

USDA WHOLESALE PORK REPORTING NEGOTIATED RULEMAKING COMMITTEE
SUMMARY MEETING MINUTES
February 8-10, 2011

The Wholesale Pork Reporting Negotiated Rulemaking Committee (hereafter the "Committee") convened its first meeting at 8:30 A.M. on February 8, 2011 at the Sheraton Clayton Plaza Hotel, Clayton, Missouri. The meeting was facilitated by Eileen B. Hoffman and Jacques Wood of the Federal Mediation and Conciliation Service (FMCS) with summary minutes prepared by FMCS staffer Julie Duszak, subject to approval by the Committee. The meeting was scheduled to last for three days, with the Committee adjourning on Thursday, February 10, 2011.

Committee members present for the February 8 – February 10, 2011 meetings (delegates in alphabetical order by name of organization):

- American Meat Institute (AMI), Joe Weber
- Chicago Mercantile Exchange (CME), Paul Peterson
- Food Marketing Institute (FMI), Erik Lieberman
- Grocery Manufacturers Association (GMA), Bill Paulos
- Livestock Marketing Information Center (LMIC), Dr. Joe Parcell
- National Farmers Union (NFU), Alan Hoefling
- National Livestock Producers Association (NLPA), Richard Ellinghuysen
- National Meat Association (NMA), Tim Uber
- National Pork Producers Council (NPPC), Jason Logsdon
- North American Meat Processors Association, American Association of Meat Processors, and Southeastern Meat Association (NAMP/AAMP/SEMA), Gary Malenke, representing three organizations
- United Food and Commercial Workers International Union (UFCW), Mark Lauritsen
- U.S. Department of Agriculture, Agricultural Marketing Service (USDA/AMS), Mike Lynch

Alternates and other identified guests also present during these meetings:

Greg Schweitzer, alternate, AMI
Pat Schwab, alternate, GMA
Chandler Goule, staff, NFU
Mark Legan, alternate, NPPC
Jim Malek, alternate, NAMP/AAMP/SEMA
R. Dennis Olson, alternate, UFCW

From USDA:

Heather Pichelman (USDA, Office of General Counsel)
Dr. Craig Morris (USDA, AMS, LSP, Deputy Administrator)
Jennifer Porter (USDA, AMS)
Bill Sumpter (USDA, AMS)
Chris Sommers (USDA, AMS)
Bill Worlie (USDA, AMS)

Members of the Public (including representatives of these and other organizations) were also in attendance throughout this public meeting and had an opportunity to comment at scheduled intervals.

DAY ONE: Tuesday, February 8, 2011

I. WELCOME AND INTRODUCTIONS

The meeting began at 8:30 A.M. and **Mike Lynch** welcomed the Committee and commended the members' agreement to participate in what he noted was a historic use of negotiated rulemaking to deal with wholesale pork pricing. He said that USDA and AMS are looking forward to working with the Committee to craft this proposed rule. He asked each of the Committee members to introduce themselves and then he introduced the FMCS facilitators. A copy of the draft agenda is attached (**Attachment #1**).

The facilitators engaged by USDA, **Commissioners Eileen B. Hoffman** and **Jacques Wood** of FMCS, introduced themselves and the Committee formally approved these facilitators for this Negotiated Rulemaking process. **Commissioner Wood** reviewed the negotiated rulemaking process and the **Commissioner Hoffman** described the role of the facilitator.

Commissioner Wood gave a brief overview of the FMCS and **Commissioner Hoffman** addressed some administrative matters, including hotel information, daily sign-in information for the Committee and members of the public, and the accessibility of handouts and documents following each meeting. A review of the meeting goals and agenda was also conducted. **Commissioner Hoffman** asked each Committee member to indicate what they hoped to have come out of this negotiated rulemaking process and the answers included: a fair process, consistency, transparency, a rule that is fair and understandable, and that will provide liquidity to this market and assist in reporting more sales.

II. OVERVIEW of the NEGOTIATED RULEMAKING PROCESS

Commissioner Wood gave a presentation entitled "An Introduction to Negotiated Rulemaking" (**Attachment #2**). He discussed the differences between traditional rulemaking and negotiated rulemaking and noted that negotiated rulemaking brings interested parties together to form a committee, discuss, and reach a consensus on a proposed or interim rule. Commissioner Wood presented the Negotiated Rulemaking Statute definition of consensus as meaning a "unanimous concurrence on the interests represented." He suggested a working definition of "consensus" to mean that each Member is at least 70% comfortable with the consensus reached, and is 100% committed to that consensus. Once a consensus is reached by the Committee, the agency then agrees to publish a Notice of Proposed Rulemaking incorporating the Committee's consensus. In turn, the Committee members and the organizations they represent agree not to submit any adverse comments to the rule.

If a consensus is not reached on all issues, the agency should incorporate any areas of consensus in developing a proposed or interim-final rule. Additionally the agency will better understand the areas where consensus was not reached. FMCS concluded this presentation with the thought that if the Committee cannot reach an agreement, the Committee leaves it up to USDA to write the draft rule that would then be followed by the usual notice and comment procedures of the Administrative Procedures Act.

The Mandatory Price Reporting Act of 2010 (2010 Reauthorization Act, Pub. L. 111-239) reauthorized Livestock Mandatory Reporting (LMR) for 5 years and added a provision for mandatory reporting of wholesale pork cuts. The Act directs the Secretary to engage in negotiated rulemaking to make required regulatory changes for mandatory wholesale pork reporting. The statute requires that the Committee include representatives from a specified list of interests and further states that any negotiated rulemaking Committee established by the Secretary shall not be subject to the Federal Advisory Committee Act.

However the relevant provisions of the Negotiated Rulemaking Act (NRA) will apply, and to operate in a transparent manner, meetings will be open to the public, announced in the Federal Register, and the public will have an opportunity to speak at specific times during the proceedings. In addition, a website www.ams.usda.gov/negotiatedrulemaking has been established that will post all approved summary minutes, agendas, and other relevant documents relating to this negotiated rulemaking.

III. TRAINING IN INTEREST-BASED NEGOTIATION MODEL

Commissioner Wood led the Committee in interest-based problem solving using a combination of exercises, discussion, and lecture. He compared and contrasted the differences between more traditional bargaining that focuses on an individual or organization's positions with the interest-based bargaining (IBB) approach that looks at the needs involved and the interests behind the positions. The use of information sharing and reaching decisions by consensus are all parts of the IBB approach and all on the Committee had a chance to practice this process. **(Attachment #3)**

IV. REVIEW AND ADOPTION OF COMMITTEE GROUND RULES

Commissioner Hoffman led the group in a discussion of the draft ground rules for this negotiated rulemaking and answered questions. FMCS stated that the ground rules were collected from samples of successful negotiated rulemaking procedures. There was discussion of the ground rules, minor clarifications, and four amendments, with additional discussion about the best way to have the issues discussed and with whom, including constituents and the press.

A copy of the approved Committee Ground rules is attached **(Attachment #4)**.

V. WELCOME BY DR. CRAIG MORRIS, USDA, AMS

Dr. Craig Morris welcomed and thanked the group for its participation in this unique process. He voiced his support for this effort **(bio, Attachment #5)**. Next, **Mike Lynch** introduced the representatives from USDA, LGMN Branch to discuss how mandatory boxed beef reporting has been working, how voluntary wholesale pork price reporting is functioning, and the results of a study on Wholesale Pork Price Reporting by **Dr. Joe Parcell**, one of its authors and a member of the Committee.

VI. OVERVIEW of VOLUNTARY PORK PRICE REPORTING

Bill Sumpter provided a presentation on "USDA Voluntary Pork Reporting Overview" where he discussed voluntary reports concerning wholesale pork prices and circulated copies of the National Carlot Pork Report and Nation Weekly Retail Pork Cuts and fielded questions from the Committee. **(Attachment #6)**

VII. SUMMARY OF WHOLESALE PORK PRICE REPORTING ANALYSIS

Dr. Joe Parcell discussed a study of wholesale pork price reporting. He discussed improving the value of the price reporting information and evaluating the economic impacts of mandated pork reporting. A summary of the study was distributed and the entire study is available from the USDA website. **Dr. Parcell** mentioned that USDA, AMS commissioned this study to determine the advantages, drawbacks, and potential implementation issues associated with adopting mandatory wholesale-pork price reporting. **(Attachment #7)**

VIII. OVERVIEW OF WHOLESALE BOXED BEEF REPORTING

Bill Worlie provided a “USDA Boxed Beef Reporting Overview” and answered questions. He discussed wholesale boxed beef reporting as a frame of reference for pork reporting. He fielded questions, with extensive discussion on intra-company transfers. The definition for boxed beef was highlighted, “Those Carlot-based portions of a beef carcass including fresh and frozen primals, subprimals, cuts fabricated from subprimals (excluding portion control Cuts)...and fresh and frozen ground beef, beef trimmings, and boneless processing beef” (**Attachment #8**).

IX. CONFIDENTIALITY

Mike Lynch discussed the 3/70/20 confidentiality guideline and how it is applied to all commodities covered by Livestock Mandatory Reporting. It will also apply to mandatory pork reporting as well.

X. REVIEW OF POTENTIAL NEGOTIATED RULEMAKING ISSUES:

OVERVIEW OF USDA DRAFT IDEAS FOR THE ROLE AND OUTLINE OF KEY ISSUES

Mike Lynch prepared a list of “Pork Reporting Issues Needing Consensus” and suggested discussion of these and other items over the next three days. The items include: (**Attachment #9**)

- Reporting times
- Price reporting basis
 - FOB Plant? FOB Omaha?
- Reporting export product
- Definitions
 - Wholesale pork
 - Purchase types
 - Others?
- Branded products
- Packaging differences and costs
- Product specifications and yields
- Intra-company transactions
- Packer to packer transactions
- Product delivery window(s)
- Company and plant ownership and affiliations
- Brokerage fees and accruals
- Refrigeration

The committee added: “injected product”

He also included an AMS Draft Version for “Mandatory reporting of pork sales” which was distributed and will be discussed throughout the meeting (**Attachment #10**).

XI. LOGISTICS: GROUND RULES

Commissioner Hoffman indicated that the Ground rules will be printed and provided in the morning for Committee approval. All changes to the ground rules would be incorporated for discussion and **Julie Duszak** would prepare the document for distribution.

XII. ADJOURNMENT

At 5:00 P.M., the Committee adjourned for the evening.

DAY TWO: Wednesday, February 9, 2011

I. WELCOME, INTRODUCTORY REMARKS

At 8:30 A.M., the meeting was called to order.

II. DISCUSSION AND ADOPTION OF AMENDED GROUNDRULES

Commissioners Hoffman and Wood led this discussion.

The Committee requested the definition of alternates to include the right of an organizational member to appoint additional alternates—a correction was made to clarify this motion—so the word “alternatives” was changed to “alternates” in Section II, B. The Committee agreed to proceed with the ground rules, with those changes made, and adopted them by consensus (**Attachment #4**).

III. DISCUSSION OF ISSUES—THE COMMITTEE

A facilitated discussion of the items on the list presented by USDA was conducted as well as discussion of the AMS Draft Version for Mandatory Reporting of Pork Sales.

- **Reporting Times**

The Committee discussed daily reporting and reached a consensus agreement on twice a day, by 10 A.M. CT and 2 P.M. CT. (The AMS Draft Version contained the following wording on Daily Reporting: “The corporate officers or officially designated representatives of each packer processing plant shall report to the Secretary at least twice each reporting day (once by 10 A.M. central time, and once by 2 P.M. central time) the following information on total wholesale pork sales, as defined herein, established on that day inclusive since the last reporting.”).

- **Definition of Pork Sales**

The Committee discussed the definition of pork sales. There was extensive discussion on what is included in “total pork sales,” and the Committee asked what system was used in reporting boxed beef and what is reportable for pork.

The Committee approved the following for mandatory reporting of pork sales: “The price for each wholesale pork sale, as defined herein, quoted in dollars per hundredweight; the quantity for each wholesale pork sale, as defined herein, quoted by number of pounds sold.” There was discussion of decimal points for dollars per hundredweight, which was clarified when the USDA-AMS representative explained that there is an Industry Users’ Guide for packers that addressed decimal rounding. For rounding monetary values, it is to 2 decimal points.

- **Categories—The Information regarding the Characteristics of each sale**

- **Type of Sale**

With a discussion of destination, time period, hedging and the differences between various type categories, the Committee agreed to four type categories:

1. Negotiated

2. Formulated,
3. Forward contract
4. Other, to be defined later.

- **What specifications would be used when reporting the cut of pork?**

The Committee discussed the options for reporting cuts of pork, in relation to using Institutional Meat Purchase Specifications (IMPS) and/or Carlot Report. There was discussion of whether or not mandatory reporting must include the packers' specifications, including yields. All of the beef packers voluntarily provide this information to assist USDA with reporting the daily and weekly boxed beef cutouts. The confidentiality of this information was also discussed and **Mike Lynch** spoke to the confidentiality of the information the AMS receives from packers. The committee decided to table the decision and revisit after further consideration and discussion with constituencies. The pork item code and weight range of the cut will be included in this discussion as well.

- **Product Delivery Period**

The Committee discussed product delivery period. Currently under voluntary reporting, the delivery period for negotiated pork trades is measured in working days rather than calendar days. Product delivery period should also take into account product shelf-life and how it is packaged. A proposal was made to first translate the working days into calendar days and then to define the delivery period as 14 calendar days for processing pork items and 21 calendar days for retail pork cuts. The Committee opted to table the issue for further consideration and discussion with constituencies.

- **The pork type**

The Committee discussed pork types as being in the following three categories:

- barrow/gilt,
- sow,
- boar

The Committee agreed on these three categories.

- **Price reporting basis: FOB Plant and FOB Omaha.**

The Committee discussed this topic and the reasons and history behind using Freight-on-Board (FOB) Omaha basis for voluntary pork reporting, as well as the reasons for using FOB Plant basis for boxed beef reporting when it became mandatory. An additional option discussed was to report the price at which the pork was transferred (delivered or picked-up.) The Committee opted to table the issue for further consideration and discussion with constituencies.

- **Reporting Export Product**

The Committee agreed to add "Destination" as a characteristic of each sale and discussed how to report export product, especially if the report's main aim is to capture sales within the United States. Some Committee members pointed out that approximately 20% of pork is sold in the export market and should be captured as well. Three categories were proposed and agreed upon with definitions to be provided:

- Domestic
- Export: overseas
- Export: NAFTA

The topic of country of origin labeling was discussed. The Committee opted to table the issue for further discussion.

- **Definition of Wholesale pork cuts**

The Committee discussed the definition of wholesale pork cuts. A proposal was made to look at the definition used for boxed beef and also to start with the Carlot Report. There was discussion on whether to address enhanced and processed products. The group defined wholesale pork cuts as:

“fresh and frozen primals, sub-primals, cuts fabricated from sub-primals, pork trimmings, pork for processing, pork offal, and variety meats, excluding portion-control cuts, flavored, cured, smoked, cooked, ground, and diced pork products.”

- **Branded products**

The Committee discussed the inclusion/exclusion and definition of branded products. The Committee opted to table the issue for further consideration and discussion with constituencies.

- **Packaging Differences and Costs**

The Committee discussed packaging differences and costs.

IV. CONFIDENTIALITY

The issue of confidentiality was brought up and USDA, OGC addressed confidentiality issues, specifically that USDA employees may not divulge information collected from packers, per the Livestock Mandatory Reporting Act. Additionally, this type of information is protected from release under the Freedom of Information Act.

V. PUBLIC COMMENT:

The Committee’s agenda allowed for public comment and questions at the end of the day’s deliberations. During this time, **Mark Legan**, a pork producer and NPPC alternate for the Committee, spoke. He noted that the composite carcass value is important to producers and they feel very strongly about it. He encouraged the Committee and the USDA to keep that in mind. Also, he mentioned that a new process of immunological castration is currently being used in other countries, and may well be available in the United States in approximately six months. The pharmaceutical industry should be working with USDA on this and it deserves further consideration in relation to definitions. The response by Committee member **Mike Lynch** was that the Pfizer Company has been in discussions with USDA regarding the progress in clearance and use. The product should be cleared before it can be considered.

At 5:00 P.M., the Committee adjourned for the evening.

DAY THREE: Thursday, February 10, 2011

The Wholesale Pork Reporting Negotiated Rulemaking Committee reconvened at 8:30 A.M.

Commissioner Eileen B. Hoffman chaired the morning session.

I. DISCUSSION ABOUT NEXT MEETING DATES:

The Committee agreed upon the proposed dates of March 15-17, 2011 in the Washington, DC area for the next meeting.

II. TOPIC FOR DISCUSSION: INTRA-COMPANY TRANSACTIONS

As one of the areas where wholesale pork sales are conducted, the draft list of issues for discussion included how to deal with “intra-company transactions”. The discussion focused on what constitutes an intra-company transfer, as well as what is meant by affiliate and joint venture.

One constituent wants more price information concerning intra-company transactions; however, since the company can place any values to such a transaction, it may be that the volume is more important than the price. One Committee member suggested that volume information should be reported rather than the price since the price can be an arbitrary figure. Others noted that intra-company transactions may not be reported because of the confidentiality provisions and even though there is a desire for more market discovery, it may not be achieved through this approach.

The Committee members struggled with the means to get more information about intra-company transfers and this topic will be revisited at the next meeting of the Committee. This topic was placed on “hold” or “in the parking lot” where it will not be forgotten but rather Committee members will check with their members and constituents and report back at the next Committee meeting.

III. TOPIC: PACKER TO PACKER TRANSACTIONS

With mandatory reporting, all transactions would have to be declared and reported. The question discussed was how to capture this information. The question became whether this should be reported generally or specifically as a separate category. A number of Committee members requested that there be a break-out for this information. The transactions have to be reported but should these be designated in a separate box. This issue was also placed on hold. There was much discussion over the definition of who is a packer and reference was made to the Act as well as the treatment of boxed beef. The Committee asked if there might be a list of packers that could be utilized. Members of the Committee asked USDA if there was such a list of processors owned by packers and others asked how joint ventures would be treated.

IV. COMPANY AND PLANT OWNERSHIP AND AFFILIATIONS

In the discussion concerning intra-company sales, the definition of affiliate as well as joint ventures was raised. This was also an issue left for the “parking lot” and placed on hold until the next meeting.

V. PRODUCT DELIVERY WINDOWS

The discussion regarding product delivery windows will continue at the next meeting.

VI. BROKERAGE FEES AND ACCRUALS

The Committee held an extensive discussion over how brokerage fees worked in wholesale pork and in boxed beef and if they were a cost of selling and thus not part of the price or if they should be included in the price. Should they be deducted or are they a cost of doing business? In addition, the Committee made a distinction between two types of accruals, one that is more like a direct rebate, where the buyer will receive money back after a certain volume is reached or other conditions are met for this deduction from the price; and the other is part of a marketing program to incentivize sales, based on volume levels

which may or may not be achieved only a longer period, if at all. Again, the Committee decided that these issues required more analysis and consultation with their constituents and would be revisited at the next meeting. In summary, brokerage fees went to the “parking lot” for further discussion; accruals, where there is a direct rebate would probably not be included in the prices, but those accruals that are contingent are very complex—so the issue is also on hold. In the end, the question was, “what is included in the net selling price to AMS?”

V. REFRIGERATION

The Committee discussed how refrigeration figures in to price reporting. In the boxed beef examples, distressed products are captured by the age of the product. The three categories used in boxed beef reporting are: Fresh 1-14 days, Frozen; and Fresh 14+ days. The last category is utilized for segregating distressed product—meaning past minimum shelf life depending on the packaging and the cut. How would this apply to wholesale pork? The Committee suggested looking for consistency but that pork would need to be defined by cut as well as by packaging which is also important because it is more variable in the pork industry. The Committee discussed the age of delivery and the age of the product at shipping. The Committee said that a uniform standard would be helpful—again, this complicated issue was sent to the parking lot for further discussion at the next meeting.

VI. NEW TOPICS

- **Reporting for Sows and Boars**

Mike Lynch brought up two new topics for the Committee’s deliberations. First, the mandatory price reporting rules for cattle, beef, and swine didn’t work as well for reporting all cows and bulls, and sows and boars. In addition, in the last reauthorization in 2006, a lower threshold was established for sow and boar packers in order to collect more sow data. In return, the reporting requirements were reduced for sow packers to once per day because smaller plants would be involved. Would the Committee want this lower threshold of once a day for reporting requirements for sow packers? After discussion, the Committee agreed that once a day reporting for sows was sufficient. There are approximately 12 or 13 sow packers, so the once a day reporting appeared to be less burdensome and more effective.

- **Reporting on the Slaughter of “Inferior Livestock”**

Mike Lynch also mentioned that with mandatory wholesale pork reporting, the category of “inferior swine” would also be reported—these are swine that have been discounted due to light-weight, health or physical conditions that affect their value. These types of swine are currently not being reported to AMS by the packers. The question was should there be a special category for reporting of these types of pork products or should they be reported at all? The Committee discussed this issue and while there is no definitive number of how many pigs is in this category, at least one percent would meet these special specifications and might be about ten to twelve butchers. The suggestion that there are heavy sows and light sows and they should not be comingled was mentioned.

VI. CONFIDENTIALITY REVISITED

The Committee returned to the question of how the LMR information and the Confidentiality rule of 3/70/20 works. Is it applied to the whole report (as in Hogs) or to each line item (as in Boxed Beef)? How will the AMS use this confidential information—to this AMS responded that the items are included for primal value and for cut-out purposes. More will be discussed on confidentiality at the next meeting.

VII. AGENDA ITEMS FOR THE MARCH 2011 MEETING

All of the items and issues on hold or placed in the “parking lot” will be discussed at the March meeting. The issues of FOB Plant, FOB Omaha, and FOB River Basis will also be discussed and a suggestion was made that the Committee members receive a radius chart with actual numbers. Another suggestion was for Committee members to come to the next session with options to discuss and USDA agreed that it will also bring its preferences and options. All Committee members will receive copies of 7 CFR Part 59 of the AMS Regulations and the site to find all materials. The Committee also requested that USDA, AMS invite at least two of its experts who appeared at the meeting in St. Louis, at least one from boxed beef and one from pork reporting to attend the next session. They noted that their participation was very helpful especially to look at ideas and lessons learned from beef and swine reporting.

VIII. PUBLIC COMMENT

Audrey Adamson of NPPC complimented the Committee and the USDA for participating in this negotiated rulemaking. She expressed appreciation for public participation and said that she had learned a lot during these three days and was impressed at how seriously all the members took their responsibilities.

IX. PARTING COMMENTS

The facilitators mentioned that the draft summary minutes would be sent to all members of the Committee by Friday, February 18, for their review and approval. The summary minutes would then appear on the USDA/AMS Negotiated Rulemaking website.

X. ADJOURNMENT

The meeting adjourned at 3:00 P.M.

FEBRUARY 8-10, 2011 SUMMARY MEETING MINUTES ATTACHMENTS

1. Agenda
2. Introduction to Negotiated Rulemaking
3. FMCS-USDA Reg-Neg Presentation
4. Ground Rules
5. Bio, Dr. Craig A. Morris, USDA
6. USDA Voluntary Pork Reporting Overview
7. USDA-AMS Wholesale Pork Price Reporting: Final Report Summary
8. USDA Boxed Beef Reporting Overview
9. USDA, AMS, Pork Reporting Issues Needing Consensus
10. USDA Draft: Mandatory Reporting of Pork Sales