

November 30, 2015

**VIA EMAIL**

Anne Alonzo, Administrator  
Agricultural Marketing Service  
United States Department of Agriculture  
Room 3071-S; Stop 0201  
1400 Independence Avenue, S.W.  
Washington, D.C. 20250

**Re: Supplemental Submission in Support of Proposal to Amend All Federal Milk Marketing Orders to Include a Modified Wichita Option for Organic Milk**

Dear Ms. Alonzo:

**Introduction**

This letter and attachments respond to your October 29, 2015 response to the Organic Trade Association Federal Milk Marketing Order Proposal submitted on September 29, 2015. This response supplements but, unless expressly stated, does not replace our original submission.

Before turning to specific responses to your five inquiries contained in your October 29 letter, we need to correct a misperception that some in the dairy industry appear to have regarding this Proposal for modified Wichita Option alternative pricing and pooling treatment for organic milk: The Organic Trade Association (“OTA”) represents growers, shippers, processors, certifiers, farmers’ associations, distributors, importers, exporters, consultants, retailers and other involved in organic production agriculture. Critically, one of the OTA working group members for this effort is a farmer owned cooperative – “CROPP Cooperative.”

CROPP is the nation’s largest organic, independent, and farmer-owned cooperative. Organized in 1988, it currently represents over 1,800 farmers in 36 states and three Canadian provinces, and achieved approximately \$972 million in sales during 2014. Focused on its founding mission of saving family farms through organic farming, CROPP produces a variety of organic foods, including organic milk, soy, cheese, butter, spreads, creams, eggs, and produce under the Organic Valley™ brand, which are sold in supermarkets, natural food stores and food cooperatives nationwide. With its regional model, milk is produced, bottled and distributed right in the regions where it is farmed to ensure fewer miles from farm to table and to support local economies.

CROPP's 1,800 farmer members include over 1,450 organic dairy farmers located in 29 states who together produce a significant percentage of USDA certified organic milk. The average herd size is small at less than 100 organic cows. USDA's Agriculture Census for 2014 states that there were 2,296 organic dairy farms in the United States. The other members of the working group also own dairy farms. Thus, the allegation by some that this proposal is processor driven simply is inaccurate – the working group represents more than a majority of the nation's organic dairy farmers.

### **General Response to October 29, 2015 Letter**

As discussed below, we attach two versions of revised proposal language - one highlighting the changes (Attachment 1) and a "clean" version (Attachment 2) - to correct an inadvertent omission in the original submission and to respond to a couple of issues raised by AMS and/or industry. Below we attempt to address as completely as possible your October 29 inquiries; we note that some of your requests fall into the category of information or "evidence" that, in my over 30 years of experience with FMMOs, would be provided only during a hearing, if one is noticed. We are unaware of previous requests in amendatory FMMO proceedings from the Department to provide this level of evidentiary detail prior to a hearing since the record evidence of a hearing is what is necessary for any decision. Indeed, as discussed more fully below with respect to response to Request 4, USDA should as part of any hearing process develop and refine the analytical data used to calculate any order impacts, especially the ability to track and quantify non-Class I organic milk products, the data for which is not presently available or monitored. Finally, OTA's members' process of responding to your letter is constrained by antitrust laws and OTA's own antitrust policy. We attach a brief antitrust legal analysis provided to OTA by Foley & Lardner LLP that discusses the legal impediments imposed on OTA and its members. Attachment 3.

### **Specific Responses to October 29, 2015 USDA Letter**

1. "Please provide any studies and analyses that support how your proposal will increase the supply of certified organic milk."

OTA has not conducted a study based on OTA member information on this subject for the antitrust reasons discussed in the attached letter from Foley & Lardner to OTA. On the other hand, the millions of dollars that are presently paid to the producer-settlement fund by handlers packaging organic fluid milk doesn't contribute to the organic industry and provides no support or benefit for growing organic supply. Should those dollars that are presently lost to the organic industry be freed up, then individual organic handlers and their farmer suppliers can discuss, independently how those funds may be used to increase organic supplies.

Nonetheless, OTA recognizes the importance of this issue, and if a hearing is noticed, we intend to develop and provide further evidence regarding this subject at the hearing, subject to complying with all antitrust laws and restrictions, including OTA's antitrust policy.

2. "Please provide an analysis of how your proposal is consistent with the requirement in the Agricultural Marketing Agreement Act of 1937, as amended, that similarly situated handlers face the same regulated minimum raw milk prices."

As an attorney working especially with the AMAA and Dairy Programs for over 30 years, it is my legal opinion that the proposal is entirely legal. First, organic handlers that make the election will be voluntarily agreeing in lieu of paying “the same regulated minimum raw milk prices,” to pay significantly higher minimum raw milk prices. Second, the Wichita Option, with its 50-year history in FMMO system, is used today by handlers who qualify as partially regulated operations. The proposal builds off of that existing legal option. Third, while USDA in federal order reform phased out “Individual Handler Pools,” USDA has never concluded that such arrangements are not lawful under the AMAA – just the opposite is true. Similarly, but again with much higher prices, we are proposing reintroducing the individual handler pool concept as to organic milk using the modified Wichita Option proposed.

3. “Please provide any studies or analyses suggesting that the measures in the proposal would encourage that the monies generated from this partial regulation can be directed to organic dairy farmers.”

To respond to this question on the merits, OTA and its members would need to discuss how these monies can be directed to organic dairy farmers, but for the reasons discussed in the attached letter from Foley & Lardner, they cannot do so without incurring potential antitrust risk and without violating OTA’s antitrust policy. For instance, in November 1987, then New York Attorney General Robert Abrams concluded that an arrangement negotiated under the auspices of the New York Commissioner of Agriculture and Markets for New York city milk dealers to pay an over-order premium in New York to the Regional Cooperative Marketing Agency was an illegal arrangement to fix prices paid to farmers that would be then passed on to consumers. Attachment 4.

However, the OTA Proposal creates a regulatory incentive for processors to pay monies generated from the partial regulation to the organic dairy farmers. Under the OTA Proposal, if a handler elects the optional Wichita Option treatment, it will be presented with an economic option each month (e.g., using the example on page 5 of OTA’s original September 29 submission where the producer settlement fund obligation would be \$2.00) that it either pay the producer-settlement fund \$0.30 difference or it could choose to pay its farmer patrons that \$0.30 difference instead. Just as with the existing Wichita Option under 7 C.F.R. § 1000.76(b), there is a regulatory incentive for handlers to choose to pay their farmer patrons more money, rather than to pay it to the producer-settlement fund. OTA intends to have one or more dairy industry experts discuss the regulatory incentive that would be created by adoption of the proposal. Additionally, FMMO regulation has always concentrated on *minimum* regulated prices. The CMPC prices discussed in our September 29 letter demonstrate that USDA does not, as a rule, seek to displace the market. OTA’s Proposal would establish a higher minimum price obligation for organic milk for electing handlers. However, OTA expects and intends that the market would continue to play a role above this new, higher minimum regulated price, just as it does today in the conventional and organic markets.

4. “Please provide any additional studies or analyses on how your proposal may impact conventional milk producers across the country. Additionally, please share any information that OTA has about support for the proposal.”

OTA in July through September requested USDA to provide as much information on impact analysis as possible, recognizing that in the normal course that information could and would be developed after a hearing notice was issued. OTA had received prior to submitting the September 29 letter information from the Order 30 Market Administrator's office only. In addition, OTA had requested further meetings or telephone discussions with the Market Administrators' data working group in order to obtain the same kind of information from all markets.<sup>1</sup> USDA has now posted limited responses to these inquiries which include an explanatory footnote that states that the responses are not estimated impacts of the Proposal. We understand that to date that no Market Administrator tracks Class II, III or IV sales of organic milk products. This overstates the potential changes in blend prices of the Proposal because those lower use classifications could likely reduce the pool value change. Nonetheless, OTA has prepared a summary of the 2 years of data and attached it as Attachment 5. The Class I only value changes range from less than one-half cent per cwt in the Mideast Order to 6.6 cents per cwt in the Central Order. The weighted average for all FMMOs is 2.8 cents per cwt for those two years.

Importantly, the estimated changes on the total blend price on a percentage basis reveals how small the impact is in total dollars. The blend price percentage differences range from 0.02% for the Mideast Order to 0.34% for the Central Order. In my experience with FMMOs, it is not likely that conventional dairy farmers would vote an Order out on this incredibly small blend price difference.

Moreover, our review of the variability of estimated changes, both by months and among Orders reveals that the estimated changes are significantly affected by: impacts of eligible milk not pooled; variability of the monthly volumes of milk pooled on each order; price variability, especially as to butterfat, between the various classes of milk; and the composition of the milk itself. There is a further order comparison issue that bears consideration. The amount of Class I organic route sales in any one order is likely significantly impacted by the § 1---.7(b) lock-in provision for extended shelf life plants (discussed more fully in response to Request 5, below). Application of that provision to some organic milk handlers likely means that the impacts of the OTA Proposal are concentrated in one or more orders. This is one reason why evaluating a weighted average estimated change on all FMMOs is highly appropriate.<sup>2</sup>

5. "Please provide information about any alternative solutions that OTA considered that may increase the supply of organic milk."

We have interpreted this question as meaning what regulatory options has OTA and its members considered since regulatory options may be discussed, with some limits, under the Noerr-Pennington doctrine exception to the antitrust laws. OTA or its members have considered (and rejected in the spirit of negotiation and attempting to address concerns raised in the past by

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<sup>1</sup> USDA has posted responses to these inquiries on the Dairy Programs website, although the source of the non-Order 30 requests is based upon another industry request made in October after OTA's request had been repeatedly made at least orally.

<sup>2</sup> It is also important that there are organic handlers today who operate partially regulated plants, rather than 7(b) plants. Those facilities are able to meet their FMMO pool obligation using the existing Wichita Option provisions under § 1000.76(b) without paying anything into any FMMO producer-settlement funds.



industry or USDA) – an exemption for organic milk from FMMOs; a modified exemption based upon a percentage price paid for organic milk above conventional milk, but based on an absolute exemption without a threshold that then requires a phase-out of any payments to the producer-settlement fund; an elimination of 7 C.F.R. §1\*\*\*.7(b) [FMMO lock-in provision for ESL fluid milk facilities] which would then permit a larger group of processors to utilize the original Wichita Option and prove payment to their producers of FMMO minimum prices at that handler's in-plant blend; before moving to the modified Wichita Option concept, we discussed with the Office of General Counsel and Dairy Programs some method of using the heretofore never utilized "production" differential language found in the AMAA in §608c(5)(A), however, OGC expressed discomfort in any reliance on that language; the modified Wichita Option at a zero threshold, but phasing in above the threshold as with the September 29 proposal; a modified Wichita Option with a \$1.00, \$1.50 and finally now \$2.90 threshold. While OTA does not presently intend to pursue elimination of the section 7(b) provision, that remains an attractive option because of its simplicity and direct connection to the existing Wichita Option.

### **Amended Proposal Language Discussion**

We have listened to USDA Dairy Programs queries and read and heard industry comments after submission of the proposal. First, on our own, we determined that we had inadvertently created an opportunity for an electing handler to get any credit based only on milk it receives rather than including milk it diverts; thus, we are adding "or diverted by" in the fourth line of §1000.74(c)(2)(B)(ii).

Second, while we do not believe that organic milk receives any significant financial benefits from the FMMOs, we understand that there is concern that organic milk may be sold as conventional milk from time to time; if so, that milk can and should be classified as "other source milk" (down allocating it to lowest classification). We have added a new paragraph (h) to address this issue even though the market reality is that this would result in a further discount paid to the organic handler on the already discounted price likely received in these kinds of transactions. Moreover, there exists a very large economic disincentive to move organic milk into the conventional milk stream because the organic handler must still pay the non-classified premium price for the organic milk if it is sold as conventional milk.

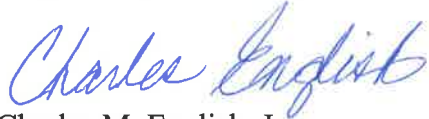
Finally, we have heard concerns expressed that an organic handler could "move" a producer off of its handler report for a month or more in order to meet the payment threshold. If that is done as an abuse, it should not be permitted. A number of the existing FMMOs have provisions dealing with such reporting abuses and we have added a paragraph (i) to address this concern. We note that there can be legitimate reasons why such a reporting handler change may be made and so the market administrator will need to investigate the circumstances of such changes. However if the market administrator determines that the producer(s) was (were) moved to a different handler for the purposes of getting the credit, appropriate penalties, including forfeiting the election for a year, would be entirely warranted.

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**Conclusion**

For all the foregoing reasons, and the reasons stated in OTA's September 29 submission, OTA respectfully requests that the Secretary promptly issue a Notice of Hearing to consider the Proposal attached as Attachment 2 and schedule a hearing for early 2016.

Respectfully submitted,

A handwritten signature in blue ink that reads "Charles English, Jr." in a cursive script.

Charles M. English, Jr.

cc: Ms. Laura Batcha  
Ms. Dana Coale  
Marni Karlin, Esq.

ORGANIC TRADE ASSOCIATION PROPOSAL - ATTACHMENT 1

1000.74 Producer-settlement fund alternative payments by a handler for USDA certified organic milk.

(a) For purposes of this section, USDA certified organic milk means organic milk that has been certified organic pursuant to 7 U.S.C. §§ 6501 - 6522 and 7 C.F.R. Part 205.

(b) If a handler elects to satisfy its \$ \_\_\_\_\_.71 producer-settlement fund obligation using this section, it shall make an annual election no later than July 1 of each year, effective August 1; provided, however, that a handler who first processes and packages USDA certified organic milk after July 1 of any year shall be permitted to make an election within 30 days of receiving such certification and such election shall be effective beginning the first day of the month that begins more than 27 days following notice of such election and such election shall be effective until the immediately following July 31.

(c) On or before the date specified in \$ \_\_\_\_\_.71, the operator of a distributing plant processing and packaging USDA certified organic milk or a § 1000.9(b) handler who purchases milk from producers and causes such milk to be picked up at the farm, if such handler has made an election pursuant to paragraph (b) of this section, shall submit the information specified in §§ \_\_\_\_\_.30(b) and \_\_\_\_\_.31(b) of the order and pay the amount resulting from the following computations in lieu of the producer-settlement fund obligation established by \$ \_\_\_\_\_.71 of the order:

(1) As to any non USDA certified organic milk, the amount specified in \$ \_\_\_\_\_.71 of the order; plus as to the USDA certified organic milk received or diverted by a \$ \_\_\_\_\_.7(a) or \$ \_\_\_\_\_.7(b) distributing plant, the amount, if any, calculated pursuant to subparagraph (2) of this paragraph;

(2) As to USDA certified organic milk, the lesser of the amounts calculated pursuant to subparagraphs (a) and (b) of this subparagraph:

(A) the amount specified in \$ \_\_\_\_\_.71 of the order; or

(B) the amount, if any, by which the amount specified in \$ \_\_\_\_\_.71 of the order exceeds the following calculation (the result shall not be less than zero):

(i) the gross payments made for the USDA certified organic milk; reduced by

(ii) the value of the USDA certified organic milk determined pursuant to \$ \_\_\_\_\_.60 of the order, provided, however, that for purposes of this subparagraph only, that the \$ \_\_\_\_\_.60 value of all USDA certified organic milk received at or diverted by the plant shall be calculated as if all USDA certified organic milk were classified as Class I, plus \$2.90 per cwt multiplied by the cwt of USDA certified organic milk.

(d) A handler who has made the election under paragraph (b) of this section shall not be eligible to use the volume of USDA certified organic milk to qualify non USDA certified organic milk for diversion. This paragraph does not affect the eligibility to divert USDA certified organic milk based upon the pounds of USDA certified organic milk physically received by the handler.

(e) A handler who has made the election under paragraph (b) of this section shall not while its annual election is effective be entitled to any payment from the producer-settlement fund under \$ \_\_\_\_\_.72 of the order with respect to any USDA certified organic milk.

(f) An election made pursuant to paragraph (b) of this section shall not affect a handler's obligation to make payments under §§ 1000.85 and 1000.86 with respect to any USDA certified organic milk.

(g) Any handler making the annual election under paragraph (b) of this section shall make available to the market administrator the books and records necessary to satisfy the market administrator that the milk subject to the election qualifies as USDA certified organic milk.

(h) Any USDA certified organic milk subject to a handler election under paragraph (b) of this section shall be treated as other source milk pursuant to § 1000.14 if received by any handler and packaged and sold as other than USDA certified organic milk products; the original electing handler shall remain responsible for paying for such USDA certified organic milk pursuant to paragraph (c) of this section.

(i) As to any handler making the annual election under paragraph (b) of this section, the market administrator may investigate the removal of a USDA certified organic milk producer from an electing handler's monthly report; if the market administrator determines, after investigation and an opportunity to be heard, that an electing handler altered the reporting of such milk for the purpose of evading the provisions of this section or for the purpose of maximizing the producer-settlement fund credit, if any, under paragraph (c)(2)(B)(ii) of this section, the market administrator may, in his discretion, require that the electing handler instead report and pay pursuant to paragraph (c)(2)(A) of this section for the month, for multiple months in that year, or the remainder of the annual election year.



ORGANIC TRADE ASSOCIATION PROPOSAL - ATTACHMENT 2

1000.74 Producer-settlement fund alternative payments by a handler for USDA certified organic milk.

(a) For purposes of this section, USDA certified organic milk means organic milk that has been certified organic pursuant to 7 U.S.C. §§ 6501 - 6522 and 7 C.F.R. Part 205.

(b) If a handler elects to satisfy its § \_\_\_\_\_.71 producer-settlement fund obligation using this section, it shall make an annual election no later than July 1 of each year, effective August 1; provided, however, that a handler who first processes and packages USDA certified organic milk after July 1 of any year shall be permitted to make an election within 30 days of receiving such certification and such election shall be effective beginning the first day of the month that begins more than 27 days following notice of such election and such election shall be effective until the immediately following July 31.

(c) On or before the date specified in § \_\_\_\_\_.71, the operator of a distributing plant processing and packaging USDA certified organic milk or a § 1000.9(b) handler who purchases milk from producers and causes such milk to be picked up at the farm, if such handler has made an election pursuant to paragraph (b) of this section, shall submit the information specified in §§ \_\_\_\_\_.30(b) and \_\_\_\_\_.31(b) of the order and pay the amount resulting from the following computations in lieu of the producer-settlement fund obligation established by § \_\_\_\_\_.71 of the order:

(1) As to any non USDA certified organic milk, the amount specified in § \_\_\_\_\_.71 of the order; plus as to the USDA certified organic milk received or diverted by a § \_\_\_\_\_.7(a) or § \_\_\_\_\_.7(b) distributing plant, the amount, if any, calculated pursuant to subparagraph (2) of this paragraph;

(2) As to USDA certified organic milk, the lesser of the amounts calculated pursuant to subparagraphs (a) and (b) of this subparagraph:

(A) the amount specified in § \_\_\_\_\_.71 of the order; or

(B) the amount, if any, by which the amount specified in § \_\_\_\_\_.71 of the order exceeds the following calculation (the result shall not be less than zero):

(i) the gross payments made for the USDA certified organic milk; reduced by

(ii) the value of the USDA certified organic milk determined pursuant to § \_\_\_\_\_.60 of the order, provided, however, that for purposes of this subparagraph only, that the § \_\_\_\_\_.60 value of all USDA certified organic milk received at or diverted by the plant shall be calculated as if all USDA certified organic milk were classified as Class I, plus \$2.90 per cwt multiplied by the cwt of USDA certified organic milk.

(d) A handler who has made the election under paragraph (b) of this section shall not be eligible to use the volume of USDA certified organic milk to qualify non USDA certified organic milk for diversion. This paragraph does not affect the eligibility to divert USDA certified organic milk based upon the pounds of USDA certified organic milk physically received by the handler.

(e) A handler who has made the election under paragraph (b) of this section shall not while its annual election is effective be entitled to any payment from the producer-settlement fund under § \_\_\_\_\_.72 of the order with respect to any USDA certified organic milk.

(f) An election made pursuant to paragraph (b) of this section shall not affect a handler's obligation to make payments under §§ 1000.85 and 1000.86 with respect to any USDA certified organic milk.

(g) Any handler making the annual election under paragraph (b) of this section shall make available to the market administrator the books and records necessary to satisfy the market administrator that the milk subject to the election qualifies as USDA certified organic milk.

(h) Any USDA certified organic milk subject to a handler election under paragraph (b) of this section shall be treated as other source milk pursuant to § 1000.14 if received by any handler and packaged and sold as other than USDA certified organic milk products; the original electing handler shall remain responsible for paying for such USDA certified organic milk pursuant to paragraph (c) of this section.

(i) As to any handler making the annual election under paragraph (b) of this section, the market administrator may investigate the removal of a USDA certified organic milk producer from an electing handler's monthly report; if the market administrator determines, after investigation and an opportunity to be heard, that an electing handler altered the reporting of such milk for the purpose of evading the provisions of this section or for the purpose of maximizing the producer-settlement fund credit, if any, under paragraph (c)(2)(B)(ii) of this section, the market administrator may, in his discretion, require that the electing handler instead report and pay pursuant to paragraph (c)(2)(A) of this section for the month, for multiple months in that year, or the remainder of the annual election year.



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November 27, 2015

Via E-Mail

Ms. Marni Karlin  
Vice President of Government Affairs and  
General Counsel  
Organic Trade Association  
444 North Capitol Street, NW  
Suite 445A  
Washington, DC 20001

Dear Ms. Karlin:

You have asked me to determine how the antitrust laws, including the Sherman Act, Federal Trade Commission (FTC) Act, and equivalent state statutes, may restrict communication and collaboration among Organic Trade Association (OTA) members in connection with responding to the United States Department of Agriculture (USDA) requests for information relating to OTA's October 29, 2015, proposal to amend the Federal Milk Marketing Orders (FMMO) (the "Proposal"). After reviewing the underlying facts, including the nature of the information that OTA members would need to exchange to address some aspects of the USDA requests, and the relevant law, I conclude that OTA members should be mindful of antitrust restrictions that may apply to the process of responding to USDA.

**FACTUAL BACKGROUND**

As confirmed in conversations with you and OTA outside counsel, Charles English, my understanding is that the USDA has requested five categories of additional information relating to the Proposal. Requests 2 and 4 do not relate, even in part, to possible future business activity of individual organic milk handlers pursuant to the Proposal should it be adopted. Requests 1, 3, and 5, at least in part, do relate to possible future business activity of individual organic milk handlers, including pricing conduct. Specifically, Request 1, asks for "any studies and analyses that support how [the Proposal] will increase the supply of certified organic milk," and Request 3 asks for "any studies or analyses suggesting that the measures in [the Proposal] would encourage that the monies generated from this partial regulation can be directed to organic dairy farmers." Request 5 asks for "any alternative solutions that OTA considered that would increase the supply of organic milk."

My understanding from reviewing the Proposal and speaking with you and Mr. English is that the Proposal contemplates that the supply of organic milk will increase because, once the FMMO is revised, more funds will be directed to organic dairy farmers through the price paid for organic milk by organic milk handlers or other means, and that the resulting investments by organic

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dairy farmers in increased capacity will increase the supply of organic milk. Therefore, pursuant to the Proposal, the questions of whether there is an increase of the supply of organic milk (the subject of Request 1) and whether the Proposal will encourage organic milk handlers to direct additional monies to organic dairy farmers (the subject of Request 3) both appear to relate to projected future prices paid for organic milk and/or to the forward-looking business strategy of individual handlers with respect to the use of additional funds they would receive under to the Proposal. More specifically, I understand that Requests 1 and 3 may be read to—again in part—elicit information about whether individual organic milk handlers, or organic milk handlers collectively, will retain those additional funds; what portion would be retained and what portion may be passed on to organic dairy farmers in the form of increased prices paid for organic milk or through other means such as investments in joint ventures. Were OTA members to discuss alternatives to the Proposal that would increase the supply of organic milk, which is the subject of Request 5, those communications might also touch on projections relating to future pricing or to forward-looking business plans.

I further understand that there is no exception from the antitrust laws or other circumstance that would immunize OTA members from discussing potentially competitively sensitive information such as future pricing or business strategy in this context, and that in fact, there is a heightened sensitivity to antitrust risk due to the historical enforcement and litigation environment in the dairy industry, particularly with respect to buyer-side activity of dairy handlers<sup>1</sup> and with respect to agreements as to any component of milk pricing, such as an over-order premium.<sup>2</sup>

Lastly, I have reviewed the OTA antitrust policy,<sup>3</sup> which appears to be designed to minimize antitrust risk by prohibiting any collaboration or discussion among members relating to information that is potentially competitively sensitive, including specifically current or future prices

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<sup>1</sup> See, e.g., *In re Southeast Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 940 (E.D. Tenn. 2008) (decision addressing alleged antitrust conspiracy involving dairy processors related to, in part, agreements on premiums to be paid above the USDA order price for fluid milk).

<sup>2</sup> An instructive historical example is of the Regional Cooperative Marketing Association (RCMA), an organization of producer cooperatives formed in the 1970s and revived in the 1980s to include independent farmers. One purpose of RCMA was to impose a premium above the USDA order price for fluid milk. The New York Attorney General challenged the practice of RCMA and certain New York milk handlers of collectively agreeing on premiums, finding that their agreements potentially violated the antitrust laws. See Letter From Robert Abrams, Attorney General of New York, to Donald Butcher, Commissioner of Agriculture of New York, dated Nov. 6, 1987 (issuing opinion that agreement among RCMA and milk distributors does not comply with state and federal antitrust laws and launching investigation into milk distributor conduct); Joel St. Ashenko, *Abrams at Center of Milk-Pricing Whirlwind*, *The Journal*, Nov. 23, 1987, available at <http://nyshistoricnewspapers.org/lcn/sn84031170/1987-11-23/ed-1/seq-2.pdf>; see also Gary Spencer, *Abrams Voids Milk Marketing Pact on Antitrust Grounds*, *Albany Times Union*, Nov. 7, 1987, 1987 WLNR 69690.

<sup>3</sup> See OTA Antitrust Brochure, “Antitrust 101.”

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at which to buy or sell; current or future costs; and current and future business plans. I understand that this policy governs all OTA activity conducted in the normal course.

### LEGAL BACKGROUND

As you are aware, Section 1 of the Sherman Act, 15 U.S.C. § 1, and analog state statutory provisions prohibit competitors from agreeing on prices to be charged on the sell side and prices to be paid on the buy side.<sup>4</sup> This may be the case where the prices at issue are maximum or minimum prices, and where the competitors agree on a range of prices or a component of prices to be charged or paid.<sup>5</sup> The Guidelines for Competitor Collaborations set forth by the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) indicate that collaboration among competing purchasers may give rise to competitive harm, even where such collaborations have a legitimate purpose and even where collaborating purchasers do not expressly agree on specific prices to be paid for a particular input.<sup>6</sup>

The fact that a collaboration among competitors occurs within the context of a legitimate and procompetitive trade association such as OTA also does not mean that the activity would necessarily be deemed lawful. The FTC has issued clear guidance that trade association activity involving competitors may run afoul of the antitrust laws unless it is undertaken pursuant to safeguards: “Dealings among competitors that violate the law would still violate the law even if they

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<sup>4</sup> See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (“Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948) (condemning buyer-side price fixing by purchasers of sugar beets); Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1, 4 (2010) (“It is a felony, as well as a basis for treble damage liability, for buyers to agree on what they will pay for goods or services that they buy.”).

<sup>5</sup> See Federal Trade Commission, Bureau of Competition, “Competition Guidance: Price Fixing” (“A plain agreement among competitors to fix prices is almost always illegal, whether prices are fixed at a minimum, maximum, or within some range.”) available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing>; see also, e.g., *Allen v. Dairy Farmers of Am., Inc.*, 2014 U.S. Dist. LEXIS 81193, at \*5-\*6 (D. Vt. June 11, 2014) (decision in antitrust class action alleging unlawful agreement by processors and producer cooperatives as to amount of premium over USDA order levels as one “component” of fluid milk price in alleged effort to suppress prices).

<sup>6</sup> See Federal Trade Commission and Department of Justice Antitrust Division, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at 14 (“Buying collaborations also may facilitate collusion by standardizing participants’ costs or by enhancing the ability to project or monitor a participant’s output level through knowledge of its input purchases.”), available at [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf); see also Information Exchange: Be Reasonable, blog post by Michael Bloom of the FTC, December 11, 2014 (noting that some information exchanges among competitors with procompetitive purposes may sometimes result in the “inadvertent ‘chilling’ of competition”) available at <https://www.ftc.gov/news-events/blogs/competition-matters/2014/12/information-exchange-be-reasonable>.



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were done through a trade association. For instance, it is illegal to use a trade association to control or suggest prices of members.”<sup>7</sup> With respect to traditional antitrust safeguards used by OTA and other trade associations to minimize risk that may accompany member collaborations, such as aggregation by the association of information from a sufficiently numerous group of participants, I understand that these cannot be effectively applied here under the present circumstances and present time constraints.

In addition, short of actually collaborating on initiatives that may affect future pricing, merely discussing pricing and future business strategies may in some circumstances also violate the antitrust laws where such discussions involve the exchange of certain competitively sensitive information. Notably, the FTC has pursued enforcement actions under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits unfair methods of competition, where competitors are alleged to have exchanged certain competitively sensitive information, even where there was no allegation that they ever entered into an anticompetitive agreement related to that information.<sup>8</sup> Indeed, the OTA antitrust policy forbids any discussion of competitively sensitive information such as future pricing and future business plans, reflecting a prudent approach to this source of potential antitrust risk.

### CONCLUSION

In light of the foregoing, I conclude that collaboration or discussion among OTA members regarding potentially competitively sensitive areas such as future pricing conduct and forward-looking business plans would not only present antitrust risk but would also likely violate the OTA’s standing antitrust policy. In responding to the USDA’s requests, it will be prudent for OTA and its members to avoid potential antitrust violations by being mindful of restrictions on collaboration and communication among competitors.

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<sup>7</sup> See Federal Trade Commission, Bureau of Competition, “Competition Guidance: Spotlight on Trade Associations,” available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade>.

<sup>8</sup> See, e.g., Decision and Order, May, 30, 2013, *In re Bosley Inc.*, FTC Docket No. 4404, available at <https://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregisdo.pdf>.



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Best regards,

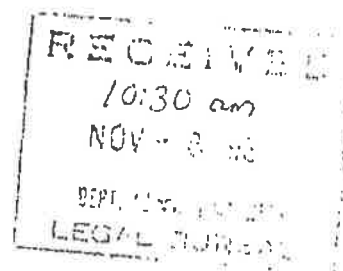
A handwritten signature in cursive script that reads "Holden Brooks". The signature is written in black ink and includes a horizontal flourish at the end.

Holden Brooks



STATE OF NEW YORK  
DEPARTMENT OF LAW  
ALBANY 12224

ROBERT ABRAMS  
ATTORNEY GENERAL



November 5, 1987

Honorable Donald G. Butcher  
Commissioner of the Department of  
Agriculture and Markets  
State of New York  
1 Winners Circle, Capital Plaza  
Albany, New York 12235

Re: The "RCMA-Distributor Marketing Agreement"

Dear Commissioner Butcher:

You have asked whether an agreement negotiated by an association of milk producers (the Regional Cooperative Marketing Agency or RCMA) and a combination of milk distributors is contrary to the provisions of the antitrust laws. The agreement, denominated the "RCMA-Distributor Marketing Agreement", was filed with your office on October 28, 1987 and contains the following terms, among others:

- (a) effective for the period September 1 through December 31, 1987, the RCMA price for Class I milk sold by any RCMA member to any dairy in the 11 state area is fixed at a minimum price of \$14.45 per hundredweight;
- (b) an "RCMA differential" or over-order premium is to be paid directly to RCMA. For the month of September 1987, the amount is \$ .73 per hundredweight;
- (c) participating distributors are entitled to receive various adjustments, credits and exemptions to be applied against the "RCMA differential";
- (d) sales to non-participating distributors will not be made on more favorable terms unless also offered to the participating distributors; and
- (e) RCMA and the distributors shall continue to negotiate in order to "minimize problems".

The "RCMA-Distributor Marketing Agreement" is an agreement between associations of milk producers and milk distributors that fixes and stabilizes the price of unprocessed milk. Price fixing agreements are among the most pernicious practices that restrain trade. They constitute in virtually every instance per se violations of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Pottery Co., 273 U.S. 392 (1927). A limited antitrust exemption is extended to a qualified agricultural cooperative pursuant to Section 6 of the Clayton Act (15 U.S.C. § 17) and Section 1 of the Capper-Volstead Act (7 U.S.C. § 291).

The Congressional philosophy that allows farmers to act together in cooperative associations without violating the antitrust law is

simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage--and responsibility--available to businessmen acting through corporations as entities.

Maryland & Virginia Milk Producers Association v. United States, 362 U.S. 458, 466 (1960). It was never the intent of Congress, however, to allow cooperatives to extend their limited immunity to those with whom they dealt.

The right of these agricultural producers thus to unite in preparing for market and in marketing their products and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.

United States v. Borden Co., 308 U.S. 188, 204-05 (1939). The Capper-Volstead Act does not permit non-producers such as milk distributors to unite in preparing for market and in marketing their products. Indeed a legitimate farmers' cooperative may not contain even one non-farmer member. National Broiler Marketing Association v. United States, 436 U.S. 816 (1978); Case-Swayne Co., Inc. v. Sunkist Growers Inc., 389 U.S. 389 (1967).

An agricultural cooperative, regardless of its entitlement to Capper-Volstead protection, may not combine "with major distributors and their allied groups in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk..." United States v. Borden Co., *supra*, 308 U.S. at 205. In my opinion the "RCMA-Distributor Marketing Agreement" constitutes such an illegal combination in violation of the Sherman Act. This conclusion is required whether or not RCMA is entitled to a Capper-Volstead exemption, whether or not

its "over order premium" program in itself is protected by Capper-Volstead and whether or not a qualified agricultural cooperative may intentionally acquire and exercise monopoly power, matters which are under continuing review and as to which I express no opinion at this time.

The "RCMA-Distributor Marketing Agreement" states that if "the parties are advised that the Attorney General of the State of New York issues an opinion, ruling or official statement to the effect that this Agreement does not comply with state or federal law or the Consent Decree [State of New York v. Dairylea Coop. et al. (81 Civ. 1891, S.D.N.Y. 1986)] this Agreement shall terminate." This correspondence constitutes such "opinion, ruling or official statement" and I therefore request that you advise the parties that the "RCMA-Distributor Marketing Agreement" has terminated.

I am seriously concerned, however, that the "RCMA-Distributor Marketing Agreement" has been used by milk dealers as a pretext to raise the price of milk to inflated and non-competitive levels. Your Department's most recent price survey indicates that the state-wide average retail price of a gallon of milk has increased 9.3 cents since September 1, 1987, the effective date of the agreement. A price survey conducted within the City of New York by the New York City Department of Consumer Affairs reveals a 15 cents per gallon increase for the same period. The actual price increase to the milk dealers due to the agreement, however, is less than 3 cents per gallon.

This is strong evidence that unscrupulous milk dealers have seized upon the "RCMA-Distributor Marketing Agreement" as a means to unduly enhance the price of milk. Pursuant to Section 254(b) of the Agriculture and Markets Law you are empowered to "investigate all matters pertaining to the production, manufacture...distribution and sale of milk and milk products in the State of New York" and to "subpoena milk dealers, their records, books and accounts, and any other person from whom information may be desired to carry out the purpose and intent of this chapter." Section 258-m(5) of the Agriculture and Markets Law authorizes you to conduct public hearings when there is reason to believe that a marketing agreement between producers and distributors has caused the price of milk to be unduly enhanced. I urge you, therefore, consistent with this and other statutory authority, to hold public hearings and to investigate fully this intolerable situation. My office is at your disposal to assist your efforts in any way we can.

These recent events have also raised the spectre of possible collusion between milk distributors. As you are aware, many of the milk dealers in the distributors' group were previously convicted for participating in price fixing and market allocation conspiracies. Therefore my office is launching an investigation pursuant to Section 343 of the General Business Law



and our enforcement powers under the Consent Decree to determine whether collusion between milk distributors has occurred.

Sincerely,



Robert Abrams

RA:pp

Change in Pool Value by Removing Class I Organic Milk July 2013 - June 2015		
	Weighted Average Change \$/cwt	Weighted Average Uniform Price Change %
Northeast	-0.048	-0.23%
Appalachian	-0.009	-0.04%
Florida	-0.026	-0.10%
Southeast	-0.018	-0.08%
Upper Midwest	-0.013	-0.07%
Central	-0.066	-0.34%
Mideast	-0.004	-0.02%
Pacific Northwest	-0.009	-0.05%
Southwest	-0.034	-0.17%
9 Order Weighted Average	-0.028	-0.14%