



## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 1005, 1006 and 1007

[Doc. no. AMS-DA-07-0059; AO-388-A22, AO-356-A43 and AO-366-A51; DA-07-03]

### Milk in the Appalachian, Florida, and Southeast Marketing Areas; Order Amending the Orders

**AGENCY:** Agricultural Marketing Service, USDA

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Class I pricing provisions and the maximum administrative assessment for the Appalachian, Florida and Southeast marketing orders. This final rule also amends certain features of the diversion limit, touch-base and transportation credit provisions of the Appalachian and Southeast milk marketing orders. More than the required number of producers approved the issuance of the orders as amended.

**EFFECTIVE DATE:** May 5, 2013.

**FOR FURTHER INFORMATION CONTACT:** William G. Francis, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, STOP 0231-Room 2971, 1400 Independence Avenue, SW, Washington, DC 20250-0231, (202) 720-7183, e-mail address:

[William.francis@ams.usda.gov](mailto:William.francis@ams.usda.gov). **SUPPLEMENTARY INFORMATION:** The provisions adopted in this final rule: 1) Adjust the Class I pricing surface in each county within the geographical boundaries of the Appalachian, Florida and Southeast marketing orders; 2) Make diversion limit standards identical for the Appalachian and Southeast orders: 25 percent of deliveries to pool plants during the months of January, February, July, August, September, October, and November, and 35 percent in the months of March, April, May, June, and

December; 3) Reduce touch-base standards to one day each month for the Appalachian and Southeast orders; 4) Add January and February as months when transportation credits are paid for the Appalachian and Southeast orders; 5) Provide for the payment of transportation credits in the Appalachian and Southeast orders for full loads of supplemental milk; 6) Provide more flexibility in the qualification requirements for supplemental milk producers to receive transportation credits for the Appalachian and Southeast orders; and 7) Increase the monthly transportation credit assessment from \$0.20 per hundredweight (cwt) to \$0.30 per (cwt) in the Southeast order. This final rule also increases the maximum administrative assessment for the Appalachian, Florida, and Southeast orders from \$0.05 per cwt to \$0.08 per cwt.

A partial tentative final decision concerning all of the proposed amendments except for increasing the administrative assessment rates was published in the Federal Register (73 FR 11194). Increasing the maximum administrative assessment was initially addressed in a separate partial recommended decision (73 FR 11062). No comments were received concerning this recommended decision. A final decision concerning all proposed amendments was published in the Federal Register (79 FR 12963). Accordingly, this final rule adopts proposed amendments detailed in the final decision (79 FR 12963).

### **Executive Orders 12866 and 13563**

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Orders 12866 and 13563.

### **Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. The Agricultural Marketing Agreement Act

of 1937, as amended (7 U.S.C. 601-674) (Act), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the U.S. Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### **Executive Order 13175**

This rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal Governments and will not have significant Tribal implications.

#### **Regulatory Flexibility Act and Paperwork Reduction Act**

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule would not have a significant economic impact on a substantial number of small entities. For the purposes of the Regulatory Flexibility Act, a dairy farm is considered a small business if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a small business if it has fewer than 500 employees.

For the purposes of determining which dairy farms are small businesses, the \$750,000 per year criterion was used to establish a marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most small dairy farmers. For purposes of determining a handler's size, if the 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.

During May 2007, the time of the hearing, there were 2,744 dairy farms pooled on the Appalachian order (Order 5). For the Southeast order (Order 7), 2,924 dairy farms were pooled on the order. For the Florida order (Order 6), 283 dairy farms were pooled on the order. Of these, 2,612 dairy farms in Order 5 (or 95.2 percent), 2,739 dairy farms in Order 7 (or 94 percent) and 153 dairy farms in Order 6 (or 54 percent) were considered small businesses.

During May 2007, there were a total of 36 plants associated with the Appalachian order (22 fully regulated plants, 10 partially regulated plants, 2 producer-handlers, and 2 exempt plants). A total of 55 plants were associated with the Southeast order (33 fully regulated plants, 9 partially regulated plants, 2 producer-handlers, and 11 exempt plants). A total of 25 plants were associated with the Florida order (13 fully regulated plants, 9 partially regulated plants, 1 producer-handler, and 2 exempt plants). The number of plants meeting small business criteria under the Appalachian, Southeast and Florida orders were 8 (or 22.2 percent), 18 (or 32.7 percent), and 11 (or 44 percent), respectively.

The adopted amendments in this final rule provide for an increase in Class I prices in the Appalachian, Southeast, and Florida orders (southeastern orders). The minimum Class I prices of the southeastern orders, as with all other Federal milk marketing orders, are set by using the

higher of an advance Class III or Class IV price, as determined by USDA, and adding a location-specific differential, referred to as a Class I differential. Minimum Class I prices charged to regulated handlers are applied uniformly to both large and small entities. At the time of the hearing, the Department estimated that the proposed Class I price increases would generate higher marketwide pool values in all three southeastern orders of approximately \$18-19 million for the Appalachian order, \$17.5 million for the Southeast order, and \$38 million for the Florida order, on a monthly basis. It was estimated that monthly minimum prices paid to dairy farmers (blend prices) would increase approximately \$0.26 per cwt for the Appalachian order, \$0.64 per cwt for the Southeast order, and \$1.20 per cwt for the Florida order.

The Class I price increases were implemented on an interim basis effective May 1, 2008.<sup>1</sup> As a result of those increases, marketwide pool values were increased in 2011 by approximately \$16 million in the Appalachian order, \$38 million in the Florida order, and \$16 million in the Southeast order. This resulted in an increase in 2011 monthly minimum prices paid to dairy farms of \$0.25 per cwt for the Appalachian order, \$1.25 per cwt in the Florida order, and \$1.25 per cwt in the Southeast order.

The adopted amendments revise the Appalachian and Southeast orders by making the diversion limit standards for the orders identical -- not to exceed 25 percent for the months of January, February, and July through November, and 35 percent for the months of March through June and for the month of December. Prior to their interim adoption, the diversion limit standards of the Appalachian order for pool plants and cooperatives acting as handlers were not to exceed 25 percent for the months of July through November, and January and February; and 40 percent for the months of December and March through June. For the Southeast order, the diversion limit standards for pool plants and cooperatives acting as handlers were not to exceed

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<sup>1</sup> Official notice is taken of 73 FR 14153

33 percent during the months of July through December, and 50 percent in the months of January through June.

In addition, the adopted amendments establish identical touch-base standards of at least one days' milk production each month by a dairy farmer in the Appalachian and Southeast orders. Prior to their interim adoption, the Appalachian order had a touch-base standard of 6 days' production in any month of July through December and not less than 2 days' production in each of the months of January through June. Prior to their interim adoption, the Southeast order had a touch-base standard of not less than 10 days' production for the months of July through December and not less than 4 days' production for the months of January through June.

The adopted amendments to the pooling standards revise established criteria that determine those producers, producer milk and plants that have a reasonable association with and are consistently serving the fluid needs of the Appalachian and Southeast marketing areas. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I needs and determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk. The criteria for pooling are established without regard to the size of any dairy industry or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities.

The adopted amendments add January and February to the months of July through December as months when transportation credits may be paid to those handlers who incur the costs of providing supplemental milk for the Appalachian and Southeast orders. The amendments also expand the payment of transportation credits for supplemental milk to include the full load of milk rather than the calculated Class I portion and provide more flexibility in the

qualification requirements for supplemental milk to receive transportation credits. In addition, the maximum monthly transportation credit assessment for the Southeast order is increased from the current \$0.20 per cwt to \$0.30 per cwt on all milk assigned to Class I use. The transportation credit provisions are applicable only to the Appalachian and Southeast orders and are applied in an identical fashion to both large and small businesses and will not have any different impact on those businesses producing manufactured milk products. The changes will not have a significant economic impact on a substantial number of small entities.

The adopted amendments also allow the Market Administrators of the Appalachian, Southeast, and Florida orders to increase the maximum administrative assessment from the current \$0.05 per cwt to \$0.08 per cwt if necessary to maintain adequate funds for the operation of the orders. Administrative assessments are charged without regard to the size of any dairy handler or entity.

The adopted amendments will affect all producers and handlers equally regardless of their size. Accordingly, the amendments will not have a significant economic impact on a substantial number of small entities.

A review of the reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these amendments would have no impact on reporting, recordkeeping or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

## **E-Government Act**

The Agricultural Marketing Service (AMS) is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

**Prior documents in this proceeding**

Notice of Hearing: Issued May 3, 2007; published May 8, 2007 (72 FR 25986).

Partial Tentative Final Decision: Issued February 25, 2008; published February 29, 2008 (73 FR 11194).

Partial Recommended Decision: Issued February 25, 2008; published February 29, 2008 (73 FR 11062).

Interim Final Rule: Issued March 12, 2008; published March 17, 2008 (73 FR 14153).

Correcting Amendments: Issued May 6, 2008; published May 9, 2008 (73 FR 26513).

Final Decision: Issued February 25, 2014; published March 7, 2014 (79 FR 12963).

**Findings and Determinations**

The findings and determinations hereinafter set forth supplement those that were made when the Appalachian, Florida and Southeast orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the Appalachian, Florida, and Southeast marketing orders:

- (a) Findings upon the basis of the hearing record.

A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Appalachian, Florida, and

Southeast marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (Act)(7 U.S.C. 601-674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas. The minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders, as hereby amended, regulate the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

(b) Additional Findings. The amendments to these orders are known to handlers. The final decision containing the proposed amendments to this order was issued on February 25, 2014 and published in the **Federal Register** on March 7, 2014 (79 FR 12963).

The changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making these amendments effective following [Insert date 1 day after date of publication of this rule in the **Federal Register**]. It

would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedures Act, 5 U.S.C. 551-559.)

(c) Determinations. It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in section 8c(9) of the Act) of more than 50 percent of the milk, which is marketed within the specified marketing areas, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order amending the Appalachian, Florida, and Southeast orders is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the orders as hereby amended;

(3) The issuance of this order amending the Appalachian, Florida, and Southeast orders is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the respective marketing areas.

#### **List of Subjects in 7 CFR Parts 1005, 1006 and 1007**

Milk marketing orders.

#### **Order Relative to Handling:**

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Appalachian, Florida, and Southeast marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby amended, as follows:

The provisions of the order amending the orders contained in the interim amendments of the orders issued by the Administrator, Agricultural Marketing Service, on March 12, 2008, and

published in the **Federal Register** on March 17, 2008, (72 FR 14153) and as corrected in the correcting amendments issued May 6, 2008, and published May 9, 2008, (73 FR 26513) are adopted and shall be the terms and provisions of these orders.

For the reasons set forth in the preamble, 7 CFR parts 1005, 1006 and 1007 are amended as follows:

1. The authority citation for 7 CFR parts 1005, 1006 and 1007 continues to read as follows:

Authority: 7 U.S.C. 601-674, and 7253

## **PART 1005 – MILK IN THE APPALACHIAN MARKETING AREA**

2. Section 1005.85 is revised, to read as follows:

### **§ 1005.85 Assessment for order administration.**

On or before the payment receipt date specified under §1005.71, each handler shall pay to the market administrator its pro rata share of the expense of administration to the order at a rate specified by the market administrator that is no more than \$.08 per hundredweight with respect to:

(a) Receipts of producer milk (including the handler's own production) other than such receipts by a handler described in § 1000.9(c) of this chapter that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1000.9(c) of this chapter;

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1000.43(d) of this chapter and other source milk allocated to Class I pursuant to § 1000.44(a) (3) and (8) of this

chapter and the corresponding steps of § 1000.44(b) of this chapter, except other source milk that is excluded from the computations pursuant to § 1005.60(d) and (e); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1000.76(a) (1) (i) and (ii) of this chapter.

## **PART 1006 – MILK IN THE FLORIDA MARKETING AREA**

3. Section 1006.85 is revised to read as follows:

### **§ 1006.85 Assessment for order administration.**

On or before the payment receipt date specified under § 1006.71, each handler shall pay to the market administrator its pro rata share of the expense of administration of the order at a rate specified by the market administrator that is no more than \$.08 per hundredweight with respect to:

(a) Receipts of producer milk (including the handler's own production) other than such receipts by a handler described in § 1000.9(c) of this chapter that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1000.9(c) of this chapter;

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1000.43(d) of this chapter and other source milk allocated to Class I pursuant to § 1000.44(a)(3) and (8) chapter and the corresponding steps of § 1000.44(b) of this chapter, except other source milk that is excluded from the computations pursuant to § 1006.60(d) and (e); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1000.76(a)(1)(i) and (ii) of this chapter.

## **PART 1007 – MILK IN THE SOUTHEAST MARKETING AREA**

4. Section 1007.85 is revised, to read as follows:

### **§ 1007.85 Assessment for order administration.**

On or before the payment receipt date specified under § 1007.71, each handler shall pay to the market administrator its pro rata share of the expense of administration of the order at a rate specified by the market administrator that is no more than \$.08 per hundredweight with respect to:

(a) Receipts of producer milk (including the handler's own production) other than such receipts by a handler described in § 1000.9(c) of this chapter that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1000.9(c) of this chapter;

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1000.43(d) of this chapter and other source milk allocated to Class I pursuant to § 1000.44(a)(3) and (8) of this chapter and the corresponding steps of § 1000.44(b) of this chapter, except other source milk that is excluded from the computations pursuant to § 1007.60(d) and (e); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1000.76(a)(1)(i) and (ii) of this chapter.

Dated: April 28, 2014

Rex A. Barnes

Associate Administrator

Agricultural Marketing Service

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