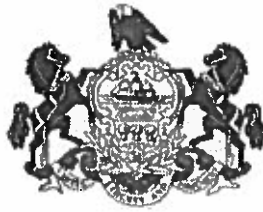


3243.

**JOHN A. LAWRENCE**  
STATE REPRESENTATIVE  
13<sup>TH</sup> LEGISLATIVE DISTRICT

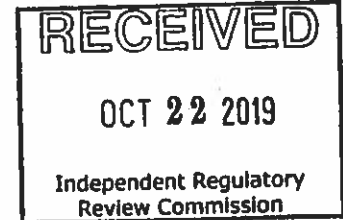


**HOUSE OF REPRESENTATIVES**  
COMMONWEALTH OF PENNSYLVANIA  
HARRISBURG

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Independent Regulatory Review Commission  
George Bedwick, Chairman  
333 Market Street, 14th Floor  
Harrisburg, PA 17101



October 21, 2019

Re: IRRC #3243, Regulation #47-20: Pennsylvania Milk Marketing Board

Dear Chairman Bedwick –

I trust all is well.

The Milk Marketing Board (MMB) recently proposed new rulemaking that is before the IRRC for review and consideration. I appreciate the opportunity to offer comments regarding the proposed amendment to 7 Pa Code ch. 143, and I have included an important change for your consideration.

As noted in the Regulatory Analysis submitted to the IRRC, the MMB has long required milk dealers to include a line-item on producers' milk checks showing the specific amount of state-mandated premiums contained in each check to each farmer. However, neither law nor regulation currently requires cooperatives to disclose this same information to their producers. Proposed regulation #47-20 attempts to address this inequity to ensure transparency and disclosure of state mandated premiums to all Pennsylvania dairy farmers.

**MILK MARKETING BOARD AUTHORITY TO DIRECT COOPERATIVES TO DISCLOSE  
BOARD MANDATED PREMIUMS TO PENNSYLVANIA DAIRY FARMERS**

Before considering the merits of the proposal, it is important to establish that the MMB does indeed have the authority to implement such a proposal. The Milk Marketing Law defines several key terms material to this proposed regulation – namely Producer, Person, Cooperative, and Milk Dealer. Please note that under the law, a Cooperative is also a Producer, and a Cooperative can also be a Milk Dealer, specifically when it acts as an agent for its members.

*"PRODUCER" means a person producing milk.*

*"PERSON" includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned or conducted by or on behalf of two or more individuals or other persons.*

*"COOPERATIVE" means a cooperative agricultural association or corporation of producers organized under the laws of this Commonwealth or of any other state and engaged in making collective sales or in the marketing of milk for producers under contract with it. A cooperative shall not be deemed a milk dealer or handler, but shall be deemed a producer, except as otherwise provided herein.*

*"MILK DEALER" or "HANDLER" means any person, who purchases or receives or handles on consignment or otherwise milk within the Commonwealth, for processing or manufacture and further sale, within or without the Commonwealth, whether on behalf of himself or others, or both. A producer who delivers milk to a milk dealer or handler only shall not be deemed a milk dealer or handler. If a cooperative distributes or makes available on consignment or otherwise milk within this Commonwealth to stores, as defined in this act, or to consumers, as defined in this act, or to other milk dealers or handlers, as defined in this act, or acts as an agent for its members, it shall be deemed to be a milk dealer or handler as to that part of its business, and shall be governed by the provisions of this act applicable thereto. Such cooperative shall be governed by the applicable provisions of this act as to the prices at which it sells, markets, or bargains to sell or make available on consignment or otherwise milk within this Commonwealth to milk dealers, handlers and others.*

Article III, section 301 of the Milk Marketing Law outlines the Board's authority to regulate the milk industry in Pennsylvania. The entire section is reproduced below, with added emphasis in **bold** as it relates to the proposed regulation:

### ARTICLE III

#### GENERAL POWERS OF THE BOARD

##### §301. Regulation of milk industry

***The board is hereby declared to be the instrumentality of the Commonwealth for the purpose of administering the provisions of this act and to execute the legislative intent herein expressed, and it is hereby vested with power to supervise, investigate and regulate the entire milk industry of this Commonwealth, including the production, transportation, disposal, manufacture, processing, storage, distribution, delivery, handling, bailment, brokerage, consignment, purchase and sale of milk and milk products in this Commonwealth, and including the establishment of reasonable trade practices, systems of production control and marketing area committees in connection therewith...***

Section 608 of the Milk Marketing Law deals with "milk checks," or more formally, written statements concerning payment for milk. Again, the entire section is reproduced below, with added emphasis in **bold** as it relates to the proposed regulation:

##### §608. Payment for milk; statement

*Milk dealers shall determine weight, measure and butterfat and appropriate milk component content of milk as provided in this act, or in rules, regulations or orders of the board pertaining thereto and consistent with this act. Payment for milk shall be made either upon the basis of weight, measure or butterfat or appropriate milk component content, or any combination thereof, as the rules, regulations or orders of the board may require.*

**Milk dealers buying or receiving milk from producers shall furnish to each producer or his agent a written statement showing the amount of milk delivered daily during the period for which payment is made, and, unless the board otherwise provides, the average butterfat or appropriate milk component tests of the milk delivered for such period. Such statement shall set forth such information as may be required by the board, shall be furnished periodically, at the time of payment prescribed by the board, and in no event less often than monthly...**

Under these sections of the law, it is clear that a Milk Dealer must provide regular statements to each of their producers or his agent, and that this statement must contain any information required by the board. The Milk Marketing Law further states that a cooperative "Shall be deemed a Milk Dealer" on any part of its business when it "acts as an agent for its members."

In light of the clear language in the authorizing statute for the Milk Marketing Board, it is certain that the law provides the board with the authority to compel cooperatives to disclose information regarding the state-mandated over-order premium to their member farmers. One might even argue that the board has the obligation under the law to promulgate such language.

## **NEED FOR THE PROPOSAL**

For decades, the Milk Marketing Board has assessed an "over-order premium" on every gallon of Class 1 fluid drinking milk sold in Pennsylvania. The idea behind the over-order premium is simple: Pennsylvania consumers are willing to pay a little more per gallon to help the Pennsylvania dairy farmer, and thus ensure a steady, reliable source of local milk.

However, many dairy farmers across Pennsylvania have absolutely no idea how many, if any, of the dollars in their milk check come from this state-mandated premium. This is a grave injustice.

Accountability and transparency with any money resulting from a government mandated tax, fee, premium – whatever word used – should be a given. A Pennsylvania family farmer should know how much of the payment he is getting for the milk sold off his farm comes from a state-mandated premium, regardless of whether that farmer sells his milk to a cooperative or a milk dealer. And today, that is simply not happening. The proposal before the IRRC, with the proposed amendment, will correct the aforementioned grave injustice.

## **OBJECTIONS TO THE PROPOSAL**

The proposed language before the IRRC, with the proposed amendment, will provide meaningful information to Pennsylvania dairy farmers who deserve transparency and accountability with a state-mandated premium. However, some have raised objections to this common-sense proposal.

### **OBJECTION #1 – THE PROPOSAL IS NOT NECESSARY**

Some have suggested that this regulation is not necessary since farmers have existing methods to learn if over-order premium dollars are in a given milk check. Some would suggest that transparency and accountability already exist with over-order premium dollars. With respect, the facts tell a different story.

A joint hearing of the House and Senate Agriculture Committees at Ag Progress Days in August 2016 on this very topic attracted a standing-room only, overflow crowd of farmers showing strong support for additional transparency and accountability with the over-order premium. I testified at this hearing, and over the last three years I have heard from many of the farmers in attendance that day. Without exception, these farmers have told me that they are desperate for more transparency and accountability with the over-order premium.

Earlier this year, the MMB presented results of a survey of Pennsylvania dairy farmers to the House Agriculture and Rural Affairs committee. One of the questions asked dairy farmers if they were receiving the over-order premium – incredibly, nearly **one-third** of farmers surveyed said they did not know. This is astounding and deeply troubling. If one-third of the intended recipients of the over-order premium don't know if they are getting this state-mandated money, that alone speaks volumes towards the need for additional transparency and disclosure.

One dairy cooperative contends this proposal is unnecessary, citing letters the cooperative has sent to their farmers since December 2015 that provide basic information about how over-order premium dollars are distributed. I suggest that this actually shows the strong need to implement the proposed regulation. Let us remember that the over-order premium has been in place for decades – but for most of that time, most cooperatives have not provided even basic information about the over-order premium to their farmer producers. Only recently, with the additional spotlight put on this issue in the Capitol, has rudimentary information been provided to dairy farmers. In addition, the letter cited by the cooperative is completely voluntary – the cooperative could decide to halt this practice at any time.

Another supposed argument against the proposal is that it somehow “restricts how communication is handled between cooperatives and their member-owners.” With respect, this statement is baloney. This proposal does not restrict anything, and it certainly doesn't restrict communication between

cooperatives and their member-owners. This proposal *encourages* communication between cooperatives and their member-owners – communication that has been lacking for decades.

Would anyone suggest that a state requirement to show tax withholding on a paystub is “restricting communication” between an employer and an employee? Would anyone suggest that the federal requirement for Nutrition Facts or ingredient lists on everything sold in the grocery store “restricts communication” between a seller and a buyer of foodstuffs? Of course not. This proposal is about transparency and accountability, and the attempt to disparage it with fearmongering phrases like “restricting communication” is distracting at best and deceptive at worst.

## **OBJECTION #2 – THE PROPOSAL IS TOO COSTLY AND/OR DIFFICULT TO IMPLEMENT**

Certainly any new regulation, no matter how well-intentioned, should be considered in light of the burdens it places on private industry. The cost, in both time and money, to implement any new rule can be substantial and must be considered.

With that being said, anyone with even a basic, rudimentary knowledge of milk pricing knows that determining the price a farmer receives for their milk is seemingly one of the most complex processes on earth. Some have suggested an advanced degree is needed to interpret some milk checks. The broad variety of quality and quantity premiums negotiated and paid by cooperatives requires detailed accounting to keep track of every penny coming in and going out. The argument that the proposed requirement to breakout the state-mandated premium on each farmer’s milk check is too expensive, or somehow beyond the technological ability of a dairy cooperative simply doesn’t pass the laugh test.

I do not mean to diminish the potential for costs that may need to be borne to implement this proposal. However, it bears mentioning that we are not discussing a quality or a quantity premium independently negotiated between the cooperative and their end customer; we are discussing a state-mandated premium. A state-mandated premium is subject to regulation by the state under the law of the state. And the interest of the state must be that premium reaches its intended recipient.

## **OBJECTION #3 – PADC CLAIM THAT STATE LAW PROVIDES COOPERATIVES SOLE AUTHORITY TO DETERMINE HOW THE OVER ORDER PREMIUM IS DISCLOSED TO FARMERS**

Comments filed by the Pennsylvania Association of Dairy Cooperatives (PADC) state:

*“cooperatives are affirmatively granted the right to determine within their membership by which the proceeds of sales are divided...[t]he [Milk Marketing Law] act expressly states that “no provision of this act shall prevent, and no provision contained herein shall be deemed or construed to prevent, any*

*cooperative association..., engaged in making collective sales or in the marketing of milk for the producers thereof, from blending the net proceeds of its sales... in all its markets... and paying its producers such blended price...."*

### OBJECTION #3.1 – PROPOSED RULEMAKING DOES NOT INTERFERE IN COOPERATIVES ABILITY TO BLEND PREMIUMS OR PAY MEMBER FARMERS HOWEVER COOPERATIVES DEEM APPROPRIATE

PADC rightly claims that cooperatives have statutory authority to "blend the net proceeds of its sales...in all markets...and paying its producers such blended price." This is, however, beside the point. Nothing in the proposed rulemaking portends to alter a cooperative's ability to blend the net proceeds of milk sales in any manner the cooperative deems appropriate. For example, a cooperative might determine it is in the best interest of their member farmers to distribute privately negotiated milk premiums to all farmer members, or perhaps just to farmer members who can supply greater amounts of milk (often referred to as a quantity premium.) A cooperative might determine that it is in the best interest of their member farmers to distribute the state-mandated over-order premium to all farmers, or just farmers whose milk is processed into to Class I fluid drinking milk.

The proposed rulemaking does not presume to dictate to or interfere with a cooperative's business practices in determining how to distribute the over-order premium amongst its membership. It simply requires a cooperative to disclose how much money in a given farmer's milk check comes from the over-order premium.

### OBJECTION #3.2 – STATE LAW DEFINES COOPERATIVES AS MILK DEALERS FOR THE PURPOSE OF THE TRANSACTIONS CONTEMPLATED UNDER THE PROPOSED RULEMAKING

PADC rightly claims that cooperatives have broad authority as granted under the Milk Marketing Law. Again, this is beside the point, since the actions contemplated under the proposed rulemaking deal with transactions undertaken by a cooperative when they are deemed a milk dealer under the Milk Marketing Law. As previously mentioned, the definitions of the terms "cooperative" and "milk dealer" are of critical importance.

*"COOPERATIVE" means a cooperative agricultural association or corporation of producers organized under the laws of this Commonwealth or of any other state and engaged in making collective sales or in the marketing of milk for producers under contract with it. A cooperative shall not be deemed a milk dealer or handler, but shall be deemed a producer, except as otherwise provided herein.*

*"MILK DEALER" or "HANDLER" means any person, who purchases or receives or handles on consignment or otherwise milk within the Commonwealth, for processing or manufacture and further sale, within or without the Commonwealth, whether on behalf of himself or others, or both. A producer who delivers milk to a milk dealer or handler only shall not be deemed a milk dealer or handler. If a cooperative distributes or makes available on consignment or otherwise milk within this Commonwealth to stores, as defined in this act, or to consumers, as defined in this act, or to other milk dealers or handlers, as defined in this act, or acts as an agent for its members, it shall be deemed to be a milk dealer or handler as to that part of its business, and shall be governed by the provisions of this act applicable thereto. Such cooperative shall be governed by the applicable provisions of this act as to the prices at which it sells, markets, or bargains to sell or make available on consignment or otherwise milk within this Commonwealth to milk dealers, handlers and others.*

The Milk Marketing Law is clear – a cooperative shall not be deemed a milk dealer EXCEPT as otherwise provided herein; if a cooperative makes available (sells) milk to consumers, other milk dealers, or acts as an agent for its members, it shall be deemed a milk dealer as to that part of its business and shall be governed by the provisions of the Milk Marketing Law applicable to milk dealers. As such, the Board has absolute authority to demand cooperatives provide accountability and transparency to their member farmers as it relates to the over-order premium.

#### **OBJECTION #4 – PADC REQUEST THAT LANGUAGE BE ADDED TO THE REGULATION SPECIFICALLY DENOUNCING ACCOUNTABILITY OF OOP DOLLARS TO THE PENNSYLVANIA DAIRY FARMER**

A key objective is to provide transparency and accountability of the MMB over-order premium to all Pennsylvania Dairy Farmers, regardless of whether these farmers market their milk to a milk dealer or a cooperative. The proposed section ( e ) is antithetical to the entire goal, specifically asking for language to be enshrined in state regulation stating that "nothing in this section shall require...information about cooperative premium programs on the monthly statements to dairy farmers." With respect, PADC's proposal is an incredibly bold request to permanently deny basic information about a state-mandated dairy premium to thousands of Pennsylvania dairy farmers.

Some have argued that the framers of the Milk Marketing Law really did intend for cooperatives to enjoy total, sole, and exclusive authority to determine what is, and is not, disclosed on a member farmer's milk check. Thankfully, section 608 of the Milk Marketing Law clearly refutes this incorrect assumption in its second paragraph:

*Milk dealers buying or receiving milk from producers shall furnish to each producer or his agent a written statement... Such statement shall set forth such information as may be required by the board...*

The law gives the Board direct authority to require a cooperative (acting as a Milk Dealer) to provide information as may be required by the Board to its producer – the Pennsylvania Dairy Farmer.

Perhaps one might make an argument that the legislative intent of the law is that the cooperative (acting as a Milk Dealer) SHALL FURNISH “information as may be required by the board” to itself (the cooperative acting as a producer or his agent.) However, I suggest to the IRRC that is absurd. Section 1922 of the Statutory Construction Act clearly states:

*Presumptions in ascertaining legislative intent*

*In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:*

*(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.*

No law is necessary to compel an organization SHALL FURNISH information to itself. The clear legislative intent of the law is that the cooperative SHALL FURNISH information to its producer – the Pennsylvania Dairy Farmer.

## **BENEFITS OF THE PROPOSAL (WITH RECOMMENDED CHANGE)**

### **BENEFIT #1 – FARMERS SHOULD SEE THE BENEFIT THAT COMES FROM THE MMB OOP REGARDLESS OF WHO THEY SELL TO**

Currently, Pennsylvania dairy farmers marketing their milk through milk dealers know exactly how much of their milk check comes from the MMB Over-Order Premium. Cooperatives marketing milk for Pennsylvania dairy farmers are under no similar obligation. Certainly, all Pennsylvania farmers should see how they benefit from a state-mandated premium.

### **BENEFIT #2 – PENNSYLVANIA CONSUMERS DESERVE TRANSPARENCY AND ACCOUNTABILITY WITH STATE-MANDATED PREMIUM DOLLARS**

The framers of the Milk Marketing Law recognized the importance of both the producer and the consumer, perhaps most notably by reserving one of the three Milk Marketing Board seats for a consumer member. Certainly, all actions taken by the Board aim to ensure the health and viability of both dairy farmers and the dairy-consuming public. The Pennsylvania milk consumer pays the over-order premium each time they pay for a gallon of milk, and is entitled to some assurance that the intended recipients of these monies have basic information.

### **BENEFIT #3 – GOOD GOVERNMENT DEMANDS ACCOUNTABILITY WITH STATE-MANDATED PREMIUM DOLLARS**

As the IRRC is likely aware, Act 13 of 2012 established an impact fee on unconventional natural gas drilling in the Commonwealth. These state-mandated fees are collected by drillers extracting Marcellus Shale gas and then remitted to the state, which in turn distributes the monies to impacted local communities to offset the effects of gas drilling.

Imagine if Act 13 instead directed gas drillers to collect the impact fee, but never required any transparency or accountability with how those fees were utilized, who received the money, or what was done with it. Certainly no one would believe such a system to be appropriate.

Yet that is exactly what is happening with the MMB over-order premium. Good government demands that some level of accountability exists any time state-mandated monies are involved. We should not accept the admonition of "Trust us" from even the most well-intentioned dairy cooperative. Instead, we should employ the well-worn axiom "Trust, but verify."

### **BENEFIT #4 – THE PROPOSAL PROTECTS PENNSYLVANIA DAIRY FARMERS**

The Pennsylvania Milk Marketing Board exists to protect and advocate for the Pennsylvania dairy farmer. The proposal before the IRRC would be of tremendous benefit to Pennsylvania dairy farmers and all dairy consumers across the Commonwealth, providing some level of transparency and accountability with the long-standing Over-Order Premium.

### **DISCUSSION ON PROPOSED REGULATION AND RECOMMENDED CHANGE**

The proposal before the IRRC contains two paragraphs amending Title 7, Part VI, Chapter 143 of the Agriculture code. Upon first glance, paragraph ( a ) mirrors accountability language applicable to milk dealers. **However, the addition of the proposed paragraph ( b ) entirely negates any value a farmer marketing milk through a cooperative might have hoped for with the adoption of this regulation.**

As submitted, paragraph ( a ) reads:

*( a ) Cooperatives shall show by line item on their monthly statements to dairy farmers marketing milk through the cooperative the specific amount of the Pennsylvania Milk Marketing Board over-order premium being paid.*

As submitted, paragraph ( b ) reads:

*( b ) For the purpose of this section, "the specific amount of the Pennsylvania Milk Marketing Board over-order premium being paid" shall be calculated monthly by each cooperative by dividing the total Pennsylvania over-order premium paid to the cooperative by the total cooperative Pennsylvania member pounds marketed."*

The definition in paragraph ( b ) would result in a listing on each farmer's milk checks of the total dollar value of over-order premiums paid to the entire cooperative for a given month. This is very different from the information provided by milk dealers to their farmer members – where a milk check shows the amount of over-order premium dollars paid to each individual farmer.

**I strongly encourage the IRRC to recommend the removal of paragraph ( b ) in the final rulemaking.** To clarify the intent of accountability and transparency of the state-mandated over-order milk premium to individual Pennsylvania dairy farmers, I also strongly encourage paragraph ( a ) be amended to read:

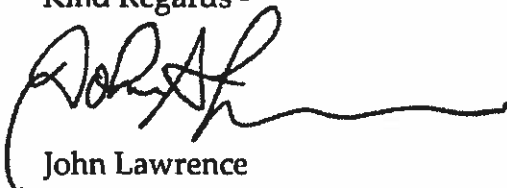
*( a ) Cooperatives shall show by line item on their monthly statements to dairy farmers marketing milk through the cooperative the specific amount of the Pennsylvania Milk Marketing Board over-order premium being paid to the farmer receiving the statement.*

## CONCLUSION

Given that the law vests the Milk Marketing Board with broad and clear authority to "regulate the entire milk industry of this Commonwealth...including the establishment of reasonable trade practices", and the law also states "information as may be required by the board" must be included on any statement to a producer, including the statement a cooperative issues to a Pennsylvania Dairy Farmer, I ask the IRRC to move forward with the proposal that any milk check issued to a Pennsylvania Dairy Farmer by a Cooperative include a separate and distinct line item stating exactly how much of the check comes from the MMB Over-Order Premium. The proposed change to paragraph ( a ) and the elimination of paragraph ( b ) will ensure that dairy farmers across the Commonwealth receive the transparency and accountability they deserve with the state-mandated over-order milk premium.

Thank you for the opportunity to comment on this important matter, and thank you for your continued service to the people of Pennsylvania.

Kind Regards -



John Lawrence