is contrary to U.S. national treatment obligations that in most instances the default rate calculation is based on the maximum milk solids content. Imported dairy products are required to be treated in a manner as favorable as the most favored U.S. product. Thus, when conversions are used for the purpose of calculating an assessment, national treatment dictates that the most favorable conversion be used. While in theory this requires the use of a minimum milk solids multiplier, the Alliance recognizes that for some tariff items such a calculation may not be feasible. Hence, at the very least the default milk solids content to be used when the actual is not known should be the typical milk solids content for that product.

Accordingly, the default rates contained Section 1150.172(b)(1)(ii) [table, "Imported Dairy Products Subject to Assessment"] should be recalculated using the minimum milk solids content multiplier for a particular product where known, and a typical milk solids content where the minimum milk solids content is not known.

c. Qualified Programs:

Section 1150.109 Qualified national, regional or State program

As noted in Part II(2), the Alliance recommends that USDA hold in escrow any funds earmarked by an importer for contribution to a qualified program until importer

[1] Proposed Rule, 74 Fed. Reg. at 23,363 (emphasis added).

programs are qualified by the Secretary. The Proposed Rule states that importers may direct one-third (2.5 cents) of their contribution to a qualified program, just as producers commonly do to support local or regional promotion, research, or education programs. However, at the present time there is *no qualified program for importers*, but the rule does appear to contemplate the possibility that one or more could be established.

With a national promotion program Board that will be dominated under the Proposed Rule by domestic dairy producers (36 to 2 importers), there is little if any incentive for the majority of the Board to support meaningful promotion program creation that fits the profile of imported dairy products when it is so different from the dairy products they have traditionally promoted and that are consistent with U.S. domestic dairy production. Because of this, the Secretary will have little if any incentive to authorize the creation of qualified programs under federal law that will meaningfully benefit importers, unless importer funds earmarked for qualified programs are held in escrow pending the creation of such programs.

Unless this step is taken, importers will have no real choice but to continue funding existing qualified programs that will not serve their interests, as they would likely be unable to affect the creation of a meaningful new promotion program that represents their interests under Federal or state law. Importers simply lack the political power to secure the creation of such a program through legislation.

Accordingly, section 1150.152 should be revised to add new section (g) to read as follows:

Section 1150.152

(g) *Creation of qualified programs for imported dairy products.* Before any funds held by the USDA in the Import Assessment Fund may be disbursed to the Board, the Secretary must establish at least one qualified promotion program consistent with the nature, kind, and quality of dairy products imported into the United States during the previous 5-years. Funds held in the Import Assessment Fund shall not be disbursed until at least one qualified program is created.

d. Collection and Handling of fees - oversight and distribution

Section 1150.152 Assessments

As noted above in Part II(3), the Alliance recommends that the Proposed Rule should allow importers to designate the same proportion of their assessment as domestic producers currently may do. In addition, the Alliance recommends that the authority to disburse assessments collected from the program should rest in the first instance with USDA and not the Board, and that additional restrictions be placed on the use of undesignated import assessments.

Currently, the Proposed Rule allows an importer to designate 1/3 of the assessment to a qualified program. However, domestic producers may direct 2/3 of their assessment to a qualified program. In order to obviate any suggestion of differing national treatment, the

Proposed Rule should be revised to allow importers to designate up to 2/3rds of their assessment to a qualified program. The Alliance has provided below a suggested revision to the Proposed Rule to effect this change.

The Alliance believes that additional changes to this section are needed. The Proposed Rule currently allows the import assessments collected by Customs to be given directly to the Board. However, the USDA has the ultimate oversight responsibility for the collection and distribution of the import assessments. As the rule stands now, USDA's oversight function can be exercised only after funds are collected and disbursed. The Alliance believes that having the USDA control disbursements will allow the USDA to better monitor the use of import assessments in accordance with this Proposed Rule, including limiting the use of imported funds on domestic program costs and other expenses, as discussed above.

Because the Board will be dominated by domestic producers, as discussed above, the Alliance further believes that the Proposed Rule should restrict the Board's discretion to direct import assessments to Qualified Programs. As noted above, importers may designate a proportion of their assessment to a qualified program (hereinafter the "qualified proportion"). However, the rule does not specify how the USDA or Board is to direct that qualified proportion if no program is designated. The Alliance believes the purposes of the rule would best be met if the qualified proportion were held until it could be disbursed *pro rata* to all qualified programs relating to imported products developed under new section 1152(g), discussed above. The remaining portion of the import assessment would be allocated to the Board, under a funds control process that ensures that the Board utilizes the import assessment funding in compliance with USDA rules. In addition, the Proposed Rule should require that that the Board certify compliance with all applicable requirements of the Proposed Rule prior to the receiving any import assessment funds.

Accordingly, section 1150.152 should be revised to read as follows:

(b)
****

(3) The assessments collected by CBP pursuant to § 1150.152(b)(2) of this section shall be transferred to the USDA in compliance with an agreement between CBP and the Agricultural Marketing Service. The USDA shall hold the assessments transferred under this section in an Import Assessment Fund. Amounts from the Import Assessment Fund will be disbursed by the USDA in its discretion and upon request by the Board, provided that:

> (i) Any request for disbursements from the Import Assessment Fund must be accompanied by a description of the planned use for the funds and
>
> (ii) Such description provides enough detail to allow AMS to determine whether the Board's planned use comports with the requirements, limitations, and purposes of this section.

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(5) At the designation of an importer, the USDA shall remit to a qualified promotion program(s) assessments paid by the importer pursuant to § 1150.152(b)(2) not to exceed 5

cents per hundredweight of milk, or equivalent thereof, of the 7.5 cents per hundredweight of milk, or equivalent thereof, paid by the importer. If no qualified promotion program is designated, then the USDA shall retain 5 cents per hundredweight of milk, or equivalent thereof, of the 7.5 cents per hundredweight of milk, or equivalent thereof, paid by the importer, in the Import Assessment Fund. Such funds shall be held in the fund until they may be disbursed to qualified program(s) identified by the Secretary pursuant to § 1150.152(g).

e. Export Promotion and Domestic Promotion

Section 1150.151 Expenses

The Alliance recommends that Section 1150.151 be changed to ensure that importers, through import assessments, do not pay a disproportionate share of domestic dairy promotion. Specifically, the Alliance recommends that the expenditure of import assessments on domestic promotion be linked to market share. Such linking of expenditures to market share will alleviate some of the disproportionate national treatment concerns identified in Part II, above.

Dairy producers benefit from domestic promotion, as evaluated by Cornell University and reported to Congress in July 2008, page 30 and page 48 "each dollar invested in generic dairy marketing by farmers would return between $5.52 and $5.94, on average, in net revenue to farmers." While it is arguable whether dairy importers would benefit from national promotion through increased demand, the Cornell University analysis demonstrates that domestic dairy producers will get increased revenue from the import assessments that are used for domestic promotion.

The Proposed Rule would prohibit import assessments from being used for export promotion, and it allows up to 100% of domestic assessments for export promotion. The Proposed Rule does not establish any requirements on how much of the domestic assessment must go into domestic promotion. Allowing up to 100% of domestic producer assessments to go into export promotion could result in allowing import assessments to pay more than their "share" of domestic promotion thereby subsidizing the export promotion activities. If uncapped levels of domestic assessments are allowed to go into export promotion, import assessments could fund a disproportionate share, up to 100%, of the domestic program and therefore underwrite the domestic gains to producers.

For instance, NDB, as reported to Congress in July 2008, spent $64.5 million on domestic marketing, research, and communications. Hypothetically, if $10 million in import assessments is added to expand these domestic promotion activities, they would be funding over 13% of domestic promotion. However, if the Board decides to increase funding for export promotion and reduce the domestic promotion program to $54.5 million, the share of import assessment funding domestic promotion would be over 18%. Currently, based on USDA estimates, imported dairy products fill about 5% of domestic dairy demand. In this example, while dairy imports could benefit from the domestic promotion program on their 5% market share, the Proposed Rule would allow import assessment on dairy products to fund up to 100% of the domestic promotion program. Thus, the Proposed Rule should