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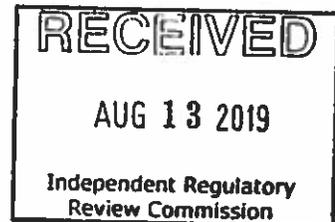
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August 12, 2019

VIA E-MAIL

Doug Eberly, Chief Counsel
Pennsylvania Milk Marketing Board
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Re: Comments on behalf of the Pennsylvania Association of Milk Dealers re: Proposed Rulemaking 7 Pa. Code § 143.31, "Transactions between Dealers and Producers; Termination of Dealer-Producer Contract"
IRRC # 3240; Regulation Number 47-18

Dear Mr. Eberly:

The Pennsylvania Association of Milk Dealers ("PAMD") provides the following comments, suggestions, and objections regarding the Pennsylvania Milk Marketing Board's ("PMMB") proposed revision to the regulation that seeks to extend the current requirement for terminating a milk supply relationship with a producer from 28-days to 90-days (hereafter, "the proposed regulation").

PAMD is a trade association representing the interests of the majority of fluid milk plants, also referred to as milk dealers, located within the Commonwealth of Pennsylvania. Fluid milk plants buy raw milk from individual dairy farmers and from cooperatives and pasteurize, standardize, homogenize, package and deliver beverage milk to wholesale customers such as grocery stores, convenience stores, food service businesses, schools, nursing homes and prisons.

Together, these milk plants employ thousands of people across Pennsylvania including union and non-union employees who are involved in plant operations, field operations, driving, repair, administration, and management. PAMD members also buy milk from hundreds of independent farms and from all the major dairy cooperatives doing business in the Commonwealth. In addition, PAMD member plants utilize many different equipment vendors

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and mechanics and trucking sales companies, and other services that contribute to the Commonwealth's economy. Further, many PAMD member plants are family run businesses that engage in charitable works throughout the Commonwealth.

Due to changing consumer preferences and competition from milk alternative beverages, milk consumption has been on the decline. According to a recent article by John Newton, Director of Market Intelligence for the American Farm Bureau Federation, between 2012 and 2016, milk sales declined approximately 8%. John Newton, *Trends in Beverage Milk Consumption*, DairyBusiness, Jan. 5, 2018, <https://www.dairybusiness.com/trends-in-beverage-milk-consumption-2/>. The continued pressure on milk sales has continued. (Rutter Testimony, p.2 ("milk sales are projected to be under continued pressure.")).¹ Declining milk sales puts tremendous pressure on fluid milk plants, which count on volume to drive efficiencies and cover many overhead costs. With declining milk sales, unrecovered costs are a significant problem for milk plants that operate on razor thin margins, and more recently, the Board has been presented with data in cost replacement hearings that those margins have completely eroded and/or turned negative for many Pennsylvania fluid milk plants.

Requiring a milk plant to buy milk from dairy farmers when they do not have a use for it means that the milk plant must still pay the Federal minimum price and/or the Pennsylvania minimum price for that milk - this is a federal or state mandate which leaves no room to negotiate lower prices based on circumstances - and depending on market circumstances, they may not be able to sell the farm milk for any value and may need to dump the milk. When those circumstances occur, dealer witnesses, on behalf of their plants and PAMD, explained that it takes four to six loads of raw milk going into new packaged milk sales to make up for the loss of one load of dumped milk. It was further explained that making up for these losses is no longer a reliable option given declining fluid milk sales trends.

Alec Dewey, on behalf of his family-owned company, Harrisburg Dairies, and as a representative member of the Pennsylvania Milk Dealers, testified in relevant part as follows:

- "A longer termination period is counterintuitive to our current business arrangements . . . In [many] situations, *just making it through the current 28 days carrying any amount of surplus raw milk puts a tremendous burden on our company*. Adding 62 days to that timeline, especially if it occurred during the summer months when our volume is typically the lowest, could be enough to jeopardize the health/future of our company." (Dewey Testimony, p.1 (emphasis added).)²

¹ Mr. Rutter's testimony is available at <https://www.mmb.pa.gov/Public%20Hearings/July2/Documents/PAMD%20%20Testimony.pdf>.

² Mr. Dewey's testimony is available at <https://www.mmb.pa.gov/Public%20Hearings/July2/Documents/PAMD%20%20Testimony.pdf>.

- “In our estimation, it takes approximately 4-6 tanker loads of sold milk to recover the losses of 1 dumped tanker of surplus milk.” (*Id.*)
- “[I]n my opinion, . . . the health and future of our valued farm producers, *as a group*, is directly tied to the health and future of their market or processor. . . . [I]f we make a change to the Producer Termination requirement, in the interest of benefiting and protecting our farmers, that burdens and weakens their market, have we truly helped them?” (Dewey Testimony, p.2.)
- “*When a company like ours is struck with an unforeseen scenario of surplus milk, each additional day can make a tremendous difference. Every additional day added to a surplus situation while requesting and waiting for a hearing to justify a hardship, only makes the hardship worse and puts our remaining farmers at greater risk.*” (*Id.* (emphasis added).)

Todd Rutter, on behalf of his family-owned business, Rutter's Dairy, and as a representative member of PAMD, testified similarly, stating:

- “[P]ractical challenges arise in changing the 28 day notification period. Our customers . . . rarely give us more than an average of 21 days notification. . . . In this very tough environment, we’ve made deliveries to customers on Friday and go back Monday to find them closed and out of business.” (Rutter Testimony, p.2.)
- “If the 28 day notification is the only practical option we have for balancing our independent milk supply against demand and it is changed to 90 days and [Pennsylvania] can’t mandate how much notice our customers give to us, this could create an oversupply issue for an additional 62 days. . . . *In a time when milk sales were increasing, I agree most plants could absorb the extra volume from a lost customer or they would gain a new customer to offset it and the 90 days would have been no big deal. But we are not in those times and milk sales are projected to be under continued pressure. So we as businesses need more flexibility not less.*” (*Id.* (emphasis added).)
- *If a Dealer is in financial straits, time is of the essence for all concerned parties. . . . [I]n my opinion in this case the 90 day rule puts producers at more risk than less risk.*” (*Id.* (emphasis added).)

This testimony was intended to explain to the Board that the current 28-day requirement, while a fact of life for decades, is already burden enough on milk dealers given today's declining fluid milk sales trends. PAMD acknowledges and appreciates the Milk Marketing Board's investment of time and effort to identify meaningful exceptions to help minimize the burdens in those instances where financial hardship can be objectively determined.

PAMD still has two primary objections to the proposed regulation: (1) A 90-day notice requirement is prohibited by the terms of the Pennsylvania Milk Marketing Law, and (2) proposed section 143.31(h) materially expands the notice period for those qualifying for the exemptions from 28 days to up to 43 days and should be replaced with a provision that does not add to the burden of those plants facing objective financial stressors described in the identified exemptions. PAMD also has some suggestions to enhance the clarity of the process.

I. The proposal to enlarge the notice required to terminate a milk supply relationship with a producer from 28-days to 90-days exceeds the authority given to the Milk Marketing Board pursuant to the Milk Marketing Law.

The proposed regulation runs afoul of the clearly defined limits of what notice can be required of milk dealers seeking to do business under the authority of the Milk Marketing Board. In Section 404 of the Milk Marketing Law, the legislature clearly provides that if the Milk Marketing Board establishes a notice requirement for terminating a prior course of dealing, that requirement may not be less than 14 days nor more than 45 days. The statute states in relevant part:

§ 700j-404. Grounds for refusal, suspension or revocation

The board may decline to grant a license to an applicant, or may suspend or revoke the right of a licensee or former licensee to apply for a license for a new license period, or may suspend, revoke or refuse to transfer a license already granted to a milk dealer or handler, . . . after determination by the board that the dealer or handler:

(1) Has rejected, without reasonable cause, any milk purchased or acquired from a producer, or has rejected, without either reasonable cause or *reasonable advance notice*, milk delivered or made available by or on behalf of a producer in ordinary continuance of a previous course of dealing, except where the contract has been lawfully terminated: *Provided, however, That in the absence of an express or implied fixing of a longer period in the contract, "reasonable advance notice" shall not be construed to mean notice of less than fourteen days nor more than forty-five days[.]*

31 Pa. Stat. Ann. § 700j-404 (emphasis added).

With Section 404, the legislature established that the Milk Marketing Board "may" take action against milk dealers by, among other things, suspending or denying a license, for (1) rejecting milk that has been "purchased or acquired" without reasonable cause; (2) rejecting, without reasonable cause, milk that has been "delivered or made available" by a producer as part of an ongoing relationship, and (3) rejecting, without reasonable advance notice, milk that has been "delivered or made available" by a producer as part of an ongoing relationship. The

Legislature then explained that "reasonable advance notice" for purposes of terminating an ongoing relationship without a notice provision in a contract can be no less than 14 days and no more than 45 days. Thus, if the Milk Marketing Board establishes a notice requirement for terminating a prior course of dealing, that requirement may not be less than 14 days nor more than 45 days.

As the dealer testimony discussed above reveals, for those milk dealers that do not satisfy the requirements of the exemptions, it is critically important that the wisdom of the Legislature as to what constitutes reasonable notice is carried in the Milk Marketing Board's proposed changes to section 143.31.

II. Section 143.31(h) should be replaced with a provision that does not extend the notice required for companies qualifying for a hardship exemption by an additional two weeks.

Section 143.31(h) provides that a 28-day notice period of section 141.31(c), (e)-(g) only starts after the Board has determined an exemption applies and that the Board's determination may take up to 10 business days, which can mean an additional 14 calendar days.

In order for the proposed exemptions to not add to the burdens of those facing economic challenge, the 28-day notice period should start when notice is simultaneously given to the dairy farmer and to the Milk Marketing Board that the milk dealer intends stop purchasing milk within 28 days. The Board would then have 10 business days to rule an exception inapplicable, but if the criteria for an exception were satisfied, then the termination could become effective 28 days after notice was initially given rather than 43 days (recognizing 10 business days could result in 14 additional calendar days).

The Milk Marketing Board's impact analysis estimating a minimum cost of \$14,000 based on 40,000 pounds per week over two weeks, is a point in time calculation that understates the gravity of what it can mean to a milk plant if they are forced to dump milk daily or even every other day for 14 days due to section 143.31(h). Mr. Dewey testified that a few years ago his company was forced to dump a load of milk (which can range between 40,000 and 50,000 pounds) about every other day due to the 28-day notice requirement, and that the dumping was so burdensome his company is still recovering.

As recently as a few years ago, our company was in almost that exact situation where, due to a major customer going out of business heading into the summer months, we had a significant amount of surplus milk on our hands. At one point, we dumped as many as 12-14 loads of milk per month before we could adjust our milk supply and replace the lost sales. As I sit here today, I can honestly say that our company is still recovering from that time.

(Dewey Testimony, p.2.) As Mr. Dewey's testimony makes clear, the Board's estimate assuming that two loads of milk might be dumped during the 10 business days that section 143.31(h) would add is not entirely realistic. Instead, it is more likely that companies like Harrisburg Dairies would be forced to dump approximately 7 loads during the additional 10 business days, and this could be devastating for companies already experiencing enough financial hardship to apply for the exemptions. Adding two more weeks of waiting to the 28-day notice for companies in financial distress will harm vulnerable milk dealers and threaten their ability to purchase milk from producers that are not being terminated. Therefore, PAMD respectfully urges the Milk Marketing Board to replace section 143.31(h) with a provision that ensures the period during which financially distressed milk dealers who are eligible for the exemptions in section 143.31(c)-(g) does not exceed 28-days.

III. Technical Considerations for Clarity

Calculating a termination notice period from the date "the producer . . . receives the notice," *see* proposed 7 Pa. Code § 143.31(a), could create ambiguity, may lead to uncertain termination dates, and could add days to the waiting period. If a dealer mails the termination notice, the dealer would only know the date the producer receives it if the dealer sends the notice by certified mail or another form of delivery requiring a signature or verification. But in that situation, the dealer would not know if the signor necessarily delivered the mail to the producer. If certified mail is acceptable, it would be helpful to clarify that suffices regardless of who is the signatory. It would also be helpful, because time is generally of the essence, to have clarity on how the dealer should proceed if the producer refuses to sign for or otherwise acknowledge the notice. Finally, in order to avoid adding additional days to the waiting period, it would also be helpful to have guidance on how to effect hand delivery or express delivery.

PAMD is simply asking for a clearer standard and enhanced guidance for starting the notice period with a producer.

IV. Conclusion

For the foregoing reasons, PAMD respectfully requests the Board (1) revise the proposed regulation to reflect the will of the Legislature and set a maximum notice requirement of 45 days, (2) revise the proposed regulation to ensure that milk dealers qualifying for the 28-day exemptions will be able to effectively give a 28-day notice, not a 43-day notice, and (3) revise the regulation to provide clarity for ease of calculating when notice is effective without unnecessarily adding to the waiting period. Thank you for considering PAMD's comments, suggestions, and objections.

Doug Eberly, Chief Counsel
August 12, 2019
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Respectfully submitted,

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by Ryan Strain*

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