

September 29, 2015

VIA HAND DELIVERY

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: Proposal to amend all Federal Milk Marketing Orders to include a Modified
Wichita Option for Organic Milk**

Dear Ms. Alonzo:

Introduction

On behalf of the Organic Trade Association, and its members, (“OTA”), and pursuant to 7 C.F.R. § 900.22, we request that the Secretary of Agriculture call a hearing to amend all Federal Milk Marketing Orders through the adoption of a new section 74 to 7 C.F.R. Part 1000 – to be entitled “Producer-settlement fund alternative payments by a handler for USDA certified organic milk.” *See* Attachment I. This proposal, if adopted, would continue USDA’s minimum price regulation of organic milk, retain USDA’s information gathering and dissemination regarding organic milk, continue to require that organic milk handlers report to, be audited by and pay the market administrator in the same manner as all other handlers, and provide organic handlers who make an annual election with an alternative mechanism, based upon the historical “Wichita Option”, for meeting their producer-settlement fund obligations.

OTA is the membership-based business association for organic agriculture and products in North America. It is the leading voice for the organic trade in the United States, representing over 8,500 organic businesses across 50 states. Its members include growers, shippers, processors, certifiers, farmers’ associations, distributors, importers, exporters, consultants, retailers and others. OTA’s Board of Directors is democratically elected by its members. OTA’s mission is to promote and protect organic with a unifying voice that serves and engages its diverse members from farm to marketplace.

In 2011, at member request, OTA set up a working group of organic fluid milk members interested in Federal Milk Marketing Order (“FMMO”) issues. Today the organic fluid milk working group’s member companies are: Aurora Organic Dairy, CROPP Cooperative, d/b/a Organic Valley, and WhiteWave Foods. The FMMO Working Group has met periodically to monitor the development of this proposal.

This submission includes this letter, the proposal attached as Attachment I and a summary of the 7 C.F.R. § 900.22 requirement responses, attached as Attachment II. This letter in narrative form is intended to address a number of those § 900.22 requirements.

Background

Federal Milk Marketing Orders (“FMMOs”) were implemented in the 1930s as a set of economic policies to encourage stability of producer milk prices and adequate milk supply for the marketplace. The minimum price and pooling requirements of orders have evolved over time, but have not essentially changed (except for the elimination of individual handler pools in isolated orders) in that time. The concept of USDA certified organic milk, as distinguished from such milk that is not so certified (“conventional milk”) was completely unknown until the adoption of the Organic Foods Production Act of 1990 (“OFPA”), so it has not been a part of the evolution of FMMOs.

Though defined differently and not interchangeable by law, organic and conventional Grade A milk has been and remains treated identically for minimum price and pooling purposes by FMMOs. As a result, the mechanisms of the FMMOs include organic volume but only affect the conventional marketplace.

The adoption of OFPA and the creation of implementing regulations that established the National Organic Program (“NOP”) set in motion the creation of a vibrant stream of USDA certified organic agricultural products. Since 2003, the organic dairy category has grown 356%, and ended 2013 at nearly \$5 billion in annual sales. In 2014, consumer sales of all organic food and non-food products in the United States reached over \$39 billion, up 11.3% from 2013. USDA certified organic milk is thus a relatively new product category that is entirely distinguished from conventional milk by the Agricultural Marketing Service (“AMS”). However, the FMMOs were not designed to address the challenges presented by this dynamic growth for organic dairy farmers, processors or consumers.

FMMOs do not distinguish (except in some information collection activities) conventional and USDA certified organic milk. USDA certified organic milk is treated precisely the same as conventional milk for minimum price and pooling regulatory purposes by AMS Dairy Programs. But by regulation enforced by AMS’ NOP, USDA certified organic milk and conventional milk are not and cannot be interchangeable products. Co-mingling USDA certified organic milk with conventional milk in any fashion causes the certified organic milk to lose its organic status. 7 C.F.R. § 205.301.

A producer and handler's commitment to USDA certified organic milk is not undertaken lightly, and USDA certification cannot be obtained overnight. A USDA-accredited certifying agent must certify organic milk production and processing facilities. It takes at least three years to convert an existing conventional farm and herd to organic milk production. Under the OFPA and its implementing regulations, organic production is defined as "a production system that is managed to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity." 7 C.F.R. §205.2. Organic cows are fed a specific organic diet of organic foodstuffs and are required to be out on pasture during the grazing season, which shall not be less than 120 days per calendar year. 7 C.F.R. §§ 205.237 – 205.240. Once certified, organic cows can never be treated with antibiotics or supplemented with any growth hormones. 7 C.F.R. § 205.238.

Organic processors are also subject to rigorous standards including insuring that certified organic and conventional milk are not comingled at plants that may package both products. This requires special scheduling, unloading and processing schedules that maintain the integrity of the USDA certified organic milk.

Organic producers and processing facilities must maintain detailed books and records, all of which are audited by the certifying agent at least annually. In short, USDA certified organic milk is subject to appropriate but rigorous audit standards enforced by the same agency that adopts and enforces FMMOs. There is also no doubt that USDA certified organic milk costs more to produce and package than conventional milk.

Not surprisingly, USDA certified organic milk is purchased by processors significantly differently than the long-standing practices for conventional milk. Most importantly, the prescribed lead time for organic dairy farm and herd conversion necessitates that development and procurement of supply begin up to 3 years in advance. This reality makes it impossible for near term FMMO policies to impact or benefit the organic marketplace. Accordingly and unlike conventional milk, USDA certified organic milk tends to be purchased under long-term, forward priced contracts. USDA organic milk is not purchased under the classified pricing system employed by cooperatives prior to the adoption of FMMOs or generally employed by FMMOs thereafter. All certified organic milk commands one price from each purchaser, almost as if it were its own class of milk. That price paid by each purchaser for all certified organic milk, regardless of use, is significantly higher than the Class I price including any non-USDA regulated over-order premiums paid for conventional milk. For example, organic milk prices for all milk (not classified, but all milk) in the Upper Midwest averaged more than \$30 per cwt in 2014. <http://www.farmers.coop/producer-pools/dairy-pool/pay-price/dairy-pay-price-comparison-chart>. In contrast, the All-Milk Price as reported by USDA averaged \$24, which was a record high. As importantly, as FMMO pay prices minimum prices (as well as overall mailbox prices) have dropped in 2015, organic milk mailbox prices have moved in the opposite direction, averaging more than \$34 per cwt in the Upper Midwest. <http://www.farmers.coop/producer-pools/dairy-pool/pay-price/dairy-pay-price-comparison-chart>.

Given the lack of interchangeability of conventional milk for USDA certified organic milk, if an organic milk processor is short of organic milk, it cannot just supplement with conventional milk from the FMMO because that milk may not be sold as organic or co-mingled with organic milk. Since organic farm milk conversion takes three or more years and since USDA certified organic milk is subject to long-term forward priced contracts on an all milk basis, organic processors cannot easily make up for product shortages outside the FMMO either. Regardless, the Class I differential and FMMO shipping requirements are meaningless when it comes to an organic processor obtaining milk. Thus FMMOs presently fail to “bring forth an adequate supply” of USDA certified organic milk. 7 U.S.C. § 608c(18). This is a significant disorderly marketing condition that is made worse, not better, by FMMOs.

Even though organic processors cannot use FMMOs to obtain additional supplies of USDA certified organic milk, most organic processors must still contribute to the FMMO producer settlement funds. This result is not fair. As approximately 65% of organic milk is processed into organic fluid milk (Class I) products, organic processors generally pay into the FMMO producer settlement funds each month. These monies are shared with conventional dairy farmers even though those conventional farmers cannot, by law, make their milk available to organic dairy processors as needed. These payments to the producer settlement fund cost the organic industry (dairy farmers and processors alike) tens of millions of dollars a year; money that could be spent on further developing a sustainable organic milk supply desired by consumers. It must also be noted that since organic processors pay one high price for all USDA certified organic milk, they have an incentive to balance their organic milk supplies by manufacturing other organic dairy products that can command a higher consumer price, rather than using the FMMOs to balance their supplies.

OTA also notes that for the past several years especially, but also as a general matter, consumer demand for organic milk (as well as all organic products generally) has outstripped supply. Organic handlers really do need additional supplies of USDA certified organic milk, but cannot grow the supply through their producer patrons fast enough especially given the time constraints imposed by the NOP. But the situation is clearly made worse, not better, by the fact that FMMOs simply cannot and do not bring forth an adequate supply of milk to meet organic consumer demands. FMMOs current regulatory rules actually inhibit the growth of this critical market – to the detriment of USDA certified organic dairy farmers, organic handlers and organic consumers.

Overview of OTA Proposal

OTA’s proposal seeks to remedy the current disorderly marketing conditions that result from USDA certified organic milk contributing money to producer settlement funds without any evidence that the FMMOs can provide an adequate supply of organic milk to organic processors. The proposal would *not* exempt organic milk from the FMMOs, but rather provide for an alternative, audited mechanism for USDA certified organic milk handlers to meet their minimum price obligations under the various Orders. In addition, since no outright exemption is sought, organic handlers would continue to report volume and prices paid for milk to the various market administrators.

Organic handlers would remain subject to audit and verification of their books and records by the market administrators. And organic handlers would continue to pay, at the same rate as all other handlers, the market administrator assessments under the order. AMS would still be able to collect and disseminate information collected from organic handlers. Further, the proposal would apply only to USDA certified organic milk and not to other differentiated milk products that are not subject to the rigorous, costly and time consuming certification requirements of the NOP, administered by AMS – e.g., rBST free milk, A2 milk, kosher or halal milk.

The proposal (attached as Attachment 1 to this letter) would, instead of an exemption, amend the FMMOs to permit USDA certified organic milk handlers to elect on an annual basis to account to the FMMO producer settlement funds based upon either the current method of payment or on a basis similar to that permitted for partially regulated plants under 7 C.F.R. § 1000.76 – a modified version of the “Wichita Option.” Under the existing Wichita Option, 7 C.F.R. § 1000.76(b), a partially regulated distributing plant can meet its minimum pricing and pooling obligations by providing sufficient evidence to the market administrator that it is paying all its farmers a plant blend price that equals or exceeds what would otherwise be its total producer and producer settlement fund obligation if it were fully regulated on that volume subject to federal regulation.

An organic processor electing this modified Wichita Option would receive a credit against its payment to the producer-settlement fund for the amount by which the prices paid to its organic dairy farmers for all of its milk (not on a classified basis) exceeded the Class I price of the milk for the month, plus a threshold amount set at \$2.90 per cwt. The credit, however, could never reduce the payment due by an electing handler below zero (i.e., an organic handler making the election could not receive a payment out of the producer settlement fund). Also any handler making the modified Wichita Option election could not use the volume of USDA certified organic milk to qualify conventional milk for diversion.

The \$2.90 proposed threshold is used because it is the average net over order premium announced for conventional Class I milk by the Central Milk Producers Cooperative (CMPC). CMPC is the largest and longest-active regional milk-marketing agency and it operates in the largest pool of reserve supply of milk available to supply various markets, including its own. Any credit against the producer settlement fund for USDA certified organic milk ought to account not only for the Class I price, but also for non-USDA mandated over order premiums paid in the marketplace for conventional milk.

By way of example, under the proposal submitted as Attachment I, if the Class I price for the month is \$22.00 and the electing organic handler paid all of its USDA certified organic dairy farmers an all milk price of \$26.60, then that handler would receive a \$1.70 per cwt credit against its producer settlement fund obligation ($\$26.60 - (\$22.00 + \$2.90) = \1.70). If that handler’s usual obligation for the month were \$2.00 per cwt, it would still pay \$0.30 per cwt to the producer settlement fund. If the handler’s usual obligation was \$1.60, then it would pay zero, but not receive any benefit by way of a payment from the fund for the \$0.10 “over-credit”.

The intent of the proposal is to make the annual election applicable to all certified organic milk received at the handler’s plant and not just a portion of that certified organic milk. Moreover, it

is anticipated that a handler that processes both certified organic and conventional milk would file two handler reports (one for the certified organic milk and one for the conventional milk). For instance, as to an electing handler, the proposal would prevent using certified organic milk to qualify conventional milk for diversion.

The credit concept should protect organic dairy farmers (the vast majority of whom qualify as small businesses under the Regulatory Flexibility Act (“RFA”)) from organic processors using the modified Wichita Option as an opportunity to lower payments to organic dairy farmers because the credit could create economic incentives to pay organic farmers more rather than paying the producer settlement fund – even as today the Wichita Option creates the economic incentive for handlers who can use it to make that payment to their farmer patrons rather than to the producer settlement fund. Each processor of course would have to independently determine whether to make the election and make its own decisions regarding what payments to make to USDA certified organic dairy farmers. OTA does not and cannot legally take any position with respect to these independent and independently determined economic outcomes. OTA does anticipate that adoption of the proposal would positively impact USDA certified organic dairy farmers, processors and consumers as the organic industry would be able to invest the funds that presently do not bring forth an adequate supply of USDA certified organic milk in further organic production to meet growing consumer demand.

OTA of course acknowledges that conventional milk blend prices would be reduced by a corresponding amount as the modified Wichita Option is utilized. The Upper Midwest Market Administrator’s office has estimated that for the two year period ended June 2015, the impact of the proposal if adopted, assuming all certified organic Class I milk were subject to the credit at the 100% level, would be approximately two cents per cwt; the impacts of Class II, Class III and Class IV are not estimated and inclusion of those handler reported pounds would reduce the impact on the pool. OTA has no reason to believe that the national blend price impact would be significantly different if the proposal were to be adopted and fully utilized by organic handlers with a 100% credit. However, the benefit to the organic industry including the vast majority of the USDA certified organic dairy farmers who qualify as small businesses under the RFA would at least equal this cost to conventional industry. However, if as expected the monies presently paid to the producer settlement fund for the benefit of conventional farmers are invested in further organic milk production, then producers, processors and consumers of organic milk would benefit from adoption of this proposal.

The proposal does not affect in any way the existing FMMO processor assessments for auditing and verification – all of which would remain in effect. The Market Administrators would still need to review books and records in order to verify the application and level of any credit. Since the Market Administrators would have access to the books and records, they could also collect and publish (subject to confidentiality concerns if there were to be fewer than 3 handlers) market information that would be useful to farmers and other interested persons.

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Conclusion

For all of the foregoing reasons, OTA respectfully requests that the Secretary issue a Notice of Hearing to consider the Proposal attached as Attachment I and schedule a hearing for early 2016.

Respectfully submitted,



Charles M. English, Jr.

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

ORGANIC TRADE ASSOCIATION PROPOSAL - ATTACHMENT I

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 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.

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Attachment II

§ 900.22 Proposal Submission Requirements

Pursuant to 7 C.F.R. § 900.22, the Organic Trade Association (“OTA”) addresses the following issues, to the extent applicable:

- (a) “Explain the proposal. What is the disorderly marketing condition that the proposal is intended to address?”

OTA’s proposal is explained in detail in the cover letter. Federal Milk Marketing Orders (“FMMOS”) presently fail to bring forth an adequate supply of USDA certified organic milk and indeed actually operate presently in such a way as to inhibit the growth of an adequate supply of USDA certified organic milk. Organic handlers pay a price substantially higher than the Class I price for all of their milk (no classified prices) and contribute to the producer settlement fund, and yet do not receive the quid pro quo benefits that are supposed to be attached to paying into the producer settlement fund – an assurance of an adequate supply of milk. This is both disorderly and not a fair result.

- (b) “What is the purpose of the proposal?”

OTA’s cover letter accompanying the Proposal answers this query. The proposal would restore a measure of fairness to the treatment of USDA certified organic milk and should result in the organic industry being able to better bring forth an adequate supply of USDA certified organic milk. The proposal, if adopted, should alleviate the present FMMO disorderly marketing condition in which USDA certified organic milk handlers contribute to the producer settlement fund, but cannot receive needed supplies of USDA certified organic milk when such milk is in short supply.

- (c) “Describe the current Federal order requirements or industry practices relative to the proposal.”

OTA’s cover letter accompanying the Proposal answers this query.

- (d) “Describe the expected impact on the industry, including producers and handlers, and on consumers. Explain/Quantify.”

OTA’s cover letter accompanying the Proposal answers this query. The organic industry should be better able to respond to growing consumer demand by having money available to invest in future organic milk production; that money today is paid to the producer settlement fund for the benefit of conventional dairy farmers and does not in turn result in an adequate supply of USDA certified organic milk being made available as needed to organic handlers. Consumers would benefit from increased investment by the organic industry in additional organic production.

(e) “What are the expected effects on small businesses as defined by the Regulatory Flexibility Act (5 U.S.C. 601-612)? Explain/Quantify.”

1. Small businesses that operate regulated organic handlers would see a decrease in their obligation to the producer settlement fund that they could then invest in future organic production;
2. Small businesses that are USDA certified organic dairy farms could negotiate with their organic handlers for a portion or all of the expected reduction in the present payment to the producer settlement fund; and
3. Small businesses that are not certified organic farms would see a reduction in their FMMO minimum uniform or statistical uniform price. The Upper Midwest Market Administrator’s office has estimated that for the two year period ended June 2015, the impact of the proposal if adopted, assuming all certified organic Class I milk were subject to the credit at the 100% level, would be approximately two cents per cwt; the impacts of Class II, Class III and Class IV are not estimated and inclusion of those handler reported pounds would reduce the impact on the pool. OTA has no reason to believe that the national blend price impact would be significantly different if the proposal were to be adopted and fully utilized by organic handlers with a 100% credit.

(f) “How would adoption of the proposal increase or decrease costs to producers, handlers, others in the marketing chain, consumers, the Market Administrator offices and/or the Secretary? Explain/Quantify.”

OTA’s cover letter accompanying the Proposal answers this query. Also the response to paragraph (d) answers the question as to the impact on consumers. The Market Administrators offices would continue to collect handler assessments. A number of the Market Administrator offices today collect information regarding organic milk, but adoption of the proposal would likely require modifying existing software and auditing procedures in order to track compliance with and application of the credit in the modified Wichita Option.

(g) “Would a pre-hearing information session be helpful to explain the proposal?”

Yes.