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August 10, 2012

1933 Act: Section 2(a)(1)
1934 Act: Section 3(a)(10)

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Minn-Dak Farmers Cooperative

Ladies and Gentlemen:

On behalf of Minn-Dak Farmers Cooperative (the "Company"), we hereby request that the staff of the Securities and Exchange Commission (the "Staff") provide its assurance that it will not recommend enforcement action against the Company if the Company ceases reporting under Section 15(d) of the Securities Exchange Act of 1934 (the "1934 Act"). This request is based upon the Company's position, as described below, that the stock of the Company does not constitute a "security" within the meaning of Section 2(a)(1) of the Securities Act of 1933 (the "1933 Act") or Section 3(a)(10) of the 1934 Act. Further, in our opinion neither the Company's common stock nor its preferred stock constitutes a "security" within the meaning of Section 2(a)(1) of the 1933 Act or Section 3(a)(10) of the 1934 Act.

I. Background

A. Organization and Business of the Cooperative

The Company was formed in 1972 as a cooperative association under the laws of the State of North Dakota. Attached to this letter as *Appendix A* and *Appendix B*, respectively, are copies of the Company's Composite Articles of Incorporation (the "Articles") and copy of the Company's Amended and Restated Bylaws (the "Bylaws"), each as currently in effect on the date of this letter.

The Company is engaged primarily in the production of sugar from sugar beets. The Company also produces certain co-products, sugar beet molasses, yeast and sugar beet pulp pellets. The Company processes the sugar beets at its facilities in Wahpeton, North Dakota. The products are pooled and marketed through the services of marketing agents under contract with the Company.

The Company purchases virtually all of its sugar beet requirements from its shareholders. All shareholders have automatically renewing agreements with the Company covering each growing season. At the end of each year, these growers agreements automatically extend for an additional year, so that these agreements always have a remaining term of one year, unless the Company, prior to the automatic renewal, has given notice of termination or amendment. Under the growers agreement, the minimum and maximum number of acres the shareholder may grow corresponds to the number of acres per "unit" of preferred stock authorized by the Company's Board of Directors for each farming year. For example, in crop year 2011, each unit of preferred stock required a shareholder to deliver a minimum of 1.40 acres of sugar beets and a maximum of 1.70 acres of sugar beets.

B. Overview of Stock

The Company has two classes of stock, common stock and preferred stock. Each shareholder must hold one share of common stock and no shareholder may own more than one share of common stock. The common stock has a par value of $250 per share. Each shareholder is entitled to one and only one vote corresponding to the one share of common stock each shareholder holds. Thus, like many true cooperatives, the voting power of the Company is structured as "one person, one vote."

The preferred stock is divided into three classes, Class A Preferred Stock, Class B Preferred Stock and Class C Preferred Stock. All shareholders hold "units" of preferred stock consisting of one share of each class of preferred stock. The preferred stock was issued as units and is only transferrable as a unit. There are no differences in the designation, preferences, limitations and relative rights of the three classes of preferred stock. The only difference among the three classes of preferred stock is the respective par value. Class A Preferred Stock has a par value of $105 per share, Class B Preferred Stock has a par value of $76 per share and Class C Preferred Stock has a par value of $75 per share, for an aggregate par value per unit of preferred stock of $256.

As described above, the units of preferred stock entitle the shareholders to sell sugar beets to the Company and determine the minimum and maximum number of acres of sugar beets the member is required or entitled to sell to the Company. No voting rights attach to the preferred stock. Regardless of the number of units of preferred stock a shareholder owns, the shareholder is entitled to one vote only based on that shareholder's ownership of common stock.

In return for the sugar beets delivered to the Company, a shareholder is paid a price per pound of extractable sugar and "bonus" sugar. Bonus sugar is a formula driven pricing premium for delivery of sugar beets during the period prior to main harvest. These payments are made in installments with all growers being paid the same price per pound for extractable sugar and bonus sugar, with the first payment made on or about November 15 (soon after the delivery of the crop) based on an estimated price and the last payment made after the end of the Company's fiscal year on August 31 based upon the final price for the applicable year. In addition, the Company's annual patronage net income, if any, which is equal to the Company's sales less all

expenditures and member sugar beet payments, is distributed to the members on the basis of the pounds of extractable sugar obtained from each of the members' sugar beets. The patronage net income is distributed either in cash payments or in the form of allocated patronage to the member's patronage account on the books of the Company. Because the amounts paid to shareholders, either in cash or as patronage credits, depend upon the extractable sugar from beets delivered and not on units of preferred stock held, two shareholders who hold the same number of units of preferred stock may receive different amounts depending upon the quality of their respective crops and the acres actually grown within the number authorized by the Company's Board of Directors. Article 6(A) and Article 6(B) of the Articles prohibits the payment of dividends on the common stock and preferred stock stating: "No dividends shall be paid on common stock" and "No dividends shall be paid on preferred stock."

Under Article 6(A) of Articles and Article XVII of the Bylaws, stock ownership in the Company is limited to producers (i) who reside within 30 miles of a Company piler (the Company has three piler sites located in North Dakota and five located in Minnesota), (ii) who patronize the cooperative in accordance with uniform terms and conditions prescribed by it, and (iii) who have been approved by the Board of Directors. The term "producers" means a person (i) actively engaged in the production of sugarbeets or other agricultural products within 30 miles of a Company piler (including tenants of land used for such production); and (ii) owners of such land within 30 miles of a Company piler who receive as rent therefore part of any such products of such land.

Common stock and preferred stock may only be owned by eligible producers and ownership of stock is further limited to those persons who have been approved by the Company's Board of Directors. *See* Article 6(A) of the Articles ("common stock…may be purchased, owned, or held only by member-producers" and "The common stock of this association may be transferred only with the consent of the Board of Directors of the association and on the books of the association, and then only to persons eligible to hold it…"); *See* Article 6(B) of the Articles ("preferred stock may be issued only to any member-producer"); *See* Article XVII of the Bylaws "Stock ownership in this cooperative shall be limited to producers…(c) who have been approved by the board of directors."). The Company does not believe there is any practical or legal significance to the variation in language in the Articles relating to Board approval of transfers of stock. Like the common stock, the preferred stock may be transferred only with the consent of the Company's Board of Directors and only to persons eligible to hold the preferred stock. The Company has not and will not recognize any transfer of preferred stock nor record any transfer of preferred stock on its books that is not so approved or any transfer to a person ineligible to hold the preferred stock. Accordingly, the Company's Board of Directors approves each transfer of common stock and preferred stock to ensure that neither the common stock nor the preferred stock is held by an ineligible shareholder and because ownership of stock must be approved by the Board of Directors under the Bylaws.

Shareholders may, from time to time, pledge their stock as collateral for loans to banks or other lenders. At the time of the pledge, the Company receives a "Notice and Assignment" form completed by the shareholder and lender. The form notifies the Company of both the pledge of

stock and the assignment of payments under the shareholder's growers agreement. This form is signed by the lender and the shareholder, and after review by management of the Company, acknowledged by the Company. If the lender should seek to foreclose upon the lien on the stock, the proposed transfer is presented to the Board of Directors of the Company for review and approval. As with any other proposed transfer, the Board of Directors of the Company will not approve, and the Company will not recognize nor record on its books, any transfer to a person not eligible to hold stock under the Articles and Bylaws.

If the Company determines that a shareholder is not or is no longer eligible to hold shares in the Company, the Company has the right to purchase the common stock and the preferred stock held by that shareholder for the lesser of its par value or its then-current book value. *See* Article 6(A) and Article 6(B) of the Articles and Article XVI, Section 1 and Section 2 of the Bylaws. Similarly, under Article 6(B) of the Articles and Article XVI, Section 1 and Section 2 of the Bylaws, if a shareholder has failed to patronize the Company for a period of 12 consecutive calendar months, has intentionally or repeatedly violated any bylaws, has breached any contract between the shareholder and the Company, or has willfully obstructed any purpose or proper activity of the Company, then the Board of Directors may redeem the common stock owned by that shareholder by payment of the lesser of its par value or its then-current book value.

C. Section 15(d) Reporting Obligations

On July 20, 1995, the Company filed a Registration Statement on Form S-1 under the 1933 Act (File No. 33-94644) to register 95 shares of common stock and 20,200 units of preferred stock. As is currently the case, each unit of preferred stock consisted of one share of Class A Preferred Stock, one share of Class B Preferred Stock and one share of Class C Preferred Stock. That Registration Statement on Form S-1 was declared effective on September 11, 1995. From 1995 to 1997, the Company sold 95 shares of its common stock and 20,200 units of its preferred stock under the registration statement; accordingly, no shares registered by the 1995 registration statement remain unsold. The Company has not filed any other registration statement and since 1997, the Company has not sold any additional units of preferred stock.

Based upon the information available to the Company regarding the decision-making in 1995, it seems that the Company filed the 1995 registration statement based upon the advice of counsel that the Company and its Board would be exposed to significant liability if the Company did not register the offering, even though it believed that the stock did not constitute a "security" for the purposes of Section 2(a)(1) of the 1933 Act. It seems that other factors influencing this decision were (i) the relatively low burdens of 1934 Act reporting in 1995, especially given that the Company was already providing certain information to its shareholders prior to the registration (for example, delivering annual audited financial statements) and (ii) the relatively low cost of the 1933 Act registration. The Company also assumed that registration was a better course of action because one of its nearby sugarbeet cooperative competitors, American Crystal Sugar Company, undertook a registered offering of its stock in 1994.

As a result of the 1995 registration statement, the Company became obligated to file periodic reports pursuant to Section 13 as required by Section 15(d) of the 1934 Act. The Company is exempt from the registration provisions of Section 12(g) of the 1934 Act pursuant to Section 12(g)(2)(E), which exempts securities of an issuer that is a "cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended." Accordingly, since the effectiveness of the registration statement on September 11, 1995, the Company has filed 1934 Act reports. The Company is current in its Section 15(d) reporting.

The Company seeks through this no-action request to terminate its 1934 Act reporting for a variety of reasons, chief among them the costs associated with 1934 Act reporting and the additional burdens on the Company's business imposed by 1934 Act reporting. In the Company's view, these expenses and burdens, which have continued to escalate in recent years, are significantly disproportionate to the benefits to the Company's shareholders. For example, the Company recently became subject to the interactive data (i.e. XBRL) requirements, which have no utility to the Company's shareholders nor to any member of the investing public because there is no market for the Company's stock.

Because the Company has total assets in excess of $10 million for each of the three most recent fiscal years, the Company's reporting obligation is suspended if and when it has fewer than 300 holders of record of each class of registered securities. *See* § 15(d) of the 1934 Act; Rule 12h-3 under the 1934 Act. As of the date of this letter, the Company has 479 shareholders who hold 479 shares of common stock and 72,200 units of preferred stock. Accordingly, the Company is not eligible to suspend its 1934 Act reporting under Rule 12h-3 of the 1934 Act. The Company has considered undertaking a "going private" transaction that would result in a reduction in the number of its shareholders. However, because each shareholder is required to deliver sugar beets to the Company as a condition of ownership of the stock, any reduction in the number of shareholders also reduces the Company's sources for sugar beets. Therefore, the Company does not believe that a reduction in the number of its shareholders is appropriate.

As stated below, the Company believes that its shareholders would receive meaningful information relating to the business of the Company through a variety of other avenues were the Company to cease its reporting under the 1934 Act. The Company also believes that if shareholders were asked to vote on a proposal to authorize the Company to terminate its 1934 Act reporting, they would vote in favor of such a proposal. Although no provision of North Dakota law, the Articles or Bylaws requires such a proposal to be put before the Company's shareholders, and the Company is not subject to the requirements of Regulation 14A, the Board of Directors of the Company will call a special meeting of the Company's shareholders to consider and vote on such a proposal. The Company will accept the results of the shareholder vote at the special meeting as binding and communicate the vote results to the shareholders, as well as disclose the vote results through filing a Current Report on Form 8-K.

If the shareholders vote to approve termination of the Company's reporting under the 1934 Act, the Company would terminate its 1934 Act reporting by filing a Form 15 with the Commission indicating that its obligation to file reports under Section 15(d) of the 1934 Act was being terminated with respect to both its common stock and preferred stock. In the portion of Form 15 requiring identification of the rule provision(s) being relied upon, the Company would indicate "other" and reference the date of the Staff's response to this no-action request. If the proposal were approved, the Company's termination of its 1934 Act reporting would also be disclosed in the Current Report on Form 8-K relating to the results of the special meeting.

II. Analysis

A. Neither the Common Stock Nor the Preferred Stock is a "Security"

Section 2(a)(1) of the 1933 Act defines the term "security" to mean one of various types of instruments, including any "stock…, investment contract or, in general, any interest or instrument commonly known as a 'security'…" Section 3(a)(10) of the 1934 Act defines a security as, among other types of instruments, any "stock,…investment contract…, or in general, any instrument commonly known as a 'security'…" The Supreme Court has ruled that the definitions of "security" in the 1933 Act and the 1934 Act are virtually identical and should be treated as such in discussions regarding the scope of the term. *See, e.g., Landreth Timber Co. v. Landreth*, 471 U.S. 681, 697 n. 1 (1985); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 847 n. 12 (1975).

Although the 1933 Act and 1934 Act definitions of security include the term "stock," the mere fact that an instrument is labeled stock does not require the conclusion that it is a "security" for the purposes of the 1933 Act or the 1934 Act. *See, e.g., Forman*, 421 U.S. at 848. Instead, the Supreme Court and other courts have stressed the importance of looking at the specific characteristics and underlying economic substance of a particular instrument. In *Securities and Exchange Commission v. W.J. Howey Co.*, the Court adopted with approval the traditional approach of state courts prior to the enactment of the 1933 Act in which "[f]orm was disregarded for substance and emphasis was placed upon economic reality." 328 U.S. 293, 298 (1946). The *Howey* approach was reiterated with approval in *Forman*, in which the Supreme Court emphasized that "we again must examine the substance – the economic realities of the transaction – rather than the names that may have been employed by the parties." 421 U.S. at 851-52.

In *Forman*, the Court applied a two part test to analyze whether stock issued by a cooperative was a security. If an instrument is both called "stock" and bears the usual characteristics of stock, the stock is deemed to be "security" and a purchaser may assume that the federal securities laws apply. *Id*. at 850-51. The Court identified five characteristics traditionally associated with stock: (1) the right to receive dividends contingent upon an apportionment of profits; (2) negotiability; (3) the ability to pledge or hypothecate the instrument; (4) the existence of voting rights in proportion to the number of securities owned; and (5) the ability of the purported "security" to appreciate in value. *Id*. at 851.

Taking into account the "economic realities" as the *Forman* court requires, neither Company's common stock nor its preferred stock falls within the definition of a "security" because each possesses so few of the characteristics traditionally associated with stock. In particular, neither the Company's common stock nor its preferred stock is a security based upon the five-factor *Forman* test for the following reasons:

1. *The right to receive dividends contingent upon an apportionment of profits:* As a cooperative, the Company distributes to its shareholders a patronage amount, either in cash or as patronage credits. This amount does not depend upon the shares of common stock or units of preferred stock owned and is not apportioned in relationship to the shares of stock held. Instead, distributions that are made to each shareholder on the basis of patronage – the pounds of extractable sugar obtained from the sugar beets that shareholder delivered to the Company. Further, Article 6 of the Articles prohibits the Company from declaring dividends on either the common stock or the preferred stock. In *B. Rosenberg & Sons, Inc. v. St. James Sugar Co-Op*, 447 F.Supp. 1, 4 (E.D. La. 1976), *aff'd mem.*, 565 F.2d 1213 (5th Cir. 1977), the court distinguished patronage distributions from dividends stating that "patron dividends are not profits similar to income from ordinary stock investments but are rebates or refunds to members based solely on patronage and not on the amount of money invested in the stock." Unlike typical stock, the patronage distributions to the Company's shareholders are not related to their initial investments in the Company, but are related to their own labor, efforts and success at growing sugar beets.

2. *Negotiability or transferability:* The Board of Directors of the Company must approve all transfers and sales of stock. Ownership of common stock is restricted to eligible producers and each shareholder-producer must own one share of common stock. Likewise, ownership of preferred stock is restricted to holders of common stock and thus, ownership is restricted to sugar beet producers. The Class A Preferred Stock, Class B Preferred Stock and Class C Preferred Stock may not be transferred or sold individually, but must be transferred as part of a unit. Moreover, ownership of both common stock and preferred stock is further restricted to those member producers who reside within 30 miles of a Company piler (currently, parts of North Dakota and parts of Minnesota). Further, ownership of stock is restricted to persons who patronize the Company under the growers agreement. The Company's right under the Articles to redeem its stock for the lesser its par value or its then-current book value further reduces the negotiability and potential market for the stock. Because the redemption right is triggered by the failure of the shareholder to be eligible to hold shares in the Company, the failure of a shareholder to patronize the Company and similar violations, the transferability is further limited to those eligible shareholders who contribute, through patronage, to the operation of the Company on a cooperative basis.

   As in *Handy Hardware Wholesale, Inc.*, SEC No-Action Letter, 2006 WL 1816942 (June 29, 2006), *National Consumer Cooperative Bank*, SEC No-Action Letter, 2011 WL 22530 (January 3, 2011), *American Truckload Cooperative, Inc.*, SEC No-Action Letter

1993 WL 262725 (July 1, 1993), and similar other no-action requests by cooperatives, the restrictions on transferability applicable to the Company's common stock and preferred stock and the Company's right of redemption differentiate it from typical "stock." Therefore, the characteristic of negotiability or transferability is not meaningfully existent with respect to the Company's common stock nor its preferred stock.

3. *The ability to be pledged or hypothecated*: Under Article XVI, Section 1 and Section 2 of the Bylaws, all of the outstanding common stock and preferred stock is subject to a perpetual, automatic lien in favor of the Company for any indebtedness of the holder to the Company. This indebtedness may be related to the sugar beet seed that growers are required to purchase from the Company or to the financial penalties for non-compliance with the growers agreement. The Company does not make cash loans to its shareholders and accordingly, no indebtedness secured by this automatic pledge is for borrowed money. Therefore, the pledge in favor of the Company is significantly different from a typical pledge by security owners for debt. Further, from time to time, shareholders may notify the Company that a bank or other lender has a security interest in the stock in connection with a loan. One reason the lenders seek pledges of the stock is to fully perfect a security interest in the sugar beet payments and patronage distributions to the shareholder. However, banks or other lenders may not hold common stock or preferred stock as non-producers. The Company's Board of Directors must approval all transfers of stock, including transfers in connection with a pledge; the Company will neither permit nor recognize any transfer of stock to a non-producer as a result of a foreclosure on a pledge or otherwise. To the Company's knowledge, in the past 30 years, there has been one attempted foreclosure on a pledge of stock. Because the pledgee was a bank and not a producer, the pledgor sold the stock to another shareholder and paid the proceeds to the bank. At no time was the bank a shareholder of the Company. The fact that ownership of the stock is limited to eligible producers operates as a significant restriction on the ability of the common stock or preferred stock to be pledged or hypothecated. The intended beneficiaries of any purported pledge or hypothecation cannot obtain the typical legal or economic benefits thereof as would the beneficiaries of a pledge or hypothecation of true securities.

4. *Conferring of voting rights in proportion to the number of shares owned:* Only the Company's common stock bears voting rights; neither the preferred stock nor the units of preferred stock bear any voting rights. Each shareholder-producer may only own one share of common stock and each share of common stock is entitled to only one vote, regardless of the units of preferred stock held. Therefore, none of the Company's stock confers voting rights in proportion to the number of shares owned.

5. *The capacity to appreciate in value:* While the Company's common stock has the capacity to appreciate or depreciate in value, this capacity is theoretical at best. The Company believes that its common stock has been sold only at its par value of $250 since the Company's formation in 1972. This is because the transferee can purchase a share of common stock from the Company in order to become a shareholder, but only at its par

value of $250, and when the transferor ceases to be a shareholder, the transferor can sell a share of common stock to the Company, but only at its par value of $250. Therefore, it would be exceedingly unlikely that a transferee or a transferor would pay more or accept less than, respectively, $250 per share of common stock, when the Company is available as both an alternative seller or buyer.

Further, while the Company's preferred stock has the capacity to appreciate or depreciate in value, a sugar beet grower's decision to become a shareholder of the Company is not predicated on the opportunity to realize an increase in the value of the stock. A grower becomes a shareholder of the Company not to realize a profit on the resale of the grower's stock, but to realize the potential economic benefits of a guaranteed market for the sugar beets and higher return on the acres produced. The inducement for a grower to purchase the stock is solely to realize the benefits of doing business with the Company on a cooperative basis; it is not to invest for profit. In the same vein, in *Forman* it was found that a share in an cooperative housing project was not a security because "the inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit." 421 U.S. 837, 851. As in *Forman*, ownership of the Company's preferred stock is merely incidental to the growers agreement and the relationship of the Company to its shareholder as a producer. S*ee also, Grenader v. Spitz*, 537 F.2d 612, 618 (C.A.N.Y. 1976). The preferred stock held by a shareholder determines only the acres of sugar beets the shareholder may deliver to the Company under the growers agreement. The preferred stock held by a shareholder does not determine that shareholder's participation in the net income of the Company nor does it determine that shareholder's return on the purchase price of, or "investment" in, the stock. As a cooperative, the Company is operated for the benefits of its members as producers – not as shareholders. *See Affiliated of Florida, Inc.*, SEC No-Action Letter, 1987 WL 108467 (September 25, 1987) ("The fundamental characteristics of an agricultural cooperative is that it is operated for the mutual benefit of its members as producers— not as stockholders. Advantages which accrue to a member of a cooperative accrue primarily because of his patronage with the association and not because of any financial investment he may have made therein"), quoting *Co-Operative Grain & Supply Co. v Commissioner*, 407 F.2d 1158, 1163 (8th Cir. 1969). The shareholder's financial return on the preferred stock units depends on patronage of the cooperative, the production of sugar beets and the sugar market. In *Grenader v. Spitz*, the court rejected the characterization of stock in a cooperative apartment building as a security despite the fact that the tenant had the opportunity to make a profit when the tenant sold "his apartment and his shares to a new and approved lessee-purchaser at whatever price the real estate market then permits." 537 F.2d at 618. This was because the economic reality presented by *Grenader* was that of a real estate transaction and not an investment in a security. *Id.* at 617. Similarly, the economic reality of ownership of preferred stock in the Company is participation in a sugar beet cooperative and not an investment in a security.

This economic reality is also evidenced by the fact that the stock only may be held by or transferred to eligible producers. As defined in the Articles and Bylaws, producers are essentially persons engaged in the sugar beet business near the Company and its facilities. Because approval of the Company's Board of Directors is required for each transfer of stock, the Company is in a position to ensure that only eligible producers hold the stock. This approval requirement ensures that the business of the shareholder (sugar beets) is consistent with the economic reality of ownership of stock, which is participation in a sugar beet cooperative and not an investment in a security. The Company's right to redeem the stock for failure to patronize the cooperative by delivering sugar beets in accordance with the growers agreement also helps ensure that the stock is not being purchased for investment purposes. The redemption price for the preferred stock is the lesser of book value or par value. Because the aggregate par value per unit of preferred stock is $256, the maximum redemption price per unit of preferred stock is also $256. This redemption price is significantly less than the current sales price of the preferred stock units. A shareholder who purchased the preferred stock for investment purposes and did not patronize the Company would be redeemed by the Company at a price that would be significantly less than the shareholder paid to acquire the preferred stock. The Company believes that the Company's redemption right is a significant deterrent to any eligible producer who seeks to acquire the stock solely for investment purposes. Like any other transferee, pledgees must also be eligible producers to hold stock in the Company. The factors identified above – restriction of ownership to eligible producers and the Company's right of redemption – prevent a lender from realizing any type of investment benefit from the stock and from obtaining the benefit of any appreciation in value of the stock since the stock will not be transferred to a lender who is not an eligible producer.

Moreover, the Staff has granted favorable "no-action" relief to several cooperatives whose stock has the capacity to appreciate or depreciate in value. *E.g.*, *Associated Grocers of New England, Incorporated*, SEC No-Action Letter, 1989 WL 246382 (October 5, 1989) (*citing Associated Grocers, Inc.* SEC No-Action Letter, 1988 WL 233663 (February 12, 1988) and *Affiliated of Florida, Inc.*, SEC No-Action Letter, 1987 WL 108467 (September 25, 1987)). Accordingly, the potential for appreciation or depreciation in value of the Company's stock should not be cause to find that the Company's stock is a security, given that the impetus to purchase the stock is so clearly tied to the business relationship between the shareholder and the Company, the motivation to purchase the stock is not to make a profit on the stock, and the *Forman* factors and other features of ownership weigh against characterization of the stock as a security.

B. Neither the Common Stock Nor the Preferred Stock is an "Investment Contract"

One category of "security" under Section 2(a)(1) of the 1933 Act and Section 3(a)(10) of the 1934 Act is an investment contract. The *Forman* court applied the test from *Howey* to determine whether an instrument is an investment contract. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975). That test is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946), quoted in *Forman*, 421 U.S. at 852. The types of profits which may motivate an investor who purchases an investment contract include appreciation of capital and participation in the company's earnings. *Forman*, 412 U.S. at 852. The Court drew a distinction between an investor who is "attracted solely by the prospects of a return on his investment" and a purchaser who is "motivated by a desire to use or consume the item purchased." *Forman*, 412 U.S. at 852-53 (quoting *Howey*, 328 U.S. at 300).

Neither the Company's common stock nor its preferred stock is an investment contract under the *Howey* test as articulated in *Forman*. The Company's shareholders do not invest in the stock to realize returns derived from the efforts of the Company's management, but rather to obtain the right to do business with the Company as a cooperative and to realize a return on their own efforts as producers. To the extent that the Company's shareholders receive a portion of the Company's profits, those profits are derived from a shareholder's patronage with the Company and are based upon the level of patronage with the Company. Federal courts relying on *Forman* and *Howey* have declined to find investment contracts where any profit motive by the purchaser is "purely incidental" to other objectives for entering into a transaction. *See, e.g., Grenader v. Spitz*, 537 F.2d 612, 618 (2d Cir. 1976), *cert. denied*, 429 U.S. 1009 (1976). Federal courts have also recognized that a cooperative's stock is not necessarily a security where there is a possibility of gains from appreciation in the value of a member's stock because the possibility of such gains may be incidental to the member's primary purpose of obtaining goods and services from the cooperative. *See, e.g., Great Rivers Co-Op of Southeastern Iowa v. Farmland Industries, Inc.* 198 F.3d 685, 699 (8th Cir. 1999) (in finding capital credits and stock in an agricultural cooperative were not a security, court stated that the holders "enter into the cooperative relationship not in expectation of the profits that will be generated from such a relationship but instead to reap the benefits of that relationship"); *see also Associated Wholesalers, Inc*., SEC No-Action Letter, 1986 WL 65423 (April 24, 1986). This is similar to the case before the court in *St. James Sugar*. In that case, the court stated that "[t]he inducement to purchase was membership in an association that would provide the sugar cane farmer with services he might not otherwise obtain that is, the assurance of a place to process and market the fruits of his labor. The cooperative member did not participate for the purpose of obtaining profits from investment securities." *B. Rosenberg & Sons, Inc. v. St. James Sugar Co-Op*, 447 F.Supp. 1, 4 (E.D. La. 1976), *aff'd mem.*, 565 F.2d 1213 (5th Cir. 1977). As the court in *St. James Sugar* clearly recognized, an agricultural cooperative like the Company "is operated for the mutual benefit of its members as producers not as stockholders. Advantages which accrue to a member of a cooperative accrue primarily because of his patronage with the association and not because of any financial investment he may have made therein." *Id.*

The Company's stock is not an investment contract because the shareholders do not expect to receive and do not receive profits derived from the managerial efforts of others. The Company's shareholders purchase units of preferred stock with the expectation of receiving financial benefits through their own skill in the management of their respective farming businesses; they hope to maximize the financial success of their farming business through the ready market the Company provides and through higher price for their sugar beets than may otherwise be received without the Company.

C. The Purpose of Section 15(d) is Not Furthered by Continued Reporting

The purpose of the reporting obligation under Section 15(d) is to provide a sufficient stream of current information to investors and the general public with respect to companies issuing registered securities. The Commission has summarized the purpose of the reporting obligations as follows:

> The purpose of Section 13 [which requires periodic reporting] is to provide investors and the public with current information concerning the business activities of issuers with securities registered under Section 12. Section 15(d) of the Exchange Act imposes a similar periodic reporting obligation on any issuer with respect to a class of securities registered under the Securities Act of 1933 (the "Securities Act"). The purpose of Section 15(d) is to assure a stream of current information about an issuer for the benefit of purchasers in the registered offering, and for the public, in situations where Section 13 of the Exchange Act would not otherwise apply.

Rel. No. 34-20263 (Oct. 5, 1983) (proposing revisions to Rule 12h-3). For the reasons set forth below, the purpose of Section 15(d) is not furthered by continued reporting by the Company.

First, there is no public market in which the common stock or preferred stock is traded and there has never been such a market. Where there is no public market, there is no public purpose in continued reporting. Moreover, there have been few private sales of the stock. For example, in the Company's fiscal year 2011, there were approximately five sales of units of preferred stock the Company believes were between unrelated third parties. These units of preferred stock sold represented approximately 0.69% of the outstanding units in fiscal year 2011. The Company believes the remainder of the transfers of units during fiscal year 2011 were gifts, transfers for estate planning purposes, transfers among family members, and changes of form of ownership. Changes in form of ownership might include, for example, a change from ownership as tenants in common to joint tenants with right of survivorship. All transfers of stock have been exclusively to persons eligible to hold stock in the Company.

Second, the Company has not sold any units of preferred stock since 1997, whether in a transaction registered under the 1933 Act or in a transaction exempt from registration. Further, since 1997, the Company has sold shares of its common stock only at par value and only to transferees of preferred units that did not also hold common stock. These sales by the Company

of its common stock were to enable the transferee to satisfy the requirement that each shareholder must hold one share of common stock if the stockholder holds units of preferred stock. Thus, not only is there no public trading market for the Company's stock, but over 14 years have passed since the Company issued any security in a registered transaction or sold any stock for capital raising purposes and over 16 years have passed since the Company filed a registration statement.

Finally, the Company provides information to its shareholders and prospective shareholders through means other than 1934 Act reporting. For example, under the uniform growers agreement, the Company is required to pay shareholders for their sugar beets according to a schedule, based upon estimated and actual prices per pound of extractable sugar applicable to all growers. When notifying the shareholders of the amounts to be paid, the Company provides shareholders with a statement of the number of pounds of extractable sugar obtained during the harvest, the estimated and final price per pound, and how the calculations and adjustments were determined. This provides the shareholders with current information regarding the results of that year's harvest. Further, under Article XIII of the Bylaws:

> The board of directors shall cause to be sent to all the members of this association, not later than 120 days after the close of the fiscal or calendar year, an annual report of the operations of the association. Such annual report shall include a balance sheet as of the closing date. Such financial statement shall be prepared in a form sanctioned by sound accounting practices and approved by a duly certified public accountant.

Prior to becoming subject to the requirements of the 1934 Act, the Company provided annual audited financial statements to the shareholders under this provision of the Bylaws. If the Staff grants this requested no-action position, the Company will not take action to amend this provision of the Bylaws for so long as the Company relies on the no-action position and will abide by this provision of the Bylaws by delivering audited financial statements to its shareholders annually. Further, if the Staff grants this requested no-action position, the Company will provide to each eligible prospective shareholder upon request the most recent annual report and related financial statements for so long as the Company relies on the no-action position.

Other companies have requested and received no-action relief on the basis that their stock, note or other instrument does not constitute a "security" within the meaning of the 1933 Act or the 1934 Act. Many of these companies were seeking the Staff's concurrence with their position because they were considering the possible sale of the instrument or a transaction involving the instrument (reorganization, merger or the like). However, there are numerous no-action requests where the requesting company was reporting under the 1934 Act and the request involved termination of 1934 Act reporting. For example, in *National Consumer Cooperative Bank*, SEC No-Action Letter, 2011 WL 22530 (January 3, 2011), the Staff concurred in a no-action request by a cooperative bank to terminate its periodic and current reports under the 1934 Act. In addition to the factors the Company identifies above that support its position that the purpose of

Section 15(d) is not furthered by the Company's continued reporting, the cooperative bank was also subject to an alternative regulatory scheme. However, other no-action requests demonstrate that termination of 1934 Act reporting is appropriate even when the requesting reporting company is not subject to an alternative regulatory scheme.

In *American Crystal Sugar Co.*, SEC No-Action Letter, 1984 WL 45677 (February 19, 1984), an agricultural cooperative received no-action relief on its request to terminate its reporting under the 1934 Act because its stock did not constitute a security. Further, in *Handy Hardware Wholesale, Inc.*, SEC No-Action Letter, 2006 WL 1816942 (June 29, 2006), the Staff concurred with a 1934 Act reporting company's request to terminate its 1934 Act reporting because its stock and notes were not securities. The Staff has reached similar conclusions in response to the no-action requests of other 1934 Act reporting companies. *See Professional Veterinary Products, Ltd.*, SEC No-Action Letter, 1996 WL 391681 (July 12, 1996); *Affiliated of Florida, Incorporated*, SEC No-Action Letter, 1987 WL 108467 (September 25, 1987) and *Associated Grocers, Incorporated*, SEC No-Action Letter, 1988 WL 233663 (February 12, 1988).

Other than National Consumer Cooperative Bank, none of the other reporting companies identified above were subject to alternative regulatory schemes. Similarly, notwithstanding the fact that the Company is not subject to an alternative regulatory scheme, the public interest is not served by the Company's continued 1934 Act reporting.

Thank you for your time and attention to this request. If you should have any questions or require any additional information, please do not hesitate to contact me.

Respectfully submitted,

LINDQUIST & VENNUM PLLP

/s/ April Hamlin

April Hamlin

cc: David H. Roche, Chief Executive Officer of Minn-Dak Farmers Cooperative
Richard J. Kasper, Chief Financial Officer of Minn-Dak Farmers Cooperative

Attachments:

Appendix A Composite Articles of Incorporation of Minn-Dak Farmers Cooperative
Appendix B Amended and Restated Bylaws of Minn-Dak Farmers Cooperative