



National Milk Producers Federation

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Agri-Mark, Inc.
Associated Milk
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Bongards' Creameries
Burnett Dairy Cooperative
California Dairies, Inc.
Cayuga Marketing
Cooperative Milk
Producers Association
Dairy Farmers of
America, Inc.
Ellsworth
Cooperative Creamery
FarmFirst Dairy
Cooperative
First District Association
Foremost Farms USA
Land O'Lakes, Inc.
Lone Star Milk Producers
Maryland & Virginia
Milk Producers
Cooperative Association
Michigan Milk
Producers Association
Mount Joy Farmers
Cooperative Association
Northwest Dairy
Association
Oneida-Madison Milk
Producers Cooperative
Association
Prairie Farms Dairy, Inc.
Scioto Cooperative
Milk Producers'
Association
Southeast Milk, Inc.
Tillamook County
Creamery Association
United Dairymen
of Arizona
Upstate Niagara
Cooperative, Inc.

June 30, 2023

VIA EMAIL ONLY

Mr. Bruce Summers, Administrator
Ms. Dana Coale, Deputy Administrator
Agricultural Marketing Service
United States Department of Agriculture
1400 Independence Avenue, SW
Washington, D.C. 20250

Re: National Milk Producers Federation's Comments on Requested Additional Proposals for Possible National Federal Milk Marketing Order Modernization Hearing and Formal Rulemaking

Dear Administrator Summers and Deputy Administrator Coale:

National Milk Producers Federation ("NMPF") thanks and commends the United States Department of Agriculture ("Department") for its actions taken in response to NMPF's request for a national federal order hearing to update the uniform pricing provisions, 7 C.F.R. §§ 1000.50-.52, of the federal milk marketing orders ("FMMO"). *See* NMPF Req. for Nat'l Hr'g at 4 ("Implementation of all five components of NMPF's comprehensive proposal would require amendment of the Federal Order pricing regulations in §§ 1000.50-.52."). The published Action Plan, Invitation to Submit Proposals, and subsequent Pre-hearing Information Session have been useful for structuring an efficient and constructive hearing to modernize the FMMOs.

On June 1, 2023, the Department insightfully requested additional proposals from interested parties and carefully limited additional proposals to "the current pricing provisions applicable to all FMMOs" ("Department's Request"). The broad, yet well defined, scope of the Department's Request provides an opportunity for the industry to discuss and debate the uniform pricing provisions of the FMMOs. At the same time, the defined scope of the Department's Request ensures the hearing will be focused on the uniform pricing provisions of all 11 orders and avoid diversions into myriad other order terms that interact with prices but involve plant definitions, accounting regulations, or order provisions tailored to regional marketing conditions.

Additionally, it is critical any hearing be limited to proposals that the Secretary has authority to adopt pursuant to the Agricultural Marketing Agreement Act ("AMAA"). 7 C.F.R. §§ 601-627. No one will benefit if the possible hearing is consumed with promotion or criticism of hypothetical order provisions that cannot become part of federal regulations.

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While NMPF does not necessarily agree with many of the additional proposals (but will not elaborate upon its objections to those proposals here), many are properly within the scope of the Department's Request. These comments are limited to the additional proposals that are beyond the scope of the Department's Request or not within the authority of the AMAA; these additional proposals should not be included in the hearing notice, if one is issued. With these guideposts, NMPF offers these comments on some of the additional proposals NMPF believes falls outside scope of the Department's Request.

A Hearing Should Be Held and Should Not Be Postponed.

Preliminarily, NMPF strongly opposes not holding a hearing at all, as requested by the CDC/CFU/NFU group, or postponing the hearing, as advocated by the Edge Cooperative ("Edge"). The hearing requested by NMPF is of urgent importance to the entire industry. The Department should stay on the course set in its Action Plan, which contemplated a hearing, if noticed, commencing August 23, 2023. The additional proposals that should not be included in the hearing notice can be grouped as (1) those outside the scope of the Department's request and (2) those not authorized by the AMAA. NMPF will review those proposals in turn.

Additional Proposals Not Within the Scope of the Department's Request.

NMPF identified five other requested proposals outside the defined scope of the Department's Request. These additional proposals do not, as directed by the Department's Request, amend the "current pricing provisions applicable to *all* FMMOs" (emphasis added). *See* 7 C.F.R. §§ 1000.50-.52. Consequently, these proposals should not be heard in the hearing.

- Lamers Dairy requests amendment to the definition of "exempt plants." 7 C.F.R. § 1000.8(e). This proposal seeks to change a definition and is not within the scope of the Department's Request because it does not address uniform pricing provisions of the FMMOs. *See* 7 C.F.R. §§ 1000.50-.52.
- The Milk Innovation Group ("MIG") proposes 7 C.F.R. § 1000.43 be revised to increase the allowable shrinkage for ESL products. This proposal is not within the scope of the Department's Request because it addresses the classification of milk, not the uniform pricing provisions of the FMMOs. *Compare* 7 C.F.R. §§ 1000.40-.45 *with* 7 C.F.R. §§ 1000.50-.52.
- MIG also proposes the definitions of "Other Source Milk," "Fluid Milk Product," and "Fluid Cream Product" be revised to exempt organic certified milk from pooling. *See* 7 C.F.R. §§ 1000.14-.16. This proposal is not in scope because, like Lamers Dairy proposal, seeks to change definitions rather than amend the uniform pricing provisions of the FMMOs. *See* 7 C.F.R. §§ 1000.50-.52.
- Edge and the American Farm Bureau Federation ("AFBF") submitted additional proposals calling for greater "milk check transparency"—in particular, for cooperative associations

and their member producers. The requirements for milk check information provided to independent producers are not identical across orders and are not part of the uniform pricing provisions of the orders. *Compare* 7 C.F.R. § 1001.73(e) *with* 7 C.F.R. § 1006.73(e). Therefore, in addition to the lack of legal authority for these proposals (discussed below), they are outside the scope of the Department’s Request.

Two other sets of proposals are outside the scope of the Department’s Request because they concern issues that, according to the Department’s policy, are subjects for regional hearings, not national consideration.

- MIG proposals 3 and 4 suggest creation of “assembly” and “balancing” credits. Whether these purported market-wide service credits should be adopted is properly the subject of the marketing conditions in individual orders, or potentially regional sub-groups of orders. Indeed, MIG’s Proposal 3 recognizes “[a]ssembly credits are a concept that already exists in FMMO 30,” which tacitly admits it is not in other orders. Likewise, MIG recently advocated for such credits in the recent *regional* hearing on the southeast orders. *See* Dkt. No. 23-J-0019 (AMS-DA-23-0003). *Market-wide* service payments are not national hearing issues by their nature. Assembly and balancing costs and dynamics are market-specific issues to be heard in regional hearings.
- Similarly, National All-Jersey proposals 2 and 3 should be resolved regionally, not nationally. Proposals 2 and 3 address component pricing of milk for all classes. As the Department made clear in Federal Order Reform, this issue is to be considered on an order-by-order basis. Consequently, these proposals are not germane to this possible hearing.

Proposals Not Authorized by the AMAA Are Outside the Scope.

Fourteen proposals are not within the authority conferred upon the Department by the AMAA. Some of these proposals are also outside the scope of the Department’s Request, as previously noted. Others are arguably within the scope of the Department’s Request but cannot be adopted by the Department, and therefore should not be included in the possible hearing. These objectionable proposals are:

- Edge proposal 4 and AFBF proposals 5, 6, 11, and 14 are premised on data being compiled by AMS pursuant to a supposed mandatory authority to collect, assemble, and publish manufactured dairy product sales volumes and costs of manufacturing. These proposals cannot be adopted because the Department does not have the authority to collect, assemble, and publish the data proposed. If the Department is granted such authority in new legislation, then these proposals may become ripe. In the meantime, they should not be heard because extending the hearing with testimony on proposals that cannot be adopted is futile. Please note that NMPF’s objection to these proposals, and AFBF’s proposals in particular, is not a comment on their merit.

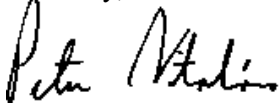
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- Similarly, the proposals of Cedar Grove Cheese and Dairy Pricing Association, Edge proposal 1, and AFBF proposal 7 cannot be adopted because they conflict with 7 U.S.C. § 608c(5)(F), which grants cooperatives the right to manage their internal financial affairs free from the prescription of any terms of FMMOs. The proposals of Cedar Grove Cheese and the Dairy Pricing Association seek to prescribe what cooperatives must pay their member producers monthly, and, similarly, Edge proposal 1 and AFBF proposal 7 seek to impermissibly infringe on the prerogatives granted to qualified cooperatives under Section 608c(5)(F). These four proposals should not be heard.
- MIG proposals 3, 4, and 6 conflict with the statutory mandates of the AMAA, cannot be adopted, and therefore should not be heard. Minimum payment and pricing uniformity are the foundations of the FMMOs. The AMAA is specific and limiting, as federal courts have repeatedly held, in the allowable deviations from producer and handler minimum payment and pricing uniformity. *See Zuber v. Allen*, 396 U.S. 168, 179-87 (1969); *see also Smyser v. Block*, 760 F.2d 514, 520 (3d Cir. 1985). MIG proposal 3 specifically requests amendment of, *inter alia*, Section __.73 of each FMMO to create an “assembly” credit that is payable to *producers*. But market-wide service payments, as authorized by Section 608c(5)(J), can only be made to *handlers*. Mandating the payment to producers is not authorized, and additionally violates producer price uniformity. *See* 7 U.S.C. § 608c(5)(B). MIG proposal 4—“Balancing Credit for Specialty Milk Producers”—is also not a qualified market-wide service payment because it too is payable to producers. *See* 7 U.S.C. § 608c(5)(J). Furthermore, it is not a permissible deviation from producer uniformity because the categories of “A2, grass-fed, and organic” milk were unknown when Section 608c(5)(B) was adopted and, therefore, such deviation could not have been authorized by Congress. Finally, MIG proposal 6, seeking exemption from pooling for all organic milk, is not authorized by Section 608c(5)(B) for the same reason.

The Department’s actions in this matter thus far have structured a hearing of substantial, but not unlimited, breadth that will address critically important issues in the modernization of the FMMOs. Now that the parameters have been set, it is important to maintain the boundaries of a possible hearing to ensure that the process has the best possible opportunity to be successful.

Thank you for your consideration of our comments.

Sincerely,



Peter Vitaliano
Vice President,
Economic Policy & Market Research