



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1051

Docket No. AO-15-0071; AMS-DA-14-0095

Proposed California Federal Milk Marketing Order.

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; delay of rulemaking.

SUMMARY: This document announces a delay of the California Federal Milk Marketing Order (FMMO) rulemaking proceeding and the Agricultural Marketing Service's (AMS) intention to await the U.S. Supreme Court decision on a related legal matter prior to proceeding further with this rulemaking.

DATES: *[insert date of publication in the FEDERAL REGISTER]*

ADDRESSES: Order Formulation and Enforcement Division, USDA/AMS/Dairy Program, STOP 0231, Room 2969-S, 1400 Independence Ave, SW, Washington, DC 20250-0231. The docket may be viewed at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Erin Taylor, Acting Director, (202) 720-7311, e-mail address: erin.taylor@ams.usda.gov.

SUPPLEMENTARY INFORMATION: On February 5, 2015, AMS received a proposal from three dairy cooperatives to call a hearing to promulgate a FMMO in California. Subsequently, AMS received additional proposals in April 2015. After publishing a notice of hearing on August 6, 2015 and proposing to add 7 CFR part 1051 (80 FR 47210), AMS commenced a hearing on September 22, 2015, presided over by

Administrative Law Judge (ALJ) Jill S. Clifton. At the conclusion of the hearing, AMS reviewed the hearing record and briefs filed subsequent to the hearing. AMS published the Recommended Decision and Opportunity to File Written Exceptions on February 14, 2017 (82 FR 10634).

On November 29, 2017, the Solicitor General of the United States submitted a brief to the U. S. Supreme Court in *Lucia v. Securities and Exchange Commission* (*Lucia*), 868 F.3d 1021 (D.C. Cir. 2017) (en banc) (per curiam), *cert. granted*, No. 17-130 (U.S. January 12, 2018). The Government's position is that ALJs are "inferior officers" of the United States, subject to the Appointments Clause of Article II of the Constitution. The Solicitor General urged the Court to grant a writ of certiorari and resolve a circuit split concerning the Constitutional requirements for ALJ appointments. On January 12, 2018, the Court did so.

At all times material to the hearing for the prospective promulgation of a FMMO for California, ALJ Clifton presided over the proceedings on behalf of the United States Department of Agriculture (USDA). At the time of the hearing, USDA believed ALJ Clifton to be an employee of the Department and her appointment was completed in accordance with agency procedures, however, if the Court determines that ALJs are inferior officers of the United States rather than employees, then ALJ Clifton's original appointment as an ALJ would be brought into question. The Court is expected to hear oral arguments in *Lucia* during the current term and to render its decision on or before the end of its term on June 30, 2018.

As of November 29, 2017, the United States Department of Justice will no longer argue in the federal courts that ALJs are employees rather than inferior officers unless the Supreme Court determines otherwise. Consequently, it is prudent and appropriate for AMS to delay further proceedings in this FMMO rulemaking until the Court renders its decision in *Lucia*.

Prior documents in this proceeding:

Notice of Hearing: Issued July 27, 2015; published August 6, 2015 (80 FR 47210);

Notice to Reconvene Hearing: Issued September 25, 2015; published September 30, 2015 (80 FR 58636);

Recommended Decision and Opportunity to File Written Exceptions: Issued February 6, 2017; published February 14, 2017 (82 FR 10634);

Documents for Official Notice: Issued August 8, 2017; published August 14, 2017 (82 FR 37827); and

Information Collection – Producer Ballots: Issued September 27, 2017; Published October 2, 2017 (82 FR 45795).

Authority: 7 U.S.C. 601-674.

Dated: February 1, 2018

Erin Morris
Associate Administrator
Agricultural Marketing Service

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