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Milk Marketing Board
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Official General
Order No. A-968 Amended

Posted: July 6, 2011
Effective: July 13, 2011

OVER-ORDER PREMIUM

NOW, this 6th day of July 2011, the Commonwealth of Pennsylvania Milk Marketing Board (Board) adopts and issues this official general order pursuant to the authority conferred by the Milk Marketing Law, 31 P.S. §§ 700j-101 – 700j-1204. This order will become effective at 12:01 a.m. on July 13, 2011.

SECTION I

The attached findings of fact and conclusions of law are incorporated herein by this reference as though fully set forth in this order.

SECTION II

The formula for calculating the over-order premium found in Official General Order A-893 shall remain unchanged.

SECTION III

All parts of Official General Order A-893 not inconsistent with this order shall continue in effect.

PENNSYLVANIA MILK MARKETING BOARD

Luke F. Brubaker, Chairman

Richard Kriebel, Member

Lynda J. Bowman, Consumer Member

Date: July 6, 2011

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
OVER-ORDER PREMIUM HEARING
FEBRUARY 16, 2010**

FINDINGS OF FACT

1. On February 16, 2010, the Pennsylvania Milk Marketing Board (Board) convened a hearing for all milk marketing areas to receive testimony and evidence concerning a change in the formula for calculating the over-order premium as set-out in Official General Order A-893.
2. Notice of the hearing was published at 40 Pennsylvania Bulletin 499 on January 16, 2010, and was mailed to those who have requested mailed notice of Board hearings by means of Bulletin No. 1458, dated January 6, 2010.
3. Based on the February 16, 2010, hearing the Board issued Official General Order (“OGO”) A-968, which was posted on June 2, 2010, with an effective date of October 1, 2010. On July 30, 2010, two out-of-state producers and the Pennsylvania Association of Milk Dealers (“PAMD”) filed a complaint in federal district court challenging the constitutionality of OGO A-968. On September 16, 2010, the United States District Court for the Middle District of Pennsylvania issued an order enjoining the Board from enforcing OGO A-968. OGO A-968, therefore, has never gone into effect.
4. David DeSantis testified on behalf of Board Staff and Governor Rendell and Secretary of Agriculture Redding (“Petitioners”) as an expert in milk cost accounting and economic regulation of milk, including producer and resale pricing. Mr. DeSantis proposed an alternative to the over-order premium formula currently used by the Board and found in OGO A-893. The alternative proposed by Mr. DeSantis would calculate the over-order premium obligation to be paid to Pennsylvania producers by Pennsylvania dealers by multiplying the over-order premium rate by a dealer’s Pennsylvania Class I utilization or a dealer’s receipts from Pennsylvania producers, whichever is less. According to Mr. DeSantis, the proposal would return more over-order premium to Pennsylvania dairy farmers than the current formula, allow Pennsylvania milk dealers to recapture all payments and premiums paid to Pennsylvania farmers in the resale price, and not disturb or change underlying calculations for class or component prices for any producer.
5. Mr. DeSantis explained that the current formula for calculating dealers’ over-order premium obligations includes a ratio of in-state to total producer milk. This results in a situation where a dealer who purchases all of its milk from Pennsylvania producers is mandated to pass the entire amount of the over-order premium received in the resale price to its Pennsylvania producers, while a dealer that purchases milk from both Pennsylvania and out-of-state producers and has Pennsylvania sales equal to or greater than its receipts from Pennsylvania producers is not mandated to pass the entire amount of the over-order premium received in the resale price to its Pennsylvania producers

because the amount is reduced by the ratio of purchases of Pennsylvania-produced milk to purchases of all milk.

6. Mr. DeSantis testified that the Board-mandated minimum wholesale price includes an amount for producer milk purchases that assumes that dealers purchase 100% of their milk from Pennsylvania producers. He testified that the proposal would have no effect on Pennsylvania dealers purchasing all of their producer milk from Pennsylvania dairy farms. He also testified that under the proposal no Pennsylvania dealer would receive less in its minimum resale price than its over-order premium obligation, nor would any dealer be required to pay a Board-mandated premium on a volume of milk greater than the volume of its receipts from Pennsylvania producers. Mr. DeSantis testified that the proposal, like the current formula, would not set a price for milk purchased from out-of-state producers, nor require or prevent voluntary premium payments to out-of-state producers. According to Mr. DeSantis, the proposal would require that Pennsylvania dealers pay the full amount of over-order premium received in the wholesale price buildup to Pennsylvania producers, up to the volume of their receipts from Pennsylvania producers. Mr. DeSantis also testified that to the extent that a dealer may have had an unfair advantage versus other dealers in that it may have been receiving more over-order premium in the resale price than it was obligated to pay its Pennsylvania producers, that unfair advantage would be substantially decreased.
7. Mr. DeSantis studied Producer Obligation Worksheets (“POW”) for Pennsylvania dealers who had purchases of both Pennsylvania and out-of-state producer milk for March 2009. He testified that he excluded from his study dealers that bought 100% Pennsylvania-produced milk because the proposal would have no effect on their mandated over-order premium obligation. The dealers studied by Mr. DeSantis did represent 58% of the Pennsylvania milk purchased by all Pennsylvania cross-section dealers. Mr. DeSantis testified that under the proposal, the dealers he studied would have had an additional mandated over-order premium obligation of \$392,000.00 for March 2009. Mr. DeSantis acknowledged that those dealers made voluntary premium payments and other overpayments beyond their mandated over-order premium obligation for the month but still believed that the proposal would bring additional revenue to Pennsylvania producers.
8. Mr. DeSantis testified that the proposal did not intend to reserve the Pennsylvania Class I market to Pennsylvania producers and that the proposal did not require Pennsylvania dealers to purchase any or all of their milk from Pennsylvania producers. Mr. DeSantis testified that Pennsylvania dealers actually have the same or greater incentive to purchase milk from out-of-state producers under the proposal as compared to the current formula and that Pennsylvania dealers could continue to purchase milk from out-of-state producers without any restrictions. Mr. DeSantis also testified that nothing in the proposal would prevent Pennsylvania dealers from reclassifying voluntary premiums to look like or to be mandated over-order premiums.
9. While Mr. DeSantis testified that he believed the proposal would result in additional revenue for Pennsylvania producers, he did not quantify the amount because he could

not know how dealers would react to a change in the formula. Mr. DeSantis testified that he was “sure” that there would be some reclassification of voluntary premiums by dealers to avoid making additional payments to producers, but he did not believe that all such premiums would be reclassified, especially for milk purchased from cooperatives. Mr. DeSantis testified that there was no correlation between the level of the over-order premium and the over-price premium. Mr. DeSantis also clarified that not all voluntary premiums paid by Pennsylvania dealers to producers are included in resale prices as over-price premium.

10. Mr. DeSantis further analyzed the effect of the proposal on dealers who purchase milk from out-of-state producers to demonstrate the potential for additional income reaching Pennsylvania producers.. For March 2009 those dealers received \$1,959,127.00 in minimum wholesale prices attributable to the mandated over-order premium, while those dealers’ over-order premium obligation to producers based on the current formula was \$1,500,709.00. The over-order premium obligation for March 2009 under the Petitioners’ proposal would have been \$1,892,905.00. For March 2009, the amount dealers who purchased out-of-state milk overpaid (above the mandated over-order premium) for Pennsylvania Class I milk was \$177,380.00. Mr. DeSantis observed that the \$177,380.00 (or the over-price premium) was less than the difference between the mandated over-order premium obligation under the proposed formula and the mandated over-order premium calculation under the current formula (approximately \$392,000.00).
11. Mr. DeSantis testified that the proposed formula would generate more over-order premium dollars for Pennsylvania producers while allowing dealers to recover all or more of their over-order premium obligation in the minimum resale price. The dealers would have an additional approximately \$392,00.00 in mandated over-order premium obligation, but the overpayments being made that are targeted to Class I Pennsylvania milk were \$177,380.00, so merely recharacterizing over-price premium payments would not be enough to offset the increased over-order premium obligation, thereby leading to increased revenue for Pennsylvania dairy farmers. While acknowledging that it might be possible to cannibalize some of the other premiums that are not included in the over-price premium, Mr. DeSantis did not believe that many of those premiums would be cannibalized because they were for things like cooperative handling fees.
12. Carl Herbein testified on behalf of the Pennsylvania Association of Milk Dealers as an expert in cost accounting and milk cost accounting. Mr. Herbein conducted a study of POW’s for January 2009, February 2009, and March 2009 for a larger cross-section than that used by Mr. DeSantis. Mr. Herbein’s cross-section consisted of dealers that are used in individual milk marketing area cost replacement hearings (with the exception of Pocono Mountain, Balford Farms, and United Dairy – Ohio) and that purchased milk from Pennsylvania and out-of-state independent producers and from cooperatives supplying both Pennsylvania and out-of-state milk. Mr. Herbein testified that his study showed that the raw milk supply in Pennsylvania is comprised of in-state and out-of-state milk for which the dealers pay more than the mandated amounts including the over-order premium. Mr. Herbein also testified that Pennsylvania

producer milk made up 86.8% of the total pounds received by the cross-section dealers and that 43.4% of the pounds received by the cross-section dealers are sold as Class I sales in Pennsylvania, demonstrating that the cross-section dealers had developed a market to export Pennsylvania milk as Class I into surrounding states.

13. Mr. Herbein also analyzed “sub” cross-sections of the entire cross-section. Mr. Herbein’s analysis of dealers that have at least a portion of their raw milk supply provided by out-of-state independent farmers revealed that Pennsylvania producers shipping to those dealers received payments exceeding the value of the so-called “stranded” premium. Mr. Herbein’s analysis of dealers that utilized independent Pennsylvania farm milk for a portion of their milk supply revealed that Pennsylvania producers shipping to those dealers received payments exceeding the value of the so-called “stranded” premium. Mr. Herbein’s analysis of dealers that obtained a portion of their milk supply from cooperatives revealed that 64% of the so-called “stranded” premium was being passed back to Pennsylvania producers and that dealers were paying out in premiums to in-state and out-of-state producers “far more” than the over-order premium that was built into the wholesale price; the over-order premium built into the wholesale price was \$8,779,468.00, while the premiums paid to in-state and out-of-state producers totaled \$13,558,554.00 (of which \$8,307,002.00 went to Pennsylvania producers).
14. Mr. Herbein also testified that the cross-section dealers paid out more in premiums than the over-price premium. He testified that for January 2009 through March 2009 the overall average over-price premium reflected in Pennsylvania Class I sales was \$0.2279/cwt while the additional overpayments by the cross-section dealers was \$0.5485/cwt.
15. Mr. Herbein testified that if the so-called “stranded” premium was mandated as an additional expense to the cross-section dealers, the Board margin included in resale price orders would be less than the minimum required by the Milk Marketing Law. This testimony was based on the estimated wholesale price for a 2% gallon of milk, an estimated margin per gallon, and a “stranded” premium of \$1,317,847.
16. Mr. Herbein testified that if the change in the over-order premium formula required Pennsylvania dealers to increase their costs without a corresponding increase in revenue it would erode profitability and prevent dealers from being competitive outside Pennsylvania. Mr. Herbein also testified that the so-called “stranded” premium is overstated by the amount of wholesale discounts that reduce the wholesale premium included in the in-to store price; the Board finds that the so-called “stranded” premium is not reduced by wholesale discounts, as the discounts do not reduce the wholesale premium but rather are included in resale price build ups to reflect delivery cost savings. Mr. Herbein further testified that the proposal would make it more difficult for dealers to blend down their raw milk costs to ensure plant competitiveness. Mr. Herbein also testified that he was concerned about the immediate impact if the proposal went into effect with additional producer obligation causing accounts to be lost; he also

testified that eventually dealers would have no choice but to develop mechanisms to avoid that additional cost.

17. Todd Rutter testified that Rutter's currently receives milk from Pennsylvania and Maryland independent dairy producers and from Pennsylvania and Maryland cooperative dairy producers. Rutter's sells milk both in Pennsylvania and out-of-state. Mr. Rutter testified that Rutter's has to remain competitive for its entire milk supply and that if the cost of the Pennsylvania supply is increased it will be forced to look for ways to offset that increase in order to keep the overall cost of its supply the same. Mr. Rutter testified that Rutter's would first look to offsetting increased costs through the amount being paid for its cooperative supply or its out-of-state independent milk supply. He further testified that if any changes to those pricing structures cause Rutter's to be uncompetitive and unable to maintain those supplies, it would have to look to the Pennsylvania supply for alternative ways to offset the increased cost. Mr. Rutter pointed to hauling and quality bonuses as two areas that would be re-evaluated for Pennsylvania producers. Mr. Rutter further testified that Rutter's would "also go on a mission" to acquire as much out-of-state milk as possible and release an equal volume of Pennsylvania-produced milk. Mr. Rutter also testified that he would explore the possibility of creating a Maryland distribution company and facility to divert all of Rutter's Pennsylvania sales through, thereby possibly negating Rutter's entire Pennsylvania over-order premium obligation.
18. Frank Chrastina, General Manager of Dean Dairy Products ("Dean") in Sharpsville, testified. Mr. Chrastina has worked in the dairy industry for 52 years, including as an Operations Manager and as a Sales Manager. He has been the General Manager at Dean's Sharpsville plant for the past 10 years. Mr. Chrastina testified that Dean opposed the proposal and that the proposal would adversely impact a number of Dean's Pennsylvania plants. He testified that the proposal would double Sharpsville's mandated premiums and increase Sharpsville's total premiums by 40%, which the plant would not be able to recover. Mr. Chrastina testified that it was irrelevant that the over-order premium was built into wholesale prices because the Sharpsville plant was already paying out more than that premium to compete for its milk supply. He also testified that Sharpsville's major account was on a service contract. Mr. Chrastina testified that when major customers see a significant raw milk cost increase, they have the option to look elsewhere and that in the past one of his largest and most significant customers had bid out portions of its business when Sharpsville's raw milk costs became uncompetitive.
19. Mr. Chrastina testified that the Sharpsville plant is located one mile from the Ohio border, one of the factors making it relatively easy for his customers to look to alternative suppliers with competitive raw milk costs from out-of-state. He testified that Save-A-Lot, Aldi, and Costco currently import milk from out-of-state plants into Pennsylvania. Mr. Chrastina also testified that Sharpsville's proximity to the Ohio border also provided him, though, with an opportunity to avoid the effects of the proposal, noting that Sharpsville was currently in the process of transitioning its milk supply from cooperative milk to independent milk. He testified that due to the hearing

on the Petitioners' proposal, Sharpsville had shifted its efforts from soliciting Pennsylvania independent producers to soliciting Ohio independent producers; Mr. Chrastina believed that Sharpsville would be able to develop a largely out-of-state milk supply if the proposal were adopted. Mr. Chrastina also testified that Sharpsville's larger customers have out-of-state warehouses and have expressed a willingness in the past, when the mandated over-order premium was uncompetitive, to take deliveries out-of-state. Mr. Chrastina further testified that he was concerned, in the short run, that Sharpsville would lose accounts if the proposal were adopted and Sharpsville had been unable to develop an out-of-state milk supply; he estimated that his customers could find an alternative supply within three months.

20. Earl Fink testified on behalf of the PAMD. Mr. Fink testified that the Board-mandated over-order premium and fuel adjuster premium, which accounted for 13% - 17% of the total Class I price to farmers for June 2008, October 2008, May 2009, and September 2009, demonstrated that the Board had done its best to help dairy farmers during the recent period of declining prices. He also testified that the PAMD believed it was not realistic to expect the Board, which sets 13% - 17% of the total Class I price paid to farmers, to solve all of the dairy producers' financial problems. Mr. Fink testified that the problem for dairy farmers that needed to be addressed was not a so-called "stranded" premium, but rather federal milk marketing order prices, especially their volatility.
21. Dennis Schad testified on behalf of the Greater Northeast Milk Marketing Agency ("GNEMMA") as an expert in agricultural economics and milk marketing. Mr. Schad testified that the "stranded" premium issue is a product of the Board's individual handler pooling system. Mr. Schad further testified that to address this problem in the most constructive way, the individual handler pooling system needed to be addressed. Mr. Schad testified that the GNEMMA cooperatives supported revisions that would capture "stranded" premiums in a clearly constitutional manner in the context of a marketwide, statewide over-order premium pool.
22. The Board finds that the proposed change to the calculation of Pennsylvania milk dealers' Board-mandated over-order premium obligations may not be adopted. The Board further finds that the Board-mandated over-order premium shall continue to be paid on an individual handler pool basis.

Under the petitioners' proposal, a Pennsylvania milk dealer whose milk is supplied by both in-state and out-of-state producers would continue to collect in the wholesale minimum price an over-order premium amount generated on account of its out-of-state milk supply, but all of the over-order premium collected in the wholesale price would be allocated by that dealer to in-state producers. This proposal is similar to a program enacted by Massachusetts which the United States Supreme Court found to be unconstitutional. West Lynn Creamery v. Healy, 512 U.S. 186 (1994).

In West Lynn, Massachusetts issued a pricing order which imposed an assessment on all fluid milk sold by milk dealers to retailers, regardless of the source of the producer milk. The money which was collected was then paid solely to Massachusetts producers.

Under the petitioners' proposal, as in West Lynn, a fund would be generated based on in-state fluid milk sales of out-of-state producer milk, and that fund would be distributed solely to in-state producers. The Board finds that no meaningful distinction between the petitioners' proposal and the Massachusetts order was shown, and concludes that the petitioners' proposal, like the Massachusetts order in West Lynn, violates the Commerce Clause of the United States Constitution.

23. Section 805 of the Milk Marketing Law instructs the Board that it is the legislative intent that the benefits of any increase of prices received by milk dealers due to the minimum price provisions of the Law shall be given to producers, unless the Board deems a deviation from that policy necessary in order lawfully to maintain milk markets and outlets for producers and consumers. Section 805 also provides the Board the authority, when we deem such action necessary, to issue orders to effectuate that intent. Since the Board cannot issue an order that violates the United States Constitution, however, we cannot issue an order adopting the petitioners' proposal. We also note that the credible evidence shows that Pennsylvania milk dealers are paying at least the amount of the so-called "stranded" premium to Pennsylvania producers.
24. Due to changing conditions in the Pennsylvania dairy industry, the Board is petitioned on occasion to revisit and examine provisions of price orders and to adapt orders and pricing policy to account for the changing conditions. For instance, the Board issued Official General Order A-948 (November 7, 2007) in response to the interaction between then high wholesale milk prices (caused primarily by high producer prices) and percentage wholesale discounts, which was causing dealer margin erosion. Now, in a time of low producer milk prices, the petitioners have requested that we reexamine the methodology by which Pennsylvania milk dealers' over-order premium obligations are calculated.

An administrative agency is not bound by the rule of *stare decisis*; however, an administrative agency must render consistent opinions and should either follow, overrule, or distinguish its own precedent. Bell Atlantic – Pennsylvania, Inc. v. Pennsylvania Public Utility Commission, 672 A.2d 352 (Pa. Commw. 1995). The burden on a petitioner seeking a change is to demonstrate to the Board that our precedent should be overruled or distinguished. In this case, based on the evidence and the law, we find that no change can be made.

25. The evidence presented by Mr. Herbein regarding decreased dealer margin is not sufficient for the Board to conclude that adopting the petitioners' proposal would result in the margin decreasing below the minimum required by the Law. The analysis is based on estimates of one product across the entire state and assumes that the entire so-called "stranded" premium would be incurred as additional expense; Mr. Herbein, Mr. Rutter, and Mr. Chrastina testified that dealers would take steps to avoid incurring

additional expense if the proposal were to be adopted. Nor is the analysis in GNEMMA's brief regarding dealer profit persuasive. That analysis was based on facts that the Board will not take official notice of (Finding of Fact 27b) and assumes that dealers are retaining the so-called "stranded" premium, while the credible evidence shows that dealers are paying to producers at least the amount of the so-called "stranded" premium in addition to mandated minimum prices.

26. There was some back and forth in post-hearing briefs regarding Mr. Herbein's expertise and whether certain of his opinions and testimony were competent and/or were excluded. The record will speak for itself regarding what testimony, objected to at the time, was not considered by the Board in issuing this order. Of course, testimony not objected to at the time it was given is part of the record and was considered by the Board.
27. The Board makes the following findings regarding issues raised in briefs and GNEMMA's post-hearing motion.
 - a. On brief PAMD requested that the Board take official notice of PAMD's pre-hearing filing related to the October 14, 2009, over-order premium hearing. The request was made because there was some dispute or uncertainty during the current hearing relative to PAMD's position at the October 2009 hearing. The Board recalled PAMD's position at the October 2009 hearing independent of the request to officially notice the pre-hearing filing. The Board finds therefore that this request for official notice is moot.
 - b. On brief GNEMMA requested that the Board take administrative notice of the Board's published price sheets for all milk marketing areas for the months of January 2009, February 2009, and March 2009. 1 Pa. Code § 35.173 provides that a hearing participant requesting the taking of official notice after the conclusion of a hearing must set forth the reasons that the request was not made prior to the close of the hearing. Since no reason was offered, the Board declines to take official notice of the facts found in the price sheets in question.
 - c. On brief GNEMMA requested that the Board take administrative notice of Official General Order A-961. The Board does not believe, nor find, that it is necessary to request administrative or official notice of our Official General Orders. For Board purposes we consider our own Orders to be analogous to published court opinions and they may be cited to the Board in briefs without requesting official or administrative notice.
 - d. In its surreply brief, PAMD requested that the Board take official notice of the definition of "mailbox price" as found in a Federal Milk Market Order 33 publication. GNEMMA objected to this request. The Board knows the definition of "mailbox price" and does not need to take official notice of that definition as found in this publication. The request is moot and the so is the objection.

e. In its surreply brief, PAMD requested that the Board take official notice of the definition of “all milk price” as found in a document published by the Wisconsin Field Office of the United States Department of Agriculture National Agricultural Statistics Service. GNEMMA objected to this request. The Board knows the definition of “all milk price” and does not need to take official notice of that definition as found in this publication. The request is moot and so is the objection.

f. In its surreply brief, PAMD attached pages of a transcript of a November 28, 2006, hearing before the Board. GNEMMA objected. In its surreply brief, PAMD did not explain why it was appropriate for the Board to consider the testimony found in the transcript pages. That testimony was essentially corroborative of the testimony summarized in the Official General Order cited to by PAMD. GNEMMA’s objection to the inclusion of the transcript pages is sustained.

g. GNEMMA moved that PAMD’s surreply brief be stricken from the record. Based on Findings of Fact 27d, 27e, and 27f, that request is denied. Argument based on the moot official notice requests was considered by the Board. The transcript pages from the November 28, 2006, hearing were not considered by the Board.

h. PAMD objected in its surreply brief to those aspects of the GNEMMA brief that raised issues for the first time that were not purely legal and/or that were not raised during pre-submission. Without going into detail on every issue that PAMD objected to, the Board believes it has given appropriate weight to all of the arguments found in all of the briefs.

CONCLUSIONS OF LAW

1. The February 16, 2010, hearing regarding the formula for calculating Pennsylvania milk dealers' over-order premium obligations was held pursuant to the authority granted to the Board in sections 801 and 803 of the Milk Marketing Law (Law), 31 P.S. §§ 700j-801 and 700j-803.
2. The hearing was held following adequate notice and all interested parties were given a reasonable opportunity to be heard.
3. All parts of Official General Order A-893 not inconsistent with the attached order will continue in effect.
4. In accordance with Official General Order A-894, milk dealers shall continue to show by line item on their monthly statements to independent producers and cooperatives the specific amount of the Pennsylvania Milk Marketing Board's over-order premium being paid.
5. In accordance with Official General Order A-894 (Supplemental), the over-order premium will continue to apply only to Class I milk produced, processed, and sold in Pennsylvania.
6. In adopting this amended order, the Board considered the entire record of the hearing held prior to the issuance of Official General Order A-968 and concludes that the amended order is supported by a preponderance of credible evidence and is reasonable and appropriate under sections 801 and 803 of the Law. Section 801 of the Law provides that the Board may amend an order without a further hearing if such amendment is based on the record of the hearing held prior to the issuance of such order.

7. Because the federal district court enjoined the Board from enforcing Official General Order A-968 prior to October 1, 2010, the order has not had an effective date yet. Therefore this order amending Official General Order A-968 is issued within 20 days after the effective date of OGO A-968, as provided in section 801 of the Law.
8. The proposal to modify the calculation of Pennsylvania milk dealers' over-order premium obligations violates the Commerce Clause of the United States Constitution.
9. The attached order may be amended pursuant to the procedures set out in section 801 of the Law.

PENNSYLVANIA MILK MARKETING BOARD

Luke F. Brubaker, Chairman

Richard Kriebel, Member

Lynda J. Bowman, Consumer Member

Date: July 6, 2011

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