

**FACILITATORS' FINAL REPORT**

**NEGOTIATED RULEMAKING**

**To Draft Regulations Concerning Mandatory Pork Pricing**

**under the**

**Mandatory Price Reporting Act of 2010, as amended**

**Prepared by**

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**Federal Mediation and Conciliation Service**

**For**

**United States Department of Agriculture**

**Agricultural Marketing Service (AMS)**

**AMS Livestock & Grain Market News Division**

**And the**

**Negotiated Rulemaking Committee**

**September 15, 2011**

**Part of an Interagency Reimbursable Agreement, R-11-36 between the Federal Mediation and Conciliation Service and US Department of Agriculture, Agriculture and Marketing Service, Livestock and Seed Program, June 28th, 2010-September 20, 2011**

## **BACKGROUND**<sup>1</sup>

On September 27, 2010, President Obama signed the Mandatory Price Reporting Act of 2010 (“the Act”).<sup>2</sup> The Act requires packers of pork products to report to the Secretary of Agriculture the prices and volumes of their sales of wholesale pork cuts. At present, packers of pork products report this information on a voluntary basis, while packers of sheep, beef and lamb products report on a mandatory basis. The Act’s purpose in requiring mandatory reporting is to improve the quality of the U.S. Department of Agriculture’s (USDA) price-and-supply reporting services and to encourage competition in the sale of livestock and its products.

The Act also provides that the rules implementing the new requirement would be developed by “negotiated rule-making,” an administrative process in which an advisory committee consisting of representatives of interest groups affected by a new requirement would decide, by consensus and in a manner open to public participation, on the language of the proposed rule.<sup>3</sup> The Act directs the Secretary of Agriculture to appoint to the committee representatives of organizations representing pork producers, packers, retailers, and buyers, the Department of Agriculture, and other interested parties participating in pork production. The Act requires that this committee provide the Secretary of Agriculture with a recommended rule within 180 days following the bill’s enactment and that the Secretary promulgate a final rule within 18 months of enactment. USDA chose the Federal Mediation and Conciliation Service (FMCS) to facilitate this rulemaking.

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<sup>1</sup> **NOTE: All documents cited in this report, including the summary meeting minutes and other documents used by the Committee, are available at:**

**<http://www.ams.usda.gov/negotiatedrulemaking> (“the AMS website.”)**

<sup>2</sup> 2010 Reauthorization Act, Pub. L. 111-239, 124 Stat. 2501.

<sup>3</sup> See Negotiated Rulemaking Act of 1996, 5 U.S.C. §§ 561-570.

In the fall of 2010, FMCS helped the Department of Agriculture’s Agricultural Marketing Service (“AMS”) form the USDA Wholesale Pork Reporting Negotiated Rulemaking Committee (“the Committee”) and plan its upcoming meetings. AMS held a formal planning session on October 28, 2010 to discuss specifics, such as issuing the Federal Register notice announcing the Committee, deciding how the meetings’ minutes would be recorded, planning the agenda, and other logistics attached to the process. Most importantly, the FMCS briefed AMS on the nature of consensus decision-making and suggested training all committee members in interest-based problem-solving techniques that would facilitate crafting a draft rule. The FMCS mediators selected for this assignment were Commissioners Eileen B. Hoffman and Jacques Woods as co-facilitators, and Commissioner Kevin Brahaney as reporter for the process.

On November 24, 2010, AMS published a notice in the Federal Register, formally announcing its intent to engage in negotiated rulemaking, to propose committee members (based on the interests specified in the Act), and to allow the public 30 days in which to comment on AMS’ proposed members and/or submit other names.<sup>4</sup> AMS named the group the Whole Pork Negotiated Rulemaking Committee (“the Committee”) and identified organizations that it believed represented the interests of those affected by mandatory price reporting. The notice provided for other organizations to submit nominations if they believed that their interests would not be adequately represented by the proposed members.

On January 26, 2011, AMS published a second notice in the Federal Register announcing the date of the Committee’s first meeting and the final list of organizations designated to send

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<sup>4</sup> 75 F.R. 226 (to be codified at 7 CFR pt. 59).

representatives.<sup>5</sup> As mentioned above, to facilitate the transparency of the rulemaking process, AMS subsequently established a website to post all approved summary minutes, agendas, and other relevant documents related to the rulemaking. AMS updated the website with these materials throughout the process.<sup>6</sup>

## **NEGOTIATIONS**

In the first half of 2011, the Committee engaged in three sets of meetings, first in Clayton, Missouri (outside of St. Louis) and then twice in Arlington, Virginia (outside of Washington, D.C.).<sup>7</sup> All committee members sent representatives, who fully participated in all meetings. The general public was also permitted to attend the sessions and the schedule allocated time at the end of each session for public comment. At the final meeting, the Committee provided the Secretary with a proposed rule based on the consensus of all committee members and a list of other recommendations, not based on total consensus, regarding the transition to the new policy. AMS is currently drafting a rule based on the Committee's proposals and will consider the Committee's recommendations.

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<sup>5</sup> 76 F.R. 4554 (to be codified at 7 CFR pt. 59). The designated organizations were: American Meat Institute, Chicago Mercantile Exchange, Food Marketing Institute, Grocery Manufacturers Association, Livestock Marketing Information Center, National Farmers Union, National Livestock Producers Association, National Meat Association, National Pork Producers Council, North American Meat Processors Association/American Association of Meat Processors/Southeastern Meat Association (all 3 organizations combined to be counted as one representative, per their request), United Food and Commercial Workers International Union, and U.S. Department of Agriculture, Agricultural Marketing Service (USDA, AMS).

<sup>6</sup>See AMS website, *supra*.

<sup>7</sup>February 8-10, 2011; March 15-17, 2011; and May 10-11, 2011.

### **The First Meeting: February 8-10, 2010**

Mike Lynch, the AMS' Chief, Livestock and Grain Market News (and a Committee member) welcomed the Committee and commended their agreement to participate in a historic use of negotiated rulemaking. After the Committee members introduced themselves, Lynch introduced the FMCS facilitators. Commissioner Wood reviewed the negotiated rulemaking process, emphasizing the differences with traditional rulemaking.<sup>8</sup> While noting that the Negotiated Rulemaking statute defined consensus as the "unanimous concurrence among the interests represented," Commissioner Wood suggested that the Committee try to reach a point where "each Member is at least 70% comfortable with the consensus reached, and is 100% committed to that consensus."<sup>9</sup> Once consensus on all issues has been reached by the Committee, USDA would then publish a Notice of Proposed Rulemaking incorporating the Committee's consensus. In turn, the Committee members and the organizations they represent agreed not to submit any adverse comments to the rule. If a consensus is not reached on all issues, however, USDA will draft its own rule, but will utilize any areas of consensus reached by the Committee (as well as other information gained through the proceedings).

After Commissioner Wood conducted training in utilizing the interest-based negotiation model, Commissioner Hoffman led a review of the draft ground rules (compiled from prior successful negotiated rulemaking procedures), particularly on the best way to discuss the issues and whether or not to discuss them with the organizations' constituents and the press. The

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<sup>8</sup>FMCS, *What is Negotiated Rulemaking?* and *Overview-Negotiated Rulemaking*, both available at the AMS website.

<sup>9</sup>*Summary Meeting Minutes: Feb. 8-10, 2011*, p. 2, available at the AMS website.

Committee then approved four amendments to the ground rules.<sup>10</sup> The Committee also approved having a member of USDA’s Office of General Counsel to serve as a member.

Before turning to the specific issues, AMS staff and outside experts gave several presentations, describing the operation of USDA’s present regimes of *voluntary* reporting of pork prices and of *mandatory* reporting of beef prices.<sup>11</sup> Mike Lynch then presented a list entitled “Pork Reporting Issues Needing Consensus.”<sup>12</sup> At this point, the Committee began discussing – and reaching consensus – on a number of issues, but tabling others for further discussions (after Committee members consulted the constituents of their organizations).<sup>13</sup> The Committee decided to schedule two more sets of meetings, both in Arlington, Virginia.

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<sup>10</sup> See *Amended Ground Rules for Negotiated Rulemaking*, available at the AMS website.

<sup>11</sup> Bill Sumpter, *USDA Voluntary Pork Reporting Overview*; Joe Parcell, *Summary of Wholesale Pork Price Reporting Analysis*; and Bill Worlie, *USDA Boxed Beef Reporting Overview*, all available at the AMS website.

<sup>12</sup> Lynch’s list consisted of the following issues: reporting times; price reporting basis; place of reporting: FOB [Forward on Board] Plant or FOB Omaha; reporting export product; definitions: wholesale pork, purchase types, and others; branded products, packaging differences and costs, product specifications and yields, intra-company transactions, packer to packer transactions; product delivery windows; company and plant ownership and affiliations; brokerage fees and accruals; and refrigeration. See the AMS website.

<sup>13</sup> The Committee was able to reach consensus on: the daily reporting times, how prices were to be reported, categories of sales to be reported, pork types to be reported, and the reporting of export products. The Committee decided to table for further discussion: the specifications of cuts of pork, the product delivery period, price reporting basis (FOB “Forward on Board” Plant vs. FOB Omaha), the reporting of branded products, and how to handle the cost of brokerage fees/accruals.

## **The Second Meeting: March 15-17, 2011**

At the Committee's second set of meetings, a USDA official gave a presentation on livestock reporting, including the issue of confidentiality and the auditing of reports.<sup>14</sup> Over the course of the three days, the Committee also discussed issues tabled from the first meeting and reached consensus on a number of these issues.<sup>15</sup> The Committee handled the branded products and brokerage fees/accruals issues by appointing a subcommittee of volunteers to study them. The Committee agreed that enough general progress had been made so as to make it worthwhile to review an AMS' "straw man" draft (that showed what a draft rule might look like) and to allow the Committee's members to suggest refinements to the language. Nonetheless, the Committee still had significant issues to work through. For example, the Committee's discussion of the underlying interests regarding the reporting of prices as to FOB Omaha or FOB Plant resulted in a debate between the industry members and the AMS members over the merits of maintaining the industry practice (FOB Omaha) versus greater transparency (FOB Plant). After caucusing, the packers' representatives suggested a one-year transition period where prices from both dates would be available. Regarding the pork cut-out (the yield in pork product from the butchering of a pork carcass), the industry members of the Committee stressed their reliance on this information in pricing and planning efforts and their desire that it be included in the mandatory reporting requirement.

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<sup>14</sup>Mike Dinkel, *Livestock Mandatory Reporting Compliance Process*, available at the AMS website.

<sup>15</sup>The Committee reached consensus at this point on: product delivery period, and injected product. It reached a tentative consensus on the definition of "wholesale pork," subject to revisiting vis-à-vis the resolution of tabled items.

### **The Third Meeting: May 10-11, 2011**

The FMCS coordinators discussed the remaining issues to be discussed, noting the key issue of whether the reported prices should be FOB Plant or FOB Omaha. Working their way through the “straw man” draft, the Committee reached consensus on various issues such as the definitions of “specialty pork products,” “wholesale pork,” and “variety meats.” In the end, consensus regarding the FOB issue eluded the Committee, however, the AMS representatives indicated that they would look into the possibility of a transition period. Besides the issues on which the Committee reached consensus, the Committee also submitted recommendations (from which the AMS members abstained) concerning the transition from voluntary to mandatory reporting.<sup>16</sup>

At the close of the meeting, AMS spokespersons thanked the Committee members, the FMCS facilitators and reporter, and the participating USDA AMS personnel. AMS pledged to move forward as quickly as possible in drafting a proposed rule, using all the provisions on which the Committee had reached consensus, and considering the members’ discussions of all other provisions, including any submissions received following the meetings’ close. They reminded the Committee, however, that the timeliness of the final rule was not within the control of AMS because of the internal government clearance process. Specifically, they warned that OMB could consider the rule to be “significant” and therefore require more economic analysis of the rule’s impact.

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<sup>16</sup>*Committee Recommendations*, available at the AMS website.



## **CONCLUSIONS**

The FMCS facilitators are generally pleased with the attitudes and approaches taken by AMS and USDA as well as all the Committee members. They all took their roles seriously; did their homework, came up with suggestions, ideas, materials and data; and worked together for constructive solutions. The facilitators point to several administrative innovations that expedited the Committee's work processes, such as reviewing the agenda in advance and allowing any changes to be made before the meeting, the review of minutes via e-mail and then posting the final version on the website, and the presentations from a variety of experts. The use of the website to circulate materials as well as the issuance of a physical briefing book on negotiated rulemaking also aided the Committee's deliberations. In retrospect, however, the facilitators would have liked to anticipate – and addressed much earlier -- the concerns of many of the Committee members about the transition period from the old voluntary pork pricing reporting system to the new mandatory version, especially concerning the new burden of record keeping and the fears of unpredictability. On other issues, the Committee worked together superbly, such as in establishing workable definitions of wholesale pork and how it should be measured. With the benefit of this initial experience, AMS will find it much easier to form and operate another negotiated rulemaking committee.

Given the overall success of the Committee's proceedings, we recommend that the Committee stay intact even after it has completed its work in order to provide feedback and support during the initial promulgation of the new rule. This group could help communicate what the rule means and how it will be enforced. Therefore, some mechanism to continue the

Committee should be explored as a productive way to receive comments and suggestions and for the Committee to continue to serve as a sounding board.

Respectfully submitted,

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Commissioner Jacques Wood, FMCS Facilitator

Commissioner Kevin Brahaney, FMCS Committee Reporter

September 15, 2011