



James Mulhern, *President & Chief Executive Officer* | Randy Mooney, *Chairman*

Agri-Mark, Inc.
Associated Milk Producers Inc.
Bongards' Creameries
Cooperative Milk Producers Association
Cortland Bulk Milk Producers Cooperative
Dairy Farmers of America, Inc.
Dairymen's Marketing Cooperative, Inc.
Ellsworth Cooperative Creamery
Farmers Cooperative Creamery
FarmFirst Dairy Cooperative
First District Association
Foremost Farms USA
Land O'Lakes, Inc.
Lone Star Milk Producers
Maryland & Virginia Milk Producers Cooperative Association
Michigan Milk Producers Association
Mid-West Dairymen's Company
Mount Joy Farmers Cooperative Association
Northwest Dairy Association
Oneida-Madison Milk Producers Cooperative Association
Prairie Farms Dairy, Inc.
Premier Milk Inc.
Scioto County Cooperative Milk Producers' Association
Select Milk Producers, Inc.
Southeast Milk, Inc.
St. Albans Cooperative Creamery, Inc.
Swiss Valley Farms Company
Tillamook County Creamery Association
United Dairymen of Arizona
Upstate Niagara Cooperative, Inc.
Zia Milk Producers, Inc.

February 17, 2015

Docket Clerk
Marketing Order and Agreement Division
Fruit and Vegetable Program
AMS, USDA
1400 Independence Avenue, SW
Washington, DC 20250-0237

**Re: Document Number AMS-FV-14-0032; FRN December 16, 2014,
Exemption of Organic Products from Assessment under a Commodity
Promotion Law**

The National Milk Producers Federation (NMPF), based in Arlington, VA, develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of more than 32,000 dairy producers on Capitol Hill and with government agencies. Visit www.nmpf.org for more information.

NMPF submits these comments in response to the Agricultural Marketing Service (AMS) notice of proposed rulemaking entitled "Exemption of Organic Products from Assessment under a Commodity Promotion Law," published in the *Federal Register* on December 16, 2014 (the "Proposed Rule"). NMPF suggests that the Proposed Rule be modified as follows:

1. The Proposed Rule, as drafted, does not make it clear that producers, processors and importers of organic dairy products are not required to claim the organic exemption. NMPF believes that AMS should revise the Proposed Rule to expressly state that producers, processors and importers are not required to claim the organic exemption. Further, AMS should clarify that they may choose to continue paying national dairy research and promotion assessments even if the organic exemption is available to them.
2. NMPF believes that AMS should revise the Proposed Rule to require producers, processors and importers that claim the organic exemption to provide more information than the Proposed Rule, as written, requires them

to provide. In the Proposed Rule, AMS appears to have consciously chosen to relax the information collection requirements applicable to producers, processors and importers that claim the organic exemption when it stated: “As such, the section of each order, plan, or regulation that specifies the information collection requirements for the organic assessment exemption would be modified to require less documentation from the applicant with regards to the type and scope of their operation.” 79 Fed. Reg. 75009 (Dec. 16, 2014). NMPF believes that AMS should not relax those information collection requirements, because it is essential that producers, processors and importers that claim the organic exemption be required to provide sufficient information and documentation to support their status.

The Proposed Rule, as written, does not even require a producer, processor or importer that claims the organic exemption to certify that the percentage of his or her production that he or she is claims is organic, and thus subject to the organic exemption, is actually organic. This is problematic, because the Proposed Rule clearly states that the organic exemption only applies to that percentage of a producer, processor or importer’s production that is organic. AMS must be able to determine the amount of the assessments that producers, processors and importers are required to remit to the dairy programs. If producers, processors and importers are not required to provide appropriate information with a certification concerning the percentage of his or her production that he or she claims is organic, AMS will not be able to perform its obligations properly.

3. NMPF believes that AMS should revise the Proposed Rule to require that producers, processors and importers that claim the organic exemption be audited in a more stringent manner, to ensure that only producers, processors and importers that actually qualify for the organic exemption are exempt from paying assessments. AMS must require bona fide information by which they can verify that producer, processor and importer submissions to AMS, in connection with their claims under the organic exemption, is accurate. While more stringent auditing standards are necessary with respect to producers, processors and importers, they are particularly essential with respect to importers, since they are required to submit assessment-related information to U.S. Customs and Border Protection (“U.S. Customs”). U.S. Customs requires accurate information regarding whether an importer’s dairy products are subject to the assessment, or exempt under the organic exemption. Accordingly, the Proposed Rule should be revised to require that producers, processors and importers that claim the organic exemption be audited in a more stringent manner.

4. The Proposed Rule does not require producers that claim the organic exemption to sell their products as organic. NMPF believes that this is problematic. The Proposed Rule indicates that producers that claim the organic exemption are not required to sell their products as organic: “Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as

organic, shall not disqualify a producer from exemption under this section.” 79 Fed. Reg. 75016 (Dec. 16, 2014). NMPF believes that the Proposed Rule should be revised to prevent producers from claiming the organic exemption if they market or sell their organic products as conventional products. If producers are allowed to claim the organic exemption and refrain from paying assessments, but still sell their products as conventional products, those producers will have an advantage over other producers that are required to pay into check-off programs covering products produced through conventional means. Those producers will essentially be lowering their costs of doing business by not paying assessments, while at the same time competing in the conventional market with other producers that are required to pay assessments. NMPF believes that this outcome would be unfair, and respectfully requests that AMS revise the Proposed Rule to prevent this outcome.

5. NMPF believes that the Dairy Promotion and Research Order and the Fluid Milk Processor Promotion Order (the “Orders”) should be amended so that the definitions of “producer”, “processor” and “importer” exclude producers, processors and importers that claim the organic exemption. The Orders currently define “producer” as “any person engaged in the production of milk for commercial use.”

The Orders define “fluid milk processor” as “any person who processes and markets commercially fluid milk products in consumer-type packages in the United States (excluding fluid milk products delivered directly to the place of residence of a consumer), except that the term fluid milk processor shall not include in each of the respective fiscal periods those persons who process and market not more than 3,000,000 pounds of such fluid milk products during the representative month, which shall be the first month of the fiscal period.”

The Orders currently define “importer” as “a person that imports dairy products into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles dairy products outside of the United States for sale in the United States, and who is listed as the importer of record for such dairy products.”

Quite clearly, the current definitions of “producer”, “processors” and “importer” do not exclude producers, processors and importers that claim the organic exemption. The failure of those definitions to exclude producers, processor and importers that claim the organic exemption creates a number of problems relating to the Orders. First, because the Orders require that the respective Boards charged with overseeing the programs be composed of “producers”, “processors” and “importers,” if the definitions of “producer”, “processors” and “importer” are not revised to exclude producers, processors and importers that claim the organic exemption, those producers and importers that claim the organic exemption could be members of the Boards. NMPF believes that this is not acceptable, since if a producer, processor or

importer claims the organic exemption and opts out of the dairy program, he or she should not be allowed to be a member of the Boards. A second problem arises from the Orders' requirement that the Board "disseminate information to producers, producer organizations, importers, processors and importer organizations." NMPF believes that, if a producer, processor or importer claims the organic exemption and opts out of a dairy program, then that producer, processor or importer should not be included among those entities that are entitled to receive information from the respective Board. Accordingly, the Orders' definitions of "producer", "processor" and "importer" should be revised to exclude producers, processors and importers that claim the organic exemption.

6. NMPF believes that implementation of the changes to the organic exemption set forth in the Proposed Rule should be delayed until the issues identified above have been fully considered and addressed.

7. Importantly, AMS has had a longstanding non-disparagement policy, most recently expressed in the 2012 Guidelines for AMS Oversight of Commodity and Research Programs, which states:

AMS will disapprove any advertising (including press releases) deemed disparaging to another commodity or competitor or in violation of the prohibition against false and misleading advertising contained in the legislation. Comparative advertising (advertising that compares facts about different commodities or products) will be allowed. Ads considered disparaging are those that depict other commodities in a negative or unpleasant light via either overt or subjective video, photography, or statements (excluding those that are strictly comparative).

In addition, the Dairy Promotion and Research Order states that "No plan or project authorized under §1150.161(a) shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product." We believe parallel restriction appear in other orders as well.

NMPF is concerned that an organic promotion program may base much of its advertising and promotional activities in a disparaging or deceptive manner that would be in violation of AMS guidelines, policies and orders. We urge AMS, in the strongest terms, to be mindful of the potential for such wrongful behavior and take steps to ensure that this does not occur.

8. The Proposed Rule should explicitly state that the organic exemption applies only to the national dairy promotion programs. It is important that producers or processors claiming the exemption understand that obtaining a certificate of exemption from assessment under the new organic exemption regulations will not exempt those producers from any state dairy promotion law or regulation that requires the payment of assessments to a state or

regional program. This is not clear from the text of the Proposed Rule and must be clarified.

NMPF appreciates the opportunity AMS has provided for consideration of our comments. We are pleased to answer any questions you may have or to provide any additional information which you may require.

Sincerely,

A handwritten signature in black ink, appearing to read "Clay Detlefsen". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping underline.

Clay Detlefsen
Senior Vice President, Regulatory and Environmental Affairs & Staff Counsel