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Proposed Rule to Exempt Organic Producers from Assessment by Research and Promotion Programs

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Horizon Organic Dairy would like to thank the people at the United States Department of Agriculture's Agricultural Marketing Service for the effort they have put forth in the creation of this proposed rule. In Section 10607¹ of the 2002 Farm Bill², Congress completely exempted the organic industry from payment of assessments arising from marketing research and promotion orders through an amendment to Section 501 of the Federal Agriculture Improvement and Reform Act (FAIR) of 1996.³

¹ Pub. L. 107-171 codified in several places in the U.S. Code, and known as Section 10607 of the Farm Security and Rural Investment Act, hereinafter referred to as "the Exemption," and/or "10607."

² Pub. L. 107-171 codified in several places in the U.S. Code, and known as the Farm Security and Rural Investment Act, hereinafter referred to as "the 2002 Farm Bill."

³ Pub. L. 104-127 codified at several places in the U.S. Code, and known as the Federal Agriculture Improvement and Reform Act of 1996 hereinafter referred to as the "FAIR Act."

The 2002 Farm Bill provides:

SEC. 10607. EXEMPTION OF CERTIFIED ORGANIC PRODUCTS FROM ASSESSMENTS.

(a) IN GENERAL- Section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401) is amended by adding at the end

The following:

e) EXEMPTION OF CERTIFIED ORGANIC PRODUCTS FROM ASSESSMENTS

(1) IN GENERAL- Notwithstanding any provision of a commodity promotion law, a person that produces and markets solely 100 percent organic products, and that does not produce any conventional or nonorganic products, shall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm (as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

2) REGULATIONS- Not later than 1 year after the date of enactment of this subsection, the Secretary shall promulgate regulations concerning eligibility and compliance for an exemption under paragraph (1).

Horizon Organic Dairy is the world's leading organic dairy company and Horizon Organic™ is the leading, dedicated organic, retail brand in any food category in the United States. We also market the Organic Cow of Vermont™ label. Our company's purchases support hundreds of thousands of acres of organic agriculture, representing the largest commitment to the stewardship of organic agriculture on the planet. Our products can be found in over 64% of all grocery stores in the United States, and nearly all natural foods stores.

Horizon Organic Dairy owns organic dairy farms in Maryland and Idaho. Our contract producers are located in the states of Colorado, Pennsylvania, New York, Maine, New Hampshire, Vermont, Michigan, Wisconsin, Minnesota, California, and Oregon.

Horizon Organic Dairy is one of the few companies that focuses exclusively on certified organic food products. The issue of "organic integrity" has always been our number-one calling. We have always, and will always, remain true to the organic mission. The shared vision of Horizon Organic Dairy team members is to see millions of acres of land converted to organic, sustainable farming methods. Through our contracts with independent producers for the purchase of milk, heifers, and feed ingredients we are seeing our dream fulfilled. Increased organic production should boost the economy in small towns, bring the next generation back to the farm, and lower the American farmer's dependence on agriculture subsidies.

General Comments:

Horizon Organic Dairy acknowledges, and generally supports, the comments submitted by CROPP Cooperative, doing business as Organic Valley.

In January 2004 Horizon Organic Dairy submitted comments to the 7 CFR Part 900 [Docket Number FV-03-900-1 PR] Page 67381 of the Federal Register Vol. 68, No. 231, *Proposed Rule to Exempt Organic Producers and Marketers from Assessment for Market Promotion Activities under Marketing Order Programs*. "Horizon Organic does have some particular concerns. We therefore wish to stress the importance of the following issues, so that the Secretary can address them in the final rule on this subject. We anticipate submission of more detailed comments, concerning dairy, when the second proposed rule to fully implement Section 10607 is published." Horizon Organic Dairy has not yet seen the department's response to those January 2004 comments. We therefore respectfully request the department review those comments in light of Pages 22689-22702 of the Federal Register Vol. 69, Number 80 and incorporate our prior comments herein by reference.

We commend the department for rulemaking that would solely use the organic certification documents from a USDA-accredited certifier to satisfy the eligibility requirements of “100 percent organic” as defined in section 2103 of the Organic Foods Production Act of 1990⁴, hereinafter referred to as OFPA.

We also commend the Secretary for recognizing, and promoting the fact, that Congress in Section 10607 of the 2002 Farm Bill intended to exempt the organic industry from paying into marketing promotion and research orders, and not solely exempt organic producers by its determination that “producers, handlers, first handlers, processors, importers, exporters, feeders, and seed stock producers may be eligible for exemption⁵...”

There are two amendments in the *Proposed Rule to Exempt Organic Producers from Assessment by Research and Promotion Programs* which are most relevant to Horizon Organic Dairy. They are the amendment to 7 CFR Part 1150 addressing the Dairy Promotion and Research Order and the amendment to 7 CFR Part 1160 addressing the Fluid Milk Promotion Order.

7 CFR Part 1150 Dairy Promotion and Research Order:

Federal Register Vol. 69, Number 80 beginning on p. 22694

1. The authority citation for Part 1150 is revised to read as follows:

Authority: 7 U.S.C. 4501-4514 and 7 U.S.C. 7401.

2. Add a new Sec. 1150.157 to read as follows:

Sec. 1150.157 Assessment exemption.

(a) A producer described in Sec. 1150.152(a) and (b) who produces and markets solely 100 percent organic products and does not produce any conventional or non-organic products shall be exempt from the payment of assessments on milk provided the milk is produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

(b) To apply for an exemption under this section, a producer pursuant to Sec. 1150.152(a) and (b) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), and a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption.

(d) If a producer described in Sec. 1150.152(a) and (b) complies with the requirements of this section, the Board will grant an assessment exemption and issue a Certificate of Exemption to the producer within 30 days of receipt of the producer's request.

⁴ 7 U.S.C. 6502

⁵ Proposed Rule To Exempt Organic Producers From Assessment by Research and Promotion Programs [Docket Number PY-02-006] RIN 0581-AC1:

Page 22689-22702 of the Federal Register Vol. 69, Number 80

(e) The producer described in paragraph (c) of this section shall provide a copy of the Certificate of Exemption to each person responsible for remitting assessments to the Board on behalf of the producer pursuant to Sec. 1150.152.

(f) The person responsible for remitting assessments to the Board pursuant to Sec. 1150.152 shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board pursuant to Sec. 1150.172.

Comments on proposed 7 CFR 1150.157(a):

This wording in the proposed rulemaking, and the examples appearing after it, demonstrate that if the producer has a split operation under the OFPA, *and produces a crop unrelated to the one for which the exemption is sought*, the producer is ineligible for an exemption. Rendering a certified organic producer who produces *any* non-organic commodity ineligible would be in conflict with the OFPA and Congressional intent as expressed in 10607.

Horizon Organic Dairy believes any construction of the 10607 exemption statute that creates a needless conflict with OFPA (which expressly authorizes split operations) renders the proposed rule ineffective to the extent of the conflict. In other words, because the OFPA is an existing statute, and the Exemption is available only to those having satisfied the rigors of the federal certification program, the Secretary must construe the Exemption's provisions to maximize, rather than narrow, the field of eligible applicants. Any other construction of Section 10607 fails to satisfy Congressional intent regarding the scope of the Exemption. The following examples highlight the deficits of the proposed approach.

Example #1: A certified organic farmer buys 200 acres adjacent to his organic farm and begins to transition the land to make it eligible for organic certification. The adjacent ground is currently in conventional hay. During the three years that land is transitioning to become eligible for federal organic certification the hay crop may not be sold or labeled as organically produced. Yet, if the farmer sells the hay on the conventional market, the proposed rule would bar that farmer's eligibility for the exemption. If the rule is enacted as proposed, that organic farmer no longer qualifies for exemption on his other program crops such as organic milk, organic soybeans, etc. The proposed rule would then actually operate to frustrate the expansion of organic agriculture, and undermine the pro-competitive aspect of the Exemption. In short, it would substitute government regulation for competition and conflict with existing provisions of the OFPA, thereby frustrating Congressional intent.

Example #2: The organic regulations at 7 C.F.R. Part 205.202(c) of the USDA AMS National Organic Program Rule⁶ specifically require an organic operation to maintain a buffer area between the organic farm's crops and any neighboring non-organic fields. If the crops growing in the buffer zone are harvested, that crop may not be marketed or labeled as organically produced. If those crops are sold on the conventional market, under the proposed rule the certified organic entity would be penalized for complying with the federal program rules and lose eligibility for the Exemption. On these facts, the proposed rule would be in conflict with OFPA and Congressional intent. The legal status of the buffer zone crops is solely and exclusively the consequence of following the organic regulations.

⁶ 7 CFR Part 205, [Docket Number: TMD-00-02-FR], RIN: 0581-AA40, USDA AMS, National Organic Program, hereinafter referred to as the "NOP Rule."

Example #3: An organic cow producing organic milk becomes ill. After treatment with organically approved methods the animal does not appear to be returning to health. The NOP Rule states that a producer must not “Withhold medical treatment from a sick animal in an effort to preserve its organic status. All appropriate medications must be used to restore an animal to health when methods acceptable to organic production fail. Livestock treated with a prohibited substance must be clearly identified and shall not be sold, labeled, or represented as organically produced.”⁷ An animal treated with a prohibited substance must be removed from the organic herd. Under the proposed rule that farmer is then producing organic and non-organic cattle, thus rendering the entire operation ineligible for the Exemption. The non-organic status of the cow is a direct and proximate consequence of following the organic regulations. The proposed rule must fail to the extent it uses compliance with the federal organic rules as the factual predicate for disqualifying the farmer. Such an outcome conflicts with the OFPA and Congressional intent as expressed in the Exemption statute.

Example #4: A 100% organic dairy farm decides to expand its operation by undertaking to convert some non-organic crop land to organic by placing it under organic production practices. Under the existing organic rules, it is necessary to farm the land organically for three years to complete the transition. Any crops harvested from that land during those three years are not yet eligible to be marketed or labeled as organically produced. Yet, under the proposed rule that farmer would no longer be eligible for the Exemption despite its status as a 100% organic dairy. If the non-organic crops are commodity program crops and marketed in the conventional market, he/she should be responsible for those program fees, but not disqualified from the exemptions for his/her organic products. Disqualification on such facts conflicts with OFPA and Congressional intent as expressed in the Exemption statute.

Example #5: A certified organic dairy farm produces and markets organic milk. All bull calves are sold off the farm and are purchased by non-organic buyers. The organic market in the area is not developed enough to absorb all of the organic bull calves produced on organic dairies. Under the proposed rule, the mere incidental sale of non-organic products would unfairly bar from eligibility this organic dairy producer and frustrate the growth of the organic marketplace. To disqualify the certified organic dairy farmer would be in irreconcilable conflict with the OFPA and Congressional intent as expressed in the Exemption statute.

Comments on proposed 7 CFR 1150.157(b) and (c):

Horizon Organic Dairy agrees with the proposed rule that any form that a producer is required to submit to the appropriate commodity board to determine exemption eligibility should contain only the following: name, address, copy of the organic certificate, and a signed declaration that the producer meets the qualifications for exemption. If the form requires information beyond what is outlined in proposed 1150.157 (c), the public must have a chance to comment.

The NOP Rule at 204.404 (b) (1-4) delineates the information required to appear on an organic certificate: (b) The certifying agent must issue a certificate of organic operation which specifies

⁷ 7 CFR Part 205, [Docket Number: TMD-00-02-FR], RIN: 0581-AA40, USDA AMS, National Organic Program 205.238(c)(7)

the: (1) Name and address of the certified operation; (2) Effective date of certification; (3) Categories of organic operation, including crops, wild crops, livestock, or processed products produced by the certified operation; and (4) Name, address, and telephone number of the certifying agent.

This information is more than sufficient to allow the commodity board to perform Exemption eligibility due diligence.

Suggested rewrite of Sec. 1150.157 Assessment exemption:

1. The authority citation for Part 1150 is revised to read as follows:

Authority: 7 U.S.C. 4501-4514 and 7 U.S.C. 7401.

2. Add a new Sec. 1150.157 to read as follows:

Sec. 1150.157 Assessment exemption.

(a) A producer described in Sec. 1150.152(a) and (b) who produces and markets solely 100 percent organic milk shall be exempt from the payment of assessments on that milk, provided the milk is produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

(b) To apply for an exemption under this section, a producer pursuant to Sec. 1150.152(a) and (b) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), and a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption.

(d) If a producer described in Sec. 1150.152(a) and (b) complies with the requirements of this section, the Board shall grant an assessment exemption and issue a Certificate of Exemption to the producer within 30 days of receipt of the producer's request.

(e) The producer described in paragraph (c) of this section shall provide a copy of the Certificate of Exemption to each person responsible for remitting assessments to the Board on behalf of the producer pursuant to Sec. 1150.152.

(f) The person responsible for remitting assessments to the Board pursuant to Sec. 1150.152 shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board pursuant to Sec. 1150.172.

7 CFR Part 1160 Fluid Milk Promotion Program:

Federal Register Vol. 69, Number 80 beginning on p. 22695

4. The authority citation for Part 1160 is revised to read as follows: Authority: 7 U.S.C. 6401-6417 and 7 U.S.C. 7401.

5. In Sec. 1160.211, paragraph (a)(1) is revised to read as follows: Sec. 1160.211 Assessments.

(a)(1) Each fluid milk processor shall pay to the Board or its

designated agent an assessment of \$.20 per hundredweight of fluid milk products processed and marketed commercially in consumer-type packages in the United States by such fluid milk processor. Any fluid milk processor who markets milk of its own production directly to consumers as prescribed under section 113(g) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4504(g)), and not exempt under Sec. 1160.108 or Sec. 1160.215, shall also pay the assessment under this subpart. The Secretary shall have the authority to receive assessments on behalf of the Board.

6. Section 1160.215 is added to read as follows:

Sec. 1160.215 Assessment exemption.

(a) No assessment shall be required on fluid milk products exported from the United States.

(b) A fluid milk processor described in Sec. 1160.211(a) who produces and markets solely 100 percent organic products shall be exempt from the payment of assessments on fluid milk products produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502). For purposes of this section, produce means to grow or produce food, feed, livestock, or fiber or to receive food, feed, livestock, or fiber and alter that product by means of feeding, slaughtering, or processing.

(c) To apply for an assessment exemption, a fluid milk processor described in Sec. 1160.211 paragraph (a) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as the fluid milk processor continues to be eligible for the assessment exemption.

(d) The request shall include the following: The fluid milk processor's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), and a signed certification that the applicant meets all of the requirements specified in paragraph (b) of this section for an assessment exemption.

(e) The Board will grant an assessment exemption to any fluid milk processor meeting the criteria in Sec. 1160.215(b) and issue a Certificate of Exemption to the fluid milk processor within 30 days of receipt of the fluid milk processor's request, provided such fluid milk processor meets the requirements of this section.

Comments on proposed 7 CFR 1160.215(b):

Unlike the dairy promotion language discussed above, the fluid milk promotion section does rely on the definition of “produce” that appears in the proposed rule. That definition authorizes eligibility for persons that *“grow or produce food...or... receive food...and alter that product by means of... processing.”* There are a number of certified organic entities that meet this definition, including Horizon Organic Dairy.

Horizon Organic Dairy both “produces” and “processes” 100% certified organic milk. Without regard to whether the assessment funds are remitted by Horizon Organic Dairy or by the facility where its milk is processed after receipt, Horizon Organic Dairy is the paying entity and is responsible for the fees. Under the proposed rule, Horizon Organic is the processor. At plants

where Horizon Organic toll processes, it leases time and pays for the equipment. The for-hire facility is the agent of Horizon Organic and all details of the production of the final product are determined and controlled by Horizon Organic, from our recipe for the product to the container in which it is placed. Horizon Organic is responsible for any assessments.

It is legally irrelevant that the designated agent transfers the funds to the commodity board to satisfy Horizon Organic Dairy's obligation. The Exemption requires only that the product's owner, Horizon Organic Dairy, is 100% organic and this is appropriate under the federal organic program when the producers and the and the processor/handlers (Horizon Organic Dairy) are 100% organic. It is very clear, according to the OFPA and the NOP Rule that to be labeled as 100% organic, all such milk must be handled, stored, processed, and packaged separately from its conventional counterpart. The legal significance of these requirements is that Horizon Organic's processing is 100% organic.

It is also legally irrelevant that the processing facility is a "split operation" under the OFPA. The Fluid Milk Promotion assessment is based on accessing "processors" not "processing facilities." Moreover, Congress based the Exemption on the OFPA's definition of "farm" not its definition of "handling operation." The clear intent of Congress here was that organic milk, produced on an certified organic farm under the OFPA, and processed by an organic processor that is certified to handle organic milk, be exempt from assessment.

In sum, although the Secretary did not recognize any solely organic processors in the proposed rule, Horizon Organic Dairy is certified and operates as a 100% organic processor and thereby qualifies for the foregoing exemption. Horizon Organic Dairy qualifies under the OFPA definition of "processing⁸," the NOP definition of "processing⁹," and Horizon Organic Dairy qualifies as a "processor" as defined under 7 CFR 1160.601¹⁰ and 7 CFR 1160.108¹¹. Horizon Organic Dairy also qualifies as a "handler" under 7 CFR 205.2, under OFPA 6502 and under 7 CFR 100.9.¹²

Suggested rewrite of 7 CFR Sec. 1160.215 Assessment exemption:

(b) A fluid milk processor described in Sec. 1160.211(a) which includes a processor defined in 7 CFR 1160.601 and 7 CFR 1160.108, who produces and markets organic dairy products, and who does not produce any conventional or non-organic dairy products, shall be exempt from the payment of assessments on fluid milk products produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502). For purposes of this section, produce means to grow or produce food, feed, livestock, or

⁸ OFPA 6502.17

⁹ 7CFR Part 205.2

¹⁰ (i) Fluid milk processor means any person who is defined as a fluid milk processor under the order, or under the proposed order on which the initial referendum is held.

¹¹ (a) Fluid milk processor means any person who processes and markets commercially fluid milk products in consumer-type packages in the United States (excluding fluid milk products delivered directly to the place of residence of a consumer), except that the term fluid milk processor shall not include in each of the respective fiscal periods those persons who process and market not more than 3,000,000 pounds of such fluid milk products during the representative month, which shall be the first month of the fiscal period.

¹² Handler means (b) Any person who receives packaged fluid milk products from a plant for resale and distribution to retail or wholesale outlets, any person who as a broker negotiates a purchase or sale of fluid milk products or fluid cream products from or to any pool or nonpool plant, and any person who by purchase or direction causes milk of producers to be picked up at the farm and/or moved to a plant.

fiber or to receive food, feed, livestock, or fiber and alter that product by means of feeding, slaughtering, or processing.

(c) To apply for an assessment exemption, a fluid milk processor described in Sec. 1160.211 paragraph (a) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as the fluid milk processor continues to be eligible for the assessment exemption.

(d) The request shall include the following: The fluid milk processor's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), and a signed certification that the applicant meets all of the requirements specified in paragraph (b) of this section for an assessment exemption.

(e) The Board shall grant an assessment exemption to any fluid milk processor meeting the criteria in Sec. 1160.215(b) and issue a Certificate of Exemption to the fluid milk processor within 30 days of receipt of the fluid milk processor's request, provided such fluid milk processor meets the requirements of this section.

In conclusion, Horizon Organic Dairy acknowledges that certain comments to this proposed rule appear to wish a rewrite of the statute to prevent certain corporate entities from receiving equal protection of the laws based upon a misperception of the Exemption and its purpose. Nothing in the law permits USDA to make such distinctions. Moreover, OFPA exemptions are plainly available regardless of corporate structure so long as the person or entity is itself in 100% organic production in the relevant crop.