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November 28, 2019

Re: Texas Animal Health Commission

Dear Texas Sunset Advisory Commission staff:

The Farm and Ranch Freedom Alliance ("FARFA") is a Texas-based nonprofit that advocates for common-sense policies supporting local, sustainable food systems. FARFA was founded in 2006 in direct response to a program proposed to be implemented jointly by the U.S. Department of Agriculture and the Texas Animal Health Commission ("TAHC" or the "Commission"). And in the 13 years since, we have repeatedly interacted with TAHC on behalf of our members.

Given FARFA's unique perspective and our interactions with TAHC, we believe we can provide valuable feedback to the Sunset Commission with respect to its review of the agency. Specifically, we believe that the composition of the Commission and its policies with respect to working groups need to be reformed in order for the Commission to more fully provide fair representation for all Texans and to develop optimal policies and regulations.

As discussed in more detail below, the current parameters used to select TAHC's Commissioners fail to provide representation for the majority of Texans who are impacted by the agency. Particularly egregious is the failure of the current provisions for "general public" members of the Commission to actually provide for members of the general public to serve on the Commission, as opposed to individuals with financial interests in a regulated industry. With respect to TAHC's use of working groups, the current, informal process for establishing and running working groups is essentially a crony system that fails to provide public process or input.

As a result of these shortcomings, TAHC does not represent or consider the views of an enormous number of the people who are impacted by the agency. The Commission epitomizes regulation without representation. TAHC's shortcomings are objectionable not only because they so blatantly infringe upon the rights of those who are regulated, but also because limiting the range of perspectives that contribute to TAHC rulemaking makes for poorer quality rulemaking.

## **I. Lack of Representation for Affected Individuals**

Of the 13 seats currently comprising the Commission, none represents the largest segment of livestock owners: small-scale producers (which also happens to be one of the only growing segments). This is inappropriate on its face, and it is particularly troubling given the agency's scope of regulatory authority.

TAHC is unusual among regulatory agencies in that its regulations are not only applicable to commercial entities. Every person who owns even a single livestock animal (including poultry) is subject to TAHC's regulations. Because the agency's jurisdiction includes "exotic fowl," its rules can even apply to pet parakeets. This issue was starkly highlighted in the fight over the National Animal Identification System



in 2006 and 2007, during which TAHC sought to require every person who owned even one livestock animal – even just a single backyard chicken or pet pony – to register the animal with the agency and pay a fee.

The vast majority of Texans who own livestock or poultry own just a few animals. According to the USDA 2017 Census of Agriculture: 91% of farms with sheep have fewer than 100 head; 97% of farms with laying hens have fewer than 100 birds; 98% of farms with horses own fewer than 25 head; 84% of farms with hogs own fewer than 25 head; and 52% of farms with cattle have fewer than 20 head.<sup>1</sup>

These census numbers are striking, and yet they don't tell the whole story. The census only includes farms, which are defined as operations that produced and sold \$1,000 or more of agricultural product in the year before the census. TAHC's jurisdiction extends much further, covering hobby and noncommercial operations.

Despite the very broad scope of the agency's authority, the Commissioners are drawn from commercial agriculture interests and almost entirely from large-scale, industrial businesses. The Commissioner representing the beef cattle industry is the president of J.D. Hudgins Inc., which has a ranch with more than 1,750 cattle,<sup>2</sup> placing it among the largest 0.2% of cattle operations in Texas. The Commissioner representing the poultry industry is a director of Holmes Foods, Inc., which, as of 2010, produced and slaughtered 700,000 broilers **per week** and employed over 400 employees.<sup>3</sup> The Commissioner representing the dairy industry owns a farm that milks around 2,800 head a day.<sup>4</sup>

No Commissioner represents the rapidly growing organic industry. No Commissioner represents small-scale producers. No Commissioner represents non-commercial, hobby animal owners.

The obvious problem is that, as in any industry, the impact of regulations is very different for small-scale entities than for large-scale entities. But in the context of animal health, there are very significant additional considerations. How animals are managed affects their health, the incidence and severity of disease, and, ultimately, human health. Whether animals are kept in low-density, low-stress settings or in high-density feedlot operations where they stand in manure and are regularly fed antibiotics has real-world, substantive implications for animal health and disease control. Yet, while the *feedlot* industry has its own dedicated Commissioner, small-scale traditional ranchers producing organic and pastured livestock have no representation.

While our focus is on the makeup of the Commission as a whole, it may be instructive to consider how one the Commissioners highlights the disparate interests of different segments of the industry. The Commissioner representing the dairy industry published an Op-Ed in June of 2015 in which he promoted unfounded concerns about the safety of raw milk – a vital source of income for small-scale farmers – and

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<sup>1</sup> 2017 Census of Agriculture, State Data for Texas, Tables 14, 25, 27, and 30.

<sup>2</sup> <https://www.jdhudgins.com/family>

<sup>3</sup> <https://thepoultrysite.com/articles/goal-not-to-be-the-biggest-just-the-best>

<sup>4</sup> <https://www.eenews.net/stories/1059996722>



professed gratitude that the dairy lobby had defeated a bill to make raw milk more accessible to consumers.<sup>5</sup>

Ironically, the Op-Ed was written five months after the Commissioner received a warning letter from the FDA for “offering for sale an animal for slaughter for food that was adulterated” with antibiotics.<sup>6</sup> The FDA found that that his operation held animals under “conditions that are so inadequate that medicated animals bearing potentially harmful drug residues are likely to enter the food supply.”

While TAHC is not the primary agency in charge of regulating raw milk as a food product, it does have regulations that specifically impact raw milk farmers; yet the Commissioner who is supposed to represent the dairy industry at this regulatory body is openly hostile to raw milk production.

In light of the power wielded by TAHC, the failure to ensure adequate representation for the majority of people who are impacted by the agency’s regulations represents a material, unjustified infringement of the rights of regulated individuals.

## **II. Working Groups**

The problems described above are exacerbated by TAHC’s approach to rulemaking. Many of the agency’s regulations are developed through informal “working groups,” which are organized and meet to develop rules without public notice.

In 2009, FARFA and two other organizations – the Texas Organic Farmers & Gardeners Association and R-CALF (a national independent cattlemen’s association) – met with TAHC’s then-executive director. We asked to be included in working groups and were informed that there is no formal process for creating these groups: the staff suggests when a working group would be useful, and the Commissioners tell the staff (in private conversations, not at the public meetings) who they think should be invited. The working groups then meet, without public notice, to develop proposed rules.

**The working group process, on its face, is problematic.** It gets worse when one considers how interconnected the Commissioners are. Five of the Commissioners are members or board members of a single industry group (Texas and Southwestern Cattle Raisers Association); three Commissioners are members or board members of the TSCRA’s national affiliate (National Cattlemen’s Beef Association); and other Commissioners belong to different industry groups that similarly represent large-scale, industrial interests.

While groups like TSCRA have small-scale producers in their membership, their boards and officer positions are dominated by large-scale producers. The regulatory proposals and positions of these organizations on topics related to animal health are consistently different (and often directly opposed) to the positions favored by small-scale and organic producers.

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<sup>5</sup> [https://www.wacotrib.com/opinion/columns/guest\\_columns/joe-osterkamp-guest-columnist-milk-dairy-products-among-most-tightly/article\\_3e3e496f-6f04-57b3-b39e-d4c52992595b.html](https://www.wacotrib.com/opinion/columns/guest_columns/joe-osterkamp-guest-columnist-milk-dairy-products-among-most-tightly/article_3e3e496f-6f04-57b3-b39e-d4c52992595b.html)

<sup>6</sup> <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/stonegate-farms-01202015>

Individuals and organization with different experiences and perspectives from these large-scale industrial producers have no opportunity to participate in the working groups. By the time TAHC formally proposes a rule and accepts public comment, the agency is firmly committed to following the working groups' recommendations. Indeed, in the past 13 years, FARFA and our members have submitted comments on a multiple proposed TAHC rules, and only **once** has the agency made even a minor change in response to those comments.

### III. Commissioners from the "General Public"

Texas Agriculture Code § 161.021 requires that three commissioners on TAHC be "members of the general public." A potential commissioner will not qualify as a member of the general public if he or she or his or her spouse:

- (1) is registered, certified, or licensed by the commission;
- (2) is employed by or participates in the management of a business entity or other organization regulated by the commission or receiving money from the commission;
- (3) owns or controls, directly or indirectly, more than a 10 percent interest in a business entity or other organization regulated by or receiving money from the commission; or
- (4) uses or receives a substantial amount of tangible goods, services, or money from the commission, other than compensation or reimbursement authorized by law for commission membership, attendance, or expenses.<sup>7</sup>

Essentially, a person will qualify as a member of the public as long as he or she is not regulated or sponsored by the commission.<sup>8</sup>

Currently, the three Commissioners representing the general public are Wendee Langdon, Eric D. White, and Jim Eggleston. Of these three Commissioners, two have conflicts of interest and do not reasonably qualify as "members of the general public." Jim Eggleston runs a herd of cattle and serves as general counsel for the Texas Longhorn Marketing Alliance, and Eric White manages large deer and exotic game hunting ranches in Mason and Kerr Counties. In prior years, **all three** of the "general public" members have had conflicts of interest.

The "conflict of interest" language used in the Agriculture Code doesn't work well in practice with the Commission **because the agency is technically regulating animals, not individuals or businesses.** So, for example, Mr. White and the hunting ranches that he manages are not regulated by TAHC – but the animals on the ranches are, and TAHC regulations have very significant impacts on his business interests. The statutory language thus is ineffective, in theory and in practice, in ensuring that the general public is represented on the Commission and should be revised to achieve that goal.

When this issue was raised in HB 809 during the 2015 Legislative Session, the response was that it is difficult to find individuals who have no connection to livestock to serve on the Commission. We believe that it would be possible to find three general public commissioners, among the non-commercial livestock

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<sup>7</sup> Tex. Agric. Code § 161(d).

<sup>8</sup> Tex. Agric. Code § 161.021 (1995).



owners as well as those involved with the human health or environmental impacts of livestock. Alternatively, one or more of these seats should be re-designated to represent specific groups – such as small-scale producers – who are not currently represented on the Commission. While not ideal (since the general public should have a substantial voice on agency governing boards), this would at least provide greater transparency and diversity. The current system allows the three “general public” seats to be filled with individuals whose backgrounds and interests are essentially the same as the conventional, large-scale industry representatives on the Commissions.

#### **IV. Proposed Changes**

##### **1. Add Commissioners who represent small-scale producers.**

In 2015, FARFA supported HB 809, which would have added two seats to the Commission to represent the interests of small-scale producers – one for small-scale livestock and one for small-scale poultry. This approach would add more diverse voices to the Commission and better represent the parties impacted by the agency. The precise number of seats to be added, and the qualifications of the new Commissioners, might benefit from further discussion, but we believe the basic approach of the bill is the best way to provide more representation for parties impacted by TAHC.

TAHC could additionally include a seat for “organic” livestock production. However, while Texas has a large number of sustainable livestock producers, it has very few “certified organic” producers. The reason is that there is no processing facility for certified organic livestock in Texas, so it is not possible to raise and process certified organic livestock in this state. As a result, the vast majority of producers who practice organic management of their livestock use other labels (such as certified grassfed) and/or sell directly to consumers without becoming certified organic. The few certified organic livestock operations are actually large, commercial operations that more resemble industrial operations in terms of their management and interests. Thus, if an additional seat were added to represent organic livestock production, it should be designed to represent small-scale sustainable livestock (without any implication that the Commissioner solely represents certified organic producers).

##### **2. Establish a process for working groups to be selected and allow for public involvement.**

The Federal Advisory Committee Act sets out specific procedures and substantive protections when agencies rely on working groups. While FACA is more restrictive and goes further than is necessary for a state agency, it is instructive in considering what sort of measures would be appropriate. First and foremost, there should be a selection process for the members that addresses diversity of interests. Once formed, every meeting of each working group should have some provision for public notice and public input and should be recorded and published online.

In addition, we urge the Sunset Commission to consider how the working group process could and should be directed to engage with historically underserved groups in the livestock industry. The U.S. Department of Agriculture has multiple avenues to support the involvement of women, veterans, people of color, and young farmers in its advisory groups and other initiatives. These are vital, growing communities in the livestock industry, and they should be recognized as important stakeholders.

### 3. Reform the qualifications for “General Public” members.

The Texas Sunset Act recommends that all state agencies under its review make an effort to prohibit conflicts of interest. While conflicts of interests are inherent for some Commissioners, conflicts with respect to members of the public serving on TAHC can be eliminated if proper restrictions are placed on the general public seats. The current definition does not reflect the expectations of the public and the common meaning of “member of the public.”

In order to ensure that the commissioners appointed as “members of the general public” are, in fact, members of the general public, the statutory language must be revised to provide that these commissioners have no recent, material ties to the industries regulated by TAHC. This could be achieved by adding a section along the following lines:

§ 161.021. Composition . . .

(d) A person is not eligible for appointment as a public member of the commission if the person or the person's spouse:

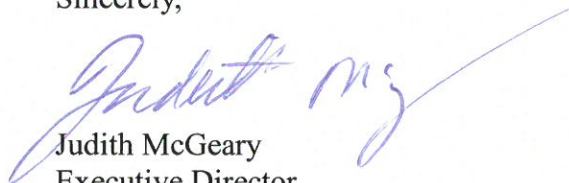
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(5) within the last five years, has had any pecuniary or participatory interest, other than as a consumer, in any organization operating in or associated with an industry regulated by the commission.

### Conclusion

FARFA respects the important role that the Sunset Advisory Commission plays in ensuring that Texas agencies serve the purposes for which they were created and in improving how those goals are achieved. We appreciate the opportunity to provide input and look forward to continuing discussions with your staff throughout the coming year.

Sincerely,



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