

WENDY M. YOVIENE, SHAREHOLDER
Direct Dial: 202.326.5027
Direct Fax: 202.336.5227
E-Mail Address: wyoviene@bakerdonelson.com

July 18, 2018

Robert N. Barley, Chairman
c/o Douglas Eberly, Esq.
Pennsylvania Milk Marketing Board
2301 N. Cameron Street
Harrisburg, PA 17110

Dear Chairman Barley and Members of the Board:

The Pennsylvania Association of Milk Dealers (PAMD) has reviewed the Milk Marketing Law as part of the process to prepare these additional comments to respond to inquiries that arose out of the hearing before the Milk Marketing Board (PMMB or the Board) on July 2, 2018. The proposal by the Pennsylvania Department of Agriculture (PDA), even as amended, to require milk dealers to give 90 days notice before terminating a raw milk supplier would run afoul of the clearly manifested intent of the legislature.

The Pennsylvania legislature states in the Milk Marketing Law the minimum and maximum notice that is expected from milk dealers in the absence of a contract or good cause. That range is articulated in Section 404 of the Milk Marketing Law and is between 14 days and 45 days. The specific language provides a failure to give reasonable notice of intent to stop buying a producer's raw milk is a basis for denying or suspending a license among other things.

The relevant portion of section 404 of the Milk Marketing Law is as follows:

§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 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"*

Robert N. Barley, Chairman

July 18, 2018

Page 2

shall not be construed to mean notice of less than fourteen days nor more than forty-five days (emphasis added);

With Section 404 the legislature has set the parameters for how much notice the Board can require of licensed milk dealers in the absence of a contract or cause. Therefore, any regulation must not require more than 45 days notice and PDA's proposal for 90 days notice falls outside of the authorized range.

PAMD witnesses, Todd Rutter and Alec Dewey, testifying on July 2, 2018 reinforced the legislature's recognition that a notice requirement that is too lengthy is not reasonable. They explained that carrying excess surplus milk beyond 28 days would pose a serious threat to individual plant financial viability. Among other reasons, this is because fluid milk dealers must still pay federal minimum prices, and in some cases Pennsylvania minimum prices, for such surplus milk without having the offsetting revenue. This is in contrast to other milk buyers such as cooperatives and manufacturing plants that do not face a government mandate to pay a minimum price when they do not have a market for the milk. This distinction explains why longer commitments that might exist between cooperative or manufacturing plant and producer cannot translate to the relationship between a fluid milk plant and its raw milk suppliers. Fluid milk plants simply do not have access to the same tools for managing surplus milk.

Following up on discussion at the hearing, PAMD has prepared a waiver application process that would cut out the time consuming and potentially costly administrative burden built into the current proposal and which would address different types of financial risk associated with carrying excess surplus milk. The proposal also suggests provisions that could help milk dealers manage surpluses while trying not to terminate a producer or producers.

The hardship provision is drafted with the understanding that the maximum notice that the Board may require would be 45 days and recognizes that in cases of imminent insolvency, the minimum statutory notice may be appropriate. PAMD thus offers the following for further consideration by the Board *even as PAMD urges the Board to maintain the status quo as the best option.*

§ 143.31. Written notice required.

(a)

(b)

(c) Waiver Application.

(1) Hardship Waiver.

The dealer shall provide Board Staff with bank statements, cash flow projections, line of credit documents, bank letters, recent P&L statements, projected P&L statements, and/or other financial evidence that shows that the Dealer is in financial distress and will not have adequate

cash to pay all or some producers for their milk without terminating some. Board Staff shall complete its review of the documentation provided within four business days (in no event longer than 6 calendar days if there is an intervening weekend or holiday). Under these circumstances, Board staff shall authorize the milk dealer to give farmers between 14 and 28 days notice of termination depending on the circumstances as presented. A failure of Board Staff to complete the above analysis and transmit the applicable authorization within 4 business days (but in no event more than 6 calendar days if there is an intervening weekend or holiday) of receiving documentation from the affected milk dealer shall constitute approval and the affected dealer's notice previously given shall be effective after close of business (5 pm) on the fourth business day (or 5 pm on the 6th calendar day if applicable).

(2) Surplus Waiver associated with having a minimum price obligation for raw milk volumes for which there are insufficient customer sales:

- (A) Identify customer losses or sales reductions experienced within any 90-day rolling period;
- (B) Document weekly average sales history in pounds for the lost customer(s) or the customer(s) decreasing volume based on 26-week rolling average (or lesser time period if customer was a customer for less time or was a school or schools and the school or schools is not renewed or lost during the school year);
- (C) Represent that good faith efforts were made to replace the lost sales;
- (D) If lost sales amount to 40,000 pounds or more of raw milk per week and the milk dealer has made the representation required by section (2)(C) hereinabove, Board staff must timely authorize the applicant milk dealer's proposed 28 day notice to terminate a producer or producers rather than a longer period if otherwise required under this regulation.
- (E) A failure of Board Staff to complete the above analysis and transmit the applicable authorization within 4 business days (but in no event more than 6 calendar days if there is an intervening weekend or holiday) of receiving required documentation from the affected milk dealer shall constitute approval and the affected dealer's 28-day notice previously given shall be effective after close of business (5 pm) on the fourth business day (or 5 pm on the 6th calendar day if applicable).

(3) Options to help with a milk dealer facing a lack of economically sound balancing options and not otherwise seeking to terminate producers. If a Dealer has surplus milk (more raw milk than milk sales based on documentation referenced in sections 2(A) and (B) hereinabove and has represented that it has made a good faith effort to dispose of the surplus but has no other more economically sound disposal alternatives than dumping, skimming and dumping or donating, the dealer may bottle and donate surplus milk to a certified food bank and shall be exempt from any Pennsylvania-mandated premiums, such as the over-order premium, fuel adjuster or similar mandated charge, on the surplus portion of raw milk, and the value of the donation shall be accepted as an authorized charitable donation with a reportable cost equal to the wholesale minimum price applicable to the donation, including any applicable discounts. In such a case, the donation shall not be considered a dealer inducement under Chapter 146 of the Milk Marketing Regulations.

(4) Procedures applicable to sections 143.31(c)(1) through 143.31(c)(3) hereinabove.

- (A) Documentation may be submitted to Board Staff electronically (via e-mail or facsimile to the Executive Secretary with copy to counsel for the Board Staff), by hand or courier including U.S. mail. Board staff shall provide the details and results of its analysis by phone, e-mail or facsimile to the person that submitted the waiver request.
 - (B) All documentation shared under this section 143.31(c) shall be subject to the same confidentiality provisions applicable to the conduct of the Milk Marketing Board pursuant to section 310 of the Milk Marketing Law.
 - (C) Termination notice may be given to any producer at the same time the milk dealer applies for a waiver under this section 143.31 as long as the termination notice indicates: (i) milk dealer intends to stop buying supplier's milk in 28 days (or lesser in the case of a waiver being sought for hardship under subsection (a)) on [INSERT APPLICABLE DATE] date; (ii) milk dealer has submitted documentation pursuant to subsections (c)(1) or (c)(2) seeking permission to terminate milk purchases on [INSERT APPLICABLE DATE] date and; (iii) final authorization for the intended termination date is expected within 4 to 19 calendar days at which time raw milk supplier will be notified within 24 hours of a final decision from the Board, whether by phone, e-mail, fax, courier, or hand-delivery, if the termination date will be extended beyond [INSERT APPLICABLE DATE] date. Any notifications by phone shall be confirmed in writing.
 - (D) If Staff does not approve a waiver requested under this section 143.31(c), including a request to make a donation to the Food Bank, the Board shall review and affirm or reverse Staff's decision within 10 calendar days after initiation of an appeal by the milk dealer. The appeal must be initiated within 3 calendar days of receiving Staff's decision by phone or otherwise and may be initiated by e-mail, facsimile, hand-delivery or courier to the Board's Chief Counsel.
 - (E) All notifications required by 143.31(c) are effective upon receipt by the intended recipient as documented by a signed acknowledgement, date stamp (manual or electronic), or other reliable record of receipt.
- (d) This section 143.31 shall not apply when the contract between a producer and a cooperative, or contract between a producer or cooperative and milk dealer, provides for the amount of notice required to terminate the contract.

Thank you for consideration of PAMD's concerns and suggestions.

Respectfully submitted,

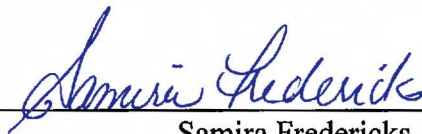


Wendy M. Yoviene

CERTIFICATE OF SERVICE

On this 18th day of July, 2018, I, Samira Fredericks, a secretary in the law office of Baker Donelson, hereby certify that I have served on this day true and correct copies of the foregoing on behalf of the Pennsylvania Association of Milk Dealers by e-mail to the following persons:

- | | | |
|----|------------------------|---|
| 1. | Douglas Eberly | <u>deberly@state.pa.us</u> |
| 2. | Andrew L. Saylor, Esq. | <u>asaylor@pa.gov</u> |
| 3. | Brook Duer | <u>dduer@pa.gov</u> |
| 4. | Timothy Moyer | <u>tmoyer@pa.gov</u> |
| 5. | Melissa Bravo | <u>bravomelissa@yahoo.com</u> |
| 6. | C. Campbell | <u>ccampbell@frontiernet.net</u> |
| 7. | Marvin Beshore | <u>mbeshore@beshorelaw.com</u> |
| 8. | Arden Tewksbury | <u>progressiveagricultureorg@gmail.com</u> |



Samira Fredericks