



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1146

RIN 0581-AD87

[Doc. No. AMS-DA-19-0001]

Establishment of a Milk Donation Reimbursement Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule establishes the Milk Donation Reimbursement Program. Under the program, eligible dairy organizations that account to a Federal milk marketing order marketwide pool and incur qualified expenses related to certain fluid milk product donations may apply for and receive limited reimbursements to cover those expenses. A provision of the 2018 Farm Bill requires establishment of this program. The program is intended to reduce food waste and provide nutrition assistance to individuals in low-income groups.

DATES: Effective: [INSERT DATE 10 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: A provision of the Agricultural Improvement Act of 2018 (Public Law 115-334) (2018 Farm Bill) repealed the Dairy Product Donation Program specified in Section 1431 of the Agricultural Act of 2014 (Public Law 113-79) (2014 Farm Bill)

and amended title I, subtitle D, part III of the 2014 Farm Bill to require establishment of the Milk Donation Program.

Section 1601(c)(2)(A) of the 2014 Farm Bill provides for the promulgation of the regulations to implement the Dairy Product Donation Program to be made without regard to the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C.

553. Section 1701 of the 2018 Farm Bill extends that Congressional direction to the establishment of a milk donation program to replace the Dairy Product Donation Program. AMS, therefore, is issuing this final rule without prior notice or public comment.

Amended section 1431 of the 2014 Farm Bill (amended statute) authorizes the Secretary of Agriculture (Secretary) to establish a program to reimburse eligible dairy organizations for a portion of the value of fluid milk products they donate to eligible non-profit organizations for distribution to individuals in low-income groups. The Secretary delegated authority to establish and administer this program to the Agricultural Marketing Service (AMS). This rule outlines the provisions of the new Milk Donation Reimbursement Program (MDRP) codified at 7 CFR part 1146. Program provisions are intended to encourage the donation of fluid milk products to provide nutrition assistance to individuals in low-income groups and to reduce food waste.

Background

Under Federal milk marketing orders (FMMOs), regulated milk handlers receiving dairy farmers' milk account to a marketwide pool on their end-use classification of the milk. FMMO milk end-use classifications are generally as follows: Class I for beverage fluid milk products such as whole, skim, nonfat, and flavored milks; Class II for soft products such as yogurt and ice cream; Class III for spreadable and hard cheeses; and Class IV for butter and evaporated, condensed, and non-fat dried milk. Class I milk products typically carry the highest value in the

marketplace. Monthly FMMO classified prices reflect surveyed end-product wholesale market prices. An FMMO generally requires that classified values for pooled milk be accounted for and paid to individual farmers or cooperative associations of farmers on the basis of a uniform, or average, price. Thus, all eligible dairy farmers whose milk is pooled share in the marketwide use-values of milk by regulated handlers.

FMMOs consider all packaged milk product deliveries to be commercial transactions and require regulated handlers to account to the FMMO pool at the Class I value for milk in all unreturned deliveries of packaged fluid milk products. Regulated handlers who elect to donate packaged fluid milk are required to account to a pool for milk contained in donated fluid milk products at Class I values. Thus, handlers may have found dumping surplus milk a more financially sound alternative than donation because they would avoid an FMMO pool obligation. Under the MDRP outlined in this rule, eligible handlers who account to FMMO pools and donate packaged fluid milk products to eligible non-profit organizations may claim reimbursements for all or part of the FMMO cost difference between the Class I value at the plant, and the lowest classified value for the month. Under the provisions of the MDRP, handlers may not claim reimbursements for other costs related to donating fluid milk products, such as the costs for processing, bottling, and transporting donated milk. The intent of the MDRP is to encourage handlers to make donations to food assistance programs and reduce food waste.

As provided by the amended statute (Sec. 1431(j)), total program funding in fiscal year 2019 is \$9 million, and \$5 million for each fiscal year thereafter. Using 2018 average FMMO classified prices and the weighted average FMMO Class I differential, AMS estimates that, had the program been in place in fiscal year 2018, \$9 million could have reimbursed eligible distributors for milk donations of approximately 28 million gallons of fresh fluid milk (assuming

a reimbursement rate of 100 percent of the difference between the Class I price and the lowest classified price). AMS further estimates that 28 million gallons of fresh fluid milk represented less than 0.6 percent of all FMMO Class I sales during 2018.

Program Provisions

This rule outlines the provisions of the MDRP established as required by the amended statute.

Definitions

The amended statute includes definitions for terms used in the statute. Similarly, § 1146.1 of the rule provides definitions of those terms as they are used in the new program. Key terms are “eligible dairy organization,” “eligible distributor,” “eligible milk,” “eligible partnership,” and “participating partnership.”

Eligible dairy organization. The amended statute specifies that a dairy organization eligible to participate in the program is a dairy farmer, either individually or as part of a cooperative, or a dairy processor, that accounts to an FMMO pool and incurs qualified expenses by accounting to the pool for fluid milk product donations. *See* Sec. 1431(a)(1)(A) and (B). Under FMMOs, only producer cooperatives acting as handlers by receiving the milk of dairy farmers and delivering it to regulated processing plants and handlers who operate regulated dairy processing plants must account to the marketwide pools. *See* 7 CFR 1000.9. Only handlers regulated under an FMMO are required to account to the pool at FMMO classified prices for all their Class I (fluid milk) purchases. Therefore, to ensure reimbursements requested under the program are properly applied only to qualified expenses, § 1146.1 defines “eligible dairy organization” as a dairy farmer cooperative or a dairy processor that accounts to the FMMO marketwide pool and incurs qualified expenses described in § 1146.108.

Eligible distributor. The amended statute specifies a distributor eligible to receive donated milk under the program must be a public or private non-profit organization able to distribute donated milk. *See* Sec. 1431(a)(2). Section 1146.1 of the rule likewise defines “eligible distributor” as a public or private non-profit organization that distributes donated eligible milk. Under the new program, participating non-profit organizations are required to verify their non-profit status and affirm they have appropriate facilities and processes for distributing donated milk to individuals in low-income groups.

Eligible milk. The amended statute specifies only Class I fluid milk products produced and processed in the United States are eligible for donation to eligible distributors and reimbursements under the program. *See* Sec. 1431(a)(3). As explained earlier, “Class I” is the FMMO classification for fluid milk products intended for use as beverages, such as whole, skim, nonfat, and flavored milks. *See* 7 CFR 1000.15. The amended statute requires eligible milk under the program be produced and processed in the United States. *See* Sec. 1431(a)(3). For use under the program, eligible milk must meet the commodity specifications and processing and packaging standards as provided in the commodity specification documents maintained on the AMS website, as required in § 1146.3 of the rule and discussed later in this document. Section 1146.1 of the rule defines “eligible milk” as Class I fluid milk products produced and processed in the United States meeting the commodity specifications referenced in § 1146.3.

Eligible partnership. The amended statute specifies participation in the MDRP requires application for the program by a partnership between an eligible dairy organization and an eligible distributor. *See* Sec. 1431(a)(4). Each partnership is required to submit a joint Milk Donation and Distribution Plan (Plan) containing information about their respective roles to AMS. Requiring the parties to apply as a partnership ensures that all aspects of the program

requirements will be met, and an agreed-upon structure will be in place when eligible milk is available for donation and distribution. Thus, § 1146.1 of the rule defines “eligible partnership” as a partnership between an eligible dairy organization and an eligible distributor.

AMS recognizes some eligible dairy organizations may have processing plants in more than one location and each may be regulated under different FMMOs. As well, eligible distributors may have more than one distribution site, for example, several food pantries operated by one umbrella organization. Thus, under § 1146.102(a) of the rule, the eligible partnership can submit one Plan to cover multiple plants and/or distribution points as long as only one eligible dairy organization and one eligible distributor are represented. Individual eligible dairy organizations and eligible distributors can also form other partnerships, but they are required to submit separate Plans for each partnership.

Participating partnership. The amended statute specifies that a participating partnership is one whose Plan has been approved by AMS. *See* Sec. 1431(a)(5). Once an eligible partnership’s Plan has been approved by AMS pursuant to § 1146.104 of the rule, the partnership is considered a participant in the MDRP. Documentation from both partners will be necessary to validate claims by the eligible dairy organization for reimbursement under the program, as specified in § 1146.106. Thus, § 1146.1 of the rule defines “participating partnership” as an eligible partnership for which AMS has approved a Milk Donation and Distribution Plan for eligible milk under § 1146.104.

Additional terms necessary for administration of the program are defined in § 1146.1.

Commodity Specifications

As with AMS programs related to commodity purchases, the commodity specifications for fluid milk products under the MDRP are contained in a separate document available on the

AMS website. Maintaining the specifications as an online document allows AMS to keep the specifications current and provide updated links to other relevant industry references, such as AMS's current Commercial Item Description for fluid milk products¹, the U.S. Food and Drug Administration's (FDA) Grade A Pasteurized Milk Ordinance², and FDA's Interstate Milk Shippers List³. These references provide guidance pertaining to the proper identification, manufacture, packaging, transportation, and storage of fluid milk products. The dairy industry is familiar with these references and the frequency with which they can be revised, sometimes several times each year. Therefore, § 1146.3(a) of the rule provides that eligible milk donations must meet the commodity specifications in effect on the date the milk is shipped from the processor to the eligible distributor, and § 1146.3(b) requires AMS to maintain current commodity specifications for donated milk on its website.

Program Eligibility and Participation

Section 1146.100 of the rule provides that an eligible dairy organization must be a member of a participating partnership to be eligible for reimbursements under the MDRP. As explained in the Definitions section above, a participating partnership is one whose Plan has been approved by AMS. Program reimbursements cannot exceed 100 percent of the eligible dairy organization's qualified expenses.

The amended statute requires the Secretary to review Plans at least annually and determine whether to approve those Plans. *See* Sec. 1431(c)(2). Further, the amended statute requires the Secretary to, at least annually, preapprove an amount for reimbursement of qualified

¹ <https://www.ams.usda.gov/sites/default/files/media/CIDMilkFluid.pdf>, accessed August 29, 2019.

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<https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Milk/UCM612027.pdf>; accessed August 29, 2019.

³ <https://www.fda.gov/Food/GuidanceRegulation/FederalStateFoodPrograms/ucm2007965.htm#sld>, accessed August 29, 2019.

expenses under each Plan based on an assessment of the Plan's feasibility and the extent to which the Plan advances the purposes of the program. *See* Sec. 1431(f)(1). Finally, Sec. 1431(c)(1) of the amended statute specifies the information that eligible partnerships must supply with their Plans. Sections 1146.102 and 1146.104 of the rule address these statutory requirements and are described in detail below.

Section 1146.102 of the rule outlines requirements for submission of Plans to AMS in order to be considered for the program. Eligible partnerships must apply or reapply for program participation each fiscal year by the deadline announced by AMS to be assured of consideration. Eligible partnerships must estimate the amount of eligible milk the dairy organization partner will donate to the distributor partner for distribution to persons in low-income groups. Such amounts should include planned milk donations that a dairy organization might make on an anticipated schedule, as well as plans for contingency donations the dairy organization might make under certain situations, such as when the distributor partner identifies a specific need for additional milk donations. Plans submitted to AMS for program approval must include a signed affirmation regarding the partnership's ability to supply, transport, store, and distribute eligible donated milk products consistent with the requirements in the commodity specifications under § 1146.3 of the rule. Finally, the eligible partnership is required to propose the rate at which qualified expenses under the program will be reimbursed to the eligible dairy organization member. Such information will enable AMS to determine whether each partnership's Plan is feasible and likely to fulfill the statutory purposes of the program. As specified in § 1146.208 of the rule, AMS will only collect information deemed necessary to determine whether an eligible partnership's Plan should be approved. All proprietary business information submitted will be used only for the purposes of the program and will be kept confidential by AMS.

Section 1146.104 of the rule specifies the process AMS will use to review applications to the program and determine whether to approve Plans submitted by eligible partnerships. Within 45 days of the application deadline, AMS will review the Plans, determine whether to approve or disapprove them, and notify the eligible partnership of AMS's determination. In making determinations, AMS will consider under § 1146.104(a)(1) the total amount of funding available for the program each fiscal year. The amended statute specifies that the Secretary shall use \$9 million dollars to carry out the provisions of the program for fiscal year 2019, and \$5 million dollars for each fiscal year thereafter. *See* Sec. 1431(j). Under § 1146.104(a)(2), AMS will consider the feasibility of each Plan by determining whether available funding will cover the total amount of donations at the reimbursement rate proposed by the partnership. As well, AMS will review the information submitted by the partnership, including the signed confirmation that the partnership can meet the requirements related to proper processing, transport, and storage of donated milk products until they are distributed. Under § 1146.104(a)(3), AMS will consider the extent to which the Plan would advance the statutory purposes of the MDRP, namely whether it would encourage the donation of eligible milk, provide nutrition assistance to individuals in low-income groups, and reduce food waste. *See* amended statute at Sec. 1431(f)(B)(ii). Finally, the amended statute specifies that preference will be given to eligible partnerships where the dairy organization provides funding and in-kind contributions in addition to the eligible milk donations for which the dairy organization will seek reimbursement. *See* Sec. 1431(f)(2). Section 1146.104(a)(4) incorporates that factor for Plan consideration.

Under § 1146.104(b) of the rule, participating partnerships can apply for continued program participation in subsequent fiscal years and can either notify AMS that there are no changes to the previous fiscal year's Plan, or they can submit a revised Plan for consideration.

Section 1431(f)(2) of the amended statute specifies that preference will be given to eligible partnerships who provide funding and in-kind contributions in addition to the donations for which they are reimbursed. Accordingly, § 1146.104(b) of the rule allows for participating partnerships desiring to continue in the program to submit additional information about funding and in-kind donations the dairy organization partner made during the previous fiscal year.

Section 1146.104(c) of the rule provides that AMS will determine whether to approve new or continuing Plans for all or a portion of each Plan's proposed donations and reimbursements, depending on the amount of funds available for allocation to all participating partnerships during the fiscal year. In their Plans, partnerships will include a rate at which they propose to be reimbursed for milk donations. For example, the Plan may request reimbursement at a rate of 75 percent of the difference between Class I and the lowest class price for eligible milk in each month they make donations. Upon Plan approval, AMS will specify the approved rate, as well as the total amount the partnership can receive in reimbursements during the fiscal year. The approved total amount will be dependent upon the number of approved program partnerships and available funding. The partnership may submit reimbursement claims any time during the fiscal year or up to 90 days after the close of the fiscal year. Once the partnership's reimbursements for the year reach the total dollar amount approved for that partnership, reimbursements under their Plan will not be approved for the remainder of the fiscal year, unless an adjustment or increase is provided as described below.

The amended statute specifies that the Secretary shall adjust or increase amounts approved for reimbursement based on performance and demand. *See* Sec. 1431(f)(3)(A). Section 1146.104(d) of the rule provides that AMS will review the status of each approved Plan during the applicable fiscal year. AMS may adjust the amount of reimbursements available

under a participating partnership's Plan based on the partnership's performance under their Plan to date, the availability of program funds, or changes in demand for fluid milk donations. For example, in the aftermath of a hurricane that displaces numerous people, AMS could determine that demand for milk donations may increase in that area and AMS could make adjustments to the Plans of participating partnerships in the affected area to allow for additional reimbursements to support increased milk donations, if the partnerships are willing to do so. In another example, during its routine review of approved Plans, AMS might observe that one partnership has been unable to donate the amount of eligible milk it originally estimated because the distributor partner's food pantry closed. Under § 1146.104(d)(2) of the rule, AMS could reduce that partnership's approved reimbursement amount and reassign the unused funds to another participating partnership who has indicated it is interested in making additional donations. AMS will provide affected participating partnerships 30 days' notice prior to adjusting their approved Plans.

The amended statute further requires the Secretary to establish a procedure for participating partnerships to request increases to the amount approved for reimbursement under their Plans based on changes in conditions. *See* Sec. 1431(f)(3)(B). Section 1146.104(e) of the rule establishes the process for making such requests. To support requests for increases in reimbursement amounts, participating partnerships are required to submit information about the change in conditions that would warrant increases. The partnership is required to indicate whether it is seeking a long-term increase to address a permanent change in conditions, such as the addition of a second food pantry by the distributor partner, or whether it is seeking only a short-term increase to address a temporary change in conditions. Examples of temporary changes in conditions might include a plant receiving excess milk during the spring flush or a

plant being temporarily shut down. AMS will notify the requester within 30 days of its determination regarding the requested increase, which will be based on AMS's evaluation of the reported change in conditions and the availability of funds.

Additionally, if a natural disaster or other unforeseen event occurs during the fiscal year, AMS may accept new Plan applications in order to facilitate donations to meet an immediate need. In this case, AMS may choose to publish the opportunity to accept new Plans, or a partnership can request AMS review a new Plan. New Plans must meet the criteria under § 1146.102 of the rule, and approval is subject to available remaining program fiscal year funds.

Under § 1146.104(e)(3) of the rule, AMS can give interim approval of the requested increase and approve incremental increases to the approved reimbursement amount prior to making a final determination regarding the increase, as authorized under Section 1431(f)(3)(B)(ii) of the amended statute.

Reimbursements and Qualified Expenses

Section 1431(d) of the amended statute specifies that the Secretary shall reimburse the eligible dairy organization member of a participating partnership for qualified expenses under the program on receipt of appropriate documentation. Section 1146.106(a) of the rule provides the process and describes the necessary information and documentation AMS will require to verify the dairy organization's claims for reimbursement. For each month in which the dairy organization makes donations and submits claims for reimbursement, the dairy organization must report the amount of eligible milk donated to the eligible distributor, the location of the plant where the milk was processed, the dates the donated milk was shipped to and received by the eligible distributor, and the applicable FMMO milk prices for that location for the month the milk was pooled on an FMMO. The dairy organization must also provide adequate

documentation to verify the eligible distributor received the donated milk. Such documentation could include, but is not limited to, processing and shipping records, bills of lading, storage records, and receiving records from the eligible distributor. As specified in § 1146.208 of the rule, AMS will only collect the information and documentation needed to verify the dairy organization's claims for reimbursement. Under FMMOs, the United States Department of Agriculture (USDA) is required to keep all proprietary business information, confidential⁴. Confidentiality of such information is extended to its use in administering the MDRP.

Section 1146.106(b) of the rule specifies that a participating partnership can submit reimbursement requests anytime up to 90 days after the close of the fiscal year. Under § 1146.106(c), AMS will review, process, and issue payments for reimbursement claims on a quarterly basis. Under § 1146.106(d), AMS will return incomplete claims to the submitter so they can be completed and resubmitted. As authorized by the amended statute (Sec. 1431(d)(2)(B)), AMS may verify the accuracy of documentation submitted with reimbursement claims with spot checks and audits under § 1146.206 of the rule.

Section 1431(e) of the amended statute specifies the amount of reimbursement that can be claimed for qualified expenses under the program. As explained in the Background section of this document, only the dairy organization's expenses related to its FMMO pool obligation can be reimbursed under the MDRP. Reimbursement rates are limited to no more than 100 percent of the difference between the Class I milk price at the plant location where the donated milk was processed and the lowest classified milk price for the applicable month (either Class III or Class IV). Section 1146.108(a) of the rule provides that reimbursements will be determined by multiplying the following: [the amount of eligible milk donated] times [the approved rate for reimbursement determined pursuant to §§1146.102(d) and 1146.104(c)] times [the difference in

⁴ See 7 U.S.C. 608d(2).

the Class I price at the processing plant location and the lowest FMMO classified price (either Class III or Class IV) for the month the donation occurred]. Total reimbursements for a fiscal year cannot exceed the amount approved by AMS for each participating partnership.

Administrative Provisions

The amended statute requires the Secretary to publicize opportunities to participate in the MDRP. *See* Sec. 1431(h). Accordingly, § 1146.200 of the rule requires AMS to publish notices inviting interested parties to apply for program participation on the AMS website. AMS will announce the total amount of funding available for each fiscal year and will specify the format for submitting applications for new or continuing program participation. If, after its review and approval of the applications submitted, AMS determines that additional funds are available for the fiscal year, it will publicize further announcements and invitations on its website.

Section 1431 (j) of the amended statute specifies that program funds are to remain available until expended. Under § 1146.202 of the rule, if reimbursement monies remain after all fiscal year reimbursement claims have been approved and distributed, the remaining monies will remain available to fund reimbursement claims in subsequent fiscal years.

The amended statute prohibits the sale of eligible milk products donated under the MDRP back into commercial markets and specifies that eligible distributors who violate that prohibition will not be eligible for future participation in the program. *See* Sec. 1431(g). Section 1146.204 of the rule implements the statutory prohibition and penalty for violation.

Section 1431(i) of the amended statute directs the Secretary to conduct appropriate reviews or audits to ensure the integrity of the MDRP. Section 1431(d)(2)(B) of the amended statute further authorizes the Secretary to verify the accuracy of documentation submitted with claims for reimbursement through spot checks and audits. Section 1146.206 of the rule provides

that AMS will verify that the donated milk for which reimbursement is being sought was pooled on an FMMO. The section further provides for the review, audit, and spot checks of information submitted.

As mentioned in the above discussions, § 1146.208 of the rule requires AMS to maintain confidentiality regarding information it collects to administer the program, and to use the information only for program purposes.

Finally, § 1146.210 of the rule specifies that milk products sold or donated under any other USDA commodity purchase or donation program are not eligible for reimbursement under the MDRP. From time to time, USDA may purchase fluid milk products for use in nutrition assistance programs or other uses, but vendors are compensated for those purchases through funding under those program provisions. One of the main purposes of the MDRP is to reduce food waste by encouraging the donation of additional milk to similar outlets. Thus, eligible dairy organizations who have received compensation for milk purchases under other USDA programs may not receive reimbursements for the same milk under the MDRP.

Paperwork Reduction Act

Section 1601(c)(2)(B) of the 2014 Farm Bill provides that the administration of the Dairy Product Donation Program shall be made without regard to the Paperwork Reduction Act (PRA), 44 U.S.C. Chapter 35. Section 1701 of the 2018 Farm Bill extends that Congressional direction to the establishment of the MDRP replacing the Dairy Product Donation Program. Thus, any information collection conducted for the MDRP is not subject to the PRA.

Implementation of this program will place information collection requirements on participating entities. AMS estimates twenty partnerships will be involved in the program during each fiscal year. Each participating partnership will be required to submit a Milk Donation and

Reimbursement Plan. Claims will be processed quarterly, thus participating partnerships can submit four Reimbursement Claim Forms per year. AMS estimates it will take participating partnerships 2 hours per year to complete a Milk Donation and Reimbursement Plan Form, and 6 hours per year to complete the Reimbursement Claim Form (1.5 hours each reporting quarter). Assuming the reporting burden will be completed by an administrative assistant employee, at an hourly salary rate of \$20, AMS estimates an annual reporting cost of \$160 per participating partnership, for a total annual program reporting cost of \$3,200 (assuming 20 participating partnerships).

E-Government Act

USDA is committed to complying with the E-Government Act (44 U.S.C. 3601, et seq.) by promoting 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. The application and reimbursements can be filed through www.ams.usda.gov/mdrp.

Executive Orders 12866 and 13771

AMS is issuing this rule in conformance with Executive Order 12866 – Regulatory Planning and Review, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity.

AMS considered alternative methods for allocating available funds under the program, including whether to allocate reimbursements equally across all the geographic areas of the United States covered by FMMOs or to target specific regions in need of milk donations. Ultimately AMS determined that because the primary purpose of the program is to reduce waste

associated with the disposition of surplus milk, the industry would be best served by allowing those who are more likely to have surplus milk and who are in a position to make donations to apply for the program without consideration of geographic location.

This rule has been designated a significant regulatory action under Executive Order 12866. This rule is not expected to have any quantified cost or benefits, rather the rule is expected to result in transfers consistent with the following table:

Table 1: Accounting Statement

	Primary Estimate	Year Dollar	Discount Rate	Period Covered
Benefits –				
Annualized Monetized (\$millions/year)	0	2019	7%	FY 2019-2023
	0	2019	3%	
Costs –				
Annualized Monetized (\$millions/year)	0	2019	7%	FY 2019-2023
	0	2019	3%	
Transfers– From the Federal Government to an eligible partnership				
Annualized Monetized (\$millions/year)	\$6.33	2019	7%	FY 2019-2023
	\$6.02	2019	3%	

As the program is voluntary, eligible partnerships are expected to only participate if their individual circumstances deem it beneficial. The transfers will be reimbursements in the form of Federal payments to program participants to help offset costs associated with eligible milk donations.

This rule is not subject to the requirements of EO 13771 because this rule results in no more than *de minimis* costs.

AMS does not anticipate this program will impact milk prices. Milk donated to non-profit organizations to feed needy people is already priced under the FMMO system. Implementation of this program will not change FMMO milk prices as it relates to donated milk. Furthermore, this program is expected to have a negligible impact on retail milk sales. Typically, needy populations that receive nutrition assistance from non-profit organizations do not buy milk at retail outlets. Consequently, fluid milk donations through this program are not expected to become a substitution for retail milk sales.

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule as defined by 5 U.S.C. 804(2).

Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601, et seq.), AMS considered the economic impact of the action on small entities. Accordingly, AMS has prepared this final Regulatory Flexibility Analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Small dairy farm businesses have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those businesses having annual gross receipts of less than \$750,000. The SBA's definition of small agricultural service firms, which includes handlers that are regulated under FMMOs, varies depending on the product manufactured. Small fluid beverage milk product manufacturers are defined as having 1,000 or fewer employees.

The milk of 31,435 U.S. dairy farms was pooled on an FMMO for the month of December 2018. AMS estimates that 28,920 dairy farms, or 92 percent, would be considered

small businesses. Dairy farmers of all sizes whose milk is pooled on an FMMO may benefit from the program because it will encourage donations of milk which will be pooled on an FMMO at its Class I value.

During December 2018 there were 233 regulated fluid milk processing plants (distributing plants) pooling Class I milk on an FMMO. AMS estimates 18 percent were operated by dairy-farmer cooperatives, while the remaining were independently owned. AMS assumes that fluid milk processing plants, whether cooperative or independently owned, are the entities most likely to qualify as eligible dairy organizations under the MDRP, as they are regulated and typically have FMMO pool obligations. AMS estimates 120 different entities operated the 233 fluid milk processing plants pooling milk in December 2018. AMS believes 120 to be the universe of fluid milk processing plants eligible to participate in the MDRP. Of the 120, 63 percent would be considered small businesses, based on their numbers of employees.

Participating in the MDRP will not unduly or disproportionately burden small fluid milk processing plants. All entities, regardless of size, can apply for the program if they incur qualified expenses as defined by program provisions. Program provisions are administered without regard for business size. Small fluid milk processing plants not accounting to an FMMO pool have no obligations that would qualify as reimbursable expenses under the MDRP and are not eligible to participate.

The definition of an eligible distributor is a public or non-profit organization that distributes donated milk. AMS was unable to obtain reliable data regarding the size of public or private non-profit organizations distributing food for nutrition assistance. Therefore, the business sizes of eligible distributors could not be estimated. Eligible distributors, regardless of size, can voluntarily participate in the MDRP if they are able to form a partnership with an

eligible dairy organization. The voluntary nature of the program allows any eligible distributor to stop participating if they find the program causes an undue or disproportionate burden.

AMS has determined establishment of this program will not have a significant economic impact on a substantial number of small entities. Program provisions will be applied uniformly to both large and small businesses and are not expected to unduly or disproportionately burden small entities.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on: (1) Policies that have tribal implications, including regulations, legislative comments, or proposed legislation; and (2) other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Office of Tribal Relations (OTR) has reviewed this rule and determined that consultation is not required at this time. If a tribe requests consultation AMS will work with the OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

Executive Order 12988

This rule has been reviewed under Executive Order 12988 – Civil Justice Reform. This final rule may have retroactive effect because milk donations made during fiscal year 2019 prior to the effective date of the rule may be eligible for reimbursement if the eligible partnership's

fiscal year 2019 Plan is approved for reimbursements and if the partnership meets all other program requirements. Fiscal year 2019 extends from October 1, 2018, to September 30, 2019. Milk donations made prior to October 1, 2018, are not eligible for reimbursement under the program. There are no administrative procedures that must be exhausted prior to judicial challenges to the provisions of this rule.

Effective Date

The APA requires the publication of a substantive rule 30 days before its effective date, unless the rule grants or recognizes an exemption or relieves a restriction (5 U.S.C. 553(d)(1)), or the agency finds good cause for excepting the rule from the 30-day notice requirement (5 U.S.C. 553(d)(3).) AMS finds that it is unnecessary and contrary to the public interest to postpone the effective date of this rule for 30 days after publication in the FEDERAL REGISTER. The Congressional mandate to establish the program specifies funding for the 2019 fiscal year, which began October 1, 2018. To take full advantage of the program, participants will need as much time as possible to submit Plans and receive approval from AMS. Furthermore, participation in the program is intended to reduce food waste by offering milk handlers alternative outlets for excess milk, which is produced primarily in the spring and summer months due to the normal seasonal variations in milk production. It would be contrary to the public interest to delay implementation of the MDRP, thereby potentially delaying donations of milk to food assistance programs and prolonging food waste. Moreover, postponing the effective date of the final rule for 30 days is unnecessary to allow for adjustment of behavior because participation in the program is voluntary. Therefore, good cause exists for making this rule effective 10 days after publication in the FEDERAL REGISTER.

List of Subjects in 7 CFR part 1146

Milk, Donations, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Subtitle B Chapter X is amended by adding part 1146 to read as follows:

PART 1146 – MILK DONATION REIMBURSEMENT PROGRAM

Subpart A – General Provisions

Sec.

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Authority: Sec. 1431, Pub. L. 113-79, 128 Stat. 695, as amended.

Subpart A – General Provisions

1146.1 Definitions.

AMS means the Agricultural Marketing Service of the United States Department of Agriculture.

Eligible dairy organization means a dairy farmer cooperative or a dairy processor that

(1) Is regulated under a Federal milk marketing order (FMMO);

- (2) Accounts to the FMMO marketwide pool; and
- (3) Incurs qualified expenses described in § 1146.108.

Eligible distributor means a public or private non-profit organization that distributes donated eligible milk.

Eligible milk means Class I fluid milk products produced and processed in the United States that meet the specifications referenced in § 1146.3.

Eligible partnership means a partnership between an eligible dairy organization and an eligible distributor.

Fiscal year means the twelve-month period beginning October 1 of any year and ending September 30 of the following year.

Participating partnership means an eligible partnership for which AMS has approved a Milk Donation and Distribution Plan (Plan) for eligible milk under § 1146.104.

Program means the Milk Donation Reimbursement Program established in this part.

Secretary means the Secretary of the United States Department of Agriculture or a representative authorized to act in the Secretary's stead.

1146.3 Commodity specifications.

(a) Eligible milk donations must meet the commodity specifications pursuant to (b) in effect on the date the milk products are shipped from the plant.

(b) AMS shall maintain on its website current commodity specifications for fluid milk products eligible for donation and reimbursement under the Milk Donation Reimbursement Program.

Subpart B – Program Participation

1146.100 Program eligibility.

An eligible dairy organization must be a member of a participating partnership pursuant to § 1146.1 to be eligible to receive reimbursements for qualified expenses related to voluntary fluid milk donations, subject to the requirements and limitations specified in §§ 1146.102 and 1146.104.

1146.102 Milk donation and distribution plans.

New and continuing program participants must submit completed Milk Donation and Distribution Plans to AMS in the form and manner established by AMS prior to the published deadline to be eligible for program consideration. The completed Milk Donation and Distribution Plans must –

(a) Include the physical location(s) of the eligible dairy organization’s processing plant(s) and the eligible distributor’s distribution site(s);

(b) Include an affirmation signed by both eligible partners regarding the partnership’s ability to supply, transport, store, and distribute donated milk products consistent with the commodity specifications under § 1146.3;

(c) Include an estimate of the quantity of eligible milk that the eligible dairy organization plans to donate each year, based on –

(1) Preplanned donations and

(2) Contingency plans to address unanticipated donations; and

(d) Describe the rate at which the eligible dairy organization will be reimbursed, not to exceed 100 percent of qualified expenses pursuant to § 1146.108.

1146.104 Review and approval.

(a) *Program application and review.* Within 45 days of the announced application deadline, AMS will review all timely submitted applications and notify applicants regarding

approval or disapproval for program participation during the applicable fiscal year. AMS's review will include the following considerations:

(1) Total annual funds available for program administration, including an appropriate reserve to cover costs related to increases in milk prices and emergencies including, but not limited to, natural disasters;

(2) The feasibility of the Milk Donation and Distribution Plan;

(3) The extent to which the Milk Donation and Distribution Plan –

(i) Promotes the donation of eligible milk,

(ii) Provides nutrition assistance to individuals in low-income groups, and

(iii) Reduces food waste; and

(4) The amount of funding and in-kind contributions the eligible dairy organization plans to provide to the eligible distributor in addition to the donations for which it will seek reimbursements.

(b) *Continued program participation.* Within 45 days of the announced application deadline, AMS will review and notify applicants regarding approval or disapproval of all timely submitted requests for continued program participation. AMS's review of requests for continued program participation will be based on consideration of the factors in paragraphs (a) and (b)(1) through (3) of this section:

(1) Eligible partnerships requesting continued program participation for a subsequent fiscal year can include information about the extent to which they provided funding and in-kind contributions in addition to eligible milk donations for which they were reimbursed through the program for the previous fiscal year.

(2) If there are no changes to the eligible partnership's approved Milk Donation and Distribution Plan from the previous fiscal year, the eligible partnership must request that AMS consider the partnership's previously approved Plan and provide the additional information described in paragraph (b)(1) of this section, if applicable.

(3) If there are changes to the eligible partnership's approved Milk Donation and Distribution Plan from the previous fiscal year, the eligible partnership must submit a new Plan as described in paragraph (a) and provide the additional information described in paragraph (b)(1) of this section, if applicable.

(c) *Plan approval.* Subject to the provisions in paragraph (a) of this section, AMS will determine whether to approve new and continuing Milk Donation and Distribution Plans for all or a proportion of each Plan's proposed donations and reimbursements. For each approved Plan, AMS will determine:

(1) A reimbursement rate applicable to each claim for reimbursement during the fiscal year, and

(2) A total dollar amount available for reimbursement during the fiscal year.

(d) *Adjustments.* AMS will review the activity of approved Milk Donation and Distribution Plans during the fiscal year to determine whether adjustments should be made to the reimbursement amounts approved under paragraph (c) of this section.

(1) Determinations about adjustments will be based on –

(i) The participating partnership's performance,

(ii) Availability of program funds, and

(iii) Demand for eligible milk donations.

(2) AMS will provide 30 days' notice to participating partnerships prior to adjusting reimbursement amounts in their respective approved Milk Donation and Distribution Plans.

(e) *Request for increase.* Eligible partnerships with approved Milk Donation and Distribution Plans during any fiscal year may request an increase in the amount of reimbursement approved under paragraph (c) of this section based on changes in conditions.

(1) Requests for an increase must be submitted to AMS in the manner and form established by AMS, and must –

(i) Describe the change in conditions that would warrant an increase in reimbursement,

(ii) Indicate whether the requested increase is intended to be a long-term revision to the eligible partnership's approved Milk Donation and Distribution Plan or a short-term increase to respond to temporary conditions, and

(iii) Specify the amount of increased reimbursement requested.

(2) Within 30 days of receipt, AMS will review the request for an increase and will notify the requester regarding approval or disapproval of the request. AMS's determination about whether such an increase is feasible will be based on its evaluation of the factors described in paragraph (e)(1) of this section and the availability of funds.

(3) Based on the change in conditions identified by the requester, AMS will determine whether to provide interim approval of an increase requested under paragraph (e)(1) of this section and an incremental increase to the amount of reimbursement approved under paragraph (c) of this section prior to making a final determination regarding approval of the requested increase.

1146.106 Reimbursement claims.

(a) In order for the eligible dairy organization partner to receive reimbursements for qualified expenses pursuant to § 1146.108, the participating partnership must submit a report and appropriate supporting documentation to AMS.

(1) *For each month* of the fiscal year pertaining to an approved Milk Donation and Distribution Plan (including the months prior to AMS's review and approval of the Plan), the report must include:

- (i) The amount of eligible milk donated to the eligible distributor;
- (ii) The location of the plant where the donated milk was processed;
- (iii) The date the donated milk was shipped from the plant where the milk was processed;
- (iv) The date the donated milk was received by the eligible distributor; and
- (v) The applicable announced Federal milk marketing order prices for the month the milk was pooled:

- (A) The Class I price at the plant location where the milk was processed; and
- (B) The lowest classified price (either Class III or Class IV).

(2) Appropriate documentation to support the report required in paragraph (a)(1) of this section may include, but is not limited to, copies of processing records, shipping records, bills of lading, warehouse receipts, distribution records, or other documents that demonstrate the reported amount of eligible milk was processed, donated, and distributed in accordance to the approved Milk Donation and Distribution Plan and as reported in the eligible dairy organization's report.

(b) Reimbursement requests may be submitted to AMS at any time during the fiscal year and for up to 90 days after the close of the fiscal year.

(c) AMS will review and process reimbursement requests on a quarterly basis, including those submitted by the last day of the month following the end of each quarter of the fiscal year.

(d) Incomplete reimbursement requests will be returned to the submitter for revision or completion and resubmission as necessary.

1146.108 Reimbursement calculation.

(a) For each reimbursement claim submitted by a participating partnership, the amount of reimbursement under § 1146.106 shall be the product of:

(1) The quantity of eligible milk donated by the eligible dairy organization to the eligible distributor member of the participating partnership;

(2) The rate described in the approved Milk Donation and Distribution Plan under § 1146.102(d); and

(3) The difference between the FMMO Class I price at the plant location and the lowest classified price (either Class III or Class IV), for the month in which the donation was pooled on a Federal Milk Marketing Order.

(b) Expenses eligible for reimbursement under § 1146.106 shall not exceed the value that an eligible dairy organization incurred by accounting to the Federal milk marketing order pool at the difference between the announced Class I milk price at the location of the plant where the milk was processed and the lower of the Class III or Class IV milk price for the applicable month.

(c) Claim reimbursements are subject to the limitations specified in paragraph (b) of this section.

(d) Total plan reimbursements are subject to the limitations specified in § 1146.104(c)(2).

Subpart C – Administrative Provisions

1146.200 Opportunities to participate.

(a) AMS will announce opportunities to participate in the Milk Donation Reimbursement Program and the amount of program funding available for each fiscal year on the AMS website. The announcements will include invitations for interested parties to submit new or revised Milk Donation and Distribution Plans and will specify the manner and form in which program applications should be submitted.

(b) If, after making approval determinations for the fiscal year about each submitted program application, AMS determines that additional reimbursement funds are available, AMS will publish an announcement to that effect and invite further requests for Plan approvals pursuant to § 1146.104(a) through (c) or for increases in reimbursement amounts pursuant § 1146.104(e).

1146.202 Rollover of fiscal year funds.

If reimbursement monies remain after all fiscal year reimbursement claims have been approved and distributed, the remaining monies will be available to fund reimbursement claims in subsequent fiscal years.

1146.204 Prohibition on resale of products.

(a) *Prohibition in general.* An eligible distributor that receives eligible milk products donated under the Milk Donation Reimbursement Program may not sell the donated milk products back into commercial markets.

(b) *Prohibition on future participation.* An eligible distributor that AMS determines has violated the prohibition in paragraph (a) of this section shall not be eligible for any future participation in the Milk Donation Reimbursement Program.

1146.206 Enforcement.

AMS will verify the donated milk for which reimbursement is sought was pooled on a FMMO. AMS will also conduct spot checks, reviews, and audits of the reports and documentation submitted pursuant to § 1146.106(a) to verify their accuracy and to ensure the integrity of the Milk Donation Reimbursement Program.

1146.208 Confidentiality.

AMS will collect only that information deemed necessary to administer the Milk Donation Reimbursement Program and will use the information only for that purpose. AMS will keep all proprietary business information collected under the program confidential.

1146.210 Milk for other programs.

Milk sold or donated under other commodity or food assistance programs administered by the United States Department of Agriculture is not eligible for reimbursement under the Milk Donation Reimbursement Program in this part.

Dated: August 29, 2019.

Bruce Summers, Administrator,
Agricultural Marketing Service.

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