UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HORIZON ORGANIC DAIRY, LLC,

PETITIONER,

v.

BROOKE ROLLINS, SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE,

RESPONDENT.

Docket No. 25-J-0063

PETITION CONTESTING APPLICATION OF CERTAIN FEDERAL MILK MARKETING ORDER REGULATIONS AND OF OBLIGATIONS ASSESSED TO PETITIONER THEREUNDER

[7 U.S.C. § 608C(15)(A) AND 5 U.S.C. § 551, ET AL.]

Pursuant to 7 U.S.C. § 608c(15)(A), the above-named petitioner respectfully represents that:

1. Petitioner, Horizon Organic Dairy, LLC ("Horizon" or "Petitioner") is a corporation incorporated and existing under the laws of the State of Colorado having its principal place of business at 12003 Airport Way, Suite 200, Broomfield, Colorado 80021. Petitioner was incorporated on July 28, 2006, and has transacted business in Colorado since July 31, 2006. The names of its officers, their addresses, and the positions which they hold are shown on **Exhibit 1** attached hereto.

2. Petitioner's complaint pertains to the entirety of 7 C.F.R. Parts 1000 – 1131, namely, the ongoing regulation of Petitioner under the Federal Milk Marketing Order system ("FMMOs"). Complaint is made of the monthly charges paid by Petitioner as incurred directly by Petitioner or indirectly via its co-manufacturers and handler partners for payments due to the various USDA producer settlement funds under the FMMOs.

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3. Attached as **Exhibit 2** is an affidavit by an officer of the Petitioner having knowledge of the facts stated in the petition. The affidavit verifies the petition and that this petition is filed in good faith and not for purposes of delay.

I. BACKGROUND

A. Petitioner

4. Petitioner operates, and during the relevant period (beginning April 18, 2019, and ongoing) operated, at least one milk distributing plant within the meaning of 7 C.F.R. §§ 1000.4 and 1000.5 of the General Rules applicable to Federal Milk Marketing Orders, located at Salt Lake City, Utah. Petitioner is, and during the relevant time period was, a "handler" as defined by 7 C.F.R. §§ 1000.9(a) and 9(b).

5. Petitioner purchases organic milk in the states of New York, Pennsylvania, Maryland, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, Georgia, Florida, Mississippi, Louisiana, Texas, New Mexico, Utah, Idaho, Oregon, Washington and California. Petitioner receives milk at its distributing plant in Utah or directs milk to be received at its co-manufacturers in New York, Virginia, Ohio, Indiana, Texas, Utah, Idaho and California from both cooperative associations and independent dairy farmers.

6. During the relevant period, Petitioner processed and packaged organic fluid milk for sale in intrastate, interstate, and foreign commerce for human consumption. Petitioner did so at its own plant in Utah or through co-manufacturers. As such, Petitioner has incurred and continues to incur obligations to the various Federal Milk Marketing Order producer-settlement funds pursuant to 7 C.F.R. § 1000.70.

7. Petitioner is a certified organic handler. Petitioner is certified for its handling scope under the United States Department of Agriculture ("USDA") National Organic Program ("NOP"). 7 U.S.C. ch. 94, 7 C.F.R. pt. 205 (2025).

8. Petitioner's NOP ID is number 5520816011.

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B. The Agricultural Marketing Agreement Act of 1937

9. The Agricultural Marketing Agreement Act of 1937 ("AMAA") authorizes the Secretary of Agriculture to issue "marketing orders" regulating the marketing and sale of agricultural commodities, including milk. 7 U.S.C. § 608c.

10. A principal purpose of FMMOs is to bring forth an adequate supply of milk for fluid use. 7 U.S.C. § 608c(18).

11. To effectuate this goal, the AMAA further authorizes USDA to regulate raw milk prices under various FMMO regional milk marketing orders administered by a regional Marketing Administrator. USDA has established 11 marketing areas for the purposes of regulating the sale of milk. For each area, USDA proposes the regulatory structure for the order, and then the dairy farmers (called "producers") in that region vote to either adopt the proposed order or not.

12. Most dairy producers market their raw milk to dairy processors (called "handlers") who process the raw milk for dairy products.

13. Each marketing area is a geographic area where handlers compete for their sales, regardless of where the milk was produced. 7 U.S.C. § 608c(5); 7 C.F.R. pts. 1000–1131 (2025). A handler is defined within the regulations generally as a processor of raw milk or a cooperative (an association of dairy farmers with full authority to market its members' milk). Handlers do not get to vote to adopt or reject a marketing order.

14. The AMAA requires milk and its products to be classified by use and that minimum prices are "uniform as to all handlers, subject only to adjustments for . . . (2) the grade or quality of the milk purchased." 7 U.S.C. § 608c(5)(A).

15. USDA has developed four classes of milk products: bottled fluid milk (Class I), soft products (e.g. ice cream, cottage cheese, yogurt, etc., Class II), hard cheeses (Class III), and butter and powdered dry milk (Class IV).

16. The FMMO mandates the regulation of fluid milk handlers while manufacturing handlers typically participate when it is economically beneficial to do so. Thus, there are two

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categories: fluid (beverage milk, Class I) and manufacturing (i.e., cheese, ice cream, butter, yogurt, nonfat dry milk, among others, Classes II, III, and IV).

17. FMMOs establish minimum uniform prices paid for raw milk by handlers to dairy producers, first establishing multiple classes of handler prices based upon end-use (as described above) and then providing for the pooling of the different classified regulated minimum prices paid for milk using regional producer settlement funds operated for each marketing area. For each regional FMMO, USDA then calculates the value of all milk associated with that order to establish a per hundredweight uniform minimum price. Handlers whose plant class utilization value exceeds the uniform value, must contribute the difference to the regional producer settlement fund; handlers whose plant value is less the uniform value receive the difference in order to pay their producers the uniform price.

18. FMMOs purport to bring forth an adequate supply of milk for fluid use through both the pricing and pooling schemes and by tying participation in the FMMO regional pools to performance standards. For example, performance standards include minimum Class I shipping requirements. The purpose of the performance standards relevant to this petition is to encourage service to the Class I market.

C. The National Organic Program

19. In 1990, as part of the 1990 Farm Bill, Congress established a separate USDA program for the certification of organic food production including dairy products. Organic Food Production Act of 1990, 7 U.S.C. ch. 94 ("OFPA"). In December 2000, USDA published the regulations implementing OFPA and establishing the National Organic Program ("NOP"). National Organic Program, 65 Fed. Reg. 80548 (Dec. 21, 2000); 7 C.F.R. pt. 205 (2025).

20. OFPA and the NOP created a system by which both the production and processing of organic milk is subject to rigorous certified production methods and segregation to prevent the co-mingling of organic and conventional (i.e., non-organic-certified) milk. Certified organic milk

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production costs for organic dairy producers and also for organic processing plants are substantially higher than conventional milk production costs.

21. These rules for organic versus conventional production all come with real and substantial cost differences for organic dairy farming versus conventional: (1) milk production per cow is substantially lower for organic than conventional; (2) feed and labor costs are higher than conventional production; (3) operational costs are higher than conventional production; and (4) herd replacements are more expensive than conventional replacements.

22. Unlike conventional feed, organic feed requires: (a) land transition over three years from conventional to organic; (b) restricted use of synthetic fertilizers, and a prohibition on use of pesticides, herbicides, or GMO seed; (c) distinct boundaries and buffer zones; and (d) crop rotation. 7 C.F.R. §§ 205.202, .204, .205 (2025). These requirements result in higher upfront investment costs to produce organic crops and lower crop yields per acre, all of which increase the cost of organic feed relative to conventional feed.

23. Unlike conventional dairy, organic producers must meet specific on-farm grazing requirements. For organic dairy herds, cows must graze a minimum of 120 days during a defined grazing season, and at least 30 percent of the Dry Matter Intake Demand must come from that grazing, and all animals older than 6 months of age must graze. 7 C.F.R. § 205.237 (2025). Milk production is lower during the grazing season, increasing the cost of milk.

24. Unlike conventional dairy farms, the NOP also regulates the actual care of organic cows. The organic dairy herd health requirements include a prohibition of unapproved synthetic substances, no hormones, no pesticides, and no antibiotics (similar to organic feed rules). The organic system plan must include use of preventive health practices which may not restrict the use of a prohibited substance in order to preserve organic status of the animal. An animal must be removed from the organic herd if treated with a prohibited substance. 7 C.F.R. § 205.238 (2025). Organic herd healthcare is more labor intensive than for conventional, increasing the cost of production.

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25. Unlike conventional dairy farms, the NOP also mandates outdoor access for the organic herd, provides housing requirements for cows, and proscribes physical alteration to cattle. 7 C.F.R. §§ 205.238–.239 (2025). These requirements further increase the cost of organic milk production relative to conventional.

26. In addition to increased production costs on the farm, organic milk also has a more costly supply chain as the producers of organic milk consist largely of smaller farm operations, and organic farms are located at greater distances from organic handlers than their conventional counterparts. Additionally, organic milk must always be transported by haulers in segregated tankers, and organic milk must be segregated from conventional milk at the processing facility. FMMOs do not recognize these systemic significant differences between conventional and organic milk costs.

D. The Interaction of FMMOs and the National Organic Program

27. USDA, through the Agricultural Marketing Service, administers both the FMMOs and the NOP.

28. Despite this fact, the FMMOs have never met their statutory mandate to bring forth an adequate supply of *certified organic milk* for fluid use.

29. Under federal law and USDA regulation, organic milk processors cannot substitute or otherwise use conventional milk (i.e., non-organic-certified milk) in their organic milk products. 7 C.F.R. §§ 205.100, .305, .310.

30. Yet FMMOs treat the products as interchangeable and make no distinction between organic and conventional milk. The general performance standards (*e.g.*, a minimum shipping percentage of milk) that otherwise can encourage delivery of milk to handlers for fluid use (known as performance standards) do not specifically apply to or differentiate certified organic milk from conventional milk. *See, e.g.*, 7 C.F.R. §§ 1001.7, .13.

31. Unlike the performance standards for conventional milk, FMMOs do not have any performance standards or other incentives to encourage the delivery of organic milk when needed

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by organic processors. For pricing and pooling purposes, FMMOs regulate organic handlers without distinction from conventional handlers.

32. Given the higher costs of production for organic milk, organic dairy producers sell their milk to organic handlers at one milk price regardless of class utilization well above FMMO minimum prices. For example, the Pennsylvania Monthly Organic Dairy Report for January 2025 reported a milk price range of $35.83 to $46.12 with a weighted average price of $40.37. *Pennsylvania Monthly Organic Dairy Report - January 2025*, Agricultural Marketing Service (Apr. 4, 2025), https://mymarketnews.ams.usda.gov/filerepo/sites/default/files/3800/2025-04-04/1233932/ams_3800_00008.pdf.

33. Yet despite the higher prices organic handlers pay their own suppliers for organic fluid milk, organic handlers must also then pay into the producer settlement fund.

34. The payments made by organic handlers into the producer settlement fund are then distributed mostly to other, mostly conventional dairy handlers to benefit conventional dairy producers.

35. Organic milk utilization is quite different from that of the FMMOs as a whole; a larger portion of organic milk is utilized for fluid use (Class I) than the portion of conventional milk that goes to fluid use. This disparity means that a greater proportion of organic milk is subject to mandatory participation in the FMMO system (as Class I milk) than conventional milk.

36. Despite organic milk being disproportionately regulated in the FMMO system due to the high Class I utilization, it is a small share of overall farm milk production. USDA's Economic Research Service report that there are about 225 billion pounds of milk produced in the United States annually, with only 2.3% of that total organic. While USDA's Estimated Fluid Milk Products Sales Report for February 2025 shows that 7.1% of fluid milk products are organic.

37. As a result, due to the high Class I utilization of organic milk relative to conventional, organic milk handlers necessarily pay into producer settlement funds at a higher rate than conventional milk handlers.

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38. In summary, organic milk producers sell milk at a higher price than that of conventional milk. So, for every sale of organic milk, organic handlers must pay the already high price to purchase organic milk in addition to making payments into the producer settlement fund. On top of that, more organic farm milk is used as fluid milk compared to conventional, meaning that organic handlers are paying into the producer settlement fund at a higher rate than conventional handlers. As a result, organic milk handlers are contributing disproportionately high amounts to the producer settlement fund.

39. While USDA cannot provide an adequate supply of organic certified milk for organic fluid (Class I) processing, it nonetheless takes funds from organic handlers. The portion of that producer settlement fund paid by Petitioner and attributable to organic dairy producer milk is diverted from organic dairy producers and instead paid to conventional dairy producers for the benefit of conventional dairy producers and processors (e.g., conventional cheese and conventional nonfat dried milk manufacturers).

40. As a simple example, for a given month assume the organic producer milk price is $40.00 per hundredweight. Each month, USDA announces the Class I – IV prices using economic formulas established in the FMMO regulations at 7 C.F.R. § 1000.50. Assume that the month's announced FMMO Class I price is $22.00, the Class II price is $19.70, the Class III price is $18.00, and the Class IV price is $19.00. For each regional FMMO, USDA will announce a single "uniform price" for all of this milk based upon the total pool volumes of each class. Assuming for this example that the uniform price is $20.00 per hundredweight and that Petitioner only purchased milk used for fluid milk that month, Petitioner then must not only pay its suppliers the agreed-upon $40.00 per hundredweight but then pay into the pool an additional $2.00 per hundredweight ($22.00 Class I price minus the $20.00 uniform price). Then the Class II, III, and IV handlers (who are primarily conventional) get to collect from the pool the difference between $20.00 and their announced price from the pool (*e.g.*., $0.30, $1.00, or $2.00).

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41. Petitioner initially pays the agreed price for the milk received from organic producers. USDA then takes additional specific funds paid by the Petitioner into the producer settlement fund.

42. Each FMMO producer settlement fund for each month has an identifiable and monetarily ascertainable specific amount taken from Petitioner that USDA diverts from Petitioner and instead pays it to other, mostly conventional dairy industry interests. Petitioner has a legal and equitable interest in its portion of the producer settlement funds that are taken by USDA for the benefit of other dairy handlers and producers.

43. For the calendar years April 2019 – March 2025, Petitioner, directly or through its co-manufacturers as a 7 C.F.R. § 1000.9(a) or 9(b) handler under the FMMOs paid at least $70 million into the producer settlement funds. No one repaid or will repay these amounts to Petitioner.

44. USDA paid Petitioner nothing for the producer settlement funds when USDA transferred those funds primarily to other handlers for the benefit of conventional dairy producers. Except in unusual circumstances (*e.g.* when class prices are inverted, as they were in May 2020 resulting from COVID market disruption), USDA never returned any of the net proceeds from the producer settlement funds to Petitioner.

45. The pool obligation paid by Petitioner is money that cannot be paid to organic producers and instead is shared in a pool where the majority of participants are conventional producers whose milk is not interchangeable with organic milk.

II. HEARING AND AMENDMENTS TO FMMOS

46. If the Secretary concludes that any order "does not tend to effectuate the declared policy" of the AMAA, he or she "shall" terminate or suspend the order. 7 U.S.C. § 608c(16)(A)(i). USDA is authorized to amend the FMMOs pursuant to 7 U.S.C. § 608c, utilizing formal rulemaking procedures pursuant to 5 U.S.C. §§ 556 and 557 (hearing notice and on the record hearing proceeding). USDA cannot presume the ongoing utility of the FMMO program and all of

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its facets; it must rather, at every hearing and routinely of its own independent accord, continually make inquiry and establish that each order serves the purposes of the AMAA.

47. In the spring of 2023, USDA received proposals from three parties with proposed amendments to the FMMOs nationwide. On June 1, 2023, USDA issued an invitation "providing the opportunity for interested parties to submit additional proposals regarding potential amendments to the current pricing provisions applicable to all FMMOs." Dana H. Coale, *Invitation to Submit Proposals for Consideration in a Rulemaking Proceeding that may be Initiated to Amend all Federal Milk Marketing Orders*, Agricultural Marketing Service (June 1, 2023), https://www.ams.usda.gov/sites/default/files/media/FMMOModernization_RequestforAdditionalProposals.pdf (emphasis added). The invitation instructed that "[e]ach pricing related proposal should be accompanied by a comprehensive explanation on the need for and potential impacts of the proposed change(s), how the proposed change(s) facilitates more orderly marketing, and any other relevant information." *Id.*

48. In its Action Plan, issued on the same day, USDA stated it was "considering initiation of a rulemaking proceeding that would include a public hearing to collect evidence regarding proposed changes to pricing provisions effective in all eleven FMMOs." *Action Plan on Proposed Amendments to the Pricing Provisions of all Federal Milk Marketing Orders*, Agricultural Marketing Service (June 1, 2023), https://www.ams.usda.gov/sites/default/files/media/FMMOModernizatino_ActionPlan.pdf (emphasis added).

49. Many in the industry responded, submitting numerous proposals. Petitioner (via its predecessor) joined with a number of other fluid milk processors to form a group called the Milk Innovation Group ("MIG"). MIG submitted a proposal to exempt organic milk from certain pricing provisions, entitled MIG Proposal 6. **Exhibit 3**.

50. Specifically, MIG Proposal 6 sought to amend the pricing provisions so that they treat certified organic milk differently from conventional milk. Proposal 6 expressly tied to

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pricing—that is, under MIG Proposal 6, certified organic milk would have to meet specific pricing constraints on a non-classified basis (at base, ensuring organic producers were still receiving the at least the minimum blend price under the regulated system) and then would be eligible for an exemption from pooling.

51. On July 24, 2023, USDA published the Hearing Notice, including 22 proposals on various subjects. USDA accepted for consideration proposed amendments to all of the Class I, II, III, and IV pricing formulas. But USDA did not include MIG's organic pricing exemption Proposal 6 in the Hearing Notice. Milk in the Northeast and Other Marketing Areas; Notice of Hearing on Proposed Amendments to Marketing Agreements and Orders, 88 Fed. Reg. 47396 (July 24, 2023); Hearing Exhibit 1 (USDA 1).

52. That same day, USDA sent a response to MIG regarding its proposals. **Exhibit 4**. USDA based its refusal to hear Petitioner's organic milk exemption proposal on the claim that the organic exemption proposal "does not seek to amend the uniform FMMO pricing formulas" and therefore "does not fall within the scope of this hearing." USDA's claim is facially incorrect. MIG's Proposal 6 sought, explicitly, to amend the same pricing provisions of 7 C.F.R. § 1000.50 USDA had deemed worth consideration at the hearing.

53. The hearing began on August 23, 2023. At the outset of the hearing, pursuant to 7 U.S.C. § 608c(15), MIG objected to USDA's decision to exclude its pricing-related proposals regarding organic milk as being not in accordance with law. Hearing Ex. 60 (MIG Ex. 1).

54. The Administrative Law Judge ("ALJ") not only denied MIG's objection but refused to even engage with the substance of Petitioner's objections to USDA's exclusion of the proposal: "The problem with the NAJ and MIG proposals were that the Secretary -- for me, is that the Secretary has already addressed those. And who am I, yeah, a lowly ALJ, to define that the Secretary's wrong or the Secretary ought to reconsider something on that." Hearing Tr. 2300:3–7 (September 6, 2023).

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55. The ALJ reiterated this position in a subsequent written order, denying the objection on the basis that he lacked the authority to overrule the Secretary in this regard:

> [T]he Deputy Administrator specifically determined that the MIG [proposal is] beyond the scope of the hearing I am charged with conducting.
>
> . . . I find no basis for me to find that I have authority to make a ruling to the contrary to the Deputy Administrator's determinations of the scope of this proceeding. Rather, it is my duty to enforce those determinations as made by the Administrator, via the Deputy Administrator, under authority delegated by the Secretary.
> . . . I do not find a provision under which I am authorized to substitute my judgment for the clearly expressed judgments of the Secretary's delegates.

Order Denying Requests by Chief Administrative Law Judge Channing D. Strother, *In re Milk in the Ne. & Other Mktg. Areas*, Docket Nos. 23-J-0067, AMS-DA-23-0031, at 7–9 (Dec. 12, 2023).

56. Petitioner, via its group MIG, presented evidence throughout the hearing that the FMMOs failed to meet the purposes of the AMAA in regard to organic milk.

57. The hearing concluded on January 30, 2024.

58. Post-hearing briefs were submitted by April 1, 2024.

59. MIG continued to oppose the new rules during the formal rulemaking process and in briefing. MIG objected that the proposed rules did not effectuate the purposes of the AMAA; MIG also raised a takings argument.

60. USDA issued a Recommended Decision on July 1, 2024.

61. Industry submitted comments on the Recommended Decision by September 13, 2024. Petitioner, through MIG, timely submitted comments and exceptions to the Recommend Decision setting forth the takings, due process, non-delegation, and APA arguments and claims made in this Petition.

62. USDA issued the Final Decision and Proposed Rule on November 12, 2024, submitted the Proposed Rule to a producer referendum pursuant to 7 U.S.C. § 608c(19), and issued

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the Final Rule on January 17, 2025, effective for milk delivered on and after June 1, 2025. USDA's Final Decision continues its unlawful regulation of organic milk under the FMMO system.

63. In the Final Rule, USDA ignored the organic milk-specific arguments made by Petitioner. Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreements and Orders, 89 Fed. Reg. 95466, 95526 (Dec. 2, 2024) ("[O]pponents argued Class I prices cannot be amended until the FMMO system is modified to recognize the organic milk sector. However, potential amendments that would adopt disparate treatment of organic milk were not within the scope of this proceeding, as defined in the hearing notice.").

64. In the Final Rule, USDA ignored the takings arguments made by Petitioner. *See* Milk in the Northeast and Other Marketing Areas, 89 Fed. Reg. at 95537 ("To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the claims to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.").

65. The revised FMMO regulations will significantly increase the burden imposed on organic Class I handlers like Petitioner. Milk in the Northeast and Other Marketing Areas; Uniform Pricing Formula Provisions, 90 Fed. Reg. 6600 (Jan. 17, 2025). USDA is implementing rules which will simultaneously increase Class I prices while decreasing Class II, III, and IV prices. Mathematically this will significantly increase the specific producer settlement fund payments made by Petitioner which will in turn be diverted from Petitioner's suppliers to other, mostly conventional dairy interests.

66. Accounting for the new, higher pricing formulas effective June 1, 2025 and December 1, 2025, Petitioner estimates that its payments into the producer settlement funds will increase approximately by 60% percent annually over 2024.

67. Petitioner now files this petition, asserting that its obligations under the current FMMO system and future obligations under the Final Rule are not in accordance with the law and

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seeks modification and/or exemption therefrom. 7 U.S.C. § 608c(15)(A) ("Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.").

CLAIM ONE
UNLAWFUL TAKING WITHOUT COMPENSATION

(U.S. CONST. AMEND. V; 28 U.S.C. § 2201)

68. Petitioner repeats and realleges each and every allegation set forth in the above and following paragraphs of this Petition as if fully set forth at length herein.

69. The U.S. Supreme Court has expressly held that "there is no warrant for taking the property or money of one and transferring it to another without compensation." *R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 357 (1935).

70. In 2015, the U.S. Supreme Court considered a similar situation involving raisin marketing orders and held that the California Handling Order's raisin reserve-pool requirement upon which USDA relied in seeking a cash monetary penalty in lieu of raisins held back by a raisin handler effected a taking in violation of the Fifth Amendment's Takings Clause for which just compensation was due. *Horne v. U.S. Dep't of Agric.*, 576 U.S. 350, 361 (2015).

71. Just as in *Horne*, Petitioner seeks to declare the FMMOs unlawful as to organic milk and recover just compensation for the taking of Petitioner's allocable and specific producer settlement funds resulting from certified organic milk production subsequently taken by the USDA pursuant to the FMMOs' pooling provisions.

72. Petitioner possessed full legal or equitable title to the specific funds it paid to the producer settlement funds for the certified organic milk it purchased from organic producers taken by USDA for the benefit of other, mostly conventional, dairy industry interests.

73. Petitioner's identifiable and specific interest in the producer settlement funds it paid were property protected by the Fifth Amendment Takings Clause.

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74. Through operation of the applicable FMMOs pooling and producer settlement fund provisions issued and enforced by USDA, title to Petitioner's specific funds it paid to the producer settlement funds passed to USDA for the benefit of other, mostly conventional, dairy handlers and producers.

75. These title transfers deprived Petitioner of all property rights in the specific producer settlement funds paid by Petitioner.

76. The Market Administrators for each FMMO acted at all relevant times on behalf of the USDA.

77. The Market Administrators provided Petitioner no compensation when the market administrators appropriated for others, Petitioner's interest in the specific funds it paid to the producer settlement funds.

78. The Market Administrators appropriation of Petitioner's interest in the specific funds it paid, and pays the producer settlement funds without payment, constitutes a per se taking without just compensation and thereby violates the Fifth Amendment's Takings clause.

79. Petitioner is entitled to receive just compensation for the identifiable and specific producer settlement funds taken for certified organic milk purchased by it but held for and paid to other handlers for the benefit of other producers based upon the payments made by Petitioner.

CLAIM TWO
VIOLATION OF DUE PROCESS

(U.S. CONST. AMEND. V; 28 U.S.C. § 2201)

80. Petitioner repeats and realleges each and every allegation set forth in the above and following paragraphs of this Petition as if fully set forth at length herein.

81. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving a person of "life, liberty, or property, without due process of law."

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82. Petitioner possessed full legal and equitable title to all amounts it has been and continues to be compelled to pay (either directly or through its co-manufacturers) into the producer settlement fund under the FMMOs, and all such monies constituted property protected by the Due Process Clause of the Fifth Amendment.

83. The AMAA delegates authority to producers to adopt FMMOs requiring payment into the producer settlement fund.

84. The AMAA delegates this authority "uncontrolled by any standard or rule prescribed by legislative action." *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928); *see also Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912).

85. USDA interprets the AMAA to permit producers of conventional dairy products to vote on FMMOs with binding impacts on organic dairy producers and organic handlers.

86. Conventional dairy cooperatives and dairy producers are motivated to adopt FMMOs imposing costs on organic handlers because of their own self-interest in receiving funds from conventional handlers benefitting from the organic handlers' contributions to the producer settlement fund.

87. Given the higher Class I utilization of organic milk, conventional dairy producers are further incentivized to vote to include organic milk in the FMMOs as organic milk contributes to the producer settlement funds at a higher rate than conventional handlers.

88. The FMMOs' pooling and producer settlement fund provisions deprived (and continue to deprive) Petitioner of title to those monies and passed that title through USDA and ultimately to the same producers who adopted the FMMOs through the referendum process. As such, biased private parties exercised government regulatory power to deprive Petitioner of its protected property interests and transfer that property to the biased private parties.

89. After producers approve the FMMOs, USDA enforces their provisions and USDA's Market Administrators acted on behalf of USDA at all relevant times when effecting the deprivation and transfer of Petitioner's property to producers.

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90. By allowing conventional producers to vote to approve USDA's fixing of prices, establish payment obligations, and impose burdens on Petitioner and other handlers through the FMMO referendum process, USDA violated the Due Process Clause of the Fifth Amendment to the United States Constitution. *See Roberge*, 278 U.S. 116; *Eubank*, 226 U.S. 137 (----).

91. Petitioner therefore is entitled to a declaration that the FMMOs' pooling and producer settlement fund provisions are unconstitutional and unenforceable as applied to Petitioner.

CLAIM THREE
VIOLATION OF EQUAL PROTECTION

(U.S. CONST. AMEND. V; 28 U.S.C. § 2201)

92. Petitioner repeats and realleges each and every allegation set forth in the above and following paragraphs of this Petition as if fully set forth at length herein.

93. The Fifth Amendment to the U.S. Constitution prohibits the government from denying any person the equal protection of the laws. The requirement of equal protection is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Where "social or economic legislation is at issue," the law must be "rationally related to a legitimate state interest." *Id.* at 440. This means governments "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446. Thus, where the law imposes burdens on a particular group but not on others who are similarly situated, those burdens must rationally address activities that "threaten legitimate interests of the [government] in a way that other permitted uses . . . would not." *Id.* at 448 (holding zoning ordinance violated Equal Protection Clause where it lacked a rational basis).

94. USDA refuses to recognize the market and production differences of organic milk, and the FMMOs therefore impose burdens on Class I milk handlers—and Class I organic milk handlers in particular—without any rational basis.

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95. The intended purposes of FMMOs are to ensure uniform pricing to producers subject to permitted "adjustments" (e.g., quality or market and production differentials) and to bring forth an adequate supply for fluid use. 7 U.S.C. § 608c(5)(A)-(18). Yet, the FMMOs' failure to account for the differences between organic and conventional milk *undermines* these required goals. The FMMOs discriminatory treatment of certain disfavored handlers therefore has no rational relationship to a legitimate government interest.

96. First, USDA fails to account for differences between market and production cost issues between conventional and organic milk, depriving organic Class I producers and handlers of genuine uniform pricing adjusted for statutorily permitted adjustments for market and production differentials customarily applied by handlers.

97. Second, and most fundamentally, organic handlers like Petitioner cannot receive the intended benefit of the bargain for the payment of minimum prices since the FMMOs cannot and do not bring forth a supply of organic milk. Thus, the FMMOs deny Petitioner both the statutory bargain intended by Congress and the equal protection required by the United States Constitution.

CLAIM FOUR
VIOLATION OF NONDELEGATION DOCTRINE

(U.S. CONST. ART. I, § 1; 28 U.S.C. § 2201)

98. Petitioner repeats and realleges each and every allegation set forth in the above and following paragraphs of this Petition as if fully set forth at length herein.

99. Article I, section 1, of the United States Constitution vests the federal government's legislative power with Congress, and the nondelegation doctrine limits the extent of the authority that Congress can delegate to other branches of government or to private parties.

100. Here, the AMAA's producer referendum provision grants a favored category of market participants—conventional producers—veto power over each FMMO and the resulting obligations that federal law imposes on a disfavored category of market participants—handlers

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and organic producers. Granting veto power to conventional producers improperly transfers the government's discretion to unaccountable and self-interested members of the public and permits them to exercise that power to the detriment of other members of the public with directly adverse interests. As a result of this delegation, USDA's residual regulatory authority is limited to offering proposals that can muster the support of two-thirds of producers regardless of the harm those proposed rules inflict on handlers like Petitioner.

101. Petitioner acknowledges that in *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 577 (1939), the Supreme Court held that the AMAA's referendum provision did not violate the nondelegation doctrine because granting regulatory veto power to private parties did not constitute a delegation of legislative power.

102. However, even when it was decided, *Rock Royal* was inconsistent with existing precedent. Although the Court cited *Currin v. Wallace*, 306 U.S. 1, 5–6 (1939), that case only affirmed the constitutionality of a referendum process permitting tobacco growers in a particular region to vote to opt into a regulatory regime that would apply uniformly to all growers. The provision did not grant veto power over specific regulations, nor did it delegate authority to one group of favored market participants to approve policies that compelled disfavored market participants to make payments to the former—indeed, *Currin* distinguished earlier enactments that had been held unconstitutional on precisely those grounds:

> This is not a case where a group of producers may make the law and force it upon a minority (see *Carter v. Carter Coal Co.*, 298 U.S. 238, 310, []) or where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners (see *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 122, []).

Id. at 15–16. Thus, the *Rock Royal* Court's reliance on *Currin* was misplaced, and it should have struck down the AMAA's referendum provision under *Carter* and *Roberge*.

103. Moreover, *Rock Royal* is inconsistent with more recent Supreme Court decisions—and multiple justices have called for the decision to be revisited. Indeed, Justice Thomas described

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Rock Royal as "discredited and lacking any force as precedent[]" because it is inconsistent with modern decisions "holding that a discretionary 'veto' necessarily involves an exercise of legislative power." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 90, (2015) (Thomas, J., concurring) (citing *INS v. Chadha,* 462 U.S. 919, 952–53 (1983)); *see also Chadha*, 462 U.S. at 987 (White, J., dissenting) (objecting that majority's view meant Congress could not grant itself the same "'veto' power" that private parties are allowed to wield under *Rock Royal*, "[a]ssuming *Currin* and *Rock Royal Co-operative* remain sound law"). Now that the Supreme Court recognizes the power to veto regulation constitutes an exercise of legislative power, the holding in *Rock Royal* is no longer tenable. *Rock Royal* should be overturned and the AMAA's referendum provision should be declared to be an unconstitutional delegation to private parties.

104. Petitioner is therefore entitled to a declaration that the FMMOs' pooling and producer settlement fund provisions are unconstitutional under the nondelegation doctrine and unenforceable as applied to Petitioner.

CLAIM FIVE
VIOLATION OF APA AND AMAA
(USDA'S ONGOING REGULATION OF ORGANIC HANDLERS)

(7 U.S.C. § 608C, ET SEQ.; 7 U.S.C. § 602)

105. Petitioner repeats and realleges each and every allegation set forth in the above and following paragraphs of this Petition as if fully set forth at length herein.

106. As opposed to assuring a fluid milk supply, the FMMO system is a burden on organic Class I processors' ability to obtain fluid milk; in order to meet the AMAA's requirements, USDA must exempt organic milk from regulation under the FMMOs.

107. The AMAA requires that orders be adopted if necessary to "insure a sufficient quantity of pure and wholesome milk." 7 U.S.C. § 608c(18).

108. USDA has consistently interpreted this mandate to apply to fluid packaged milk for packaged milk sales ("fluid milk"). Milk in the New England and Other Marketing Areas;

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Decision on Proposed Amendments to Marketing Agreements and to Orders, 64 Fed. Reg. 16026, 16070 (Apr. 2, 1999); Milk in the New England and Other Marketing Areas; Proposed Rule and Opportunity To File Comments, Including Written Exceptions, on Proposed Amendments to Marketing Agreements and Orders, 63 Fed. Reg. 4802, 4891–900, 4907–08, 4912 (Jan. 30, 1998).

109. This Declared Policy of the AMAA— "to insure a sufficient quantity of pure and wholesome milk"—has become a USDA term of art after 80 years of agency application and interpretation. Milk in the Chicago Marketing Area; Emergency Partial Decision on Proposed Amendments to Marketing Agreement and to Order, 52 Fed. Reg. 38235, 38240 (Oct. 15, 1987) ("[A] major purpose of the order program is to assure an adequate supply of pure and wholesome milk for the fluid market . . . ."). In the 1998 Proposed Rule during FMMO Reform, USDA expressly tied this concept to the legislative language of the "AMAA mandate." Milk in the New England and Other Marketing Areas, 63 Fed. Reg. at 4892 ("the AMAA mandate 'to provide an adequate supply of milk' for fluid use"); *see also* Milk in the New England and Other Marketing Areas, 64 Fed. Reg. at 16070 ("[M]arketing order provisions for both markets must provide for attracting an adequate supply of milk for fluid use."); Milk in California; Proposal To Establish a Federal Milk Marketing Order, 83 Fed. Reg. 14110, 14133, 14135 (Apr. 2, 2018) (discussing California FMMO provisions necessary or unnecessary "to ensure an adequate supply of milk for Class I use");

110. Under the AMAA, the Class I differential's purpose must be ensuring service to the Class I marketplace and supporting orderly marketing conditions. *See* 7 U.S.C. § 602(4).

111. The AMAA's Declared Policy also mandates that FMMOs be both in the public interest and the interests of producers and consumers. 7 U.S.C. § 602(2)-(4).

112. The APA's agency action requirements are found in 5 U.S.C. § 706(2). For the formal rulemaking required under the AMAA, the APA directs courts to declare unlawful any agency action, findings, or conclusions either found to be arbitrary and capricious or not based on substantial evidence (in addition to other criteria). *Id.* ("The reviewing court shall . . . (2) hold

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unlawful and set aside agency action, findings, and conclusions found to be-- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; . . . (E) unsupported by substantial evidence . . . ."). USDA's regulation of organic milk is arbitrary and capricious because its regulation does not move organic milk to markets in need or serve any purpose in ensuring a sufficient supply of organic milk for fluid use.

113. USDA's FMMO regulation of organic milk is arbitrary and capricious because it fails to acknowledge that under the NOP handlers cannot substitute conventional milk for organic milk. By treating the conventional and organic milk identically under FMMOs, USDA fails to achieve the AMMA statutory goal as applied to organic milk.

114. USDA's regulation of organic milk under FMMOs is arbitrary and capricious because it does not serve the interests of consumers or producers because it artificially inflates the costs of organic milk production.

115. USDA has and continues to disregard the distinct status of organic milk in its regulation of organic milk under the FMMO system.

CLAIM SIX
VIOLATION OF APA AND AMAA
(USDA'S REFUSAL TO CONSIDER THE ORGANIC EXEMPTION PROPOSAL)

(7 U.S.C. § 608C ET SEQ.; 7 U.S.C. § 602)

116. Petitioner repeats and realleges each and every allegation set forth in the above and following paragraphs of this Petition as if fully set forth at length herein.

117. USDA's refusal to hear MIG Proposal 6 on the organic exemption violated both the APA and the AMAA.

118. In the first instance, USDA violated the AMAA by refusing to consider a relevant proposal to the pricing regulations at issue in the hearing. Pursuant to 7 U.S.C. § 608c(15), MIG objected to USDA's decision to exclude its pricing-related proposals regarding organic milk as being not in accordance with law. Hearing Ex. 60 (MIG Ex. 1).

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119. Second, the ALJ exacerbated the violations by refusing to consider Petitioner's objection on the meris. USDA must meet both the requirements of the AMAA and also follow the APA's agency action requirements found in 5 U.S.C. § 706(2). The APA for formal rulemaking, such as under the AMAA, directs courts to declare unlawful any agency action, findings, or conclusions either found to be arbitrary and capricious or not based on substantial evidence (in addition to other criteria). *Id.* ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be-- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; . . . (E) unsupported by substantial evidence . . . .").

120. USDA's decision to exclude the organic exemption proposal was both arbitrary and capricious and unsupported by substantial evidence.

121. MIG's Proposal 6 was related to pricing provisions and had clear bearing on the issues relevant to the hearing. USDA's refusal to consider MIG's relevant proposal, but to willingly consider every single one of the proposals submitted by other groups (like the National Milk Producers Federation proposals) was arbitrary and capricious. USDA's refusal to consider the proposal also led to the circular reasoning that it could dismiss the relevance of the unfair impact of the FMMOs on the organic milk industry on the basis that MIG Proposal 6 was not part of the hearing notice. Milk in the Northeast and Other Marketing Areas, 89 Fed. Reg. at 95526 ("[O]pponents argued Class I prices cannot be amended until the FMMO system is modified to recognize the organic milk sector. However, potential amendments that would adopt disparate treatment of organic milk were not within the scope of this proceeding, as defined in the hearing notice.").

122. USDA's decision to exclude MIG's price-related proposals is not in accordance with the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 et seq., or USDA's obligations under the Administrative Procedure Act.

CLAIM SEVEN

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VIOLATION OF APA AND AMAA
(USDA'S FINAL ORDER FOUND AT 89 FED. REG. 95466 RAISING CLASS I PRICES)

(7 U.S.C. § 608C ET SEQ.; 7 U.S.C. § 602)

123. Petitioner repeats and realleges each and every allegation set forth in the above and following paragraphs of this Petition as if fully set forth at length herein.

124. The Final Rule fails to fulfill the purposes of the AMAA for the same reasons that USDA's prior regulation of organic milk is unlawful.

125. USDA's Final Order further violates the APA because USDA failed to identify substantial evidence to support its ongoing regulation of organic milk. Under the substantial evidence test, USDA cannot ignore evidence or discount evidence without providing an explanation of why it chose some evidence over other evidence.

126. The Final Rule is arbitrary and capricious because it dismisses, ignores, or otherwise treats as irrelevant compelling evidence on the FMMO systems' failures in regard to organic milk.

127. Additionally, the Proposed Rule fails to meet the APA's "substantial evidence" requirement because it fails to consider and reconcile all the evidence (rather than just the evidence that might support the decision), relies on speculative evidence, relies on evidence or expertise not recounted in the record, and opts to rely upon less persuasive, incomplete, or less compelling evidence in an effort to reach a certain conclusion. Specifically:

a. The FMMO system does nothing to incentivize the production or delivery of organic milk.

b. The FMMO system sends inaccurate and disruptive supply and demand signals to the marketplace, including under-incentivizing the production of organic milk and over-incentivizing the production of conventional milk.

c. The FMMOs do nothing to incentivize the service of the organic Class I marketplace.

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d. Organic milk markets are disconnected from the conventional market and yet organic milk pays into the FMMO pools without drawing any benefit (especially no ability to raise shipping percentages to get more organic milk).

e. Organic milk's payments to the pools increases the blend price paid to non-organic producers. By increasing the conventional price, organic producers' pool payments promote increased production of conventional milk, while that very milk cannot be used for organic dairy products. This unfairly burdens organic producers.

128. One of the proposals that USDA adopted in large part was determined to create a ***30 percent increase*** in one organic milk handler's annual pooling obligations. Hearing Exhibit 474 (MIG 22A), at 9 (Shawna Nelson) (emphasis added).

129. Increases to Class I prices for organic handlers (with no certainty that organic dairy producers would benefit and, if they did, the benefits would be very small compared to the industry and consumer costs) runs counter to USDA's AMAA mandate to act in the "public interest". 7 U.S.C. § 602.

130. USDA did not and cannot reasonably explain how its proposed regulations will impact organic producers and processors going forward, nor justify any negative impacts. By ignoring the disadvantages of its decision, USDA fails to account for evidence presented by Petitioner and others to the contrary or justify why the Final Rule still fulfills the statutory mandate even in light of those enormous negative consequences.

III. CONCLUSION

131. Petitioner has exhausted its remedies short of filing this action under Section 15(A) of the Agricultural Marketing Agreements Act.

132. Payment of the pool obligation by Petitioner would result in significant irreparable harm to Petitioner because monies paid for the pool obligation cannot be readily recovered as it is paid out in full each month to Class II, III, and IV handlers for the benefit of qualifying producers.

133. This Petition is filed in good faith and not for the purpose of delay.

134. Petitioner requests immediate relief and an expedited hearing.

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WHEREFORE, Petitioner respectfully prays that the Secretary exempt certified organic processors, like Petitioner, from regulation under the FMMO system, compensate Petitioner for the Taking of its identifiable and specific settlement funds paid during the applicable statute of limitations period, and, in addition, grant such other relief as is just and equitable under the circumstances.

DATED this 21st of April, 2025.

DAVIS WRIGHT TREMAINE LLP

By _____

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EXHIBIT 1

Name: Horizon Organic Dairy, LLC
Business Structure: Corporation
State of incorp./org.: Colorado
Trade Names/DBAs: "Horizon"
Date of Formation/Registration: 07/31/06

Executives:	
Tyler Holm, President & Chief Executive Officer	12303 Airport Way, Suite 200, Broomfield CO 80021
Dwight McCardwell, Chief Financial Officer	12303 Airport Way, Suite 200, Broomfield CO 80021
John Gerald Holland Secretary and Vice President	360 North Cresent Drive, South Building, Beverly Hills CA 90210
Ty Nolan Renbarger Vice President –	360 North Cresent Drive, South Building, Beverly Hills CA 90210
Mary Ann Sigler Vice President	360 North Cresent Drive, South Building, Beverly Hills CA 90210
Barbara Velasco Assistant Secretary	360 North Cresent Drive, South Building, Beverly Hills CA 90210
Dawn Marie Walloch Assistant Treasurer	360 North Cresent Drive, South Building, Beverly Hills CA 90210

EXHIBIT 2

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HORIZON ORGANIC, **PETITIONER,** v. **BROOKE ROLLINS, SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE,** **RESPONDENT.**	Docket No. _____

PETITIONER'S VERIFICATION OF PETITION

UNSWORN DECLARATION PURSUANT TO 28 U.S.C. §1746

I, Tyler Holm, being duly sworn according to law, depose and say that I am the Chief Executive Officer of Horizon Organic Dairy, LLC, that I am duly authorized to make this affidavit, that the foregoing Petition filed by Horizon Organic Dairy is undertaken in good faith and not for the purposes of delay, and that the facts set forth therein concerning Petitioner are true and correct and based upon my personal knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 25 of April, 2025.

HORIZON ORGANIC DAIRY, LLC

By _____

Tyler Holm, Chief Executive Officer

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EXHIBIT 3

STAMP & RETURN

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June 14, 2023

Margaret Cop
6-14-23
12:21 pm

Via US Mail and Email
Dana.Coale@usda.gov
FMMOhearing@usda.gov

Ms. Dana Coale, Deputy Administrator
USDA – AMS – Dairy Programs
1400 Independence Avenue, SW
Washington, D.C. 20250-0225

Re: Petition of the Milk Innovation Group ("MIG") For a Hearing to Amend Federal Milk Marketing Orders

Dear Deputy Administrator Coale:

In response to USDA's Action Plan announced on June 1, 2023, prompted by the recent hearing petitions from the International Dairy Foods Association ("IDFA") and the Wisconsin Cheese Makers Association ("WCMA"), and National Milk Producers Federation ("NMPF"), the Milk Innovation Group ("MIG")[1] hereby petitions the Secretary of Agriculture to consider its additional proposals (the "Petition") to amend all current Federal Milk Market Orders ("FMMOs"), 7 C.F.R. Parts 1000–1135.

A. Introduction and Summary

Fluid milk companies' ("Class I processors") ability to compete, invest and innovate suffers from antiquated rules in today's modern beverage market. This adversely affects the entire dairy industry as falling Class I sales result in lower prices paid to dairy producers. The fluid milk segment of the dairy industry has declined for decades, continues to decline dramatically, and

[1] The members of MIG are: Anderson Erickson Dairy Co., Inc.; Aurora Organic Dairy; Crystal Creamery; Danone North America; Fairlife; HP Hood LLC; Organic Valley/CROPP Cooperative; Shamrock Foods Company; Shehadey Family Foods, LLC (Producers Dairy Foods, Inc.; Model Dairy, LLC; Umpqua Dairy Products Co.); and Turner Dairy Farms.

struggles to compete on grocery store shelves today.[2] Failure to update federal pricing regulations risks not just the success of the fluid milk industry, but the viability of regulated minimum classified pricing.

This Petition to consider additional proposals seeks to relieve the economic burdens on fluid milk processors resulting from the disproportionate and unsustainable burden on these processors under the current FMMO regulations. Pursuant to 7 C.F.R § 900.22, MIG's proposals provide positive change for Class I by helping especially dairy farmers who serve the Class I market and limiting barriers to fluid milk innovation and investment. MIG's proposals, which are consistent with current USDA legal authority and policy, aim to update the regulations to reflect the reality of the current industry and consumer marketplace.

At the outset MIG acknowledges and recognizes that, like other dairy industry participants, producers have faced significant challenges in recent years. However, the solution to those challenges is not to be found in ignoring economic realities by raising Class I prices.

B. History of Regulations

Ever since the U.S. Department of Agriculture established a fluid milk dependent FMMO pricing system, FMMOs have always relied on the theory that differentiated and higher prices charged on fluid milk could and would generate additional and increasing revenue for all dairy farmers under the FMMO minimum pricing and pooling system. This system depends on theories about inelastic demand for fluid milk, lack of substitutes for beverage milk, perishability, and implicitly the idea that bottled milk is more valuable than milk used in other dairy products.

MIG believes that at a hearing, it can and will demonstrate that these theories are in 2023 significantly attenuated or wrong. Far from being robust, fluid milk sales declines mean that Class I pricing is misaligned with the purpose of FMMOs; it is past time to address this economic reality. Even today, USDA has already received, and will likely continue to receive, proposals, not to appropriately price Class I or encourage innovation and investment, but to raise Class I prices relative to other classes of milk just for the sake of maintaining or increasing prices. MIG understands the desire by producers for only "revenue neutral" or revenue enhancing changes to FMMOs, but the system does not, and in fact cannot, recognize this motivation (particularly when contrary to the economic realities underpinning FMMOs). This effort for "revenue neutrality" is often coupled with a false argument that Class I processors can and should simply pass on Class I price increases to retailers and thus consumers. But USDA also owes a statutory duty to consumers under the AMAA, and the FMMO system is not, and cannot, be a price enhancement or cost-covering system—it is a regulated minimum price program with a narrow purpose. USDA must

[2] See, for example, Kim Severson, *Got Milk? Not This Generation.*, N.Y. Times, Apr. 4, 2023, https://www.nytimes.com/2023/04/04/dining/milk-dairy-industry-gen-z.html.

reject proposals contrary to its standard, discussed below, which is to set the Class I price at the lowest value necessary to bring forth an adequate supply of milk. These other parties seek to extract every last penny from the declining Class I market to the risk and detriment of the dairy industry as a whole.

1. Establishment of the Class I Differential

During FMMO reform, USDA established the Class I differential at $1.60, along with county-level price surface adjustments based on location. Prior to that time, Class I prices were determined by individual orders. Thus, during FMMO reform about 25 years ago, USDA developed and implemented the current Class I pricing structure. Except for "temporary" price increases in the Southeast, USDA has not made significant revisions to the Class I pricing structure since FMMO reform.

USDA aimed to establish the Class I price differential at the "***lowest value necessary***" to ensure sufficient milk supply for fluid use. USDA acknowledged the concern that setting the Class I differential at too high of a level would "be an incentive to overproduce for fluid needs." Specifically:

> The $1.60 minimum differential level proposed is perceived to be the lowest value necessary under present supply and demand conditions to maintain stable and viable pools of milk for Class I use in markets that are predominantly manufacturing oriented. Applying this minimum differential to each of the three low pricing areas will ensure that low utilization and surplus markets will have similar differentials. However, having a larger portion of Class I value pooled could mute price signals to producers more than prices determined strictly by market forces. If the blend price exceeds the marginal value of milk in manufacturing, there would be an incentive to overproduce for fluid needs.

Milk in the New England and Other Marketing Areas, 63 Fed. Reg. 4802, 4909 (Jan. 30, 1998).

Of this $1.60 in the Class I Differential, USDA concluded that $0.40 reflected the costs to producers of maintaining Grade A milk status:

> A review of current marketing practices has revealed that the $1.04 per hundredweight base zone differential may not be established at a level high enough to ensure adequate milk supplies for fluid use. First, a portion of the Class I differential must reflect the value associated with maintaining Grade A milk supplies since this is the

> only milk available for fluid use. Originally the differential needed to be established at a level that would encourage conversion from Grade B to Grade A status. With approximately 96 percent of all milk already converted to Grade A, this value now needs to reflect the cost of maintaining Grade A milk supplies. Although it may be difficult to quantify the cost to maintain Grade A status, there are specific associated costs, as described below.
>
> . . . .
>
> . . . Often, this will require additional labor, resource, and utility expenses. It has been estimated that this value may be worth approximately $0.40 per hundredweight.

Id. at 4907–08.

USDA also found that this $1.60 included $0.60 for the marketing/balancing costs incurred in supplying the Class I market:

> Traditionally, the additional portion of the Class I differential reflects the marketing costs incurred in supplying the Class I market. These marketing costs include such things as seasonal and daily reserve balancing of milk supplies, transportation to more distant processing plants, shrinkage, administrative costs, and opportunity or "give-up" charges at manufacturing milk plants that service the fluid Class I markets. This value has typically represented approximately $0.60 per hundredweight.

Id.

Finally, USDA determined the remaining $0.60 constitutes necessary compensation to incentivize producers to supply milk for fluid use, rather than manufacturing purposes.

> Option 1A presumes that the $1.04 per hundredweight minimum Class I differential is no longer adequate to ensure a sufficient supply of milk due to the competitive nature of the manufacturing facilities in this region. Thus, Option 1A establishes an additional competitive factor into the development of the base zone Class I differential. Option 1A values this competitive factor to be worth about $0.60 per hundredweight. This value reflects approximately

> two-thirds of the actual competitive costs incurred by fluid plants to simply compete with manufacturing plants for a supply of milk.

Id. at 4909.

This base Class I $1.60 differential is the starting point of the adjusted Class I differentials found in 7 C.F.R. § 1000.52, with county location adjustments (the "price surface") applied atop.

Since Federal Order reform, except in the Southeast (location price changes only), USDA has not made meaningful updates to the underlying structure of Class I prices despite radical changes in the market. This basic breakdown of the Class I differential has been affirmed since its establishment, including impliedly with USDA's adoption of the California FMMO, 7 C.F.R. pt. 51. *See also* Hr'g on Promulgation of a Federal Milk Marketing Order in California, Ex. 70 ("Testimony of Dennis Schad"), at 30–32. However, affirmation was driven by a desire for national uniformity, not from careful reconsideration of the components of the Class I differential. Current market evidence (discussed in more detail below) demonstrates that fluid milk prices are not inelastic—meaning they cannot continue to be increased without the consequence of decreasing volume. It is far past the time for the base Class I differential to be reconsidered in light of market changes, including the exploding growth of dairy beverage alternatives, the ongoing precipitous decreases in both absolute volume and per capita fluid milk consumption, and the exponential growth of non-fluid milk products often sold in the export market.

2. Assembly Credits

Historically, the Chicago Marketing Area adopted assembly credits for the purpose of compensating handlers and by extension the dairy producers supplying the Class I market for the cost of assembling milk to supply Class I handlers and ensuring an adequate supply of fluid milk. USDA justified this proposal as necessary for servicing Class I needs:

> The Act, in 608c(5)(J)(i), delineates 'providing facilities to furnish additional supplies of milk needed by handlers…' as a service of marketwide benefit. The operation of supply plant facilities is a service of marketwide benefit because it is a function involved in moving milk from one location to another for the purpose of fulfilling requirements for milk of a higher classification. Before milk can be transported from a supply plant to a distributing plant, it must be assembled and perhaps cooled and stored, then reloaded onto a truck. The costs incurred in performing these functions are not currently recognized in the order.

> Since servicing the Class I milk needs of fluid milk handlers is recognized as a service of marketwide benefit, it is appropriate that all producers share in the cost of providing that service. This will be realized by providing an assembly credit, and is consistent with a major purpose of the Act to assure an adequate supply of pure and wholesome milk for the fluid milk market and to maintain orderly marketing conditions.

Milk in the Chicago Regional Marketing Area; Emergency Partial Decision on Proposed Amendments to Marketing Agreement and to Order; 52 Fed. Reg. 38235, 38242 (Oct. 15, 1987).

These assembly credits were then later adopted as part of the Order 30 FMMO during Federal Order Reform. 7 C.F.R. § 1030.55. They have been successful in ensuring that the Class I supplying handlers and the dairy producers shipping to those facilities in Order 30 are fairly, if only partially as they have not been updated, compensated for the costs of servicing that market.

3. Organic Milk

Since the 1930s, minimum price and pooling requirements of orders have evolved over time, but the scope of mandatory participants 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.

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 563%, and ended 2022 at nearly $8 billion in annual sales.[3] AMS data shows that organic fluid milk volume was about 7% of total fluid milk volume in 2022. In 2006, the first year for which AMS data is available, organic fluid milk was about 2% of the total.[4] USDA certified organic milk is thus a relatively new product category that is entirely distinguished from conventional milk by AMS. However, the FMMOs were not designed to address this distinction, or the challenges presented by this dynamic growth for organic dairy farmers, processors or consumers.

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[3] *2023 Organic Industry Survey*, Organic Trade Association, https://ota.com/sites/default/files/indexed_files/OTA_Report_2023.pdf (last visited June 13, 2023).

[4] *Estimated Fluid Milk Products Sales Report*, U.S. Dep't of Agric., Agric. Mktg. Serv., https://www.ams.usda.gov/resources/marketing-order-statistics/estimated-fluid-milk-sales (last visited June 13, 2023).

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.

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, while organic handlers cannot benefit from one of the few rights given to mandatory Class I processor participants—the ability to "command" milk via a first priority for supply. 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 supply 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 nearly all USDA certified organic milk is subject to long-term forward priced contracts on an all-milk basis (i.e., organic milk is not subject to classified pricing except by the FMMOs), 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 "insure a sufficient quantity of pure and wholesome milk" of USDA certified organic milk. *See* 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. Further, pooling certified organic and conventional milk together in the FMMO pools signals to the market higher demand for Class I milk than exists in the conventional market. As approximately 55% 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 organic dairy (farmers and processors alike) tens of millions of dollars a year; money that could be spent on further developing the organic milk supply desired by consumers. It must also be noted that since organic processors pay a premium fixed price no matter the classified utilization 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.

C. The current Class I pricing system creates disorderly marketing.[5]

Currently, the dairy industry is suffering from disorderly marketing. The terms "orderly" and "disorderly" marketing, both historically and in USDA's application of the same, are based on the conditions of the fluid milk market. Despite Class I being the only captive class in FMMOs, Class I sales of fluid milk have been in precipitous decline and are continuing to fall. Yet at the same time, farmers are receiving record mailbox prices, encouraging the production of more milk, and consumers are suffering from inflationary pressures that not only prevent passing through additional costs to consumers, but threaten sales even at current prices. Industry cannot wait any longer to face the fact that the system as designed misaligns with current economic realities in a way that puts all sectors of the dairy industry at risk.

1. Fluid milk sales have been in unequivocal decline in recent decades.

As demonstrated by USDA's own data, Class I (fluid milk) has been on a steep downward trajectory since the 1970's. (See chart from the Central Marketing Area, below).[6] Class I handlers are hamstrung by outdated regulations that fail to provide in any way for returns on investment, preventing them from innovating and growing the Class I market for the benefit of the entire dairy industry. In fact, looking at just the last 25 years, ERS found that total ***fluid milk consumption has dropped about 20%; per capita consumption is down 30%***.[7]

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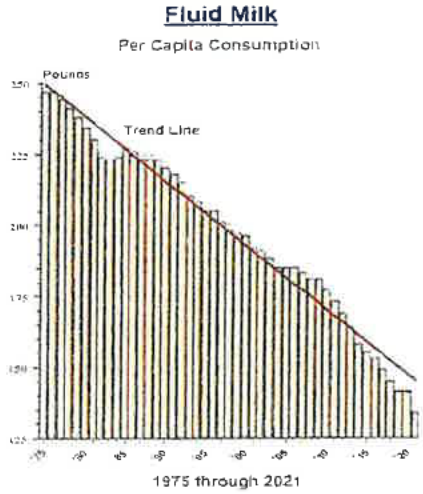
[5] Addressing 7 CFR § 900.22(a).

[6] *See* USDA, *Per Capita Consumption of Selected Dairy Products*, Cent. Mktg. Area Mktg. Serv. Bull. (Oct. 2022), https://www.fmmacentral.com/PDFdata/msb202210.pdf.

[7] *See Dairy Data*, U.S. Dep't of Agric. Econ. Res. Serv. (June 13, 2023), https://www.ers.usda.gov/data-products/dairy-data/dairy-data/; *Dairy Products: Per capita consumption, United States (Annual)*,



USDA's Economic Research Service confirmed that, in the past two decades, "individuals of all ages significantly decreased their consumption" of fluid milk.[8] Industry publications echo this conclusion, that per capita consumption of fluid milk "fell at a faster rate than it did during each of the previous six decades."[9] Fluid milk sales since 2021[10] have similarly fallen into the long-term declining trends.[11]

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https://www.ers.usda.gov/webdocs/DataFiles/48685/pcconsp_1_.xlsx?v=7161.8 (last accessed June 13, 2023); *Fluid beverage milk sales quantities by product (Annual)*, https://www.ers.usda.gov/webdocs/DataFiles/48685/fluidmilk.xlsx?v=1083.2 (last accessed June 13, 2023).

[8] USDA Economic Research Service examined dietary intake studies cooperatively planned and conducted by USDA and the National Center for Health Statistics to investigate U.S. fluid milk consumption trends among age groups; this decrease "includes plain and flavored milk as well as malted milk, eggnog, and hot chocolate, among other milk-based beverages." Hayden Stewart and Fred Kuchler, *Fluid Milk Consumption Continues Downward Trend, Proving Difficult to Reverse*, U.S. Dep't of Agric. Econ. Res. Serv., Jun. 21, 2022, https://www.ers.usda.gov/amber-waves/2022/june/fluid-milk-consumption-continues-downward-trend-proving-difficult-to-reverse/.

[9] *Report examines decline in consumption of milk*, Wis. State Farmer (Nov. 2, 2021), https://www.wisfarmer.com/story/news/2021/11/02/report-examines-decline-consumption-milk/6249045001/ (citing Hayden Stewart, Fred Kuchler, Diansheng Dong, and Jerry Cessna, *Examining the Decline in U.S. Per Capita Consumption of Fluid Cow's Milk, 2003-18*, U.S. Dep't of Agric. Econ. Res. Serv. (October 2021)).

[10] *How are Fluid Milk Sales Going? DOWN!*, The Bullvine (Jan. 5, 2022), https://www.thebullvine.com/news/how-are-fluid-milk-sales-going-down/.

[11] From February 2022 to February 2023, sales of both conventional and organic milk products decreased. Dairy Product Trends – Fluid Milk, PennState Extension (last updated May 18, 2023), https://extension.psu.edu/dairy-

The media is awash with articles laying bare this unprecedented challenge for Class I processors.[12] *The New York Times* claims that last year, members of Generation Z bought 20 percent less milk than the national average.[13] This decreased consumption led U.S. Representative Glenn Thompson (R-PA) to speculate that "[w]e lost almost an entire generation of milk drinkers."[14]

Key to this decline is Class I's ability to compete with fluid milk alternatives. In fact, the decrease in Class I sales "appears to reflect changes in the competitiveness of cow's milk compared to other beverages at retail stores".[15] As even USDA itself has noted, "[e]very decade brings a wider selection of beverage choices at supermarkets, restaurants, and other food outlets" and "[c]ompetition among these products is based in part on price."[16] Consumers now have a "multitude of other options available like sports drinks, energy drinks, and plant-based drinks" at retail stores, continually expanding and creating competition for fluid milk.[17] Even if competition between milk and other beverage options is not so direct as to effect fluid milk sales, plant-based milk alternatives directly compete with fluid milk. But unlike these alternatives, fluid milk processors are locked into an antiquated and rigid price-enhancement system that limits their ability to innovate and to provide customers with the long-term stable pricing of competitive options.

Thus, fluid milk handlers and consumers continue to bear almost the entire burden of pricing regulations, despite making up an increasingly shrinking portion of the marketplace.

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product-trends-fluid-milk#:~:text=The%20oft%2Dreported%20decline%20in,decrease%20of%20approximately%2046%20percent (citing USDA Agricultural Marketing Service).

[12] *See, e.g.*, Laura Reiley, *Milk shake-up: High school student sues school district over dairy flap*, Wash. Post (May 12, 2023 8:59 AM) https://www.washingtonpost.com/business/2023/05/12/dairy-milk-lawsuit-school-lunch/; Kristina Peterson, *School Cafeterias Might Serve Whole Milk Again*, Wall St. J. (June 6, 2023 3:30 PM) https://www.wsj.com/articles/school-cafeterias-might-serve-whole-milk-again-b5876a94 (an article which includes statements from NMPF chief economist Peter Vitaliano confirming that sales of drinking milk are declining).

[13] *See supra* note 2.

[14] Tom Venesky, *USDA Decision to Keep 1% Milk in Schools Seen as Positive Step*, Lancaster Farming (last updated Dec. 7, 2022), https://www.lancasterfarming.com/farming-news/news/usda-decision-to-keep-1-milk-in-schools-seen-as-positive-step/article_9c2d1d28-8b59-11ec-a761-97e876f2262b.html.

[15] *See supra* note 9.

[16] *See supra* note 8.

[17] Zach Myers, *Dairy Markets & Management Update*, Center for Dairy Excellence (Jan. 19, 2021), https://www.centerfordairyexcellence.org/wp-content/uploads/MM-Update-012221-Fluid-Milk-in-Households.pdf.

2. Food inflation is a major industry hurdle, and a failure to give economically-justified price relief to consumers risks further market share loss.

While Class I sales are already declining, food inflation is rampant. USDA predicts in 2023 that consumer dairy products prices will increase 4.5%, which is over and above the 2023 dairy product price increase of 12.0%.[18] The AMAA requires that prices be in the "public interest" and the "interests of . . . consumers." 7 U.S.C. § 602. This statutory language must be given real meaning, and not just lip service by industry and USDA. Consumers are legally entitled to a pricing system that does not simply always foist all producer pricing "needs" onto the fluid market.

3. Even in the face of significant economic obstacles, milk supplies remain robust.

Despite this decline in sales and inflation, milk supply remains high. The explanation—prices paid dairy farmers are encouraging ever more milk production over and above that which economic conditions call for. As acknowledged by USDA's own publications, "It is possible therefore for certain regulations to raise prices beyond the level which the public interest requires. This would tend to encourage excessive production, discourage consumption, and add to surplus." *Regulations affecting the movement and merchandising of milk*, U.S. Dep't of Agric., Agric. Mktg. Serv. Marketing Research Report No. 98 (June 1955).

USDA's own data demonstrates that there is a concerning over-supply of conventional milk in the marketplace due to a failed pricing structure. First, producers have dumped (and are dumping even now[19]) significant volumes of milk. Pre-pandemic, during 2015 to 2019, 400 to 500 million pounds of pooled milk was dumped annually demonstrating significant excess production.[20] Then in 2020, this grew to over 780 million pounds with 350 million pounds dumped in April 2020 alone.

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[18] *Summary Findings: Food Price Outlook, 2023*, U.S. Dep't of Agric. Econ. Res. Serv., https://www.ers.usda.gov/data-products/food-price-outlook/summary-findings/#:~:text=In%202023%2C%20all%20food%20prices,of%204.5%20to%208.1%20percent.

[19] Karen Bohnert, *Midwest Dairy Producers Forced to Dump Milk*, Dairy Herd Mgmt. (June 7, 2023), https://www.dairyherd.com/news/business/midwest-dairy-producers-forced-dump-milk?mkt_tok=ODQzLVlHQi03OTMAAAGMQWxzkKgatX1vKOvtewx9-l5o6t3fGerxikDrtW_FAw80GthK3KBKWG-L9wi7K0kZGhWvyLZzlfMqecPkzhTv1yW5vquaCPcxcFwT5HV_UD9SbBOsuw.

[20] USDA's Response to MIG Data Request, 2021 Info Request Excel File 03 – FMMO Other Uses Milk January 2015 - YTD 2021.xlsx

Second, not only is milk being dumped at alarming rates, but many times in recent years FMMO Market Administrators have suspended or lowered performance standards because there is far more milk available then needed for fluid use. For example, in FMMO 1 (Northeast) there have been shipping percentage reductions approved for each year in the 2013 to 2023 period as well as routine authorizations for the "temporary dumping of surplus milk."[21]

These facts demonstrate that there is more than enough fluid milk on the market to meet USDA's adequate supply of milk standard, and that FMMOs are stimulating an oversupply of milk by setting prices out of line with the marketplace. This oversupply is so significant it has grown from a niche-industry issue to one of general consumer concern.[22]

Additionally, USDA reported that in 2022 the mailbox milk price dairy farmers received (the actual milk check) was the highest level ever.[23] In 2021, USDA established the Pandemic Market Volatility Assistance Program (PMVAP) to provide assistance payments to dairy farmers who received a lower value for their milk due to market abnormalities caused by the pandemic. The first round of USDA' s pandemic volatility assistance program paid eligible dairy farmers dairy producers over $250 million. In January 2023, announced a second round of PMVAP payments of $100 million this year for a total of $350 million.[24]

These disparate market signals are resulting in an oversupply of milk in an economic environment not calling for the same.

4. Certain assumptions built into Class I pricing no longer hold

Despite the FMMO's reliance on robust Class I demand as the cornerstone of pricing, USDA has not evaluated the elasticity of Class I products. Critically, USDA has not conducted and has no recent studies demonstrating that fluid milk demand is inelastic and can support unfettered price

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[21] *Policy Statements for Northeast Marketing Area's Handlers*, U.S. Dep't of Agric., Agric. Mktg. Serv., https://www.fmmone.com/Policy_Statement_Handlers.htm

[22] Meredith Lee, *Got Milk? Yes, actually, U.S. has too much.*, Politico (Nov. 6, 2021 7:00 AM), https://www.politico.com/news/2021/11/06/got-milk-yes-actually-too-much-519775; Hope Kirwan, *Coming together: Dairy Farmers debate plans for overseeing US milk supply*, Wis. Pub. Radio (Mar. 26, 2022 5:00 AM), https://www.wpr.org/coming-together-dairy-farmers-debate-plans-overseeing-us-milk-supply; Shaun Gallagher, *Down the drain: Wisconsin dairy farmers told to dump milk because of an oversupply in the market*, TMJ4 (Apr. 2, 2020), https://www.tmj4.com/news/coronavirus/down-the-drain-wisconsin-dairy-farmers-told-to-dump-milk-because-of-an-oversupply-in-the-market.

[23] Corey Geiger, *Mailbox milk prices reached a new record*, Hoard's Dairyman (Apr. 3, 2023), https://hoards.com/print-article-33422-permanent.html

[24] *Pandemic Market Volatility Assistance Program*, U.S. Dep't of Agric., Agric. Mktg. Serv., https://www.ams.usda.gov/services/pandemic-market-volatility-assistance-program (last visited June 13, 2023).

increases to prop up the FMMO system. In response to data requests from this group to USDA in 2021, USDA asserted the following:

> *[MIG Request 16]. Any studies that USDA has conducted regarding whether or not the current FMMOs and their pricing formulas bring forth an adequate supply of fluid milk in total and with a breakdown between conventional and organic.*
>
> [USDA Response:] None have been conducted.

Additionally, perishability concerns are no longer the same as in the past and the reality for significant volumes of fluid milk is that products can be produced and stored for long periods (not just for ESL, but also HTST products). Similar to the issue above, in response to data requests from this group, USDA asserted it has conducted no recent studies regarding perishability of fluid milk.

> *[MIG Request 14.] Any studies that USDA has conducted regarding the perishability of fluid milk as related to or in support of a Class I differential.*
>
> [USDA Response:] No studies have been conducted.

Thus, the idea that fluid milk is "price inelastic" fails to be supported based on the current data developed by USDA.

In March 2023, Drs. Ishdorj and Capps completed a study of milk price elasticity. It showed that while milk is a relatively price inelastic product, price increases decrease volume by 0.24% to 0.40%. Additionally, specialty and value-added milk items were more price elastic than traditional white milk. For example, a 1% price increase is associated with 1.44% and 2.02% volume decreases for organic and lactose-free milk, respectively.[25]

D. Current Federal Order Requirements or Industry Practices Relative to the Proposals[26]

At present, the Class I price is the USDA regulated minimum price for fluid milk. It contains a base Class I differential of $1.60, but ultimately is variable and changes monthly with the commodity prices for butter, powder, and cheese. The Class I price is also geographically variable

[25] Dr. Ariun Ishdorj and Dr. Oral Capps, Jr., *A Deeper Look at Milk and Competing Beverage Price Elasticities*, Int'l Dairy Foods Ass'n (Mar. 23, 2023).

[26] Addressing 7 CFR § 900.22(c).

with county location adjustments. The Class I price formula includes a "skim mover," which is determined via an average of Class III and Class IV skim milk prices. Finally, for fluid milk processors, milk received from producers but "lost" during the manufacturing process is priced at the lowest price class for the first 2% of pool plant "shrinkage," and any shrinkage that exceeds 2% is priced at Class I.

The Class I price is a minimum price, with processors routinely paying prices above the minimum ("over-order premiums"). Organic milk is treated the same as conventional milk by FMMOs, despite conventional milk not being a substitute for organic milk and organic milk routinely commanding premiums far above conventional milk.

The "Class I price" generated by the Class I pricing formula is not the price dairy farmers are paid, nor is it the price milk processors ultimately pay; rather, the Class I price is used to determine both the minimum regulated uniform price and handler pool obligation. Generally, the higher the Class I price relative to other class prices, the higher the pool obligation for fluid milk processors. This pool obligation can also vary greatly based upon after-the-fact decisions made by Class III and IV handlers whether and how much milk to associate with the individual order pools every month. The intention for advance pricing for Class I milk is often a mirage when large negative producer-price differentials are announced in the middle of the following month after Class I processors have sold their milk based upon prices set to their customers in advance.

E. USDA's Call for Additional Proposals

On June 1, 2023, USDA issued an Action Plan and Call for Proposals. MIG understands that USDA will be considering all proposals both in direct response to NMPF's proposals, as well as those proposals related to pricing.

- "Based on the information submitted, USDA is considering initiation of a rulemaking proceeding that would include a public hearing to collect evidence regarding proposed changes to pricing provisions effective in all eleven FMMOs." (Action Plan, emphasis added).

- "Before deciding whether a hearing will be held, USDA is providing the opportunity for interested parties to submit additional proposals regarding potential amendments to the current pricing provisions applicable to all FMMOs." (Call for Proposals, emphasis added).

In response, MIG submits for USDA's consideration the following proposals on pricing provisions applicable to all FMMOs. Each of MIG's proposals not only relates to pricing provisions, but responds to some specific aspect of the proposals put forth by NMPF. Should the agency accept any of NMPF's proposals for a hearing, MIG maintains that basic fairness and due process would

require equal consideration of MIG's proposals that respond to and advocate for alternatives to NMPF's proposals.

F. Explanation and Purpose of Proposals[27]

Long-term and continuing declines in Class I volume are in large part due to the consistent innovation of competing beverages that are more attractive to both consumers and businesses. The current FMMO pricing structure limits the ability of Class I to invest in improvements that can respond to its changing market, extending fluid milk share losses. The purpose of these proposals is to modernize Class I structure to address the inhibitors to innovation: price volatility, relatively higher prices, recognition of differentiation, and fewer risk management tools.

MIG respectfully requests that USDA promptly issue a Notice of Hearing on the below requested changes to Class I FMMO price formulas. The specific proposed language for each of these proposals can be found in **Exhibits A–F**, attached hereto. Those proposals are summarized here and then explained in detail below:

1) MIG Proposal 1 – Average of Plus Rolling Adjuster for "Class I Skim Milk Price Mover"

2) MIG Proposal 2 – Update the Base Class I Differential from $1.60 to $0.00

3) MIG Proposal 3 – Establish a $0.55 Assembly Credit for Handlers

4) MIG Proposal 4 – Establish a $0.60 Balancing Credit for Specialty Milk Producers

5) MIG Proposal 5 – Establish ESL Shrinkage Level

6) MIG Proposal 6 – Organic Exemption to Pooling Requirements

Note, Proposal 6 and Proposals 2, 3, and 4 all contain language designed to (a) credit dairy producers or 9(c) cooperatives for the costs of serving the Class I market and/or (b) designed to address the unique nature of balancing for specialty milks including certified organic milk. As such there would be overlapping language that would need to be coordinated if USDA includes multiple MIG proposals in its Proposed Rule. The language attached to this letter is drafted as if only each individual proposal is adopted, although the Milk Innovation Group supports adoption of all its proposals.

[27] Addressing 7 CFR § 900.22(a), (b), and (d)

1. MIG PROPOSAL 1 – Average of Plus Rolling Adjuster for Base Class I Skim Milk Price

Risk management, no matter the FMMO class, is important to both producers and processors. There is a reason the industry united behind the current "average of plus adjuster" formula—it is "hedge-able" for Class I processors. The old "higher of" formula was not. There are Class I handlers participating in Class I hedging today, and MIG will present direct testimony at any hearing of handlers who utilize hedging under the current system. Additionally, more would do so if there was regulatory certainty that this agricultural industry standard practice would remain in place despite NMPF's proposal to revoke it without justification. Thus, MIG submits this proposal in direct response and as an alternative to NMPF Proposal 3.

In spite of NMPF's claims to the contrary, the current approach does not only benefit processors. The current formula also offers a more general benefit of lower price volatility throughout the market from farmer to consumer. This reduced volatility helps support the growth of the dairy industry as a whole, as it makes the cost of milk more stable and consistent for retailers and consumers.

Routinely updating the adjuster with a rolling average, instead of the current fixed $0.74 adjuster, ensures that it continues to reflect current market conditions. Likewise, using a Rolling Adjuster, as opposed to a monthly "higher of" calculation, allows Class I risk management opportunities.

Thus, instead of reverting to the "higher of," we propose an approach that would preserve risk management opportunities for both processors and producers: an "average of" formula with the adjuster updated monthly using a 24 month look back period with a 12-month lag. Specifically, one would:

A. For each of the preceding months, calculate the "higher of" the advanced Class III or IV skim price (in other words, the pre-May 2019 method).

B. For each of the preceding months, calculate the "average of" the advanced Class III and IV skim price (in other words, the post-May 2019 method, without the $0.74).

C. Calculate the difference between (A) and (B).

D. Monthly, calculate the adjuster by averaging (C) for the preceding 24 months with a 12-month lag (this is the "Rolling Adjuster"). For example, if this were in place now, the Rolling Adjuster for January 2023 would have been average of (C) for January 2020 to December 2021. And then the Rolling Adjuster for February 2023 would be the average of (C) for February 2020 to January 2022. And so on.

E. Monthly, average the Class III and IV skim prices for that month and add (D) (the Rolling Adjuster).

MIG's proposal aligns with other elements of the Class I price formula that also change monthly and fulfills the key policy goals of the "mover." The 12-month lag is critical for processors to be able to stake their positions and hedge the market. The 24-month lookback stabilizes the price, a benefit to the entire industry as it makes dairy a more reliable and "safe" purchase for retailers (particularly restaurants). Finally, the rolling adjuster gives updated market signals to producers to produce milk at the appropriate rates. It also makes it easier for a processor to absorb that level of month-to-month volatility since it dampens the overall impact of the changes in any given fiscal quarter/year versus the prior year.

Like NMPF's Class I skim price proposal, this would require modification of 7 CFR § 1000.50(b). The regulatory language for this proposal is in **Exhibit A**. Critically, MIG's proposal is estimated to have a negligible immediate impact on producer and processor's prices, and a negligible immediate impact on consumer prices. In fact, **in MIG's initial analysis MIG's proposal returns roughly equal to or higher than what the "higher of" would have returned for producers in recent years.** However, MIG's proposal may have long-term positive impacts (i.e., lower costs) for processors and retailers given the ability to hedge and decreased variability in customer pricing.

2. MIG PROPOSAL 2 – Update the base Class I differential from $1.60 to $0.00.

This proposal eliminates the base Class I differential on the basis that the economic justifications for it no longer exist. USDA developed the base Class I differential during Federal Order reform, determining producers must be compensated: (1) $0.40 for maintaining Grade A status; (2) $0.60 for bearing balancing and marketing costs; and (3) $0.60 to incentivize service to the Class I market. However, as explained in the three subparts of this proposal, none of these justifications exist any longer. Thus, the base Class I differential must be set at zero.

MIG submits this proposal in direct response and as an alternative to NMPF Proposal 5. When considering the base Class I differential underlying both NMPF's proposals and the current $1.60 base differential, MIG concluded that the justifications for the $1.60 base no longer hold true. The fundamental idea of FMMOs that fluid milk is both the problem and the solution to the problem does not hold in today's world.

The regulatory language to implement this proposal amends 7 CFR § 1000.52, the Class I differential for each county in the continental 48 states. The regulatory language for this proposal is in **Exhibit B**.

MIG's proposal does not include revising the current price surface adjustments (which MIG opposes). MIG does not dispute there is a location value for milk and that the Act requires the Secretary to bring forth an adequate supply of milk for fluid use. But setting the Class I differentials at too high a level does indeed "result in artificially-induced overproduction . . . [and]

reduc[es] fluid milk consumption by consumers."[28] It is also not in the public interest. Thus, MIG proposes the appropriate and economically-justified base Class I differential of $0.00, adjusted for location value at the current price surface adjustments.

MIG's proposal will reduce processor costs by $1.60/cwt and reduce the pool contribution by Class I handlers by $1.60/cwt (thereby reducing the uniform producer price by a lesser amount, but that has to be determined by consideration of the pool calculation as a whole). There is no indication that MIG's Proposal 2 would increase prices for consumers.

a. Proposal 2A – Eliminate the Grade A compensation portion of the Class I differential.

The $1.60 Base Class I Differential is made up of, in part, $0.40 as compensation to producers for producing Grade A milk. Milk in the New England and Other Marketing Areas, 63 Fed. Reg. 4802, 4907–08, (Jan. 30, 1998) ("It has been estimated that this value may be worth approximately $0.40 per hundredweight."). MIG proposes eliminating this compensation and reducing the Class I Differential by $0.40.

Historically, this $0.40 Grade A compensation mattered given that the cost of maintaining Grade A status was unique to producers supplying Class I processors. Decades ago, there were significant amounts of Grade B milk on the market, and Class III and Class IV products were oftentimes made with Grade B milk. But now nearly all (at least 99.5% of milk) [29] is Grade A, and Class III and IV products are made with Grade A milk. Given that Class III and IV prices (including make allowances) are intended to be market clearing, they account for this cost of Grade A status. The Class I price is built upon the Class III price, so including $0.40 as compensation on top of the Class III price is a "double dip" for Grade A milk.

The Grade A compensation portion of the Class I differential is antiquated and discriminatory now that virtually all milk is Grade A, and USDA should eliminate this double compensation for producers.

[28] Milk in the New England and Other Marketing Areas; Decision on Proposed Amendments to Marketing Agreements and to Orders, 64 Fed. Reg. 16026, 16116 (Apr. 2, 1999).

[29] *Milk Production, Disposition, and Income 2022 Summary*, U.S. Dep't of Agric. Nat'l Agric. Statistics Serv. (Apr. 2023), https://downloads.usda.library.cornell.edu/usda-esmis/files/4b29b5974/79409c30t/6w925r29k/mlkpdi23.pdf.

b. Proposal 2B – Eliminate the balancing compensation portion of the Class I differential.

In proposing and ultimately adopting Option 1A during Federal Order Reform in 1999, USDA stated that $0.60/cwt "reflects the marketing costs incurred in supplying the Class I market." These are primarily market balancing costs for "seasonal and daily reserve balancing of milk supplies . . . and opportunity or "give-up" charges at manufacturing milk plants that service the fluid Class I markets." 63 Fed. Reg. at 4908. In other words, the Class I differential compensates farmers $0.60 for costs supposedly borne at the farm level to balance the market.

Things have changed over the last 25 years. Market balancing costs do not belong in the regulated minimum price. Sometimes these costs are borne by producers/cooperatives, but other times by processors. For example, longer storage time for extended shelf-life products allows processors to manage supplies and inventory to balance the market (at a cost to the processor). In other scenarios, the processor may accept even day receiving and remain open to receiving milk on weekends or holidays. Balancing arrangements can also vary regionally. The myriad of situations in which a processor (and note the farmer) can provide and bear the costs of balancing proves it does not belong in the minimum price. In any event, the market can, should, and does price balancing services.

The market balancing costs of $0.60 in the $1.60 base Class I differential should be eliminated.

c. Proposal 2C – Eliminate the $0.60 amount allegedly "necessary" to incentivize service of the fluid market.

A recent report by the Congressional Research Service notes that one of the main objectives of FMMOs are to "promote orderly marketing conditions in fluid milk markets."[30] The Federal Orders were conceived at a time when the fluid use of milk represented about two-thirds of the utilization in FMMOs, and both the problems and the solutions were built around fluid regulations. Today, less than one-third of FMMO utilization is Class I and less than 20% of all usage (regulated and unregulated) is fluid milk. Manufactured dairy products are the primary use of farm milk today.

When developing the proposed rule on the base Class I differential under Federal Order Reform, USDA determined that the remaining $0.60 constitutes necessary compensation to incentivize producers to supply milk for fluid use, rather than manufacturing purposes. USDA considered this

[30] *Federal Milk Marketing Orders: An Overview*, Congressional Res. Serv. (June 15, 2022), https://crsreports.congress.gov/product/pdf/R/R45044/5

amount the necessary addition to the then-current $1.04 to attract sufficient supplies of milk for fluid use, as opposed to manufacturing use.

> Option 1A presumes that the $1.04 per hundredweight minimum Class I differential is no longer adequate to ensure a sufficient supply of milk due to the competitive nature of the manufacturing facilities in this region. Thus, Option 1A establishes an additional competitive factor into the development of the base zone Class I differential. Option 1A values this competitive factor to be worth about $0.60 per hundredweight. This value reflects approximately two-thirds of the actual competitive costs incurred by fluid plants to simply compete with manufacturing plants for a supply of milk.

63 Fed. Reg. at 4907–08.

MIG now proposes a reexamination of this component, based on data from economic programs long utilized by USDA in setting dairy pricing systems. The U.S. Dairy Sector Simulator (USDSS) is a spatial model of the U.S. dairy industry that has been used by the USDA to help understand the relative relationships of milk values across the 48 contiguous states.[31] This model takes milk and its components at the county level and then is tasked to assemble farm milk for fluid and manufacturing plants and distribute the finished products in the most cost efficient way possible. Actual road mileages with estimates of transportation costs are calculated. Milk components must move to existing U.S. plants to be made into 21 dairy products for final demand in domestic consumption and for export. USDA used this USDSS model during Federal Order Reform to determine the price surface for the Class I price. 64 Fed. Reg. at 16037 (Apr. 2, 1999) ("The adopted Class I pricing structure establishes a price surface that utilizes USDSS model results adjusted for all known plant locations and establishes differential levels that will result in prices that generate sufficient revenue to assure an adequate supply of milk.")

In the USDSS, the raw milk flows from farm to dairy plants, and finished products to consumers, representing the "primal solution" of the model. The model can also be used to generate the "dual solution" which is an indication of the marginal value of milk in any location and for any product. It is these dual solutions for Class I milk that is the starting point for Class I differentials.

The dual value can be interpreted as how much cost savings to the entire dairy market if another hundredweight of milk was available at a specific location. For differentials, it is the standardized value at fluid plants that is used. So, for example, the model results might indicate that the

[31] James E. Pratt, Phillip M. Bishop, et al., *A Description of the Methods and Data Employed in the U.S. Dairy Sector Simulator, Version 97.3*, Cornell Univ. Dep't of Agric., Resource & Managerial Econ. (July 1997), https://dairymarkets.org/pubPod/pubs/RB9709.pdf.

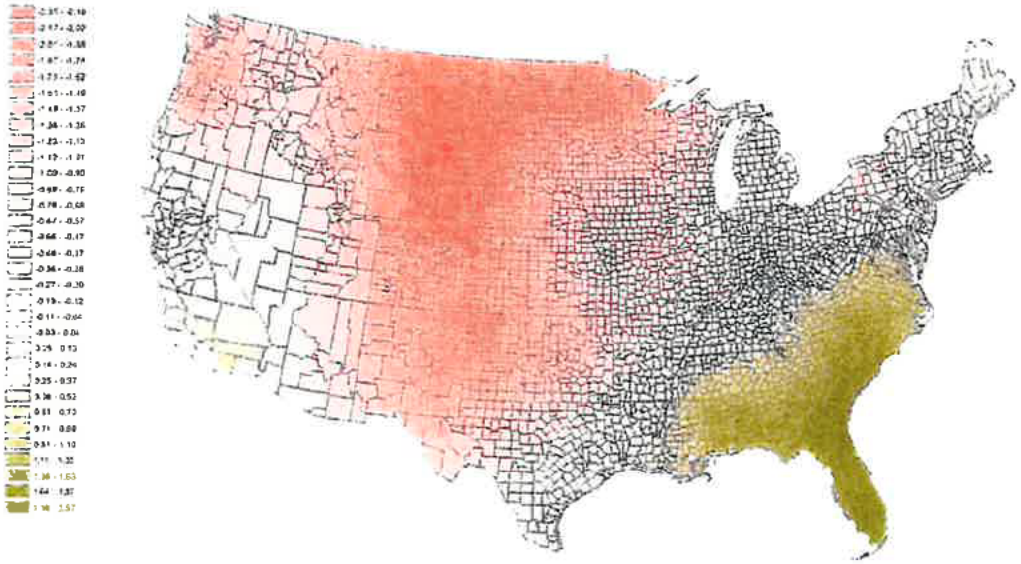
marginal value of another cwt of milk in Miami was $5.40, but in Milwaukee the marginal value might only be $0.15. Economists refer to this difference as a "price relative." Somewhere in the country the marginal value of another cwt of milk will actually be $0. To get a Class I differential, a fixed increment is added to the dual value everywhere.

In the recent past, $1.60 has been the fixed increment resulting in $6.00 differential in Miami and $1.75 in Milwaukee. Part of the justification for this fixed increment is to help attract milk to fluid milk plants and to help further the goals of an efficient market. FMMOs have only recognized the spatial differences in *fluid milk* values across the country, but there are values for milk used in other products too. These values can be different—even at the same location—because the model can find a more market efficient solution with different products. For instance, in some locations another hundredweight of milk will reduce the marketing costs of the dairy industry more in a fluid plant than in a manufacturing plant. But, in other locations, the model can find additional cost savings for milk in a cheese plant rather than a fluid plant.

MIG worked with Dr. Mark Stephenson to use the USDSS model to measure the comparative dual values of Class I versus a manufacturing class. Using March 2016 dual values for Classes I and III across the country, one can highlight the relative value of milk in plants. The green-shaded regions of the map below show where milk in fluid plants lowers market costs more than milk used for cheese. The red regions highlight where milk in a cheese plant lowers industry costs more. The grey regions are about of equal value in either plant.

This map demonstrates that at a ***national*** level, fluid milk plants have no need to compel the production of more milk to ensure a sufficient supply of fluid milk. In fact, setting an "incentive" mark up on fluid milk prices in the red regions distorts markets by both stimulating unneeded raw milk but also signaling a value for Class I proceeds that do not exist (and in fact are likely negative). The fixed increment added to Class I price relatives is one of the places where Class I dollars may be misdirected, exacerbating the problem rather than correcting it.

Difference in the Marginal Value of Milk in Class I minus Class III Plants.



Today, milk supply is more than ample. So ample, in fact, that there are some orders regularly authorize dumping of pool milk (evidence of which MIG intends to introduce at the hearing). The amount necessary to incentivize delivery to a fluid plant is significantly less in this milk-abundance environment and, based on the long-respected and relied upon analysis above, should be set at zero. Dairy markets have changed a great deal since the 1940s. Trying to address fluid milk problems with fluid milk solutions only is too simplistic in a complex marketplace where incorrect price signals can create disorderly markets.

3. MIG PROPOSAL 3 – Establish a nationwide assembly credit for all Class I handlers.

All dairy farmers share in the benefits of the marketwide pool, but only those dairy farmers actually shipping milk to Class I incur the costs for doing so. To fairly allocate pool funds, an assembly credit compensates dairy farmers for incurring costs that not all dairy farmers incur. Thus, MIG submits this proposal in response to NMPF's proposals given NMPF's estimate on the impact its proposals will have on Class I prices. The regulatory language for this proposal is in **Exhibit C**.

Assembly credits are a concept that already exists in FMMO 30 (Upper Midwest), intended to offset the costs of assembling milk for delivery to fluid milk plants in lieu of non-fluid milk plants. Assembly credits serve to actually bring forth an adequate supply of fluid milk by rewarding Class I service to incentivize voluntary participation in the same (as opposed to a "call provision," which forces participation only when there is a shortfall).

Our proposal is to create a nationwide credit to handlers against their pool obligation, but paid to dairy farmers (not a reduction in the total dollars paid, but a credit against the pool obligation), on milk received at Class I plants. While the credit is a redirection to producers for direct-ship milk, the credit for non-direct ship milk (*i.e.*, that supplied by 9(c) handlers) is to be retained by that handler. At a hearing, MIG will present evidence to support that the assembly costs are, as a national average, $0.55. These costs include expenses for multi-stop routes, equipment costs for loading and transfer, and other expenses to be presented at the hearing. Additionally, assembly credits compensate producers directly for efforts to share supplemental milk transportation costs when combining loads, which supports service during times of milk deficits.

MIG's proposal will reduce processors' pool obligations but have no impact on their overall costs. MIG's proposal will increase certain producers serving Class I plants payments by $0.55/cwt and have a lesser impact on producers paid out of the pool. But MIG's proposal will directly benefit smaller farms who bear greater costs of getting their milk assembled and the producers who assemble the milk. MIG's proposal will likely have no impact on consumer prices.

This Proposal aims to fulfill the same policy goals and address the same market conditions as Proposal 2, albeit with a different approach. Proposal 3 (and similarly, Proposal 4) adapts the FMMO system to better direct incentive to service the fluid market to those farmers actually supplying the Class I plant. A marketwide service incentive (like the current $1.60 base Class I differential) sends market signals too far and too wide, resulting in oversupplies of milk and geographic misalignment of needs. Should any Class I service incentive be needed, it must be tailored to ensure only a sufficient supply of fluid milk and not a nationwide proliferation of milk supplies.

4. MIG PROPOSAL 4 – Establish a balancing credit for specialty fluid milk.

Part of the cost justification for the base Class I differential is daily and seasonal balancing, as well as the ability to service the Class I market under performance standard provisions or similar mechanisms. Of the base Class I differential of $1.60, about $0.60 is allocated to compensation for these efforts. 63 Fed. Reg. at 4908. However, specialty milk supplies (e.g., A2, grass-fed, organic) cannot rely on the general FMMO pool for balancing. Instead, many such processors balance their supplies of specialty milk by receiving milk every day, not adjusting for seasonal or daily needs in the same manner as the conventional market. As the FMMOs are unable to fulfill

"the bargain" to supply additional milk for organic, A2, or grass-fed milk, modified treatment for these milks is appropriate. Thus, MIG submits this proposal in direct response and as an alternative to NMPF Proposals 5. The regulatory language for this proposal is in **Exhibit D**.

This proposal would create a credit for specialty milk handlers of $0.60 that the handler would then pay to the specific producers supplying the handler. This proposal redirects a part of a processors' producer settlement fund obligation to the processor's specific suppliers who supply specialty milks: organic, grass-fed, and/or A2. Modified treatment is appropriate as the characteristics of these milks are not aligned with the traditional FMMO paradigm.

MIG understands this proposal would likely require parameters to ensure the credit is used as intended. Thus, under this proposal MIG limits the ability to pool other milk through "diversions or transfers" to other handlers and allocating any milk that must be balanced by another handler to "other source milk" (down allocating the milk to the lowest priced class for the month). These elements are included in the proposed language.

MIG's proposal will reduce processors' pool obligations but have no impact on their overall costs. MIG's proposal will increase certain specialty milk producers payments by $0.60 /cwt, and have a lesser impact on producers paid out of the pool. MIG's proposal will likely have no impact on consumer prices.

5. MIG PROPOSAL 5 – Adjust ESL shrinkage.

Currently, under the FMMOs pool plant shrinkage that exceeds 2% is priced at Class I. Shrinkage that does not exceed 2% is assigned to the lowest price class. Due to engineering and operating differences, ESL processing experiences shrinkage above 2%. Thus, MIG submits this proposal as a necessary pricing update and generally in response to the NMPF proposals.

MIG submits this proposal in response to NMPF's proposals given NMPF's estimate on the impact its proposals will have on Class I prices. The regulatory language for this proposal is in **Exhibit E**. MIG's proposal will slightly reduce ESL processors' costs. MIG's proposal will have a negligible impact on producer or consumer prices.

The Dairy Institute of California raised this issue at the hearing establishing FMMO 51 in California. There, the testimony demonstrated ESL shrinkage of about 5%. Industry and USDA data confirm this finding. Ultimately, USDA decided to align the FMMO 51 shrink provisions with the other 10 FMMOs—i.e., it was viewed as a national, not a California, matter. Now is the appropriate time to address this straightforward issue on a national basis.

This proposal updates the shrink allowance for ESL products to 5%. We have begun work to update the industry data reviewed at the California hearing to present to USDA at any hearing in

support of this proposal. It should be noted that all plants have every incentive to minimize shrinkage as plants do not generate any sales from milk lost to shrinkage, so nothing about this proposal will encourage any change in the approach to the same.

6. MIG PROPOSAL 6 – Organic Milk Exemption

One of the key justifications for mandatory Class I participation in FMMOs is the ability of the FMMO to service the Class I market utilizing performance standards (e.g., shipping percentages, touch base requirements and in the past "call provisions" or similar mechanisms). But FMMOs are unable to fulfill "the bargain" to supply additional milk for USDA certified organic fluid use. FMMO pool milk is not a substitute for organic milk.

Organic milk makes up about seven percent of fluid milk volume and only about three percent of milk production in the United States but is forced to participate in the order system from which it cannot draw the primary benefit. *See supra* note 4. Modified treatment for certified organic milk is long overdue. Moreover, traditionally organic milk is subject to longer term contracts and is not subject to classified pricing (i.e., all organic milk is paid one premium price regardless of how it is used). The so-called and alleged destructive competition that gave rise to the Agricultural Marketing Agreement Act and FMMOs is not applicable to organic milk.

The quid pro quo that serves as the basis for the Class I-led FMMO system is that, in exchange for higher minimum prices, Class I processors have priority access to milk supplies. It is, in fact, the only benefit that Class I processors receive from an FMMO system. In times of shortages of organic milk, an FMMO Market Administrator cannot resolve this situation by calling for the provision of additional supplies from conventional dairy farmers.

FMMOs provide orderly marketing because they ensure that farmers who produce essentially interchangeable product receive equal minimum prices for their milk, regardless of the ultimate use of the milk. The philosophy behind the notion that all farmers should share in the higher value (Class I) and lower value (other Classes) markets is that each participating farmer could, given the opportunity, have served the higher value market. In the case of organic fluid milk, though, conventional farmers are not producing an interchangeable good, and, under federal law, could not participate in the higher value Class I organic fluid milk market. Thus, under current FMMOs, organic milk farmers are being forced to forego potential revenues that are paid into the settlement pool to be shared with farmers who are not producing a comparable product.

Under MIG's proposal, USDA certified organic milk that is priced above the Class I minimum price is exempt from mandatory pooling. In other words, a handler of certified organic milk that meets or exceeds the FMMO regulated minimum Class I price for the purchase of certified organic milk (whether direct ship or 9(c) cooperative) would be exempt from mandatory pooling for such milk. Using Class I as a standard ensures that organic milk will always be paid at the highest

conventional price for that order – a benefit for farmers. The handler (and the organic milk) would remain subject to reporting requirements, enforcement mechanisms, administrative fees and "in" the FMMO system. The regulatory language for this proposal is in **Exhibit F**.

First, MIG'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. This proposal is in direct response to NMPF's Proposal 5, in that it seeks to correct the fact that the factors supporting application of the Base Class I Differential and Price Surface to USDA certified organic milk do not exist.

Secondly, this type of pricing disparity for the type or quality of milk is specifically contemplated by the Act and entirely consistent with the principles of uniform pricing. 7 U.S.C. § 608c(5)(A) ("Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (emphasis added)).

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 exemption. 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.

MIG's proposal addresses pricing for organic milk, with corresponding revisions to the definitions of Part 1000 to ensure the proposal only applies as intended and provides guardrails. The regulatory language for this proposal would define organic milk (adding § 1000.20) and would amend § 1000.50 by adding a new subparagraph (r) regarding the treatment of organic milk. The proposed regulatory language also would amend other definitions as guardrails to protect against a handler benefiting from the exemption for organic milk and then in turn burdening the pool. Thus, under this proposal, MIG limits the ability to pool other milk through "diversions or transfers" to other handlers and by specifying that organic milk pooled as conventional is "other source milk" (i.e., down allocating the milk to the lowest priced class for the month). These elements are included in the proposed regulatory language.

MIG's proposal will reduce organic handlers' pool obligations but has no guaranteed impact on their overall costs. MIG's proposal may increase certain specialty milk producers payments, but, given the nature of the premium payments already utilized, any change is speculative. MIG's proposal will likely have no impact on consumer prices.

G. Cost Impact of the Proposal on the Industry[32]

The precise impacts of the proposals should be analyzed by USDA using a preliminary economic analysis. MIG included estimates in each individual Proposal of its impact on producers and processors.

From a consumer perspective, MIG's proposals will likely result in a positive change. In 2023, USDA predicts that all food prices will increase 7.5 percent, which is over and above the 2022 food price increase of 9.9 percent. To add insult to injury, ***ultimately any increase in Class I prices will increase costs for consumers*** buying a gallon of milk. MIG's proposals counteract these trends and will not put any pressure on increasing prices for fluid milk dairy products. They also will likely result in more options and variety of fluid milk products for consumers.

There would be a one-time cost to the market administrator offices of developing revised software to capture the proposals. Market administrator offices will continue to have ongoing costs of audits; handlers pay for these costs through assessments. MIG does not anticipate its proposals would have any appreciable cost impact to the Market Administrator, USDA, or the Secretary.

H. Expected Effects on Small Businesses[33]

The impacts on small businesses as defined by the U.S. Small Business Administration are described above, including that the current system is unsustainably burdening fluid milk processors many of whom qualify as small businesses as defined by SBA. The impact of MIG's proposals are to either reduce the burden on fluid milk processors or to ensure producers who serve the fluid milk market are paid for those efforts. Given a) that FMMO prices are regulated minimums and USDA has in the past recognized that prices actually received by dairy farmers will vary from regulated minimums; and b) that dairy farmers with investments in fluid milk facilities bear the burden of these significant costs which then depress prices paid to the very dairy farmers who own the facilities, small businesses in these respective industry roles may not be impacted or may benefit.

I. Would a pre-hearing information session be helpful to explain the proposal?[34]

Yes, MIG welcomes a pre-hearing information session to explain its proposals.

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[32] Addressing 7 CFR § 900.22(f).

[33] Addressing 7 CFR § 900.22(e).

[34] Addressing 7 CFR § 900.22(g)

J. Conclusion

Every day that goes by the Class I market suffers and, by extension, dairy farmers and the entire FMMO system suffer, depending as it does on the Class I revenue stream to fund the producer settlement funds. The industry needs this petition considered promptly to address these serious economic problems. Any FMMO hearing involving Class I must include consideration of alternatives that ***remove barriers to Class I innovation and compensate dairy farmers who ship milk to fluid milk plants***. Leaving Class I trapped in antiquated pricing models spells long-term failure for the FMMO system. Now is the moment to bring FMMOs into the present and establish a regulatory system with fairness and longevity.

MIG urges USDA to include its proposals for consideration in any upcoming hearing.

Respectively Submitted,

Davis Wright Tremaine LLP

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Aurora Organic Dairy
Crystal Creamery
Danone North America
Fairlife
HP Hood LLC
Organic Valley/CROPP Cooperative
Shamrock Foods Company
Shehadey Family Foods, LLC
(Producers Dairy Foods, Inc.; Model Dairy, LLC; Umpqua Dairy Products Co.)
Turner Dairy Farms

EXHIBIT F

MIG Proposal 6 – USDA Certified Organic Milk Exemption from Pool Obligation

This proposal amends 7 C.F.R. § 1000 as follows. Additions are red font. ~~Deletions are red strikethrough font.~~

§ 1000.14 Other source milk.

(d) Receipts of any USDA certified organic milk not used to produce USDA certified organic products.

§ 1000.15 Fluid milk product.

(b) The term fluid milk product shall not include.

(1) Any product that contains less than 6.5 percent nonfat milk solids and contains less than 2.25 percent true milk protein; whey; plain or sweetened evaporated milk/skim milk; sweetened condensed milk/skim milk; yogurt containing beverages with 20 or more percent yogurt by weight and kefir; products especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers; and products that meet the compositional standards specified in paragraph (a) of this section but contain no fluid milk products included in paragraph (a) of this section

(2) The quantity of skim milk equivalent in any modified product specified in paragraph (a) of this section that is greater than an equal volume of an unmodified product of the same nature and butterfat content.

(3) Any USDA certified organic product meeting the requirements specified in paragraph (a) of this section and §1000.50(r).

§ 1000.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients. The term fluid cream product shall not include USDA certified organic products and that meet the requirements §1000.50(r).

§ 1000.20 USDA Certified Organic Milk.

USDA certified organic milk means milk that has been certified organic pursuant to 7 U.S.C. §6501 *et seq.* and 7 C.F.R. §205 *et seq.*

§ 1000.50 Class prices, component prices, and advanced pricing factors.

(r) *USDA Certified Organic Milk.* All USDA Certified Organic Milk that receives a producer pay price which meets or exceeds the Class I price defined under subparts (a) – (c) of this Section shall be excluded from mandatory pooling and exempt from the producer-settlement fund payments of a handler under §1000.70 so long as each of the handler's payments to producers, dairy farmers, and cooperative associations for USDA certified organic milk satisfies the price requirement.

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STAMP & RETURN

Ms. Dana Coale, Deputy Administrator
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Re: Revised Proposals to Petition of the Milk Innovation Group ("MIG") For a Hearing to Amend Federal Milk Marketing Orders

Dear Deputy Administrator Coale:

In response to USDA's Action Plan and Call for Proposals announced on June 1, 2023, the Milk Innovation Group ("MIG")[1] petitioned the Secretary of Agriculture to consider its additional proposals (the "Petition") to amend all current Federal Milk Market Orders (FMMOs), 7 C.F.R. Parts 1000–1135. On June 16, 2023, USDA held a Pre-Hearing Information Session. MIG hereby resubmits its Petition, with its individual proposals revised in light of discussions at the Pre-Hearing Information Session.

A. Introduction and Summary

MIG restates and incorporates by reference here its Petition submitted on June 14, 2023. Herein, MIG explains the revisions it made to its individual proposals and includes the update proposed regulatory language for the same. MIG requests that USDA treat these revised proposals as MIG's operative proposals for any upcoming hearing.

[1] The members of MIG are: Anderson Erickson Dairy Co., Inc.; Aurora Organic Dairy; Crystal Creamery; Danone North America; Fairlife; HP Hood LLC; Organic Valley/CROPP Cooperative; Shamrock Foods Company; Shehadey Family Foods, LLC (Producers Dairy Foods, Inc.; Model Dairy, LLC; Umpqua Dairy Products Co.); and Turner Dairy Farms.

1. MIG PROPOSAL 1 – Average of Plus Rolling Adjuster for Base Class I Skim Milk Price

MIG will present evidence at any hearing in support of its Proposal 1 and reiterates the need for risk management tools for Class I processors and supports USDA adopting its Proposal. MIG proposes an approach that would preserve risk management opportunities for both processors and producers: an "average of" formula with the adjuster updated monthly using a 24-month look back period with a 12-month lag, *i.e.*, the preceding the 13 to 36 month period. For clarity, MIG provides this example of how its Proposal 1 would work in practice for January 2024:

A. For each prior month, calculate the "higher of" the advanced Class III or IV skim price (in other words, the pre-May 2019 method).

B. For each prior month, calculate the "average of" the advanced Class III and IV skim price (in other words, the post-May 2019 method, without the $0.74).

C. Calculate the difference between (A) and (B).

D. Monthly, calculate the adjuster by averaging (C) for the preceding 13 to 36 month period (this is the "Rolling Adjuster" with a 24 month look back period with a 12 month lag). For example, if this were in place for January 2024, the Rolling Adjuster would be the average of (C) for January 2021 to December 2022. And then the Rolling Adjuster for February 2024 would be the average of (C) for February 2021 to January 2023. And so on.

E. Monthly, average the Class III and IV advanced skim prices for that month and add (D) (the Rolling Adjuster).

To further clarify this application of Proposal 1, MIG added additional language to its updated proposal in **Exhibit A** to make clear the operation of the Rolling Adjuster (new language underlined):

> Class I skim price adjuster. The Class I skim price adjuster per hundredweight shall be a <u>24-month simple average</u> of the difference between the higher of the advanced pricing factors computed in paragraph (q)(1) and (2) and the simple average of same for the <u>preceding 13 to 36 month period</u>.

2. MIG PROPOSAL 2 – Update the base Class I differential from $1.60 to $0.00.

MIG will present evidence at any hearing in support of its Proposal 2, a change driven by the unavoidable realities of the dairy market. MIG did not make any revisions to the regulatory language for its Proposal 2, and resubmits here, **Exhibit B**, the version previously submitted on June 14.

3. MIG PROPOSAL 3 – Establish a nationwide assembly credit for all Class I handlers.

MIG will present evidence at any hearing in support of its Proposal 3, a credit MIG maintains appropriately incentivizes Class I supplies and compensation for the same. MIG revised its Proposal 3 to correct a typographical error regarding the amount of the assembly credit. That credit should be $0.55, not $0.56, and the updated **Exhibit C** reflects the correct amount.

4. MIG PROPOSAL 4 – Establish a balancing credit for specialty fluid milk.

MIG will present evidence at any hearing in support of its proposal to establish a specialty milk balancing credit. In response to USDA's technical questions at the public information session, MIG submits a revised version of Proposal 4 which is intended to clarify (a) the third party verification standard for grass-fed and A2 milk, (b) the definition of the producer milk eligible for the credit; and (c) that handlers cannot divert off the milk that receives this credit. The updated **Exhibit D** reflects these clarifying revisions.

5. MIG PROPOSAL 5 – Adjust Allowable ESL shrinkage.

MIG will present evidence at any hearing in support of its proposal to adjust shrinkage for extended shelf life (ESL) processing, including ultra-pasteurized and aseptic Class I facilities. In response to USDA's technical questions at the public information session, MIG submits a revised version of Proposal 5 which is intended to clarify the treatment of partially regulated plants with ESL milk.

The threshold for a partially regulated plant would be the same threshold applicable to a 7(b) plant for the order in which partially regulated plant has route disposition (*e.g.*., 25% for Order 1 and 50% for Order 5). The revised language also replaces the word "extent" with "volume" to clarify which milk is subject to the additional allowable shrink. The updated **Exhibit E** reflects these clarifications.

6. MIG PROPOSAL 6 – Organic Milk Exemption.

MIG will present evidence at any hearing in support of its Proposal 6, a change driven by the unavoidable reality that FMMO pool milk is not interchangeable with or a substitute for USDA certified organic milk. In response to USDA's technical questions at the public information session, MIG submits a revised version of Proposal 6 which is intended to clarify that the proposed language in § 1000.15 and § 1000.16 apply only for pricing and pooling purposes and that the reporting handler shall nonetheless report its organic milk receipts as defined by § 1000.40 to the Market Administrator, explicitly identifying the USDA certified organic milk. AMS should have no difficulty confirming, by reviewing the handler's records, that the milk is certified organic by AMS under the National Organic Program. For instance, the NOP maintains the up-to-date

Organic INTEGRITY database regarding certified organic operations and organic handlers are required to maintain organic certificates.

MIG also responds to USDA's inquiry for proposed § 1000.50(r) with respect to which Class I price the processor must equal or exceed by replacing "(a) – (c)" with "(b) plus (c)." Finally, to address USDA's concern about for which month should the exemption apply, MIG proposes to add language that the exemption shall apply if the requirements have been met for each of the three preceding months. So for July, the exemption would be available in July, if the requirements were met for each month, April, May, and June of the same year. This addition also should add protections against a handler jumping in and out of the pool should there be, for instance, an unusual price inversion. MIG also proposes a special provision for newly certified organic milk handlers. The updated **Exhibit F** reflects these revisions.

B. Conclusion

MIG urges USDA to include all of its proposals for consideration in any upcoming hearing.

Respectfully Submitted,

Davis Wright Tremaine LLP

Charles M. English, Jr.

Ashley L. Vulin
CE:AL:af

Encls.: Exhs. A-F

cc: *Via Email Only*

Bruce Summers
Erin Taylor
Anderson Erickson Dairy Co., Inc.
Aurora Organic Dairy
Crystal Creamery
Danone North America
Fairlife
HP Hood LLC
Organic Valley/CROPP Cooperative
Shamrock Foods Company
Shehadey Family Foods, LLC
Turner Dairy Farms

EXHIBIT 4

USDA Agricultural Marketing Service

1400 Independence Avenue, SW
Room 2530-S, STOP 0225
Washington, D.C. 20250-0225

July 24, 2023

Mr. Charles M. English, Jr.
Ms. Ashley L. Vulin
Davis Wright Tremaine LLP
Suite 3300
920 Fifth Avenue
Seattle, WA 98104-1610

Dear Mr. English and Ms. Vulin:

This letter is in reply to Milk Innovation Group's (MIG) proposals submitted in response to a Request for Additional Proposals relating to the pricing provisions of the Federal milk marketing order (FMMO) program. USDA received MIG's six proposals on June 14, 2023, and subsequent modifications on June 20, 2023.

A Hearing Notice has been published in the Federal Register announcing a hearing will convene at 9:00 a.m. ET on Wednesday, August 23, 2023, at 502 East Event Centre in Carmel, Indiana. Testimony and evidence will be taken on the following proposals submitted by MIG:

- Proposal 1 to adopt an average-of plus rolling adjuster for the base Class I skim milk price; and
- Proposal 2 to update the base Class I differential from $1.60 to $0.00.

We encourage MIG to participate in the hearing to provide evidence regarding why your proposals should be adopted. Please refer to the Hearing website (www.ams.usda.gov/rules-regulations/moa/dairy/hearings/national-fmmo-pricing-hearing) for full information on how to participate.

The Secretary has determined the hearing will be limited in scope to amendments directly impacting the uniform pricing formulas used in FMMOs. USDA received several proposals that did not relate directly to the uniform FMMO pricing formulas and have been determined to be beyond the scope of the upcoming rulemaking. Not including the proposals in this rulemaking proceeding does not prevent MIG from offering the proposals for consideration in a separate rulemaking proceeding. Requirements for submitting a proposal are outlined in 7 CFR 900.22 and are outlined at www.ams.usda.gov/sites/default/files/media/DairyMarketingOrderAmendmentBrochure.pdf.

Regarding proposals submitted by MIG specifically, the following will not be considered at this time:

Proposal 3 and Proposal 4
Proposals 3 and 4 seek to adopt amendments that would provide direct financial incentives to producers for supplying Class I plants. Proposal 3 aims to establish a nationwide assembly credit to Class I handlers against their pool obligation that would be paid to the plants' dairy farmers suppliers. Proposal 4 would establish a handler balancing credit, payable to producers who supply specialty fluid milk (e.g., A-2, grass-fed, organic) to Class I plants. These proposals do not seek to amend the uniform FMMO pricing formulas. Rather, these proposals seek to redirect part of the handler minimum classified milk price to those dairy farmers who supply the Class I handler. Accordingly, these proposals do not fall within the scope of this hearing and will not be heard at this time.

Proposal 5
Proposal 5 seeks to increase the amount of allowable extended shelf-life shrinkage and consequently the amount of milk that can be priced at the lowest classified price for the month. As this change does not seek to amend the uniform FMMO pricing formulas, the proposal does not fall within the scope of this hearing and will not be heard at this time.

Proposal 6
Proposal 6 seeks to exempt organic milk from FMMO pricing and pooling provisions if it is priced above the Class I minimum price. As this change does not seek to amend the uniform FMMO pricing formulas, the proposal does not fall within the scope of this hearing and will not be heard at this time.

Thank you for your interest in the FMMO program. We look forward to your participation in the rulemaking process.

Sincerely,

Dana H. Coale

Dana H. Coale
Deputy Administrator
USDA-AMS-Dairy Program