



BC Farm Industry Review Board

August 2, 2023

DELIVERED BY EMAIL

Rob Delage
General Manager
BC Milk Marketing Board
32160 South Fraser Way, Unit 200
Abbotsford, BC
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Dear Rob Delage:

RE: BC MILK MARKETING BOARD CONCEPTS AND BACKGROUND INFORMATION ON THE WESTERN MILK POOL TRANSFORMATION INITIATIVE: PRELIMINARY CONSIDERATIONS AND REQUESTS FOR CLARIFICATION

On behalf of the BC Farm Industry Review Board (BCFIRB), thank you again for responding to BCFIRB's May 5, 2023 letter requesting a board-to-board meeting and preliminary information on the Western Milk Pool Transformation Initiative (WMPTI).

A board-to-board meeting has been scheduled for October 12, 2023, which will support a first discussion on the WMPTI, as well as the WMPTI draft agreement the Milk Board anticipates providing to BCFIRB by mid-September 2023. As requested by the Milk Board and in anticipation of the October 12, 2023 meeting, I am writing to share BCFIRB's preliminary considerations of the Milk Board's WMPTI concepts and background information and request clarity and information in three key areas.

1. Delegation of Power and Decision-Making Model

The Milk Board background information notes it will use subsection 11(p) of the *Natural Products Marketing (BC) Act (NPMA)* to delegate certain regulatory authority to the two Milk Board members sitting on the WMPTI board and that in turn, these members will exercise the delegated authorities at the WMPTI table to make decisions. As described in the Milk Board's background information, these decisions fall under the general categories of production controls, milk supply agreements, pricing, interprovincial transportation, milk quality, and processor policies. The background information also indicates that WMPTI board decisions that require a change to the Milk Board Consolidated Orders, policies and/or procedures would be implemented by the Milk Board using its provincial statutory authority.

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The Milk Board has described the WMPTI board as a voluntary group of western provincial regulatory boards and producer association representatives coming together. The WMPTI is not created by statute or regulation, nor is it being granted any authority under provincial or federal legislation that presently resides with provincial regulatory boards. The proposed structure, scale, and scope of WMPTI activities appear much broader than the pooling operations conducted under the current Western Milk Pool inter-provincial agreement between the four western milk boards and the Canadian Dairy Commission.

Given this new structure may have a significant impact on how BC's dairy sector is regulated consistent with sound marketing policy, BCFIRB requests clarity and further information on the following:

1. How will the WMPTI board, as an as-yet undefined legal entity, operate as a decision-making body within the current provincial and federal statutes?

Based on the WMPTI decision categories identified by the Milk Board, it appears that the intention is to delegate core regulatory functions of the Milk Board to the WMPTI board through its participant Milk Board members.

2. How will the Milk Board ensure it retains its ability to operate as an independent regulatory decision-maker exercising its statutory authority in the best interest of the province?
3. How does the Milk Board intend to manage reasonable apprehension of bias, conflict of interest, and fettering of discretion concerns that may arise as a result of its decisions being influenced or directed by the WMPTI?
4. What consideration has the Milk Board given to whether the scope of the intended delegation of authority to the WMPTI is "necessary or advisable" and whether such a delegation might undermine or be offside the purpose and intent of the BC Milk Marketing Regulation?

The Milk Board is subject to reporting requirements and is accountable to its registered producers through disclosure of financial statements and its annual general meeting.

5. How will the WMPTI be held to account? What kind of reporting and disclosure of financial information is contemplated with this new regime? To whom will the WMPTI report?

2. Decisions and Appeals

BCFIRB understands from the Milk Board that a goal of the WMPTI is to harmonize policies and seek administrative efficiencies across the four provinces. However, in BCFIRB's initial view, there may be legal risk associated with the proposed decision-making model, and the broad and ambiguous delegation of authority to an extra-territorial entity. Harmonization may not be achieved given the potential for Milk Board decisions on matters previously decided or influenced by the WMPTI board to be challenged based on perception of bias, conflict of interest, fettering of discretion, and/or

improper delegation (where the actual decision maker lacks the authority to make the decision challenged). Legal challenges may also raise constitutional questions. As a basic principle, where provinces want to act in concert, a constitutional underpinning is required. In the wake of potential legal challenges, instead of harmonization, there could be a patch work of policies across the four provinces.

Given this, BCFIRB requests clarity and information on the following:

1. What consideration has the Milk Board given to the legal risks, including procedural fairness issues, and concerns such as constitutional limitations, that may hinder the WMPTI in fulfilling its harmonization goals?

3. Resourcing

BCFIRB understands from the Milk Board that the Milk Board intends to only use BC producer levies to cover the Milk Board's allocation of the WMPTI costs. However, given the broad scope and ambiguous nature of the current and future WMPTI activities, some of which may fall outside of the Milk Board's jurisdiction, BCFIRB has the following question and request for more information:

1. What measures will the Milk Board put in place to ensure that producer levies are used "to carry out the purposes of the scheme" and/or "to pay the expenses of the marketing board" and not be used for purposes beyond the authority of the *NPMA*?

BCFIRB also understands from the Milk Board that the Milk Board plans to change its staffing structure. One Executive Director will jointly serve the Milk Board and the BC Dairy Association (currently separate roles, employed by the respective organizations). Given Executive Directors have a significant role in briefing part-time commodity board members, and the different responsibilities of the organizations (regulatory and producer advocacy), BCFIRB requests the following for clarity and information:

2. What measures will the Milk Board take to address the risk of apprehension of bias or potential allegations of staff being in a conflict of interest based on the duality of roles?

The current WMPTI board structure includes the Milk Board Chair, an independent Order in Council appointee. Considering the proposed WMPTI/Milk Board decision-making model, BCFIRB requests clarity on the following:

1. What measures will the Milk Board take to address the risk of apprehension of bias or potential allegations of the Chair being in a conflict of interest based on the duality of roles?

Conclusion

BCFIRB hopes these preliminary considerations and requests for clarification and information will assist the Milk Board in its analysis of issues, risks and legal concerns as you proceed in the process of drafting a WMPTI agreement with your WMP partners.

As this matter moves forward, BCFIRB is of the view that the Milk Board, the Ministry of Agriculture and Food, and BCFIRB would benefit from sharing and discussing their respective legal advice. BCFIRB is open to a discussion of how to best facilitate this.

Please feel free to reach out to myself or Olivia Mattan, Senior Manager, BCFIRB, if you have any questions on these preliminary considerations and requests for clarity and information.

On behalf of BCFIRB, I am requesting that we receive information from the Milk Board on the items in this letter by August 31, 2023. This will help us prepare information for our Board members in advance of the October board-to-board meeting and discussion.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Anslow', written in a cursive style.

Martha Anslow
BCFIRB Executive Director

Cc: Peter Donkers, BCFIRB Chair
Janice Comeau, BCMMB Chair
Olivia Mattan, Senior Manager, BCFIRB