

Comments of the Independent Regulatory Review Commission



Milk Marketing Board Regulation #47-18 (IRRC #3240)

Transactions Between Dealers and Producers; Termination of Dealer-Producer Contract

September 11, 2019

We submit for your consideration the following comments on the proposed rulemaking published in the July 13, 2019 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) (RRA) directs the Milk Marketing Board (Board) to respond to all comments received from us or any other source.

1. Determining whether the regulation is in the public interest.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. The Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under § 745.5(a) of the RRA in the Regulatory Analysis Form (RAF).

The explanation of the regulation in the Preamble and the information contained in the RAF are not sufficient to allow the Commission to determine if the regulation is in the public interest. We note the following examples:

- Section 143.31(a) increases the notice period that is required to terminate a dealer producer purchasing agreement and requires dealers to provide reasons for termination. It also addresses when payment is to be made to the producer whose contract has been terminated. However, the description in the Preamble only reports on the required notice period;
- The explanation of Section 143.31(c) includes a lengthy rationale for utilizing the O-score, but does not address the notification requirements or the definition of “necessary documentation;” and
- The Preamble explains why Section 143.31(k) is needed but does not describe the requirements of the subsection.

The Board should also address the following issues in the RAF:

- In RAF #10, the Board provides an in-depth and cogent rationale for increasing the notice to producers to 90 days. However, Section 143.31(a) also increases the notice period of termination given to a dealer by a producer to 90 days, but the Board does not provide any rationale for the need for that increase. The Board should explain the need for this provision in the RAF and Preamble to the final regulation.

The Board also provides a detailed explanation and rationale for the exceptions to the 90-day notice period that dealers can claim under Sections 143.31 (c), (d), (e) and (g). However, those provisions apply only to the notice dealers must give to producers. The Board does not provide any rationale for not providing any exceptions for the longer notice period producers are required to provide to dealers. The Board should either allow the producer to also petition for a shorter notice period or provide its rationale for not permitting any exceptions to the producer's required notice period to the dealer.

The proposal carries over existing language that requires the dealer to specify in the notice to a producer the reasons for termination. However, the Board does not require a producer that wishes to terminate its agreement with a dealer to provide reasons for the termination. The Board should explain why it is unnecessary for producers to provide this type of information to dealers.

- In RAF #25, the Board is asked to identify provisions of the proposal that have been developed to meet the particular needs of affected groups. The Board's response includes summaries of Subsections (c), (d), (e), (f) and (g) as special provisions to mitigate adverse impacts on both dealers and farmers. There is ample discussion in the RAF regarding the impact of the notification provisions in Subsections (c), (d) and (e) for the various situations that milk dealers may encounter. However, there is not sufficient information for Subsection (f) which permits a milk dealer to report the value of a charitable donation to the Board as an authorized contribution. The Board should explain in greater detail how the charitable donation provision will be implemented and the benefits expected to milk dealers.

In the Preamble and RAF submitted with the final-form rulemaking, the Board should provide information required under Section 5 of the RRA (71 P.S. § 745.5(a)), including complete descriptions of amendments and responses to RAF questions that incorporate all aspects of the proposal.

2. Possible conflict with or duplication of statutes or existing regulations.

The Pennsylvania Association of Milk Dealers (PAMD) asserts that the proposed timeline for notice of termination of a contract conflicts with the Milk Marketing Law (Act) definition of "reasonable advance notice." PAMD believes Section 404 of the Act limits the Board to establishing a notice requirement for purposes of terminating an ongoing relationship without a notice provision in a contract to not less than 14 days nor more than 45 days. 31 P.S. § 700j-404 The Board should explain how its proposal to extend the current 28-day notice to a 90-day notice is consistent with the Act.

3. Section 143.31. Written notice required. Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures and timetables; and Fiscal impacts of the regulation.

New Subsection (a)

The Board proposes to increase the required notice period to terminate a dealer-producer purchasing agreement from 28 days to 90 days. This new subsection requires that at least a 90-day written notice must be given before termination. The period of notice begins when the producer or dealer receives the notice. Since the period of notice officially begins upon receipt of the written notice, the regulation should require the notice to be provided by registered mail or certified mail with return receipt. The Board should specify in the annex of the final-form regulation how that written notice will be sent and receipt verified. Likewise, the Board should clarify how it will notify the dealer and affected producers in the following sections: 143.31(c), 143.31 (e)(5), 143.31 (f) and 143.31(g)(8).

The regulation currently requires the dealer to pay the producer in full by the 20th day of the “following month.” The proposed language does not change that provision. With the current 28-day notice period, the “following month” is not subject to any interpretation. However, with the proposed extension to a 90-day notice period, it is unclear whether the “following month” is the month following actual termination or the month following the notice of termination. The Board should clarify that the “following month” is the month following the actual termination and not the month following the notice of termination.

This subsection requires that if a dealer petitions for a shorter notice period, the notice to the producer must inform the producer that the dealer is petitioning for the shorter notice period. Is it the intent of the Board for the dealer to petition the Board and notify the producer on the same day? The Board should clarify in the Preamble to the final rulemaking how this provision will be implemented. If it is the goal of the Board to have the dealer notify simultaneously the producer and the Board, it should be clearly stated in annex of the final regulation.

New subsections (c)

This subsection allows a dealer to terminate a contract or purchasing agreement or ordinary continuance of a previous course of dealing with a producer by giving a 28-day notice if the dealer is in financial distress. Financial distress is determined using the Ohlson O-score. The Board is to compute and review the O-score within 10 business days of receiving the necessary documentation from a dealer.

How did the Board determine that 10 business days is an appropriate period of time to perform the activities required under this subsection and in Sections 143.31 (e)(5), 143.31 (f) and 143.31(g)(8)? Given the possibility that a dealer may have to purchase producer milk for up to 10-14 days longer than is currently required, the Board should explain the reasonableness of the time period for review and notification.

The Board does not explicitly provide that a dealer is required to petition the Board to utilize the exceptions in this subsection or Sections 143.31(d), (e) and (g). We suggest the Board revise the last sentence of Section 143.31 (a) to read: "If a dealer petitions for a shorter notice period UNDER CLAUSES (c), (d), (e) and (g)" These subsections should also be revised to state that the Board is notifying the dealer and affected producers of its decision to either approve or disapprove a dealer's petition to waive the longer notice period.

New subsection (e) and (f)

Would a milk dealer applying for an exception to the longer notice period in Sections 143.31(c), (d), (e) and (g) be eligible to make a charitable donation as provided for in §143.31(f)? If so, the Board should explain why an additional 10 business days for each of the exceptions is needed to review documents that should already have been submitted by the dealer as part of its petition to the Board for a 28-day notice. It should also explain the need for the Board to notify affected parties that a dealer is making a charitable donation under Subsection (f).

New subsection (g)

This subsection allows a dealer to terminate a contractual arrangement with a producer if there is insufficient plant output due to a catastrophic event reasonably expected to last beyond 28 days by giving a 28-day notice. Subparagraph (g)(1) includes a shut down or slow down of plant operations as a catastrophic event.

First, why is a plant shut down or slow down considered to be "catastrophic"--in the same category as massive fire or tornado damage? Would it be more appropriate to include such an event as a separate exception to the notice requirement?

Second, under the federal Worker Adjustment and Retraining Notification (WARN) Act, there are instances where employers are required to provide a 60-day notice to employees in the event of a plant shut down or mass layoff of employees. 29 U.S. Code § 2102. If a producer falls within the criteria of the WARN Act, how can that producer comply with the 60-day notice requirement if the dealer is only providing it with a 28-day notice of termination? The Board should take this federal notice requirement into consideration when it prepares the final-form rulemaking package.

New Subsection (h)

This subsection provides that a 28-day notice period for Sections 141.31 (c), (e)-(g) commences on the day the 28-day notice is approved by the Board. PAMD is concerned that this provision will effectively turn what is to be a 28-day notification period into possibly a 43-day notification period. It contends that the Board's fiscal analysis that estimates a minimum dealer cost of \$14,000 for the two weeks or 10 business days is "a point in time calculation" that understates the gravity of the situation. To alleviate what it considers an additional burden on already struggling milk dealers, it suggests that the Board permit the 28-day notice period to begin when the notice is simultaneously given to the dairy farmer and the Board. Given the possible

significant fiscal impact that an additional 10-14 days could have on these small businesses, the Board should explain its decision to have the 28-day notice begin upon the Board's approval.

The Board explains in RAF #19 that costs associated with purchasing milk are different for each dealer and are based on many factors such as utilization, location, monthly milk price and volume purchased. It further explains in the *Fiscal impact* section of the Preamble that "Given these uncertainties, a precise quantification of this impact is not possible, but a minimum could be as much as \$14,000." The Board should explain its rationale for using the December 2018 simple average minimum value due to producers from dealers as the basis for its estimate.

We commend the Board for the outreach it has conducted and recognize its efforts to strike an appropriate balance between the needs of independent dairy farmers and milk dealers. We encourage the Board to continue its dialogue with the regulated community as it develops the final version of the regulation.

New subsection (k)

This section requires the Board to maintain a current list of government agencies and nonprofit organizations which are available to assist producers who receive termination notices. The amendment states that "The termination notice shall not be considered received by the producer unless it includes this list."

The Board should clarify how dealers will access the most-up-to date list of these entities. Will it be available on the Board's website or must dealers request it from the Board? Also, the Board should revise Section 143.31(a) (relating to Written notice required) to refer to this list since it is information that must accompany the written notice.

4. Miscellaneous Clarity.

- Under Section 143.31(c), should there be a "+" symbol instead of an "=" before "0.285Y?"
- The Board is proposing to delete § 143.32 (relating to Forfeit use of notice rights). As drafted, the section is bracketed. It should, instead, be marked as "(Reserved)." See Section 2.2 (relating to deletion and addition of sections) of the *Pennsylvania Code and Style Manual*.
- We notice that § 143.32 is referenced in § 143.33 which is not part of this rulemaking. For clarity, we suggest the Board, in the final-form regulation, remove the reference to the deleted section in § 143.33.
- The phrase "including, but not limited to" is used in § 143.31(g)(1). Section 6.16 of the *Pennsylvania Code & Bulletin Style Manual* recommends that the term "includes" or "including" be used instead of the phrase "including, not limited to."