SWEETENER USERS ASSOCIATION

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Case No. A-201-845 &
Case No. C-201-846
Suspension Agreements
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VIA ACCESS ELECTRONIC FILING
The Honorable Wilbur R. Ross
Secretary of Commerce
U.S. Department of Commerce
Attn: Enforcement & Compliance
14th Street & Constitution Avenue, NW
Washington, DC 20230

RE: A-201-845 and C-201-846 – Amendments to Agreements Suspending the Antidumping and Countervailing Duty Investigations on Sugar from Mexico

Dear Mr. Secretary:

The Sweetener Users Association (SUA) appreciates the opportunity to comment on the proposed amendments to agreements suspending the antidumping (AD) and countervailing duty (CVD) investigations on sugar from Mexico.

SUA's members are food and beverage companies that use sugar and other caloric sweeteners in manufacturing their products, as well as trade associations representing these companies. Food companies that use significant amount of sugar in their operations employ 600,000 Americans directly, and account for many more jobs when economic multiplier effects are taken into account. Unfortunately, higher U.S. sugar prices and restricted supplies as a result of federal sugar policies have already put undue pressure on U.S. jobs in the sugar-using sector, contributing to the loss of 123,000 American manufacturing jobs over the last 18 years. Our

concern about additional job loss as a result of federal government policies is even greater after reviewing the proposed amended suspension agreements with over the last few days.

SUA commends the Department of Commerce for attempting to correct problems that arose from the operation of the original suspension agreements negotiated by the previous Administration that were signed on December 19, 2014. Unfortunately, important aspects of the proposed amendments would make these agreements even more onerous for U.S. consumers and for food companies and their employees. The current agreements have already distorted trade flows, threatened refining jobs and artificially inflated sugar prices in the U.S. market. They have encouraged greater imports of sugar-containing products from third countries and imposed additional annual costs, ultimately borne by consumers, of $460 million, above and beyond the $790 million increase in consumer costs that the agreements initially generated.

Both the current suspension agreements and the proposed amended suspension agreements are fundamentally flawed in limiting access to imported sugar that is essential to adequately supplying a U.S. market where domestic producers are only able to supply about 75 percent of domestic needs. The proposed suspension agreements add new layers of restraints on trade by not only limiting the volume of available sugar in the domestic market, but also go further in unnecessarily raising the guaranteed floor price to both U.S. sugar producers and the Mexican sugar industry.

Even tighter controls on the total volume of sugar in U.S. market will force sugar prices higher than current domestic prices, which are already at least 80 percent higher than world market prices. Given the constraints on supplies introduced by the suspension agreements, we believe that increasing the ending stocks-to-use ratio from 13.5% to 15.5% would provide both U.S. cane refiners and food companies more adequate supplies of sugars. The fact that U.S. sugar producers cannot grow enough sugar to supply the domestic market, and that Mexico is the only country that is not subject to a tariff-rate quota (TRQ) in supplying our market with much-needed sugar, makes it all the important that Mexico is provided sufficient access to adequately meet U.S. needs.

The new proposed suspension agreements clearly increase government management of the U.S. sugar market (i.e., maximum polarity mandate of 99.2 polarity and new bulk shipping requirements for raw sugar imports, higher minimum floor prices for both raw and refined sugar, and more), reduce the supply certainty for U.S. food companies, and lower prospects for above minimum quota access for TRQ country holders.

It is certainly interesting that Mexico is provided first right of refusal for any additional sugar imports after they have been found to be violation of U.S. antidumping and countervailing duty laws. Given this determination, it's a big question why Mexico needs to be rewarded with this special treatment that could be used by Mexico to block entry of any future additional sugar from other countries into the U.S. market. The first right of refusal feature of the proposed suspension agreements appears to be designed to limit competition for sugar producers in both the U.S. and

Mexico. This raises the broader question of why we need to implement a federal government policy to subsidize Mexican sugar producers as well as U.S. sugar producers through forcing higher costs onto American consumers and food companies.

SUA strongly opposes adoption of the amendments. The original suspension agreements, while ill-considered, would be far preferable to these amendments. Despite minor improvements (as we note below), these amendments will in their overall impact be overwhelmingly negative to the interests of our members, their employees and their ultimate customers, American consumers.

In what follows, we comment on several specific provisions of the amendments to both agreements.

Amendment to Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico

Section II.F

SUA opposes the use of the definitions of Refined and Other Sugar to discriminate among individual cane refining companies. The definitions limit the ability to import Other Sugar to only those companies with the capacity to receive bulk shipments in ocean-going vessels. Companies that refine cane sugar, but do not have this capacity, are clearly being singled out for discriminatory treatment. It is inappropriate for the federal government to unilaterally prefer certain companies to their competitors, and raises troubling anti-competitive issues.

This is not to say that SUA is unconcerned about the plight of traditional cane refiners. We have repeatedly stated our reliance on these companies and our hope that amendments to the AD and CVD agreements can address the harm inflicted upon them by the original suspension agreements. But we believe the way to deal with this issue is by increasing the total amount of sugar available to Mexico for export to the U.S. market. Decreasing the proportion of refined imports from Mexico and increasing the proportion of raw sugar imports, as the amendments in fact do, will help supply coastal sugar refineries. We support this new proportional mix provision of the amendments, but oppose the change in the definitions for refined and raw sugar, which are designed to limit competition from inland refineries.

We also question whether this provision, by favoring traffic that goes through certain ports of entry but disfavoring traffic through other ports, may raise Constitutional issues, since Article I, Section 9, Clause 6 of the U.S. Constitution prohibits any "preference" being "given by any regulation of commerce or revenue to the ports of one state over those of another." But these amendments would seem to discriminate among ports able to receive bulk sugar in ocean-going vessels and those unable to do so.

SUA supports the portion of the "Other Sugar" definition which permits Additional U.S. Needs Sugar to enter at a polarity of less than 99.5. We note that this polarity is an international standard as a breakpoint between raw and refined sugar. It is incorporated in the Harmonized Tariff Schedules of the United States, so contrary to some statements by the U.S. sugar lobby, it is in fact the 99.2 breakpoint which constitutes an exception or special treatment. Although we do not specifically oppose the use of a 99.2 polarity standard in this case, we think Commerce did well to treat Additional U.S. Needs Sugar in a manner more consistent with international practice. However, it is not appropriate to apply the refined sugar reference price to Other Sugar exported to the United States by means other than bulk ocean vessels.

New Section II.O

We address this new definition in our discussion of the operation of Section V.B.3 of the CVD agreement as it would be amended.

Appendix I

We strongly oppose the increase in Reference Prices for both Refined and Other Sugar, for several reasons –

- The entire trade dispute between the U.S. and Mexico was precipitated by overproduction in Mexico in 2012-13, which in turn was an obvious response to unprecedented high prices in the U.S. market in the years following implementation of the restrictive import polices of the 2008 farm bill. U.S. sugar production also grew by 10 percent between 2007-08 and 2012-13. The U.S. Department of Agriculture improperly administered the sugar program during roughly the 2009-10 marketing year, starving the market of sugar and driving up prices to the point where some 200,000 short tons, raw value (STRV), of third-country sugar entered outside normal quota channels, paying duties intended to be prohibitive. Excessively high prices encourage excessive production responses. **It is no solution to the ongoing distortions in the North American market to artificially increase prices even more.**

- The Reference Prices, by underpinning Mexican selling prices, in fact create a new floor price under the entire U.S. sugar market. This phenomenon has been seen clearly already under the existing suspension agreements, and has consistently been reflected in both the #16 raw sugar futures market and in U.S. refined sugar prices. The current agreement's Reference Prices (i.e. floor prices) are already far above the support levels mandated by Congress in the 2014 farm bill. The new Reference Prices constitute a further stealth price support increase and further enshrines the U.S. market as one of the most expensive sugar markets in the world. **The Commerce Department should not lay claim to authorities to set agricultural prices that Congress has never granted, nor should Commerce take away the U.S. Department of Agriculture's authority over agricultural commodity policies.**

- By raising the Reference Prices, the Commerce Department is sanctioning a particularly ironic result. The AD and CVD laws exist to punish, not reward, anti-competitive behavior. **If Mexico in fact dumped and subsidized sugar, as Commerce found, why would Commerce then reward Mexico with a selling price higher than the price it would otherwise obtain in the U.S. market?** And why would Commerce respond to problems in the original agreement by rewarding Mexico with still higher prices?

Amendment to Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico

Section V.B

SUA is concerned about the implications of the change in the Export Limit from 70% to 50% of the Target Quantity of U.S. Needs. In general, we favor more flexibility rather than less in the timing of imports, since their total volume is already constrained by the Agreements. Moreover, it is not clear that this change makes a substantive difference in operation of the Export Limit, since the underlying Agreement in Section V.B.1 continues to require an adjustment to 70% of the Target Quantity in September. It is theoretically possible that market conditions could change so drastically between July and September that this calculation would yield a number equal to or less than 50% of the July-calculated Target Quantity, but it seems unlikely.

Section V.B.4

Conceptually, SUA favors provisions that permit increases in the Export Limit due to changing circumstances. We appreciate the work of the Commerce Department and USDA in this regard. We believe the timelines for consultation under amended V.B.4.b. are reasonable. **However, we submit that there is a missing step.** Mexico will have a strong incentive to assert that it is capable of fulfilling 100% of the higher Target Quantity, since otherwise third countries might fill this portion of demand. Moreover, Mexico has an incentive under the structure of the suspension agreements to benefit from tight supplies in the U.S. market, since such market conditions will likely result in a higher selling price for Mexico's exports to the United States.

Therefore, we believe it is necessary to establish additional safeguards to ensure that Additional Needs sugar is, in fact, exported from Mexico in a timely manner. During the third fiscal quarter of the year, USDA should assess progress in meeting the supply needs of the U.S. market, taking into consideration the timing of raw sugar arrivals in relation to refining capacity, as well as other factors. If it does not appear likely that Mexico will ship the entire amount of the Target Quantity (including Additional Needs Sugar), then USDA should utilize its existing statutory authority (which is not limited in any way by the suspension agreements or amendments thereunto) and increase the TRQ established under our World Trade Organization (WTO) obligations, in order to supply the U.S. market adequately.

In addition, Commerce should establish a final date for arrival of any Additional Needs U.S. Sugar. If this sugar is needed, it is needed in a timely fashion. Thus, **increases in the Export Limit filled by Additional Needs U.S. Sugar should be required to arrive, notwithstanding other provisions of the agreements, by July 31**. The different polarity specifications that apply to this sugar should facilitate distinguishing among shipments for purposes of enforcing this deadline.

In Section V.B.4.a of the amended CVD agreement, the language needs to be modified, so that **whenever USDA notifies the Commerce Department with a request for an increase in imports prior to April 1, such increase shall not be subject to the 70% raw and 30% refined sugar mix limitation**. It is critical that USDA retain the ability to adequately supply the U.S. market at any time throughout the year, since there are likely to be future situations that require greater percentages of either raw or refined sugar to meet domestic needs.

Numerous SUA members have asked how the provisions for calculating Additional U.S. Needs Sugar and increasing the Export Limit, in Section V.B.4, interact with USDA's ability to increase the WTO TRQ, independent of the structure of the suspension agreements. It is well-established that, prior to these amendments, USDA did have that power: The Department acted in 2016 to achieve more adequate supplies by simultaneously increasing the TRQ and requesting that Commerce increase the Export Limit.

SUA would strongly oppose any amendments to the suspension agreements that would in any way limit USDA's authority – pursuant to completely separate statutes under which Commerce has no role whatever – to increase the TRQ. Our reading of the amendments, however, is that they leave this authority intact, for reasons we explain below.

1. The amendments to the AD agreement define "Additional U.S. Needs Sugar" as "the quantity of Sugar allowed to be exported" above the Export Limit that would otherwise apply. This term can only mean sugar from Mexico, for two reasons:
    a. No other country's sugar exports are subject to the Export Limit.
    b. The capitalized term "Sugar" is defined in Section II.M of the CVD agreement by reference to the agreement's "Product Coverage," found in Sec. I. This section defines the "product covered by this Agreement" as raw and refined sugar, along with numerous other details. The Agreement is signed only by the United States and Mexico, and not by any other country. Therefore, no other country's sugar could be a "covered product."

2. Section V.B.4 of the CVD agreement – which is not altered by the amendments and which is referenced in the new definition of "Additional U.S. Needs Sugar" – outlines a process of calculating "a need for additional Sugar in the U.S. market beyond the Export Limit calculated in December."

a. The use of the capitalized term "Sugar" indicates this section's applicability only to sugar from Mexico, and does not (and could not) place any limit on USDA's ability to increase TRQ imports under other statutory authorities.
b. As noted above, this reading of Section V.B.3 is borne out by the precedent of increasing both the TRQ and Mexico's Export Limit simultaneously.

It is in this context that the new procedures in Section V.B.4 must be read. USDA may notify Commerce (V.B.4.1) of "any additional needs for Sugar," which again uses the capitalized term "Sugar" in a way that must be read to mean only Mexican sugar. (Otherwise the same word would mean different things in the same agreement, something that presumably neither party would agree to.)

Therefore, it is not simply *any* additional need for supplies that will be the subject of Section V.B.4 in operation, but a need for additional supplies of sugar from Mexico. Nothing prevents USDA from determining a need for still other supplies, for instance by utilizing a different (higher) stocks-to-use ratio in its operation of the sugar program than the 13.5% parameter that was included in the agreements by the Commerce Department.

Thus, while we recognize that not only these amendments but the underlying NAFTA provisions give Mexico important advantages over other suppliers, we commend Commerce for crafting amendments that, if interpreted properly according to their plain language, do not place any obstacles in the way of USDA continuing to exercise its authority to increase the TRQ, subject of course to certain (regrettable) limitations that Congress has enacted.

Section V.C.3

SUA supports the requirement that no more than 30%, compared to the present 55%, of imports may be Refined Sugar. One of the main problems with the current agreements is their adverse impact on coastal cane refineries. As noted earlier, we do not believe this problem is appropriately solved by discriminating among refiners of cane sugar, but rather by changing the percentages for each type of sugar. In that way, Commerce could avoid the problem of picking winners and losers among individual U.S. companies.

We submit that with the 30% limitation in this section, the further restriction on eligible importers of Other Sugar in Section II.F is unnecessary, and indeed inappropriate, as explained earlier in these comments.

Disregard for the Public Interest

We finally note our surprise that the public has not been provided notice in the *Federal Register* and SUA (who filed for interested party status with the Commerce Department) has been given only seven calendar days (which translates to only five business days) to comment on the proposed amendments. We are aware of few, if any other comment periods, of such short

duration. We respectfully submit that when industrial users and consumers have been excluded from negotiations on the agreements, and therefore must analyze the text of the amendments *de novo*, five business days does not afford a reasonable or meaningful opportunity for comment, and does not suggest a high level of interest in the views of the public.

While SUA appreciates the opportunity it has been afforded to meet with Commerce officials to discuss the many problems with the current suspension agreements and the proposed amended agreements, we have concerns about the lack of a *Federal Register* notice providing an opportunity for public comments. The absence of a meaningful public comment period – after over a year of behind-closed-door discussions with U.S. sugar producers and Government of Mexico and Mexican sugar industry representatives – which has resulted in even higher guaranteed floor prices for both U.S. and Mexican sugar producers, and a new feature providing preferential treatment to the Mexican sugar industry over other traditional import suppliers, raises serious questions about the implementation process for any new suspension agreements.

A very long process of crafting new proposed suspension agreements among a small group of interested parties, followed by no public notice, raises serious concerns about whether the public interest is adequately taken into account. How is the federal government able to determine whether the current or proposed suspension agreements are in the public interest if there is no public notice to inform U.S. consumers or other stakeholders, who may be adversely impacted by these agreements? The public should rightfully be concerned about the lack of transparency and due process.

For the limited group of interested parties (including SUA), who were not petitioners and who were not privy to the details of the proposed agreements until they were announced, being given only five business days to read, analyze, and respond to these complex agreements also raises serious questions about how meaningful this comment period will be in influencing the features of the final suspension agreements that are likely to be announced in short order.

Concluding Comments

While we appreciate Commerce's efforts, SUA must strongly oppose these amendments in their current form. We believe that any new suspension agreements at a minimum must provide adequate supplies of sugar to the U.S. market throughout the marketing year. Providing a calculation of sugar needs based on a 15.5% stocks-to-use ratio and competitive floor prices, among other reasonable recommendations, would go a long way in making the suspension agreements more balanced and workable for all stakeholders. The amendments are not in the public interest and will harm U.S. consumers and food companies.

Respectfully submitted,

Richard E. Pasco
President & General Counsel
Sweetener Users Association

REPRESENTATIVE CERTIFICATION

I, Richard E. Pasco, with McLeod, Watkinson & Miller, general counsel to the Sweetener Users Association and its Members, certify that I have read the attached submission, "Amendments to Agreements Suspending the Antidumping (AD) and Countervailing Duty (CVD) Investigations on Sugar from Mexico" dated June 21, 2017. In my capacity as counsel to the Sweetener Users Association and its Members, I certify that the information contained in this submission is accurate and complete to the best of my knowledge. I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD and CVD proceedings, the U.S. Department of Commerce may preserve this submission for purposes of determining the accuracy of the certification. I certify that a copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.

PUBLIC CERTIFICATE OF SERVICE

Sugar from Mexico
DOC Case Nos. A-201-845 & C-201-846

I hereby certify that on June 21, 2017, copies of the foregoing public submission were served on the following by first class mail, postage prepaid mail.

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