



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.

SUMMARY: This document announces the ratification of the evidentiary record of the California Federal Milk Marketing Order (FMMO) rulemaking proceeding by the United States Department of Agriculture (USDA) Judicial Officer (JO).

DATES: [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Erin Taylor, Acting Director, Order Formulation and Enforcement Division, USDA/AMS/Dairy Program, STOP 0231, Room 2969-S, 1400 Independence Ave, SW, Washington, DC 20250-0231, (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 requesting 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 (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. 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.

AMS published a final rule to amend the definition of “judge” in the rules of practice and procedure to formulate or amend a marketing agreement, marketing order, or certain research and promotion orders (82 FR 58097). The new definition adds a presiding official appointed by the Secretary as an official who may preside over the rulemaking hearing, in addition to an administrative law judge. AMS then published a delay of rulemaking on February 6, 2018 (83 FR 5215) indicating the agency’s intention to await the U.S. Supreme Court decision on the *Lucia* case prior to proceeding further with the California FMMO rulemaking proceeding. Subsequently, effective February 14, 2018, the Secretary of Agriculture appointed the USDA JO to serve as the judge presiding over the formal rulemaking proceedings for the California FMMO. The

Secretary instructed the JO to conduct an independent de novo review of the hearing record and either ratify or modify any decision made by the ALJ.

On March 9, 2018, the USDA JO completed his review and ratified all of ALJ Clifton's actions, including instructions regarding corrections to exhibits, rulings on objections, rulings on the admission of evidence, rulings on the conduct of the hearing, and rulings on requests for corrections to the transcript of the hearing. The JO ratified ALJ Clifton's Certification of the Transcript, except that he revised the list of exhibits that ALJ Clifton identified as not having been admitted into evidence by adding "Exhibit 108-Exhibit D" to that list.

Consequently, USDA will move forward with the California FMMO rulemaking proceeding by issuing and publishing a final decision in the Federal Register.

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);

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

Delay of Rulemaking: Issued February 1, 2018; published February 6, 2018 (83
FR 5215).

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

Dated: March 14, 2018

Bruce Summers
Acting Administrator
Agricultural Marketing Service

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