



# Fact Sheet

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## Negotiated Rulemaking: Mandatory Wholesale Pork Price Reporting

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The United States Department of Agriculture (USDA), Agricultural Marketing Service (AMS) reports prices for wholesale pork trade using information provided to it voluntarily by hog processors and/or pork buyers. This notably differs from price reporting in swine, cattle, boxed beef, lamb, boxed lamb imports, and boxed lamb markets. In these markets, price reporting for qualifying packers is mandatory under the authority of the Livestock Mandatory Reporting Act of 1999. Concerns have surrounded AMS reporting of wholesale pork prices for more than a decade. Many of these concerns center on changes in pork processing industry marketing practices; AMS price reporting has not been able to adequately keep pace under current voluntary reporting guidelines. The percentage of wholesale pork trade captured through Voluntary Price Reporting (VPR) has declined over the past few years. The Food, Conservation and Energy Act of 2008 called for an economic assessment of establishing a mandatory wholesale pork price reporting program. [The Wholesale Pork Price Reporting Analysis](#) was completed in spring 2010. The report found industry support for wholesale Mandatory Price Reporting (MPR), but the authors warned that MPR could do more harm than good if it were not appropriately structured. Furthermore, the study revealed numerous factors of greater importance than mandating wholesale pork price reporting that needed addressing to reduce problems associated with pork price reports.

The Mandatory Price Reporting Act of 2010 established the law for requiring the mandatory price reporting for wholesale pork products, and the act established the procedures for how the law would be developed. The law required that the wholesale pork mandatory price reporting law would be developed through negotiated rulemaking. The negotiated rulemaking process is defined by the Negotiated Rulemaking Act. This factsheet summarizes the wholesale pork MPR negotiated

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rulemaking process. The factsheet also summarizes the committee's recommendations for forming the wholesale pork mandatory price reporting law.

### Negotiated Rulemaking<sup>2</sup>

The typical rulemaking process utilized by the USDA includes developing the rule, releasing the rule for public comment, responding to comments, and making changes to the proposed rule as deemed necessary. The rule is then forwarded to the legislature to become law. Negotiated rulemaking replaces the first step of this process, agency development of the rule, with committee consensus in developing the rule. Committee members are constituents that represent industry sectors and government agencies with the most at stake with the new rule. The committee's goal is to reach consensus for all items within the rule. Once committee consensus is reached, the rule is written, and the agency follows the conventional process for publishing and public comment for the rule. A negotiated rulemaking process ensures that stakeholders have input into the rule development from the beginning. While there is prior evidence of failure using the negotiated rulemaking process, the negotiated rulemaking process for wholesale pork was a success.

The wholesale pork MPR committee met on three separate occasions during the winter and spring 2011. Each meeting was open to the public, and at each meeting between 10 and 20 non-committee attendees were present. The committee met for three days in February in St. Louis, Missouri. The committee met for two and one-half days in March in Washington, DC, and the committee reached consensus during a two-day meeting in May in Washington, DC. The St. Louis meeting began with orienting committee members with the negotiating rulemaking process. The committee's first task was to establish the rules under which the committee would operate. These rules included defining consensus, outlining the process, and setting guidelines for how to communicate issues and biases to the public. The committee mutually agreed to work in good faith, and the committee conducted all business with transparency, mutual appreciation for all committee members, and trust that the agency (AMS) ultimately will develop a rule that meets industry and society needs. During this first meeting, the committee members were provided with background information related to voluntary and mandatory price reporting. The first meeting concluded with the committee designing a rule straw man including the key components of the rule.<sup>3</sup>

At the second meeting, the committee reviewed the AMS audit process. This presentation was requested at the end of the first meeting so that committee participants could clearly understand if, and how, that committee-mandated processor data would be audited. This allowed for the committee to develop a rule that took into account the cost-benefit tradeoff between more information versus less and the degree of data complexity with which processors will report.

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<sup>2</sup> The wholesale pork MPR committee consisted of twelve individuals representing the 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, and Southeastern Meat Association (1 combined representative for all three per organizations' request); United Food and Commercial Workers International Union, and AMS. (AMS) offered to allow a person - of legal counsel representing agency (this sentence is awkward) to be a non-voting member of the committee, and the committee voted unanimously to allow for this. This committee decision was the first of many successful and positive decisions. Only voting committee members are allowed to speak during the negotiating process, in hindsight I believe the committee should have allowed for the AMS field officer in charge of data collection and price reporting to also serve as a non-voting committee member. This person was able to clarify many committee member questions, which because this person was a non-voting member a request for input had to be made each time this individual spoke.

<sup>3</sup> The rule straw man refers to a committee's recommendations up until a point in time. The straw man is then revised and updated as the committee reaches consensus for additional portions of the rule.

Any committee can choose to caucus at any time. Caucus within the negotiated rulemaking process refers to the process where a committee member and constituents meet in private to further discuss a particular topic of the rule and the issues associated with the particular aspect. During the second and third meetings, the caucus process was used often and proved effective for moving discussions forward. The straw man continued to be tweaked and updated, but consensus on all parts of the rule could not be reached. During the second meeting, the primary obstacle surrounded price reporting location, FOB plant (consistent with MPR for all other livestock and meat products) vs. FOB Omaha (consistent with VPR for wholesale pork).

The final meeting of the wholesale pork MPR concluded nearly three months after the first committee meeting. Consensus was reached; the committee was split on using FOB Plant versus FOB Omaha for the reported base price. It was mutually agreed that processors would report both an FOB Omaha and an FOB Plant price. The agency would then develop the appropriate reports for both reported prices. Also, because the structure of the industry relies heavily on contracts, the committee reached consensus that the agency will run in parallel with both MPR and VPR for up to one year.

#### Highlights:

- Committee members should seek consensus. "Consensus" for the current rule is defined as the MPR wholesale pork committee reaching 100% committee approval.
- Committee members should be committed to act in good faith and to be present.
- Committee members should utilize issues-based negotiating, where the committee member should be able to describe issues motivating his or her desired stance to a recommendation.
- The committee was tasked with developing a recommendation for the data that pork processors will report to AMS.
  - The committee's task did not include what type of information, or in what form, AMS is to report out of the data collected; AMS asked for the committee to offer friendly recommendations for such (see below).
  - Following the Livestock MPR Act, only data to be used in the creation of information can be collected. That is, there must be a justification for each product attribute that processors report.
- Should consensus not be achieved, AMS has the authority to write the rule.
  - AMS was committed to developing a rule that would, within reason, meet the guideline supported by the committee majority should consensus not be reached.
- The committee placed much thought toward the long-term industry needs, i.e., a price reporting process that changes as the industry changes.
- Recommendations for any future negotiated rulemaking process
  - Devote an entire day, in the beginning, to educate relative to the industry segment. Having AMS personnel present was key to understanding data collection procedures, issues and audit procedures. The more information made available, the better.
  - Provide committee members, ahead of the initial meeting, with a comprehensive list of industry terminology and existing similar type laws, along with current procedures that are to be changed.
  - A committee member alternate in attendance is strongly encouraged.

### Wholesale Pork Price Reporting

The committee developed recommendations consistent with existing MPR rules for other meat products and swine. Where appropriate, language was added to provide clarity for how wholesale pork price data should be collected. The committee was divided between a reporting basis of FOB Omaha, as currently reported with voluntary wholesale pork price reporting, and a reporting basis of FOB Plant, as currently reported for all other livestock and meat commodities covered under the mandatory price reporting act. Because of this divide, the committee recommendation was the collection of two prices for each wholesale pork cut: FOB Plant and FOB Omaha.<sup>4</sup> The committee recommended that AMS post at least quarterly a transportation matrix that processors would use in making FOB Omaha price adjustments to plant prices. Because of significant changes between the voluntary and the mandatory price reporting process, the committee recommended parallel mandatory and voluntary price reporting for up to 12 months prior to full implementation of wholesale pork MPR.<sup>5</sup> This will allow for assessing the consistency among the three price series (MPR-Omaha, MPR-Plant, and VPR), with AMS delaying the daily and weekly MPR report releases to ensure continued use of the VPR reports while pricing contracts are re-negotiated.

#### Highlights of the committee's proposed rule:

- (a) *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 for barrows and gilts (once by 10 a.m. Central Time, and once by 2 p.m. Central Time) and once each reporting day for sows and boars (by 2 p.m. Central Time) the following information on total pork sales established on that day inclusive since the last reporting.<sup>6,7</sup>
- (1) The *price* for each wholesale pork sale, as defined herein, quoted in dollars per hundredweight on an FOB Plant and an FOB Omaha basis.<sup>8</sup> All prices shall include brokerage fees, if applicable. All direct, specific, and identifiable marketing costs (such as point of purchase material, marketing funds, accruals, rebates, and export costs) shall be deducted from the net prices if applicable and known at the time of sale, and
  - (2) The quantity for each pork sale, quoted by number of pounds sold; and
  - (3) The information regarding the characteristics of each sale is as follows:
    - (i) The type of sale;
    - (ii) Pork item description;
    - (iii) Pork item product code;
    - (iv) The product delivery period, in calendar days;
    - (v) The pork class (barrow/gilt, sow, boar);<sup>9</sup>
    - (vi) Destination (Domestic, Export/Overseas, NAFTA);

<sup>4</sup>Any alteration in the primary data will occur before AMS receives the data. Thus, processors are required to report price data in adjusted form. These adjusted prices, as with any other reported attribute, are subject to audit by AMS. The audit criteria place responsibility on the processor to accurately report data.

<sup>5</sup> Voluntary price reporting is intended to continue as is now, and AMS will continue to publish VPR reports. Processors will also data dump following the proposed MPR rule.

<sup>6</sup> Type of entities (i.e., number of hogs processed) required to provide data are consistent with hog processors that must report under hog MPR.

<sup>7</sup> Definition includes "Off" hog packers that meet the guidelines for number of animals annually processed.

<sup>8</sup> Price reporting will be inclusive of inter-firm trade and exclusive of intra-firm trade. While consider intra-firm trade occurs, the inability for processors to establish auditable intra-firm prices would add ambiguity to the final published prices.

<sup>9</sup> The committee agreed to use the APHIS ruling that barrows through castration by immunization meet the definition of "barrows."

- (vii) Type of refrigeration (fresh, frozen, age range of fresh product); and
- (viii) Specialty pork product, if applicable<sup>10</sup>
- (b) *Publication*. The Secretary shall make available to the public the information obtained under paragraph (a) of this section not less frequently than twice each reporting day for gilt and barrow product and once each reporting day for sow and boar product.
- (c) The Secretary shall obtain product specifications upon request.<sup>11</sup>
- (d) The Secretary shall provide publicly available freight rate information for the purpose of calculating prices on an F.O.B. Omaha basis. The Secretary shall update this information periodically but not less than quarterly.

#### Characteristic definitions, where not self-described

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 are used 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.

Type of sale. The term “type of sale” with respect to wholesale pork means a negotiated sale, forward sale, or formula marketing arrangement.<sup>12</sup>

Negotiated sale. The term ‘negotiated sale’ means a sale by a packer selling wholesale pork to a buyer of wholesale pork under which the price is determined by seller-buyer interaction and agreement. The sale must be scheduled for delivery not later than 14 days for boxed product and 10 days for combo product after the date of agreement. The day after the seller-buyer agreement shall be considered day one for reporting delivery periods.

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.

Forward Sale. When used in reference to wholesale pork, the term ‘forward sale’ means an agreement for the sale of pork where the delivery is beyond the timeframe of a “negotiated sale” and means a sale by a packer selling wholesale pork to a buyer of wholesale pork under which the price is determined by seller-buyer interaction and agreement.

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.

<sup>10</sup> The committee recommended aggregating all branded and non-branded product as reported product because of the prevalence of branding within the wholesale pork trade. Thus, only specialty pork products will be tagged and separated from the commodity data. In the future, specialty reports could be made available.

<sup>11</sup> Product specification descriptions are unique to each processor and for each product. AMS personnel will work with processors to identify the placement of individual products in similar specification “buckets” so that AMS is able to provide the most relevant reports possible. Furthermore, as the industry evolves over time and as product specifications either change or new products are developed, AMS reports will evolve with the industry.

<sup>12</sup> To include all packer-to-packer sales and to exclude all intra-firm transfers.

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. The committee recommended that wholesale pork variety cut prices and characteristics data be voluntarily reported. This is consistent with beef variety meat price reporting.

### Price Reporting Information Recommendation<sup>13</sup>

- (1) Types of reports (primals, cutout values and volumes, barrow/gilt only): comprehensive, domestic, NAFTA, overseas/export (FOB plant), forward contract (< 60), forward contract (>60), and if applicable, then specialty pork products.
- (2) Include only negotiated sales inclusive of packer-to-packer sales, branded sales and non-branded sales.
- (3) Exclude prices from intra-firm trade, specialty pork products, overseas trade, distressed product (proxy by refrigeration code of 7+ fresh, combo and 11+ fresh, boxed).
- (4) Publish carcass cutout for both FOB Plant and FOB Omaha.<sup>14</sup>

The proposed rule and information reporting recommendation represents a rule that will evolve with the industry, and the rule provides sufficient latitude to ensure the maximum reporting of the representative negotiated wholesale pork trade. The rule will address several recommendations from [The Wholesale Pork Price Reporting Analysis](#), including a reduction in the number of missing daily pork subprimal price quotes, a reduction in selective price reporting, an increase in the price information to small market participants, and will encourage movement toward weighted -average prices in formula trade to the extent the FOB Plant price series is used. One concern with the rule is that two separate prices will be reported, FOB plant and FOB Omaha. Two separate prices may be confusing and could result in conflicts over forward and formula pricing agreements. The societal value of collecting and reporting two price series may not be as great as cost due to potential confusion.

Based on the findings from [The Wholesale Pork Price Reporting Analysis](#) study, there remain two issues that are left unaddressed with the current rule. First, the reporting of prices of case ready and enhanced products is exempt with the current rule. The report authors suggest computing standardized quality adjusted prices following a hedonic model approach. While the prevalence of case ready and enhanced pork products is increasing, the committee felt the risk of skewing the published prices higher with their inclusion exceeded the value of capturing more transactions. Furthermore, the committee felt that processors will have difficulty validating the audit of a quality-adjusted price. Second, the industry sentiment reported in the price reporting analysis study indicates the negotiated time period should exceed the committee agreed to 10- and 14-day period for combo and boxed product, respectively. Survey respondents, as reported in the study, felt a larger delivery window is necessary to capture sufficient negotiated transaction volume.

<sup>13</sup> This set of recommendations was included in the committee’s straw man rule, but the recommendations cannot be recorded as part of the rule because the recommendations refer to information reporting by AMS and not price reporting by processors.

<sup>14</sup> The committee recommended voluntary reporting of transformation/cost and yield percentages to compute primal and cutout values. Processors representing more than 80 percent of the wholesale pork trade market signed a letter offering to voluntarily report fabrication costs and yield percentages on a voluntarily basis.

Note: Opinions expressed in this fact sheet are solely those of the author.

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