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Historical Perspectives and Economic Impacts of Pending Updated Organic Livestock Regulations ("Access to Pasture" Requirements for Ruminants)

We appreciate the opportunity to submit these comments to the Office of Management and Budget. Given the tight timeframe for finishing your evaluation of the proposed organic livestock regulations, our comments will be brief summaries and include important background information. All statements can be substantiated, but because of our time constraints, they are not footnoted in this document. We would be happy to accommodate questions or requests for citations of reference materials.

I. History—Growth, Corruption in the Organic Dairy Sector

What was clear in 2004, when The Cornucopia Institute launched its *Organic Integrity Project*, was that there was a perfect economic model for where the organic dairy industry was headed—the conventional dairy industry.

During the 80s and 90s, as the center of dairy production shifted to giant industrial-scale operations in arid Western states (where the environmental liabilities of concentrating quantities of manure are minimized and cheap land and immigrant labor reduce costs), inflation-adjusted prices and profit margins eroded and squeezed thousands of family-scale farms out of business in traditional dairy states in the Midwest and Northeast.

Part of the original impetus, in terms of growing the organic dairy industry, was for family farmers to disconnect from the rapacious market forces that were driving them out of business. It was clear by 2004 that the successful market collaboration developed in organic agriculture, with consumers that were willing to pay premium prices, was too inviting to investors looking to produce organic milk "on the cheap."

In January 2004, Dean Foods, the largest dairy processor in the country, completed its acquisition of Horizon Organic, the leading organic dairy brand. The former principal owners of Horizon then formed a new business enterprise, Aurora Organic Dairy, intending to become the low-cost leader in the production and packaging of private-label ("store-brand") organic milk.

In the 1990s, prior to launching Aurora Organic Dairy as a separate business enterprise, Aurora Dairy was the largest conventional milk producer in the United States with a number of large

concentrated animal feeding operations (CAFOs) stretching from Colorado to Florida.

Horizon had built its leading market share in organic dairy foods by producing milk on their own corporate-owned dairies and purchasing milk from other giant CAFOs. This was the same scenario followed by Dean Foods after the Horizon acquisition.

Aurora further refined this approach, and they now operate five industrial-scale facilities in Texas and Colorado. They have become the retail cost leader with their private label products, exerting downward pressure on pricing in every market in the United States.

II. National Organic Standards Board Actions—Attempting to Rein in the Scofflaws

Although the company launched its business by buying 100% of its milk from family farmers, as early as the year 2000, it had become obvious to industry participants that Horizon was *gaming the system* by producing "organic" milk on a corporate-owned 8000-head dairy in desert-like conditions in southern Idaho. In addition, Horizon was purchasing milk from the Case Vander Eyk, Jr dairy in Pixley, California, a 10,000-cow split operation (milking both organic and conventional cows). These two operations likely made up a substantial majority of Horizon's milk production during the late 90s and early 2000s.

Neither of these operations were providing any access to pasture to their lactating dairy cows. Their explanation at the time, in concert with their certifier, was that due to the confinement exemption in the federal organic regulations for "*stage of production*," they were not grazing their lactating cows (this explanation was still being used and abused by Dean/Horizon and Aurora as late as the mid-2000s).

It should be noted that Cornucopia Institute board member, Bill Welsh, who was a member of the National Organic Standards Board (NOSB) livestock committee in 2000, states that it was patently clear that "stage of production" was referencing the reproductive process and very young baby animals (not the 305 day lactation period that would result in large dairies confining their milk cows 24/7, for the majority of every year, for the majority of their lives).

In 2000, the NOSB passed the first of at least five guidance or rule change recommendations, intending to rein in the abuses that were taking place. The board stated that "lactation is not a stage of production."

Every effort the board made in subsequent years was either ignored or rejected by the USDA and the NOP. Even the rule you have in front of you for review disrespected the Congressional requirement that the NOSB be consulted and involved in reviewing/recommending policy. Although the language pertaining to "access to pasture" was thoroughly vetted by the NOSB, in concert with the greater organic community, the rest of the wholesale rewrite of the entire organic livestock standards – not just those applying to dairy animals – was created without the board's input.

Subsequent to the publication of the draft livestock standards, the USDA held, belatedly, a series of listening sessions around the country where stakeholders, including NOSB members, were indeed allowed to critique the draft. It is a shame that this process did not take place before its publication. That is the reason why we requested that the USDA publish the upcoming final rule, that OMB is reviewing, as "interim." If, as expected, the Department extensively integrates

comments from the public into this final iteration of the rule, it will be radically different, and hopefully far better, than the controversial draft version.

We strongly encourage you to publish an interim final rule without delay.

III. USDA's Refusal to Enforce the Current Regulations

Besides for refusing to adopt guidance or rulemaking recommendations from the NOSB, the USDA systematically, since the regulations went into effect in late 2002, refused to take action against factory farm scofflaws producing organic milk.

USDA and National Organic Program (NOP) officials repeatedly, during the past administration, claimed that the rules were "unenforceable." The Cornucopia Institute has consistently challenged this specious analysis.

First, our legal advisors tell us that everything included in federal law "means something." It was unreasonable for federal regulators and accredited certification agents to allow dairies to operate with zero (0) pasture. We could argue about how much pasture access would be required to meet the legal requirements—but it's hard to argue that none was required.

Second, the regulations clearly state when it is legal to confine your cattle (environmental factors, stage of production, health of the animal, etc.). It is clear that organic livestock producers are obligated to provide access to the outdoors for their animals, and access to pasture for ruminants, unless one of these exceptions are met.

And last, there is a clear definition for the term "pasture" in the regulations. At one point in time, Aurora Dairy was referring to "pasture" when they were really referencing a dirt feedlot with hay bale feeders (see photo gallery at www.cornucopia.org). The regulations require management of pasture to maintain or improve its contribution to environmental protection and feed value.

IV. Proving the Current Regulations are Enforceable

In early 2005, The Cornucopia Institute filed formal legal complaints with the USDA, alleging that the Dean Foods Idaho operation, the Vander Eyk dairy and Aurora's Platteville, Colorado dairy were violating the federal organic standards in reference to access to pasture.

By August of that year, all three complaints had been dismissed without an investigation, for political reasons, as per the request of the Deputy Administrator of Transportation and Marketing Programs who oversaw the NOP at the time (this is part of an ongoing investigation by the Office of Inspector General at the USDA). Again, we can provide documentation, in this case based on FOIA material, upon request.

Cornucopia refiled complaints against these dairies. The Vander Eyk dairy has subsequently been decertified. Aurora Dairy was found by career civil servants at Agricultural Marketing Service compliance and the NOP to be in "willful" violation of 14 tenets of the federal organic standards. These included confining cattle without pasture access and bringing in conventional cattle illegally into their operations. Perhaps most seriously, the USDA concluded that Aurora was willfully selling milk labeled as organic that did not meet federal standards from December

5, 2003 to April 16, 2007 – the date of the letter sent to Aurora corporate officials notifying them of their investigation’s findings and their intent to decertify the corporation.

In negotiations with the Deputy Administrator of TMP, and Bush administration officials at the USDA, Aurora entered into a consent agreement resolving the matter without a fine and was allowed to continue in business with modest modifications to one of their five dairies. This is highly regrettable as the incident was undoubtedly the largest scandal in the history of the organic program.

Consumers have subsequently filed 19 class action consumer fraud lawsuits against Aurora and their marketing partners (Wal-Mart, Target, Costco and a number of supermarket chains). We understand this whole episode, related to possible collusion in the penalty phase, is also part of the investigation by the OIG’s office.

Although the USDA has never investigated Dean Foods’ Paul, Idaho Horizon dairy, we have now asked Secretary Vilsack to reopen the matter. Dean Foods closed their original dairy barns and feedlot facility sometime last year, and opened a newer facility two miles from that site.

Complaints we have filed against other industrial-scale dairies are in various stages of being adjudicated by the USDA. In one other example, the Rockview Dairy in Amargosa Valley, Nevada, that had been operating as a split operation with a total of approximately 5,000 cows (half of which were reported to be "organic") has been forced by their certifier to reduce the number of organic cows to 300—a number more consistent with the pasture available at the site.

These instances clearly illustrate that the present livestock standards, pursuant to pasture requirements, are perfectly enforceable and that the USDA, and some certifiers, had refused to fulfill their legal responsibilities. Additional examples can be supplied upon request.

We are illustrating this past history to discredit statements that have been made by Aurora Dairy, Straus Dairy, and others, that updated regulations would be "new" burdens and economically damage these enterprises—severely economically damaging other industry participants.

We have personally visited a great number of the large CAFOs, and many family-scale operations around the country, likely more than anyone else in the industry. We can conclude from our onsite investigations that excepting for the large CAFOs, the vast majority of industry participants, farmers, processors and certifiers perfectly understand what the organic regulations expect and are operating their enterprises accordingly.

V. Lack of Enforcement—Serious Ongoing Industry Damage

Based on Cornucopia research, we estimate that 30-40% of the nation's organic milk supply is coming from just a handful of CAFOs milking in excess of 2,000 cows each. Our research has since been corroborated by the USDA report that pegged the number, as of a few years ago, at 30%.

Since the commercialization of organic dairying, in the late 1980s, systemic marketplace shortages of organic milk was the norm, and continued to be so until early 2009. Market share was being determined by who had the raw material (milk) available, not by other advertising or market initiatives. Large CAFOs could be brought online quickly, sometimes with conventional

cows that have now been determined by the USDA to have been illegally integrated into some of these organic operations.

Companies like Aurora and Dean Foods created commanding market shares, now well exceeding 60-70% of the market, by quickly getting illegal milk on the store shelves (it should be noted that current industry market shares are not tracked by government data and hard to precisely pinpoint).

Not enforcing the current law has already economically injured the 1,800 or so family-scale organic dairy producers in the United States, who, on average, have an estimated herd size of approximately 60 dairy cows plus young stock. They have been robbed of income by the illegitimate operations. Adopting a standard without a strict set of benchmarks, thereby preventing certifiers and the USDA from employing easy tools to enforce the law, or worse unintentionally weakening the rule from what it currently is will further disadvantage 1800 family farmers.

Since early 2009, organic dairy farmers have seen their pay price erode and have been forced by processors to cut back milk production. Many are being forced out of business, others are in danger of foreclosure and there have been, regrettably, suicides in the dairy business, including organic producers. The gravity of this rulemaking decision, and the importance to many hard-working families in this country, cannot be emphasized enough.

VI. Alleged Damage to CAFOs by Implementing Strong Regulatory Language Now

When this discussion first began at the NOSB level in the year 2000, and was later significantly ramped-up in terms of media coverage after Cornucopia launched its Organic Integrity Project in 2004, there were only two large CAFOs producing organic milk in the United States. Most of the new construction and conversions of similar operations occurred during a period in time when this overt controversy was being publicly debated.

Investors in this industry would have undoubtedly been exposed to coverage in the general media including the *New York Times*, *Wall Street Journal*, *Washington Post*, *San Francisco Chronicle*, Associated Press and National Public Radio, among other outlets. In addition, numerous trade publications in the dairy, farm and organic industry provided extensive coverage.

There is little doubt that investors knew that stricter enforcement and/or rulemaking was a potential if not likely byproduct of the lively debate—and the 120/30 benchmarks were agreed upon by most industry participants is far back as 2005. Since the discussions had taken place with the NOSB, these proposals, which are now part of the draft rule, were all clearly spelled out in the public record with numerous opportunities for official comments from stakeholders.

Cornucopia codirector Mark Kastel, years ago, in public testimony before the NOSB, made it abundantly clear that investors who continued to construct or convert new CAFOs to organic production were putting their capital at risk.

Any claim that the rules of this game are now being suddenly or unexpectedly changed, or somehow strengthen beyond current accepted regulatory interpretations, or that this was done in secret, are patently inaccurate.

VII. New Livestock Regulations—a Collaborative Industry Effort

It is important that the new regulations are just as strict as the existing standards. We do not believe that the draft proposal was any more restrictive to livestock operators than what is currently expected of them.

It's important to note that the 120 day/30% requirements were negotiated reference points agreed-upon by the vast majority of all organic dairy farmers, and NGOs representing their interests. Other than Aurora and Straus, and a handful of other farmers who mostly objected to the proposed standards for philosophical reasons, there has been almost no dissent within the organic dairy community.

To clarify, organic livestock producers, who are required to provide pasture, would be required to graze their cattle for the entire growing season, but not less than 120 days. And they would be required to maximize pasture utilization by providing not less than 30% dry matter intake from pasture for their animals.

The rule cannot simply say 120 days/30%. That might be an appropriate baseline for a few farmers in difficult climatic regions. But it would be far too lax for the majority of organic ruminant producers in the country who can provide access to pasture for far more, on average, than 120 days. It should also be emphasized that if irrigation is necessary to produce crops, be it corn, soybeans, alfalfa or pasture grasses, that not having irrigated land would be an illegitimate excuse to minimize days on pasture or pasture consumption.

This means, for example, that a producer in, let's say Wisconsin, that could easily graze for 180 days or more, could not pull the plug after 120 days saying, "I've met the standard and now I'm going to confine my cattle to the barn facilitating extra production."

The benchmarks started higher. Many organic livestock producers provide 50-100% of the dry matter intake for their dairy cattle for well over 120 days. It was only in negotiations with, primarily, farmers in the San Joaquin Valley, and the North Bay areas of California (where Straus is located), that convinced the rest of the nation's producers—from regions where the majority of organic farmers are located—that they should accept the lower benchmark of 120 days/30% so that these few producers in difficult climatic regions could stay involved in organic dairying.

We can connect you with farmers to interview in Sonoma County, including within 10 miles of where the Straus Dairy is located, who will testify that they graze their animals for 5 1/2 months per year and can achieve the 30% average. As Mr. Straus' dairy brand grew in popularity, he made a personal and business choice to add many more cattle to his operation— more than the land base can legally support under the current regulations or under the 120 days/30% benchmark.

It is important to realize that this standard is a negotiated figure and one borne of compromise between a wide swath of the organic dairy community—any lower standards would make the pasture requirements meaningless!

Another important provision that was included in the draft livestock standards, by the USDA authors, and has since been widely supported, is the requirement for producers to plant crop

varieties suitable for the environment and climate. Some of the large CAFOs in desert-like conditions have planted annuals instead of perennial pastures. These annual crops have burned up in the summer heat leaving the cattle without any access to pasture. This practice is obviously unacceptable.

VIII. The Final Arbiter—Meeting Consumer Expectations

When consumers pay a premium for organic dairy products, they think they are supporting:

- ❖ A different kind of environmental ethic
- ❖ A more humane animal husbandry model
- ❖ Economic justice for family-scale farmers

Shipping milk produced on a few mega-farms in the West to Portland, Oregon or to Portland, Maine is not environmentally sustainable in the eyes of organic consumers.

Burning cattle out after a couple of years by pushing the animals for high production (indicative of the conventional model of dairy production), and then sending them to slaughter at a young age, does not meet the expectation of organic consumers in terms of humane treatment.

And the cheap CAFO milk, forcing farmers out of business, betrays the covenant between organic consumers and producers.

Many of these giant dairies may indeed become unprofitable or less profitable if forced to follow the organic standards under review by the OMB. But that does not mean, especially if some exit the industry and milk supplies tighten up, that others will not change their production models, possibly reducing the overall size of their herds, or adding additional pasture acreage, so that they can meet the marketplace demand for additional organic milk.

It is imperative, for the health of the industry, and those ethical farmers who have built the reputation of organic dairying, that good, easily interpreted, and easily enforced regulations be put in place.

We are not lobbying for any stricter regulations than the vast majority of industry participants currently respect and operate under. But any weakening of the standards for "access to pasture," that were presented in the draft rule, will hasten the demise of organics as being the last true economically sustainable market niche for family-scale farmers in this country.

In closing, organics offers consumers a choice in the marketplace so they can support a different model of agricultural production. Many consumers find CAFO production repugnant, be it conventional or organic. If large operators succeed in blurring the lines, so that consumers can no longer choose organics as an alternative, much stands to be lost economically by all industry participants.

Furthermore, many farmers have stated that they don't object to what Aurora and other large factory farm operators are doing. They just object to it being labeled as organic. Strictly enforcing the current rules, and adopting workable new regulations, at this point in time, will not force any of the scofflaws out of business. Although it might very well force them to go back to conventional production if they can't, or are unwilling to, meet the federal organic standards.

On behalf of Cornucopia's members—numbering over 3,000, mostly family-scale organic farmers—we sincerely thank you for the opportunity to present this background information.

Again, please feel free to contact us with questions or for additional documentation.