

USDA WHOLESALE PORK REPORTING NEGOTIATED RULEMAKING COMMITTEE
SUMMARY MEETING MINUTES
May 10-11, 2011

The Wholesale Pork Reporting Negotiated Rulemaking Committee (hereafter the “Committee”) convened its third meeting at 8:30 a.m. on May 10, 2011 at the Holiday Inn, Arlington, Virginia. The meeting was facilitated by Commissioner Eileen B. Hoffman and Commissioner Jacques Wood of the Federal Mediation and Conciliation Service (FMCS) with summary minutes prepared by Commissioner D. Kevin Brahaney (FMCS), subject to approval by the Committee. The meeting lasted two days, with the Committee adjourning on Wednesday, May 11, 2011.

Committee members present for the May 10 – May 11, 2011 meeting (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), Joe Parcell
- National Farmers Union (NFU), Alan Hoefling
- National Livestock Producers Association (NLPA), Richard Ellinghuysen
- National Meat Association (NMA), Shane Miller
- 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
- United Food and Commercial Workers International Union (UFCW), R. Dennis Olson
- U.S. Department of Agriculture, Agricultural Marketing Service (USDA/AMS), Mike Lynch

From USDA (or “USDA/AMS”, or “AMS”):

- Heather Pichelman (USDA, Office of General Counsel)
- Jennifer Porter (USDA, AMS, LGMN)
- Bill Sumpter (USDA, AMS, LGMN)
- Sherry Wise (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, May 10, 2011

I. WELCOME AND INTRODUCTIONS, and REVIEW OF PRIOR MEETING MINUTES, GOALS, & AGENDA

The meeting was convened at 8:30 a.m. by the facilitators engaged by USDA: Commissioner Eileen B. Hoffman and Commissioner Jacques Wood of FMCS. Commissioner Hoffman reviewed introductions and confirmed consensus for acceptance of the prior meeting minutes. The agenda (**Attachment #1**) was agreed upon. Two major areas of needed discussion were characterized, with one being the issue pertaining to FOB including a transition period relative to any change from the current practice under voluntary reporting. The other area of discussion encompassed the balance of varied topics that were discussed but not fully resolved to consensus at the previous meeting.

Commissioner Wood reviewed the goals and principles of Negotiated Rulemaking with regard to such considerations as what is necessary to form consensus and the fact that consensus requires that there be no dissent from any Committee member. Commissioner Wood also reminded the Committee that USDA will utilize consensus language to the maximum extent possible consistent with the legal obligations of the agency under its Notice of Proposed Rulemaking. (See Grounds Rules, IV, paragraph (B)) agreed to by the Negotiated Rulemaking Committee at its first meeting).

The Committee agreed to proceed in reviewing the 28 page “strawman” draft (version 2011-05-09) that USDA had prepared (**Attachment #2**) as an effective means of addressing the majority of open items from the previous meeting.

II. DISCUSSION of OUTSTANDING TOPICS

Previously Tabled Items as Covered in the Strawman Draft

Mike Lynch explained the formatting and context used in the strawman, shown as wording weaved into the existing Livestock Mandatory Price Reporting regulations. The new/edited text is shown in black text and highlighted in yellow. The existing regulatory text that would remain unchanged is in gray. USDA also offered a rough draft of a possible form showing detail on how characteristics such as delivery period and destination would be reported.

With regard to the yellow-highlighted section that appears on page 1 of the strawman: The Committee established consensus with regard to the placement of “59.205 Mandatory reporting of wholesale pork sales” into the table of contents.

With regard to the yellow-highlighted section that appears on page 4 of the strawman (i.e., §59.20 (f)): The Committee expressed consensus regarding these reporting times. The Committee also agreed that reporting will be required at least twice each reporting day for barrows and gilts, and once each reporting day for sows and boars, and this would be shown elsewhere in the regulations.

With regard to the first yellow-highlighted section that appears on page 5, there was consensus for the suggested addition of reference to the website

<http://www.ams.usda.gov/AMSv1.0/LivestockStandardizationIMPS>.

There was also consensus for the second proposed revision on page 5 regarding the definition of the term “lot,” i.e., §59.30 Lot (3) When used in reference to boxed beef, wholesale pork, and lamb, the term ‘lot’ means . . .

The third yellow-highlighted item on page 5, “Negotiated Sale,” precipitated discussion that concluded in agreement to place unresolved aspects in the ‘parking lot’ to be reviewed later in the meeting. It was then later resolved in reaching consensus to not include the term “wholesale pork” in this general definition, but instead include a separate definition for “Negotiated Sale” in Subpart C, Swine Reporting.

With regard to the first yellow-highlighted §59.200 definition shown on page 14 as Branded, consensus was established to not use the term “branded”, but instead to include a definition for “specialty pork products” as follows:

Specialty Pork Products. The term ‘specialty pork product’ means wholesale pork produced and marketed under any specialty program such as genetically-selected pork, certified programs, or specialty selection programs for quality or breed characteristics.

It was further agreed that the wording, “specialty pork product, if applicable” would also be added to section 59.205(a)(3).

With regard to the second yellow-highlighted §59.200 definition shown on page 14 as Formula marketing arrangement, consensus was reached in agreement to remove the words “executed in advance of manufacture” with the result appearing as:

Formula marketing arrangement. When used in reference to wholesale pork, the term ‘formula marketing arrangement’ means an agreement for the sale of pork under which the price is established in reference to publicly-available quoted prices.

With regard to the third yellow-highlighted §59.200 definition shown on page 14 as Forward sale, consensus was reached on the proposed wording.

With regard to the first yellow-highlighted §59.200 definition shown on page 15, Committee discussion led to consensus agreement for not including a definition of Other sale arrangement in the regulations.

With regard to the yellow-highlighted §59.200 definition shown page 16, there was consensus for the definition of Pork class as proposed.

With regard to the first yellow-highlighted §59.200 definition shown on page 17, consensus was reached on the definition of Type of sale, upon removal of “or other sale arrangement”, such that the wording will appear as:

Type of sale. The term “type of sale” with respect to wholesale pork means a negotiated sale, forward sale, or formula marketing arrangement.

Discussion regarding the second yellow-highlighted §59.200 definition (i.e., Wholesale Pork) shown on page 17, led to consensus involving both a revision and the addition of a separate definition pertaining to Variety meats. On the second day the Committee met, it confirmed consensus on a revised definition to appear as:

Wholesale pork. The term “wholesale pork” means fresh and frozen primals, sub-primals, cuts fabricated from sub-primals, pork trimmings, pork for processing, and variety meats (excluding portion-control cuts, cuts flavored above and beyond normal added ingredients that are used to enhance products, cured, smoked, cooked, and tray packed products). When referring to wholesale pork, added ingredients used are to enhance the product’s performance (e.g. tenderness, juiciness) through adding a solution or emulsion via an injection or immersion process. The ingredients shall be limited to water, salt, sodium phosphate, antimicrobials, or any other similar combination of foresaid or similar ingredients and in accordance with established USDA regulations.

Further, a definition for Variety meats was added to §59.200 as follows:

Variety meats. The term ‘variety meats’ with respect to wholesale pork means cut/processing floor items, such as neck bones, tails, skins, feet, hocks, jowls, and backfat.

With regard to the yellow-highlighted §59.205 beginning on page 21, there was considerable discussion about adding language for this definition similar to the following language from the prior (March, 2001) meeting:

(from the upper portion of page 5 of the previous minutes) (2) All direct, specific and identifiable marketing costs like POP material, marketing funds, accruals, rebates, etc.; should be deducted from the net price if these costs are known at the time of sale; and,

Further discussion pertained to specific terminology and the degree of appropriate qualification needed with respect to the items to be listed under §59.205(a)(3). USDA also indicated that they would revise the language to account for the fact that reporting for sows and boars would be required at a minimum of only once per reporting day. It was agreed that the Committee would review the revised language prior to the close of this two-day meeting.

The Committee caucused for lunch with the understanding of re-convening to cover the topic of FOB, including transition.

FOB, Including Transition

Upon re-convening, Commissioner Wood suggested three possible approaches to the FOB topic:

- 1) FOB Omaha
- 2) FOB Plant with Transition
- 3) FOB Plant

Considerable discussion followed on foreseen limits or concerns, and advantages and disadvantages associated with different approaches. Committee members representing packers noted that their goal is to take the impact of freight out of the price of wholesale pork before it is reported to AMS. AMS reiterated the goal of reporting actual transactions. CME and LMIC also expressed support for FOB Plant basis reporting.

The Committee agreed to table this topic, for further consideration at a later time in the two-day meeting.

Return to Parking Lot Items

Commissioner Hoffman led a review of items that had been placed in the 'parking lot' from the morning session. Discussion followed with the understanding that USDA would fashion, and present before conclusion of this two-day meeting, a revised strawman draft that reflects the revisions suggested by Committee members. Toward that goal, USDA sought further clarification and qualification from the Committee with regard to a variety of specific topics and considerations.

III. PUBLIC COMMENT

The Committee allocated 30 minutes to allow for public comment beginning at 4:30 p.m. There was no public comment offered.

VII. ADJOURNMENT

The Committee adjourned at 4:40 p.m.

Day Two: Wednesday, May 11, 2011

I. WELCOME AND INTRODUCTIONS and SUMMARY OF PROGRESS

Commissioner Hoffman convened the meeting at 8:30 a.m. and gained consensus that the meeting day would begin with the review of the latest revised strawman draft that USDA had prepared after the Day One Meeting.

II. COMMITTEE DISCUSSION

Previously Tabled Items as Covered in the Strawman Draft

USDA distributed the updated “strawman” draft (version 2011-05-11) (**Attachment #3**), and led a review of the updated proposal revisions.

Consensus was established or confirmed on all items through and including page 21 of the revised strawman.

Considerable discussion and request for clarification and comment ensued with regard to the multiple aspects of the proposed revisions at §59.205 beginning on page 21.

Consensus was reached whereby there was no need for additional parenthetical qualification of §59.205 (a)(3)(iv) The product delivery period, in calendar days.

There was considerable discussion regarding the appropriate degree of qualification to be associated with §59.205 (a)(3)(vii) Type of Refrigeration. Consensus was reached whereby USDA would slightly revise the additional parenthetical qualification/clarification.

Consensus was established regarding acceptance of the balance of the §59.205 revised proposals as shown in the latest strawman draft, including the capture of once-daily reporting for sows and boars (vis-à-vis twice-daily for barrows and gilts).

Caucus was held, after which the Committee reported there was consensus on all items except the topic of FOB, including any transition.

FOB, Including Transition

Commissioner Wood suggested that the Committee consider this topic as two issues:

- I. FOB
 - a. FOB Plant
 - b. FOB Omaha
 - c. FOB Plant AND Omaha

- II. Transition

Commissioner Wood then asked USDA to offer its thinking with respect to both issues.

Mike Lynch indicated that USDA’s position supporting FOB Plant was based on the desire of the agency to maximize the transparency of the information. With respect to transition, Mike Lynch explained that while USDA can support a transition, the agency is not able to commit to such considerations as for how long of a period or related specifics because there are too many contingencies, e.g., what if four months into a transition, complete information is not being reported.

Caucus was held so that Committee members could consult with their constituents, and consider the development of a potential proposal toward the goal of reaching consensus.

After caucus, several Committee members expressed their concerns and those of their constituents. The representative from CME noted that his constituents are in the risk management business and that they get hog prices on a plant basis and, similarly, would want pork prices on a plant basis. They could not simply adjust using a freight chart because they don't know where the product came from and where it went. FMI agreed that they would like to see FOB Plant prices.

It was suggested that a possible approach would be the adoption of reporting both FOB Plant and FOB Omaha – but only upon the condition that the Committee could reach consensus with regard to identifying some type of standardized freight table or template.

Commissioner Wood asked whether there was consensus for the above proposed idea (i.e., report both FOB Plant and FOB Omaha – with the proviso that agreement could be reached with regard to identifying some type of standardized freight table or template). Caucus was requested and held so as to allow Committee members to consult with their constituents, and evaluate whether they would support (reach consensus on) the proposed idea.

Upon re-convening, the Committee established that consensus would be reached provided that agreement could be first reached with regard to identifying some type of standardized freight table or template. Toward the goal of a standardized table or template, USDA indicated a desire to hear in more detail what Committee members were seeking.

The Committee then caucused for lunch in order for industry members to further consider what would be most appropriate to use in terms of a standardized freight table or template for FOB Omaha and for USDA to further consider what general concepts of a transition plan could be agreed to by the agency.

After returning from lunch, committee representatives from industry offered some thoughts on how to include FOB Omaha in proposed regulatory language including the creation of a standardized freight table.

1) On page 4 of the May 11 version of the strawman language in **Attachment #3**: Include "FOB Omaha" in the parenthetical that currently references as examples FOB plant and FOB feedlot. Including that language introduces the concept of FOB Omaha before it shows up later in section 59.205.

2) Proposed section 59.205(a)(1) on page 22 should be amended to read, in pertinent part, ".... on an FOB plant basis and on an FOB Omaha basis".

3) It was also proposed that section 59.205(a)(1) also should include the following language: "FOB Omaha basis shall be calculated utilizing freight information provided by the Secretary, which shall be based on publicly available information. The Secretary shall publish and provide the freight information periodically, but not less frequently than quarterly." It was suggested that this language immediately follow the first full sentence in (a)(1) and before the sentence that currently reads at the beginning "The price should include".

During Committee member discussion on the above proposed language for 59.205(a)(1), AMS advised that it was unknown whether data that will be needed to derive the freight information would in fact be public information. The Committee agreed that what was crucial was that the freight information, not the data from which the freight information was derived, was publically available to ensure transparency and consistency of FOB Omaha pricing. It was agreed that AMS would incorporate language into the draft regulatory text to reflect that the freight information provided by the Secretary is publicly available.

With regard to transition, Mike Lynch assured the Committee that the industry's strong preference for a transition period for a minimum of a year would be considered. He also commented that publishing the data on a delayed weekly basis seemed feasible, and that the agency would consider putting this information in a different section of the website to avoid confusion.

With regard to publication of the regulations, consensus was reached that the table or template will not be part of the published regulations.

All items necessary for drafting a regulation to implement mandatory wholesale pork reporting were agreed upon by the Committee. Further, several Committee members presented recommendations to AMS regarding the development and implementation of these guidelines. These items were presented as being separate from the regulatory text, and can be found in **Attachment #4** "Consensus Recommendations of Wholesale Pork MPR Committee". These recommendations to AMS were unanimously approved by the rest of the Committee.

Several Committee members offered their assistance for the rulemaking process, and noted that meetings or letters of support/clarification could be sent to other decision-making officials if needed.

III. PUBLIC COMMENT

The Committee allocated 30 minutes to allow for public comment. There was no public comment offered.

IV. ADJOURNMENT

The Committee adjourned at 2:10 p.m.

ATTACHMENTS TO THE MAY 10-11, 2011 SUMMARY MEETING MINUTES

1. Agenda
2. Strawman Draft version 2011-05-09 showing proposed "Part 59-Livestock Mandatory Reporting"
3. Strawman Draft version 2011-05-11 showing proposed "PART 59-Livestock Mandatory Reporting"
4. Consensus Recommendations of Wholesale Pork MPR Committee