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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 58**

**RIN 0581-AD25**

**[Doc. No. AMS-DA-10-0002]**

**Increase in Fees for Voluntary Federal Dairy Grading and Inspection Services**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule increases the fees for voluntary Federal dairy grading and inspection services. The fees will increase 10 percent effective August 2013 and an additional 10 percent effective February 2014. The fees applicable to European Union Health Certification Program derogation requests are unchanged. Dairy grading and inspection services are voluntary and are financed in their entirety through user fees assessed to participants using the program. Despite the adoption of technologies that have improved services, additional changes in operations that enhanced efficiencies, and reduced employee numbers, increases in salaries, technology investments, and general inflation have more than offset savings resulting in the need to increase fees. AMS estimates the fee increase will result in an overall cost increase to the industry of less than \$0.0004 per pound of dairy product graded.

**DATES:** *Effective:* August 1, 2013.

**FOR FURTHER INFORMATION CONTACT:** Diane Lewis, Director, Grading and Standards Division, Dairy Programs, Agricultural Marketing Service, U.S. Department of

Agriculture, Stop 0225, Room 2968 – South, 1400 Independence Avenue, SW,  
Washington, DC 20250-0225, or call (202) 720-4392.

**SUPPLEMENTARY INFORMATION:**

**Executive Orders 12866 and 12988**

This rule has been determined to be “not significant” for purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget (OMB).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not retroactive. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

**Regulatory Flexibility Act and Paperwork Reduction Act**

Pursuant to the requirement set forth in the Regulatory Flexibility Act (5 U.S.C. 601-612), AMS has considered the economic impact of this action on small entities. It has been determined that its provisions would not have a significant economic effect on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy products manufacturer is a “small business” if it has fewer than 500 employees. If a plant is part of a larger company operating multiple plants that collectively exceed the 500 employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Under the Agricultural Marketing Act of 1946, as amended, (AMA)(7 U.S.C. 1621-1627), the Dairy Grading and Inspection Branch, AMS, provides voluntary Federal inspection and dairy product grading services to about 360 plants. An estimated 345 of

these users are small businesses under the criteria established by the Small Business Administration (13 CFR 121.201).

This rule will raise the fees charged to businesses for voluntary plant inspections, grading services for dairy, and related products. This rule will not raise fees applicable to the European Union Health Certification Program derogation process. These actions will equally affect all businesses that use these services. Dairy processing plants participating in the voluntary plant inspection program have their facility inspected against established USDA “General Specifications for Dairy Plants Approved for USDA Inspection and Grading Service” construction and sanitation requirements. Businesses are under no obligation to use these voluntary user-fee based services and any decision on their part to discontinue the use of the services would not prevent them from marketing their products. It is estimated that the fee increases will result in an increase to plants of \$0.0004 per pound of graded product. Therefore, AMS has determined that this rule will not have a significant economic impact on small businesses.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The review determined that this rule would have no impact on reporting, recordkeeping, or other compliance requirements for entities currently using voluntary Federal dairy inspection and grading services because they would remain identical to the current requirements.

This action does not request additional information collection that requires clearance by OMB. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff.

Thus, the information collection and reporting burden is small. Requiring the same information from all participating dairy plants does not significantly disadvantage any plant that is smaller than the industry average.

### **Description of Program**

Plants participating in the voluntary AMS Dairy Grading and Inspection Program process milk into dairy foods that enter commerce as retail products, ingredients for further processing, purchases for Federal food assistance programs, or exports to other countries. Services provided by the program enhance the marketability and add value to dairy and dairy-containing foods. Dairy products manufactured in facilities complying with the USDA inspection requirements are eligible to be graded against official quality standards and specifications established by AMS and certain contract provisions between buyer and seller. Dairy products tested and graded by AMS have certificates issued describing the product's quality and condition.

AMS continually reviews cost structures to assure it is operating efficiently while maintaining the resources necessary to meet the dairy industry's demand for services. Periodically, fees must be adjusted to ensure that the program remains financially self-supporting. The AMS Dairy Grading and Inspection Program has made great efforts to reduce the costs associated with providing grading and inspection services since the last fee increase in 2006 (71 FR 60805). Cost-saving initiatives to date have resulted in substantial gains in the efficiency of service delivery. In 2006, total costs for the program were \$5.2 million to grade and certify 1.5 billion pounds of dairy products—a per pound cost of \$0.0035. In 2011, the program's total costs were \$5.3 million to grade and certify 2.0 billion pounds of dairy products—a per pound cost of product certified of \$0.0026, a

25 percent improvement in efficiency. Further enhancements will continue to improve the efficiency, quality, and timeliness of providing inspection and grading services.

In an effort to minimize the costs associated with managing its workforce, the Dairy Grading and Inspection Program has restructured. The number of administrative personnel has been reduced from 14 full time employees to 5 resulting in annual savings of over \$400,000. The National Field Office, located in the suburbs of Chicago, co-located with other USDA offices in Lisle, Illinois, saving about \$32,000 annually. One supervisor and one training position were eliminated allowing about \$170,000 to be redirected to cover cost increases for additional grading staff needed to provide requested services. In addition, system automation has resulted in improved customer service with less staff involvement, especially in the delivery of export certificates. Advances in electronic submissions and deliveries allowed nearly 20,000 export certificates to be issued with only 2 staff positions during FY 2011.

Although significant effort has been directed at reducing expenses, savings from these efforts have not offset increasing operating expenses incurred over the past 6 years. Consequently, existing fee rates are no longer adequate to cover current obligations. The program is depleting reserve funds at a rate that jeopardizes its ability to ensure effective delivery of services to meet industry needs. Fees must be adjusted to cover current and projected operating costs.

The Secretary of Agriculture is authorized by the AMA to provide voluntary Federal dairy inspection and grading services to facilitate the orderly marketing of dairy products and to enable consumers to obtain the quality of dairy products they desire. The AMA also provides for the collection of reasonable fees from users of the Federal dairy

inspection and grading services to cover the cost of providing these services. AMS establishes hourly fees by distributing the program's projected operating costs over the estimated service-revenue hours provided to users. AMS continually reviews its cost structure to assure it is operating efficiently while maintaining the resources necessary to meet the dairy industry's demand for services. Periodically, fees must be adjusted to ensure that the program remains financially self-supporting.

As part of its financially self-supporting status, agency requirements necessitate that the program maintain a reserve trust fund with a minimum of 4 months of operating funds to account for program closure or an unexpected decrease in revenues. Since revenues have not covered program costs for several years, the trust fund has gradually been depleted. The fund first dipped below its mandated 4-month reserve level in FY 2010. Without a fee increase, the AMS Dairy Grading and Inspection Branch will be put in an unstable financial position that will adversely affect the ability to provide dairy inspection and grading services.

In an effort to reduce costs and delay depletion of reserve funds, AMS has continued to automate its business practices, consolidate facilities, limit personnel, and implement other efficiencies. As detailed earlier, progress to date for the AMS Dairy Grading and Inspection Program has been significant and has resulted in decreasing costs per pound of graded product from \$0.0035 to \$0.0026. This is equivalent to a savings of approximately \$816,000 on every one billion pounds of product graded. Further enhancements in automated business practices will continue to improve the efficiency and timeliness of providing inspection and grading services as well as information to users of these services.

## **Discussion of Comments**

On January 17, 2013, the USDA published a Proposed Rule (78 FR 3851) to increase the user fees for voluntary Federal plant inspections and dairy product grading services. The Proposed Rule included a 15 percent increase in user-fees for dairy grading beginning in February 2013, and an additional 5 percent increase beginning in October 2013. Comments were due on or before February 19, 2013.

Six comments were received: one from a federation of dairy cooperative associations, two from dairy manufacturer associations, one from a non-profit trade organization and two from individuals.

One of the comments received from an individual expressed opposition to the proposed fee increase. The comment explained how adoption of the proposed fee increase would increase prices to consumers, increase employee workload, and exempt larger plants from the grading program.

The Dairy Grading and Inspection Program is voluntary. Plants who utilize the program do so in order to prove to their customers and to consumers that their product has been certified by the USDA to meet certain standards. The program is utilized by both small and large businesses. USDA estimates that the increased costs to dairy manufacturing plants resulting from the proposed fee increase for grading and inspection services to be negligible \$0.0004 per pound of product graded.

Two of the comments supported the fee increase as proposed by USDA. Both comments stated that a fee increase is justified since the program has not increased fees since 2006. They also expressed how a decline in grading services from insufficient revenue would be harmful to the dairy industry, and ultimately to consumers.

Three comments supported a fee increase for the Dairy Grading and Inspection Program, but proposed a more gradual phase in. The comments stated that it is reasonable that the fee-for-service program occasionally increase its fees to cover costs in order to avoid service reductions. They also acknowledged the increased efficiencies that the Dairy Grading and Inspection Program has already achieved.

Two of these comments described how the proposed increase to grading and inspection fees would be a significant burden on dairy product manufacturers since it would increase grading fees by 20 percent in less than one year. The comments explained that grading and inspection fees are usually negotiated into sales contracts, and that these contracts are typically negotiated months in advance, thus manufacturers would have to renegotiate contracts to reflect the higher grading fee. The comments argued that this would place an undue financial burden on dairy product manufacturers who utilize the grading program. Alternatively, the comments proposed a three-part fee increase of 8 percent starting October 2013, an additional 6 percent in October 2014, and an additional 6 percent in October 2015.

The additional comment proposed that the fee increase not be implemented until October 2014, and at a lower level of 5 percent in the first year. The comment described how a longer phase-in of smaller increments would be less disruptive to the industry and consumers. The comment explained that Federal grading and inspection of dairy products can be required as part of sales agreements with customers. The comment also stated that many dairy manufacturers have no mechanism for recouping the increased grading fee from customers.

The suggested revisions to the fee increase schedule and implementation date provided by commenters led the USDA to further review the fee structure, taking into consideration the commenters concerns, as well as the budgetary realities faced by the Dairy Grading and Inspection Program. As a result of the analysis, this final rule adopts provisions that are modified from those in the proposed rule. The proposed rule provided for a 15 percent fee increase beginning in February 2013, and an additional 5 percent fee increase beginning in October 2013. This would have applied to all grading services, including EU health certification program derogation requests. This final rule, however, includes a two-part incremental fee increase consisting of a 10 percent increase beginning in August 2013, which is seven months later than initially proposed, with an additional 10 percent increase beginning in February 2014.

Two of the comments also stated that the fee increase should not apply to the standard two-hours of non-resident service per European Union (EU) Health Certification Program derogation for somatic cell count and standard plate count. They explained how users of the EU Health Certification Program have invested significant resources to streamline the application process by creating electronic transfer programs to apply for derogations as a group. The comments explained how these systems should have already reduced USDA's processing time to less than two-hours per derogation, and requested that USDA examine its current cost structure for derogations to see if the rate could be reduced.

Beginning January 1, 2012, the U.S. dairy industry began transitioning to a farm level milk sampling program to verify somatic cell count and standard plate count compliance with EU regulations for products exported to the EU. Currently, the EU

maximum SCC level is 400,000 and the U.S. SCC standard is 750,000. In an effort to facilitate trade, AMS implemented a derogation program to provide a level of flexibility for farms that exceed EU SCC requirements. Milk from farms granted a derogation can still be manufactured into products that are exported to the EU.

The commenters stated the USDA processing time for derogations has been reduced as a result of the industry developing an electronic transfer program to simultaneously submit a group of derogation applications. While this development may reduce time for the submitter, USDA must unbundle the group submission and individually review each application, resulting in no reduced staff time. Furthermore, now that the derogation program is in its second year applications must be compared with previously submitted applications to ensure that farms are working towards compliance with the EU standard. Upon further review, USDA determined that the current fee is appropriate and as a result, the fee applicable to derogations is unchanged.

Currently, the fees are \$63.00 per hour for continuous resident services and \$68.00 per hour for non-resident services. The increases outlined in this final rule result in fees of \$69.00 per hour for continuous resident services effective August 2013 and \$76.00 per hour effective February 2014. The fee for non-resident services between the hours of 6 a.m. and 6 p.m. is \$75.00 per hour beginning August 2013 and \$82.00 per hour as of February 2014. The fee for non-resident services between the hours of 6 p.m. and 6 a.m. is \$82.40 per hour effective August 2013 and \$90.20 as of February 2014. For services performed in excess of 8 hours per day and for services performed on Saturday, Sunday, and legal holidays, 1½ times the base fees will apply and result in increases to \$104.00 per hour for resident grading beginning August 2013 and \$114.00 per hour

effective February 2014. Similarly, a fee of \$112.40 per hour for non-resident grading services effective August 2013 and \$123.00 as of February 2014 also apply. Lastly, a fee of \$68.00 per hour at the standard two-hour per derogation application will still apply.

The following table summarizes the fee changes:

| <b>Service<br/>(All rates in dollars per hour)</b>               | <b>Current</b> | <b>August<br/>2013</b> | <b>February<br/>2014</b> |
|--|----------------|------------------------|--------------------------|
| Continuous resident services                                     | \$63.00        | \$69.00                | \$76.00                  |
| Non-resident services  | \$68.00        | \$75.00                | \$82.00                  |
| Non-resident services 6pm—6am<br>(10 percent night differential) | \$74.80        | \$82.40                | \$90.20                  |
| Continuous resident services—in excess of 8 hours<br>(1½ x base) | \$94.50        | \$104.00               | \$114.00                 |
| Non-resident—in excess of 8 hours<br>(1½ x base)                 | \$102.00       | \$112.40               | \$123.00                 |
| Derogation Applications  | \$68.00        | \$68.00                | \$68.00                  |

AMS estimates that dairy grading and inspection fees, including the adopted increases, will generate the following revenue (in thousands of dollars): FY 2013 (\$6,869); FY 2014 (\$7,430); FY 2015 (\$7,546); and FY 2016 (\$7,342). Program costs are estimated as follows (in thousands of dollars): FY 2013 (\$6,051); FY 2014 (\$6,459); FY 2015 (\$6,536); FY 2016 (\$6,615). The additional cost to the industry will still represent less than \$0.0004 per pound of product certified as described in the proposed rule. At this increased rate, program analysis estimates that required minimum trust fund reserves will be reached by FY 2015. Based on the above assumption, trust fund reserves are estimated as follows (in thousands of dollars): FY 2013 (\$1,385); FY 2014 (\$2,356); FY 2015 (\$3,366); FY 2016 (\$4,093).

#### **List of Subjects in 7 CFR Part 58**

Dairy Products, Food grades and standards, Food labeling, Reporting and recordkeeping requirements.

For the reason set forth in the preamble, 7 CFR part 58 is amended as follows:

1. The authority citation for 7 CFR part 58 continues to read as follows:

**Authority:** 7 U.S.C. 1621-1627.

**PART 58—GRADING AND INSPECTION, GENERAL SPECIFICATIONS FOR APPROVED PLANTS AND STANDARDS FOR GRADES OF DAIRY PRODUCTS**

**Subpart A [Amended]**

2. Revise §58.43 to read as follows:

**§58.43 Fees for inspection, grading, sampling, and certification.**

Except as otherwise provided in §§58.38 through 58.46 and through the last day of January 2014 inclusive, charges shall be made for inspection, grading, and sampling service at the hourly rate of \$75.00 for services performed between 6 a.m. and 6 p.m. and at \$82.40 for services performed between 6 p.m. and 6 a.m. for service performed for the time required to perform the service calculated to the nearest 15-minute period, including the time required for preparation of certificates and reports and the travel time of the inspector or grader in connection with the performance of the service. Starting the first day of February 2014, the hourly rate will be equal to \$82.00 for service performed between 6 a.m. and 6 p.m. and \$90.20 for services performed between 6 p.m. and 6 a.m. calculated in the same manner. A minimum charge of one-half hour shall be made for service pursuant to each request or certificate issued. Charges for service performed in excess of the assigned tour of duty shall be made at a rate of 1½ times the rate stated in this section. The hourly rate for work regarding compliance with European Union Health Certification Program derogation applications and/or review shall be assessed at \$68.00.

3. Revise §58.45 to read as follows:

**§58.45 Fees for continuous resident services.**

Irrespective of the fees and charges provided in §§58.39 and 58.43, charges for the inspector(s) and grader(s) assigned to a continuous resident program shall be made at the rate of \$69.00 per hour for services performed during the assigned tour of duty until the last day of January 2013. Starting the first day of February 2014, the hourly rate shall be assessed at \$76.00 for services calculated in the same manner. Charges for service performed in excess of the assigned tour of duty shall be made at a rate of 1½ times the rate stated in this section.

Dated: June 21, 2013

Rex A. Barnes  
Associate Administrator  
Agricultural Marketing Service

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