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VIA HAND-DELIVERY

The Honorable Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Anne L. Alonzo, Administrator
Agricultural Marketing Service
U.S. Department of Agriculture
Room 3071-S; Stop 0201
1400 Independence Avenue, SW
Washington, DC 20250

Dear Secretary Vilsack and Administrator Alonzo:

On behalf of fluid milk processing plants representing more than 90% of the fluid milk processed and packaged in the northeastern United States - including Pennsylvania, New Jersey, New York, Vermont, New Hampshire, Rhode Island, Maine, Massachusetts, and Connecticut, the milk processing companies represented by the Pennsylvania Association of Milk Dealers ("PAMD") and the Northeast Dairy Foods Association ("NEDFA"), collectively "Northeastern Milk Processors," applaud the Department for asking more questions before taking a position on the Organic Trade Association's ("OTA") petition for a hearing to amend all Federal Milk Marketing Orders to provide an exemption from FMMO pooling requirements and hereby provide additional information and urge the Department to deny the OTA hearing request.

PAMD has operated as a trade association since 1933 and currently represents 20 fluid milk processors doing business in the Commonwealth of Pennsylvania, the vast majority of which are subject to the pooling and pricing requirements of federal milk marketing orders. They are also subject to additional premium and pricing requirements under the Pennsylvania Milk Marketing Law. *See e.g.*, Pennsylvania Milk Marketing Board Minimum Wholesale and Retail Prices for December 2015 available at mmb.pa.gov under Pricing (showing a combined fuel adjuster and state-mandated over-order premium above the federal/state mandated Class I minimum price). The vast majority of the PAMD membership purchases and processes raw milk for Class I (fluid) use. The vast majority of PAMD member milk is marketed as from cows not treated with recombinant bovine somatotropin ("rBST"), an artificial growth hormone. The Pennsylvania Department of Agriculture imposes substantiation requirements on processors making such claims, which require record keeping and quality control measures, including

measures to prevent the commingling of milk from cows not treated with rBST with milk from cows that may have been treated with rBST. See Pennsylvania Department of Agriculture, Division of Food Safety, Milk Labeling Standards, Part II Section 7(B)5 (Jan 17, 2008) available for download at <http://www.agriculture.pa.gov/Protect/FoodSafety/Dairy%20and%20Dairy%20Product%20Manufacturing/Documents/Milk%20Labeling%20Standards.pdf>.

NEDFA has operated as a trade association since 1928 and currently represents the interests of dairy product processors, manufacturers and distributors in eight northeast states including: New York, New Jersey, Vermont, New Hampshire, Rhode Island, Maine, Massachusetts, and Connecticut. The membership processes all four classes of milk identified by the northeast federal order.

The plants opposing the OTA hearing request represent 90% of fluid milk processed and packaged in the northeastern U.S. These products include all types of fluid milk and cream products such as whole, 2%, 1%, skim, flavored, buttermilk, and egg nog for sale in, but not limited to, supermarkets, convenience stores, food service locations and schools.

Together, these companies employ more than 12,000 personnel, receive milk from more than 7,000 dairy farmers, and contribute over a billion dollars annually to the agricultural economies of the states in which they operate.

The OTA proposal should not be heard because it runs counter to the basic tenets of the FMMO framework and would provide a competitive advantage to organic milk processors over conventional fluid milk processors.

As the Department is no doubt aware, the AMAA grew out of a need to address the cyclical nature of milk production and to prevent cutthroat competition among dairy farmers for access to the fluid milk market, which paid more for raw milk than other uses. *Smyser v. Block*, 760 F.2d 514, 516 (3d Cir.1985) (“In an unregulated market ‘cutthroat’ competition for more profitable fluid milk sales can lead to an overall decline in prices.”) Before the AMAA, cooperatives formed to, among other things, share the value of all uses of raw milk. *In Re: Borden, Inc., Southland Corp. & Carnation Co.*, 46 Agric. Dec. 1315, 1322-25 (U.S.D.A. Sept. 30, 1987). Sharing the value of the fluid milk market was intended to address the desire of dairy farmers to vie for sales to fluid milk plants in order to gain access to the higher returns associated with fluid milk. However, even cooperatives had difficulty preventing dairy farmers from choosing to pursue sales directly to fluid outlets. *Id.* As a result, federal legislation, ultimately culminating in the AMAA, was adopted to enforce pooling and mitigate efforts to seek out the premium fluid milk market to the exclusion of others. *Id. at 1324*. Thus, one of the objectives of the AMAA was to prevent disorderly marketing conditions by providing for the ability of farmers to receive a uniform price that includes a share of the premium Class I market and thus limits incentives for producers to compete with their neighbor for the more lucrative markets. *Lehigh Valley v. Block*, 829 F.2d 409, 411-12 (3d Cir. 1987).

Based on OTA's description in its letter dated September 29, 2015 suggesting a difference of about \$6.00 per cwt between the pricing that organic farmers receive compared to conventional farmers, it appears that organic milk may be emerging as the latest premium outlet. Giving organic milk an exemption, partial or otherwise, would undercut the FMMO concept that the value of the premium market must be shared by all dairy farmers to prevent uneconomic competition for access to the premium outlet.

No matter what one's views are of the merits of the present system, there can be no doubt that there would be a manifest unfairness and lack of uniform pricing among handlers - a requirement under the AMAA¹ - if the proposed organic exemption were adopted under present day circumstances where conventional fluid milk processors continue to pay into the pool. Organic fluid milk competes head-to-head, with conventional milk. In stores today, conventional fluid milk shares the milk case with organic fluid milk. Competition between conventional and organic milk for the consumer dollar is more pronounced now with the onset of other premium fluid milk products such as milk from cows not treated with rBST and milk from cows not administered antibiotics. These products are better able to compete for a consumer segment that cares about production claims. Yet these products continue to be subject to FMMO pooling obligations and their organic fluid milk competition would not if OTA's proposal is considered and adopted. And, like organic fluid milk, fluid milk that makes claims about the production process is subject to internal, and in some cases governmental, substantiation requirements. *See Discussion supra.* at 1. As such, these types of specialty fluid milk products require record keeping, process verification, and safeguards against commingling as well. Thus, many conventional milk processors find that, like organic milk processors, they cannot readily rely on the call provisions of the FMMOs when they are in short supply of raw milk. This is because manufacturing milk is not necessarily from cows not treated with rBST or antibiotics. And, like organic fluid milk, fluid milk processors also pay premiums above the federally mandated minimum prices, some of which is paid pursuant to state law. *See Discussion supra.* at 1.

Notwithstanding these similarities, the proposed exemption would hand a regulatory cost advantage to organic milk processors. Today, both conventional and organic fluid milk processors are required to make the same payments into the FMMO pools. Any exemption for organic processors - whether partial or full - would hand organic processors money to work with that conventional fluid milk processors would not have. Organic processors would be able to pocket the money, use it to lower prices on store shelves to compete with conventional fluid milk products for those customers that need a nudge to make the switch, use it to pay more to lure dairy farmers to transition and to supply their plants, or some combination thereof.

Conventional fluid milk sales have been slumping for many years now. There has been a 9% decline in conventional milk sales between 2006 and 2013 even as organic milk sales have more than doubled in that same time frame. *See Attachment A, USDA, Economic*

¹ 7 U.S.C.A. § 608c(5)(A) (2015) (providing for uniform prices among handlers subject to limited set of adjustments).

Research Service, *Estimated U.S. sales of organic and total fluid milk products, monthly and annual, 2006-13*.² Having carried the burden of subsidizing other class uses for more than 70 years, even as conventional fluid milk sales are slumping, conventional fluid milk should not have to carry the mantle of the “premium outlet” alone when new premium products, such as organic fluid milk have emerged.

Nor can the proposal be justified because organic pays premiums above minimum prices or because organic cannot use the call provisions of the FMMOs to supplement their supply when their raw milk supply is short. Following that logic as articulated by OTA, since a great proportion of fluid milk today pays in excess of regulated prices and cannot utilize the call provisions of FMMOs to procure raw milk during times when raw milk supplies are short, one can imagine that the OTA proposal, if adopted, is the nose under the FMMO tent. On the precedent of an exemption for organic milk, No rBST use milk, No antibiotic use milk, and other specialty fluid milk products that derive their specialized characteristics in part from the production side will have legitimate and compelling reasons to seek similar exemptions. If there is to be FMMO reform, it should be thoughtful and comprehensive and should not single out substantially similar competitors for advantages, especially here where the disadvantaged group is facing declining demand and where the products made by that group represent a significant portion of the products the AMAA was intended to ensure were available to the public in sufficient quantities.

Despite OTA’s suggestion that the Secretary should take steps to bring forth an adequate supply of *organic milk*, it is well-accepted that under the AMAA, the Secretary, in fixing minimum prices, shall set prices at a level that brings forth an adequate supply of fluid milk. In a USDA publication entitled “Questions and Answers On Federal Milk Marketing Orders,” the Department itself explained, “Federal orders are used to stabilize conditions for *fluid milk* – to make the buying and selling fluid milk an orderly process upon which dairy farmers, milk dealers and consumers alike can depend.” *See* Attachment B, Excerpt from Questions and Answers on Federal Milk Marketing Orders, United States Department of Agriculture, Agricultural Marketing Service, at 1 (Rev’d. Mar. 1996) (*emphasis added*).

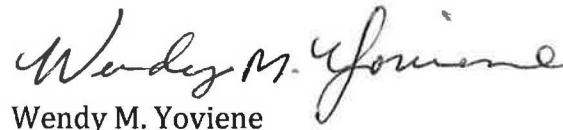
The AMAA was adopted before the Organic Foods Production Act of 1990, but since 1990, Congress has acted to amend the AMAA in the area of federal milk marketing orders, but notably has not seen fit to do so with respect to organic milk. *See e.g.*, Milk Regulatory Equity Act of 2005, PL 109–215, April 11, 2006, 120 Stat 328 (amending section 608c(5)). Congress’ inaction with respect to organic milk in the context of federal milk marketing orders is telling. Without congressional action, OTA (and the Department) may not read into the statute an objective that is not presently authorized in order to give an advantage to a product that has tapped into a marketing niche largely for the elite.

² Also available at: <http://www.ers.usda.gov/data-products/organic-prices.aspx>.

While an exemption from making pool contributions would create competitive issues at the processing level, there is no indication that the exemption if used to lower organic milk prices in stores would be sufficient to bring organic milk within reach of the average consumer. Using OTA's example, if the exemption is \$1.70 and the entire amount were used to lower the store price, that would lower the nationally advertised organic half gallon price of \$3.80 by 7.3-cents, which would still be significantly out of reach for consumers accustomed to a conventional half gallon price of \$1.64.³ There are many consumers, including school children, for whom organic milk is out of reach at a price difference of \$2.16/half gallon (or \$2.09/half gallon if the 7.3-cent adjustment is passed to the consumer). As such, the Department is urged not to countenance the proposed exemption, which would disadvantage conventional processors that are positioned to reach the average consumer.

Thank you for your consideration of this important information.

Respectfully submitted,


Wendy M. Yoviene

Enclosures (2)

cc: Dana Coale
Will Francis
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³ Dairy Market News, Nov 16-20, 2015 Vol. 82, Rep. 46 at 1A, available for download <http://search.ams.usda.gov/mndms/2015/11/DY20151120WEEKLYREPORT.PDF>.

Attachment A

Estimated U.S. sales of organic and total fluid milk products, monthly and annual, 2006-13 1/

	Year	January Sales	February Sales	March Sales	April Sales	May Sales	June Sales	July Sales	August Sales	Sept. Sales	October Sales	November Sales	December Sales	Jan-Dec	Annual change
		(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(Mil lbs)	(%)
Total Organic Milk Products	2013	189	162	186	191	195	179	189	195	192	194	193	199	2,264	5
Total Fluid Milk Products Adj.*		4,572	4,120	4,386	4,337	4,347	3,859	4,068	4,350	4,326	4,496	4,390	4,394	51,645	(2)
Organic milk/Total milk (%)		4.13	3.93	4.24	4.40	4.49	4.64	4.65	4.48	4.44	4.31	4.40	4.53	4.38	
Total Organic Milk Products	2012	193	176	185	169	181	170	164	187	174	194	191	174	2,158	4
Total Fluid Milk Products Adj.		4,694	4,162	4,537	4,340	4,391	4,072	4,136	4,420	4,404	4,618	4,478	4,496	52,748	(2)
Organic milk/Total milk (%)		4.11	4.23	4.08	3.89	4.12	4.17	3.97	4.23	3.95	4.20	4.27	3.87	4.09	
Total Organic Milk Products	2011	171	157	183	170	172	163	167	171	182	179	176	182	2,073	14
Total Fluid Milk Products Adj.		4,814	4,278	4,683	4,411	4,500	4,129	4,195	4,458	4,474	4,653	4,553	4,575	53,723	(1)
Organic milk/Total milk (%)		3.55	3.67	3.91	3.85	3.82	3.95	3.98	3.84	4.07	3.85	3.87	3.98	3.86	
Total Organic Milk Products	2010	138	125	151	142	144	148	151	158	167	159	159	169	1,811	13
Total Fluid Milk Products Adj.		4,819	4,357	4,729	4,515	4,584	4,181	4,261	4,509	4,579	4,714	4,521	4,759	54,528	(2)
Organic milk/Total milk (%)		2.86	2.87	3.19	3.15	3.14	3.54	3.54	3.50	3.65	3.37	3.52	3.55	3.32	
Total Organic Milk Products	2009	133	125	144	126	127	132	133	133	139	138	135	137	1,602	(4)
Total Fluid Milk Products Adj.		4,817	4,369	4,845	4,601	4,613	4,269	4,369	4,611	4,626	4,800	4,679	4,847	55,446	1
Organic milk/Total milk (%)		2.76	2.86	2.97	2.74	2.75	3.09	3.04	2.88	3.00	2.88	2.89	2.83	2.89	
Total Organic Milk Products	2008	142	145	143	134	138	133	129	142	143	144	133	150	1,676	19
Total Fluid Milk Products Adj.		4,811	4,287	4,728	4,556	4,599	4,254	4,282	4,572	4,581	4,812	4,656	4,829	54,967	(0)
Organic milk/Total milk (%)		2.95	3.38	3.02	2.94	3.00	3.13	3.01	3.11	3.12	2.99	2.86	3.11	3.05	
Total Organic Milk Products	2007	114	103	112	108	110	115	111	126	120	134	132	127	1,412	33
Total Fluid Milk Products Adj.		4,858	4,371	4,762	4,586	4,587	4,263	4,310	4,558	4,567	4,779	4,630	4,778	55,049	(0)
Organic milk/Total milk (%)		2.35	2.36	2.35	2.35	2.40	2.70	2.58	2.76	2.63	2.80	2.85	2.66	2.56	
Total Organic Milk Products	2006	83	66	86	81	95	95	84	90	90	99	97	96	1,062	
Total Fluid Milk Products Adj.		4,806	4,313	4,774	4,487	4,626	4,297	4,368	4,608	4,632	4,827	4,712	4,801	55,251	
Organic milk/Total milk (%)		1.73	1.53	1.80	1.81	2.05	2.21	1.92	1.95	1.94	2.05	2.06	2.00	1.92	

1/ These figures are based on the consumption of fluid milk products in Federal milk order marketing areas and California, which represents approximately 92 percent of total fluid milk sales in the United States; an estimate of total U.S. fluid milk sales is derived by interpolating the remaining 8 percent of sales from the Federal milk order and California data.

Total fluid milk products include the products listed plus miscellaneous products and eggnog.

* AMS adjusts sales volumes of total fluid milk products for calendar composition; 2013 sales volume estimates have not yet been adjusted.

SOURCE: AMS-USDA, Federal Milk Market Order statistics, www.ams.usda.gov

Attachment B

Questions And Answers On Federal Milk Marketing Orders



This document reformatted and converted to PDF (with permission) by the Cornell Program on Dairy Markets and Policy. Content of questions and answers has not been altered.

**United States Department of Agriculture
Agricultural Marketing Service
Dairy Division**

AMS — 559

TABLE OF CONTENTS

	Page
INTRODUCTION	1
 QUESTIONS:	
1. What is a Federal milk marketing order?	3
2. What is the scope of the Federal milk order program?	3
3. What are the objectives of a Federal order?	3
4. How does a Federal order attain its objectives?	4
5. Who administers the Federal order program?	5
6. What kind of milk is covered by Federal orders?	5
7. Who is regulated by an order?	5
8. Are dairy farmers controlled in any way?	5
9. Does a marketing order regulate retail prices?	6
10. How is milk priced under an order?	6
11. How are specific price levels determined?	7
12. What is the Minnesota-Wisconsin (M-W) manufacturing grade milk price?	8
13. How is the uniform or blend price to farmers computed?	8
14. How are farmers paid under an order?	9
15. How is multiple component pricing (MCP) used in milk orders?	9
16. How are Federal orders enforced?	10
17. Has the legality of orders ever been tested?	10
18. How are the operating costs of Federal orders defrayed?	10
19. Are Federal orders a substitute for producer cooperatives?	11
20. Does a marketing order guarantee an adequate income to all farmers?	11
21. Are milk handlers required to buy from certain farmers?	11
22. What is a milk marketing agreement?	11
23. Are orders adapted to individual market conditions?	12
24. May an order be issued for any market?	12
25. How is action on establishing an order first started?	12
26. What are the procedures to be followed before an order can be issued?	12
27. Why are these procedures necessary in establishing an order?	13

TABLE OF CONTENTS (CONTINUED)

	Page
QUESTIONS: (continued)	
28. What groundwork must be laid before an order is issued?	13
29. Does the Government provide any help in laying the groundwork?	14
30. How soon after a petition is entered will an order be issued?	14
31. How are orders changed after they have been issued?	14
32. Can orders be voted out after being in effect?	15
33. In what way is the approval of dairy farmers determined?	15
34. Can milk promotion, education and research programs be financed under Federal orders?	15
35. What is the meaning of terms used in Federal orders?	16
a. Producer	16
b. Handler	16
c. Minimum price	16
d. Marketing area	16
e. Marketwide or individual handler pools	16
f. Reserve milk supplies	17
g. Seasonal incentive payment plans	17
 APPENDIXES:	
A. MARKETING AREAS UNDER FEDERAL MILK ORDERS AS OF OCTOBER 1, 1996	19
B. MEASURES OF GROWTH IN FEDERAL MILK ORDER MARKETS, 1950-95	20

These appendixes are updated periodically. Current ones can be obtained by writing the Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, P.O. Box 96456, Washington, D.C. 20090-6456.

Slightly Revised March 1996

QUESTIONS AND ANSWERS ON FEDERAL MILK MARKETING ORDERS

INTRODUCTION

To understand how Federal orders contribute to market stabilization, it is helpful to take a look at the conditions which brought them into being, their objectives, how they are organized and how they operate. These orders are now operating in most of the fluid milk marketing areas of the United States and cover about 70 percent of all U.S. milk marketings (see Appendix B, Measures Of Growth In Federal Milk Order Markets, 1950-95).

Fluid milk (chiefly used as a beverage) flows from dairy farmers to consumers through a vast channel work of modern production, processing and distribution. The marketing system on which this flow of milk depends is fast and highly organized. On a daily schedule, fresh milk flows from farms through local, regional and national processors and distributors, along urban, suburban and rural delivery routes to reach consumers whose appetites also operate on a daily schedule.

Because this supply of milk cannot easily be turned on and off to fit the supply of milk to the demand, the marketing system often runs into trouble with milk prices. At times, marketing conditions can result in wildly fluctuating prices which work unnecessary hardship both on those who depend on milk for a living and those who depend on it for food.

Federal orders are used to stabilize conditions for fluid milk—to make the buying and selling of fluid milk an orderly process upon which dairy farmers, milk dealers and consumers alike can depend.

At one time, dairy farmers delivered milk to homes in the nearby town. The matter of a "reasonable price" was settled through simple agreements between farmers and their customers. But as marketing methods developed, farmers became separated from consumers by distributors and wholesalers who set prices for both farmers and consumers.

The effect of this change was not only to put farmers in a more difficult bargaining position but also to make the pricing of milk to farmers subject to serious new elements of instability.

Farmers observed that prices became unstable chiefly because of fresh milk supplies in excess of daily consumer purchases. Yet, they also observed that