



Agricultural Marketing Service

7 CFR Parts 1146 and 1147

[Doc. No. AMS-DA-21-0013]

RIN 0581-AE00

Establishment of a Dairy Donation Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule establishes the Dairy Donation Program as required by the Consolidated Appropriations Act of 2021. Under the program, eligible dairy organizations that account to a Federal milk marketing order and incur a qualified expense related to certain dairy product donations may apply for and receive reimbursements for those donations. The program is intended to facilitate donation of eligible dairy products and prevent and minimize food waste.

DATES:

Effective Date: This interim final rule is effective [INSERT DATE 1 DAY AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] and expires September 1, 2023, unless extended by notification in the **Federal Register**.

Public Comment Date: Public comments on this interim final rule must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Information Collection Comment Date: Pursuant to the Paperwork Reduction Act, comments on the information collection burden must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments can be submitted online at *www.regulations.gov*. Comments received will be posted without change, including any personally identifying information provided. Comments will be made available via the internet at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Erin Taylor, Director, Order Formulation and Enforcement, AMS Dairy Program, USDA; 1400 Independence Avenue SW, Room 2973-S, Washington, DC 20250; telephone: (202) 720-4392; email: DDP@usda.gov; web address: *www.ams.usda.gov/ddp*.

SUPPLEMENTARY INFORMATION:

Section 762 of the Consolidated Appropriations Act of 2021 (CAA) (Public Law 116-260) authorizes the Secretary of Agriculture (Secretary) to establish a program to reimburse dairy organizations for donated dairy products to non-profit organizations for distribution to recipient individuals and families. The Secretary delegated authority to establish and administer this program to the Agricultural Marketing Service (AMS). This rule outlines the provisions of the new Dairy Donation Program (DDP) codified at 7 CFR part 1147. Program provisions are intended to encourage the donation of dairy products and to prevent and minimize food waste. The DDP is an additional dairy donation program that overlays on existing USDA dairy milk donation activities such as the Milk Donation Reimbursement Program (MDRP). The MDRP was established as part of the 2018 Farm Bill to facilitate the donation of fluid milk products and avoid food waste. The program was funded for \$9 million in fiscal year 2019, and \$5 million per fiscal year thereafter. DDP and MDRP are separate from USDA purchase programs. The donation program provides for reimbursement of certain costs for donations made between two private entities. USDA's TEFAP and Section 32 are done through a bid process where USDA purchases the product and arranges for delivery to the distribution point.

This rule also amends provisions of the MDRP (codified at 7 CFR part 1146), where appropriate, to gain administrative efficiencies and lessen the burden for entities

participating in the two programs. DDP and MDRP are separate and distinct from the USDA safety net program (Dairy Margin Coverage), indemnity and disaster assistance programs, risk management tools through the public-private partnership of the Federal Crop Insurance Program, or USDA purchases of commodities, which may include dairy products depending on the market conditions and demand from school lunch or nutrition programs.

Background

In 2020, the COVID-19 pandemic disrupted dairy supply chains and displaced significant volumes of milk normally used in food service channels. This led to milk being dumped or fed to animals across the United States; AMS estimates that the volume of milk dumped due to pandemic-related supply chain issues was almost triple what is typically observed during normal market conditions.¹ At the same time, amidst surging unemployment and economic hardship nationwide, an increasing number of individuals have been in need of nutrient-dense foods such as dairy products. Throughout 2020 and 2021, milk and dairy products have been in food donations authorized under the Coronavirus Aid, Relief, and Economic Security Act (CARES) and through the Commodity Credit Corporation (CCC). In December 2020, Congress also authorized an additional \$400 million until expended to establish the DDP, designed to encourage the timely and efficient distribution of dairy products to families and individuals while reducing food waste.

While the DDP is intended to assist in balancing the supply chain during the pandemic recovery, it also will provide the benefit of creating an incentive to donate dairy products during the normal spring flush of milk production. During normal marketing years (pre-pandemic), daily milk production in the spring averaged 6 to 7

¹ USDA Federal Milk Marketing Order Statistics, Other Use Volumes, March and April, 2015 through 2021.

percent more than in the lower production months of the fall.² Economic Research Service (ERS) 2019 food security data estimates that 10.5 percent of U.S. households were food insecure at some time during 2019.³ ERS 2020 data has not been released, but it is reasonable to assume food insecurity was higher in 2020 because of high unemployment and nationwide economic hardship. The United States remains in the midst of the recovery, and even when employment returns to more normal levels there will continue to be food insecurity. The persistent need for nutrient-dense foods such as dairy products can be met, in part, through donations encouraged by the DDP.

As detailed later in this rule, the normal rulemaking process would be impracticable, unnecessary, and contrary to the public interest in light of the importance of distributing donated dairy products as quickly as possible to individuals and families. Therefore, AMS finds that there is good cause to forgo the notice and comment requirements in the Administrative Procedure Act (APA) for this rulemaking.

The following paragraphs give a general overview of how the DDP will operate. Detailed explanations of program provisions can be found later in the *Program Provisions* section.

Who is eligible to participate?

Program eligibility is open to eligible dairy organizations (EDOs), defined as dairy farmers (either individually or as part of a cooperative) or dairy processors that meet the following conditions: 1) account to a Federal milk marketing order (FMMO) marketwide pool; and 2) incur a qualified expense. Although the definition of EDO includes individual dairy farmers, many such farmers might not meet the other specified conditions to qualify as EDOs. For example, many such farmers would not incur

² USDA, National Agricultural Statistics Service, Monthly Milk Production data, 2012 through 2020.

³ Trends in U.S. Food Security, 2019; Update for September 9, 2020.

<https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/interactive-charts-and-highlights/#childtrends>, accessed August 23, 2021.

qualified expenses because they do not donate eligible dairy products, since they do not have the infrastructure to process raw milk into such products. Those individual farmers who do meet the required conditions, however, would qualify as EDOs under statutes and this rule for both the DDP and MDRP.

As explained below, the DDP and MDRP refer to the same statutory EDO definition; therefore, this rule amends the MDRP to reflect the statutory interpretation explained below.

1) Account to a FMMO marketwide pool

The DDP authorizing statute⁴ adopts the EDO definition contained in the statute establishing the MDRP⁵. When AMS issued the final rule for the MDRP, it interpreted the statutory language, “account to a FMMO marketwide pool”, to apply to entities that are regulated by, and therefore file reports with, a FMMO. Participation in the MDRP has been limited, partly due to the requirement to be regulated.

The COVID-19 pandemic and its impacts affected the entire United States. Supply chain disruptions described earlier were not limited to only those participating in a FMMO. Consequently, Congress authorized the DPP through a broad relief package. In reviewing Congress’s intent to encourage dairy product donation across the country, AMS has determined the interpretation of “account to” requiring regulation by a FMMO is too narrow; instead, an EDO could “account to” a FMMO marketwide pool by filing a report with a FMMO office. Consequently, this rule revises the definition of “eligible dairy organization” for MDRP by removing the requirement that the EDO be regulated under a FMMO. It also adopts the same definition for the DDP.

⁴ Sec. 762(a)(1) of the Consolidated Appropriations Act of 2021.

⁵ Sec. 1431 of the Agricultural Act of 2014 (7 U.S.C. 9071(a)). Implementing regulations are codified at 7 CFR part 1147.

The report the EDO files to “account to” a FMMO marketwide pool will list the fresh fluid products and/or bulk dairy commodity products purchased and how they were utilized to produce donated eligible dairy products. EDOs can contact their local FMMO office or access the DDP website to determine the applicable FMMO office where the report should be filed. Since EDOs may not know they will be donating product during the production month, reports may be filed retroactively. Filing of this report for the purpose of participating in the DDP will not cause the EDO to become regulated by the FMMO.

2) Incur a qualified expense

The statute further specifies that an EDO must incur a qualified expense. Since only Class I fluid products are donated through the MDRP and most Class I processors are regulated by a FMMO, incurring a qualified expense in the MDRP is currently interpreted as paying minimum classified values into a FMMO pool because that is the requirement for processors regulated by a FMMO. As explained above, an EDO no longer needs to be regulated under a FMMO. This rule adds a definition of “qualified expense” to MDRP regulations to specify that a qualified expense is not tied to the FMMO regulatory requirement of paying minimum classified values. The same definition also applies to the DDP.

EDOs incur a qualified expense by either purchasing fresh fluid milk product (raw milk, skim milk, cream, or concentrated fluid milk products) for processing into an eligible dairy product or purchasing bulk dairy commodity product for further processing into an eligible dairy product.

Dairy processors are often associated with buying fresh fluid milk products for processing into dairy products. The structure of the dairy industry is such that processors are also purchasing bulk dairy commodity products for further processing into retail packaging. For example, a processor buys 40-pound cheese blocks to further process and

package into 8-ounce blocks or bags of shredded cheese typically preferred by consumers and eligible distributors alike. The DDP is intended to facilitate these types of product donations. Therefore, in addition to processors who buy fresh fluid milk for processing, the DDP will allow processors who purchase and further process bulk commodities for donation to qualify as an EDO. To be considered an EDO, a secondary processor will also need to account to a FMMO marketwide pool as described earlier.

Once these two above conditions — accounting to a FMMO and incurring a qualified expense — are met, EDOs participate in the program by forming partnerships with eligible distributors and then submitting a Dairy Donation and Distribution Plan (Plan) to AMS for approval. If an EDO or eligible distributor is looking for a partner, they may contact DDP Office for assistance.

Because regulations now include a definition of “qualified expense”, the definition of “eligible dairy organization” is further revised to cite that definition when referring to the requirement that an EDO must incur a qualified expense.

What will be reimbursed?

Upon Plan approval, EDOs can submit a Reimbursement Claim Form (Claim Form) to receive reimbursement for donations made. DDP will reimburse EDOs for the all or part of the following: 1) input costs — fresh fluid milk or bulk dairy commodity product milk equivalent used in the eligible dairy product; 2) manufacturing costs; and 3) transportation costs.

3) Input costs—fresh fluid milk or bulk dairy commodity product milk equivalent.

In the FMMO system, milk is priced based on its end use. FMMO classifications are generally: Class I — traditionally the highest class price — for beverage fluid milk products such as whole, skim, nonfat, and flavored milks; Class II for soft products such as yogurt, ice cream, and packaged fluid cream; Class III for spreadable and hard cheeses; and Class IV for butter and milk products in dried form. Announced monthly,

FMMO-minimum classified prices reflect surveyed end-product wholesale market prices. Under a FMMO, regulated processors are required to pay at least minimum classified values for how they use their milk.

For processors purchasing and processing fresh fluid milk products (raw milk, skim milk, cream, or concentrated fluid products), the DDP will reimburse for the FMMO-minimum classified value applicable on the date of production for fresh fluid milk products used to make the donated eligible dairy product. FMMO prices are a good approximation of what the processor paid for the fresh fluid milk products because they represent observed market values paid for product at the time of purchase. The DDP will not reimburse for powders and other dry dairy products used as an ingredient in eligible dairy products (for example, powder used to fortify cheeses or ice cream).

Reimbursement is not extended to these ingredients because the DDP is designed to encourage the use of excess fresh fluid milk for donation, rather than being dumped. Dry milk powders in retail packaging, such as 10-ounce containers of nonfat dry milk, which are made directly from fresh fluid milk, are considered eligible dairy products under this program as it is likely surplus fresh fluid milk was manufactured into dry milk powder as opposed to being dumped.

Since FMMO-minimum classified prices are on a hundredweight basis, the EDO will report its donation in the quantity and size of the donated product, which will be converted to hundredweights with a yield factor (how much product can be made from 100 pounds of milk). Applicable announced minimum class skim and butterfat prices will be used in determining the input cost of the donated dairy product. The EDO will have the ability to provide its actual product yield factor or the EDO can use a standard yield factor. Standard yield factors will be posted on the Dairy Donation Program website.

Processors buying bulk dairy commodity products for further processing and donation, as described earlier, will be reimbursed at the classified use value applicable for

the month the eligible dairy product was processed in the consumer-type package. The reimbursed value will represent the milk-equivalent market price of the bulk dairy product at the time of conversion into an eligible dairy product.

4) Manufacturing costs

Processors incur expenses beyond input costs to make dairy products. To encourage dairy product donations, the DDP will reimburse for some of the costs to convert fresh fluid milk product into an eligible dairy product.

Manufacturing costs will be reimbursed at the make (manufacturing) allowance levels in the FMMO system, which are generally accepted by the industry as representative costs of manufacturing dairy products from raw milk. For Class I and II, the Class IV make allowance contained in the Class IV price formula will be applied. AMS lacks data on manufacturing costs for Class I and II products and therefore selects the lower of the two FMMO make allowances to ensure processors are not reimbursed for more than their actual manufacturing costs. As Class I and II products require different processing, the actual manufacturing costs could be higher than the Class IV manufacturing allowance. This rule seeks public comment and supporting data related to actual manufacturing costs for Class I and II products. For Class III and IV products, the manufacturing allowances in the respective class price formulas will be applied.

Currently, the Class III and Class IV FMMO makes allowances are \$3.17 and \$2.16 per hundredweight, respectively, for milk containing 3.5 percent butterfat. If the FMMO make allowances are updated in the future, the DDP will be automatically adjusted to reflect these changes.

5) Transportation costs

Transportation costs from the processor to distribution outlet are often cost prohibitive. Absent reimbursement, processors may not be willing to incur additional transportation costs and feeding organizations may lack the funding to cover these costs

to facilitate the donation. DDP aims to facilitate timely donations and reduce food waste. Therefore, this program will cover part of the transportation costs from the EDO to the eligible distributor. This may be especially beneficial to rural communities whose donation sites are often far from plants serving them and who may not receive assistance from other government feeding programs with distribution points closer to urban centers.

As the reimbursement value will be paid to the EDO, the DDP will only reimburse for transportation if the EDO incurred the expense. If donated eligible dairy products are picked up from the plant by the eligible distributor, no transportation reimbursement will be paid. The transportation cost reimbursement rate is defined later in this rule.

6) Total reimbursement value

Section 762(d)(2)(A) of the CAA specifies the total reimbursement—the sum of input, manufacturing, and transportation costs—must be set neither too high (such that it would “interfere with the commercial marketing of milk or dairy products”) nor too low (such that it would fail to “be sufficient to avoid food waste”). The statute further requires total reimbursement to be between the highest and lowest of the classified milk values. To ensure costs can be sufficiently covered for most donations, total reimbursement payment, on a per hundredweight basis, will be capped at the Class I value for the highest FMMO differential zone (Dade County, Florida).. Capping at the higher FMMO zone will allow for Class I handlers to obtain some reimbursement for manufacturing and transportation costs.

Section 762(d)(2)(B)(iv) of the CAA further allows the Secretary to maintain traditional price relationships – Class I being the highest, followed in sequence by II, III and IV – in setting the reimbursement rate. In 2020, dairy markets experienced pronounced class price inversions, where the Class III price was significantly higher than the Class I price in many areas of the country. However, the Class III price has been

above the Class I price in Dade County, Florida only three times since the current pricing system was adopted on January 1, 2000.⁶ Such extreme inversions are not anticipated in the foreseeable future, as both short-term COVID-19 -related disruptions and long-term production capacity issues are beginning to ease. While the DDP does not directly determine classified prices and price relationships, the program rules should not exacerbate price inversions if they occur. Therefore, in times of price inversion, where the Class I price is not the highest class price, total reimbursements will continue to be capped at the Class I price for Dade County, Florida.

When do plans and reimbursement claims need to be submitted?

Entities must submit Plan and Eligible Distributor Certification Forms (Certification Forms) to AMS for approval before they can submit Claim Forms for reimbursement. AMS will approve or disapprove Certification Forms within 15 business days of receipt. Reimbursements claims, along with supporting documentation, can be filed any time after the Plan is approved and the donation is made. AMS will use the supporting documentation to verify program requirements were met. Plans only need to be submitted once for approval. The DDP does not require annual Plan renewal.

How will AMS handle both the DDP and MDRP?

Although program funds for the DDP and MDRP are statutorily prohibited from being consolidated, the two programs will operate as one from a stakeholder standpoint. EDOs making Class I fluid milk product donations—which are covered by both programs—will be reimbursed through MDRP funds at the difference between the Class I and lowest classified price and receive a supplemental reimbursement of the lowest classified price plus the manufacturing and transportation cost reimbursement through DDP funds. Total combined reimbursement will be capped at the Class I price in Dade County, Florida.

⁶ USDA, Federal Milk Marketing Order Statistics, Final Class and Component Prices by Order.

EDOs already enrolled in MDRP will automatically be enrolled in the DDP and qualify to receive supplementary payments for fluid milk products donated under their currently approved MDRP Plans. To lessen the burden on applicants and gain administrative efficiencies, new Plan and Claim Forms will be used for both the DDP and MDRP. AMS will ensure program funds are paid according to the provisions of both programs. Finally, this interim final rule simultaneously amends the MDRP regulations, where applicable, reflecting the new Plan, Certification Form, Report of Receipts and Utilization, and Claim Forms that will be used to administer the program.

Will there be a retroactive period for reimbursement?

Section 762(h) of the CAA requires supplementary payments be made to EDOs participating in the MDRP for donations made on or after January 1, 2020. Since the statute allows for retroactive reimbursement to those participating in DDP, a retroactive date of January 1, 2020, also applies to the DDP to better streamline administration of the two programs. To ensure adequate availability of funds for donations made before enactment of the CAA, total program expenditures for eligible dairy product donations made from January 1, 2020 to December 27, 2020, will be limited to no more than \$50 million.⁷ An EDO seeking retroactive reimbursement must include in its Plan information on the volume of these donations from January 1, 2020, through December 27, 2020. A deadline for requesting retroactive reimbursement will be posted on the AMS webpage for DDP. If total reimbursement requests exceed \$50 million, reimbursements will be prorated.

Program Provisions

⁷ As indicated in the Economic Analysis, USDA expects the DDP to expend \$68 million annually. In determining funds available for this retroactive period, USDA is limiting expenditures to approximately 80 percent (\$50 million), consistent with other USDA COVID -19 recovery programs (7 CFR part 9 – Coronavirus Food Assistance Program).

The following details the DDP provisions and amendments to the MDRP, where applicable.

Definitions

The statute includes definitions for terms used. Section 1147.1 provides definitions of those terms as they are used in the new program. Key terms are “eligible dairy organization,” “eligible dairy product,” “eligible distributor,” “eligible partnership,” and “qualified expense.”

Eligible dairy organization. As explained in the *Background* section, section 762(a)(1) of the CAA adopts the same EDO definition contained in the statute establishing the MDRP. *See* Sec. 1431(a) and (b) of the Agricultural Act of 2014 (7 U.S.C. 9071(a)). The regulatory definition matches the statutory definition, which 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: 1) accounts to a FMMO marketwide pool; and 2) incurs qualified expenses. *See id.*

Eligible dairy product. Section 762(a)(2) of the CAA specifies that only dairy products primarily made from cow’s milk, including fluid milk, that are produced and processed in the United States are eligible for donation and reimbursement under the DDP. Accordingly, § 1147.1 defines “eligible dairy product” as a dairy product meeting the commodity specifications referenced in § 1147.3. Currently, other than cow’s milk, there is not a surplus of milk or any other form of milk being dumped at the farm. Given that the program is designed to prevent surplus milk from being dumped at the farm, it is the Secretary’s discretion to limit to cow’s milk.

Eligible distributor. Section 762(a)(3) of the CAA defines “eligible distributor” as “a public or private nonprofit organization that distributes donated eligible dairy products to recipient individuals and families.” Section 1147.1 likewise defines “eligible distributor” as a public or private non-profit feeding organization that distributes, or

coordinates the distribution of, donated eligible dairy products to recipient individuals and families. Eligible distributors such as food banks, shelters, kitchens, and other food distribution organizations would be eligible so long as they are a nonprofit entity. Under this new program, participating eligible distributors will fill out an Eligible Distributor Certification Form to verify their non-profit status and affirm they have appropriate facilities and processes for distributing donated dairy products to recipient individuals and families.

Eligible partnership. Section 762(c) of the CAA requires that an EDO and eligible distributor form a partnership to participate in the DDP. Each partnership is required to submit a Plan and a Certification Form, to AMS containing information about their respective roles. Requiring the parties to apply as a partnership ensures that all program provisions will be met and an agreed-upon structure will be in place when eligible dairy products are available for donation and distribution. Section 762(a)(4) of the CAA defines “eligible partnership” as “a partnership between an eligible dairy organization and an eligible distributor” and this rule adopts the same definition.

AMS recognizes some EDOs may have processing plants in multiple locations that may report to different FMMOs. Similarly, eligible distributors may have multiple distribution sites; for example, several food pantries are operated by one umbrella organization. Thus, under § 1147.102(a), the eligible partnership can submit one Plan to cover multiple plants and/or distribution points as long as only one EDO and one eligible distributor are represented. Individual EDOs and eligible distributors can also form other partnerships, but they are required to submit separate Plans for each partnership.

Qualified expense. The statute does not define “qualified expense,” but does specify that one needs to be incurred to be eligible for program participation. Section 1147.1 defines “qualified expense” as the cost incurred to purchase fresh fluid milk for processing into eligible dairy products or the cost incurred to purchase bulk dairy

commodity products for further processing into eligible dairy products. Qualified expense is different than the reimbursement rate, which is defined later in this rule.

Because defining “qualified expense” is fundamental to determining program eligibility and the MDRP and DDP reference the same “eligible dairy organization” statutory definition, the “qualified expense” definition is also added to the MDRP regulation.

Additional terms necessary for administration of the program are defined in § 1147.1. “Program” is defined as the Dairy Donation Program and “Secretary” is defined as the Secretary of the United States Department of Agriculture or a representative authorized to act in the Secretary’s stead.

Commodity Specifications

The DDP is intended to reimburse eligible dairy organizations for timely donations of eligible dairy products and minimize food waste. It is therefore reasonable for AMS to ensure that eligible dairy products donated under the DDP meet minimum food safety and quality standards and in package sizes desired by eligible distributors, consistent with the intent of the program to minimize food waste that might otherwise result. Section 1147.3 defines the commodity specifications that must be met. Eligible dairy organizations must comply with all applicable Federal, State, and local laws, executive orders, and rules and regulations related to its performance under this program.

In addition, to qualify under the program eligible dairy products must:

1. Be made primarily from cow’s (bovine) milk produced in the United States;
 2. Be packaged in consumer-sized packaging;
 3. Meet the applicable provisions for dairy products in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et. seq.), as amended. Grade ‘A’ dairy products shall meet the applicable provisions of the current edition of the Pasteurized Milk ordinance;
- and

4. Have a sell-by, best-by, or use-by date no sooner than 12 days from the date the eligible dairy product is delivered to the eligible distributor.

Program provisions specify donated dairy products must be in consumer-sized packaging. This provision should be interpreted by the eligible partnership as to whatever consumer-sized package format is agreeable to both entities. Examples of consumer-sized packaging include, but are not limited to, gallons of milk, 8-ounce blocks of cheese, single serve containers of yogurt, 1-pound packages of butter, or large bags of milk if the eligible distributor has the ability to dispense (i.e. a soup kitchen). When submitting Plans for approval, the EDO is required to list what types of products it will be donating. AMS will check that information against distributor process provided by the eligible distributor to ensure it has the ability to distribute that types of products to be donated.

Program Eligibility and Participation

Section 1147.100 provides that an eligible dairy organization must be a member of a partnership whose Plan has been approved by AMS to be eligible for reimbursements under the DDP.

Section 1147.102 outlines requirements for Plan submission in order to be considered for the program. Plans submitted to AMS for program approval must include a signed affirmation regarding the type of product to be donated and the EDO's ability to process and transport eligible dairy products consistent with the requirements in the commodity specifications under § 1147.3. Along with the Plan submission, eligible distributors are required to submit a signed Certification Form, which includes a description of the eligible distributor's distribution process, contact information, and a tax identification number to ensure compliance with program provisions. As specified in § 1147.208, 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 1147.104 specifies the process AMS will use to review program applications and determine whether to approve Plans submitted by eligible partnerships. Within 15 business days of application submission, AMS will review the Plan and Certification Form, determine whether to approve or disapprove, and notify the eligible partnership of the determination. Under § 1147.104(a)(1), 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, storage, and distribution of eligible dairy products until they are distributed. Under § 1147.104(a)(2), AMS will consider the extent to which the Plan would advance the statutory purposes of the DDP, namely, whether the Plan would facilitate the timely donation of eligible dairy products and prevent and minimize food waste. *See* Sec. 762(b) of the CAA.

Finally, section 762(c)(2)(B)(i) of the CAA specifies that priority review will be given to submitted Plans where an emergency or disaster was a substantial factor, including a declared or renewed public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247(d)) or a disaster designated by the Secretary. In reviewing a Plan, AMS will determine if an emergency or disaster was a substantial factor in the Plan's submission. In this case, "substantial factor" means that a supply and/or demand disruption caused by the emergency or disaster event is a main reason for the partnership submitting the Plan. For example, the COVID-19 public health emergency—which caused a significant decrease in school and restaurant dairy demand, leading to large volumes of displaced milk and many people in need of food assistance—could be considered a justification for priority review. If an emergency or disaster is deemed a substantial factor, AMS will prioritize review of that Plan to facilitate

donations and meet an immediate need. Section 1147.104(a)(3) incorporates those factors for Plan prioritization.

Once approved, Plans do not need to be resubmitted in subsequent fiscal years, unless changes are made. Eligible partnerships that received reimbursement from the MDRP will be automatically enrolled in the DDP to receive the supplemental reimbursement as defined in § 1147.109.

Reimbursement and Reimbursement Price

Section 762(d) of the statute requires the Secretary to reimburse EDOs with approved Plans. Section 1147.106(a) provides the process and describes the necessary information and documentation AMS will require to verify the EDO's donation and calculate its reimbursement. To receive reimbursement, the EDO must complete and submit a Reimbursement Claim Form (Claim Form) that includes: the type, volume, and manufactured date of the eligible dairy products donated; the entity type (processor or eligible distributor); the location(s) of the plant(s) that processed the eligible dairy product(s) and where donated dairy products were distributed; the universal product code(s) (UPCs) for donated product(s); the sell-by, best-by, or use-by date(s) for donated product(s) and the dates the donated dairy products were processed and shipped to the eligible distributor.

There is no requirement dictating the frequency of Claim Form submissions; therefore, any time after its Plan is approved, the EDO can submit Claim Forms for donations made. However, there is limited funding for this program so prompt submission may be beneficial to EDOs. The EDO also must provide adequate documentation, which should be available through its normal business records, to verify the eligible distributor received the donated eligible dairy products. Such documentation could include, but is not limited to, processing and shipping records, bills of lading, storage records, or receiving records from the eligible distributor. As specified in §

1147.208, AMS will only collect the information and documentation needed to verify the EDO's reimbursement claim.

Section 762(d)(4) of the CAA allows the Secretary to make retroactive reimbursements to EDOs that donated eligible dairy products before their Plans are approved. Eligible dairy products donated through the MDRP are eligible for supplemental reimbursement through DDP for donations made on or after January 1, 2020. The statute also provides for retroactive reimbursement for donations made through DDP prior to Plan approval, though a specific retroactive date is not provided. To gain administrative efficiencies and streamline the two programs, donations of eligible dairy products through DDP beginning on the same date also will be eligible for reimbursement. Partnerships will need to submit Plan and Certification Forms for approval prior to submitting a Reimbursement Form for donations made prior to Plan approval. Accordingly, § 1147.106(a)(3) provides for donations of eligible dairy products beginning on January 1, 2020, to be eligible for reimbursement under this program. As described above, total reimbursement for donations made from January 1, 2020 through December 27, 2020, is capped at \$50 million.

As authorized by section 762(d)(3)(B) of the CAA, AMS may verify the accuracy of supporting documentation with spot checks and audits under § 1147.206.

Under section 762(d)(2)(A) of the CAA, the Secretary shall set a reimbursement price that reflects the cost of the milk required to make the donated eligible dairy product, is between the FMMO Class I and Class IV minimum prices for the month of production, is sufficient to avoid food waste, and does not interfere with the commercial marketing of milk or dairy products. Section 1147.108 provides for reimbursement of three separate cost factors: (1) input cost—fresh fluid milk or bulk dairy commodity product milk-equivalent cost; (2) manufacturing cost of converting fluid milk into a product; and (3)

transportation cost from the processing plant to the eligible distributor. Section 1147.108(a) provides that reimbursements will be the sum of the three cost factors.

For the first of these factors, input cost, processors purchasing and processing fresh fluid milk products (raw milk, skim milk, cream, or concentrated fluid products), will be reimbursed at the applicable FMMO minimum classified skim and butterfat values. Processors purchasing bulk dairy commodity products for further processing into eligible dairy products will be reimbursed at the applicable FMMO minimum classified skim and butterfat values for the fluid milk equivalent contained in the bulk product.

That value will be determined by the milk's end use (Class I for fluid milk products, Class II for soft products such as yogurt, Class III for cheese products, and Class IV for butter and powder products) pursuant to 7 CFR 1000.40 and the applicable classified price in effect for the month of production pursuant to 7 CFR 1000.50.

The manufacturing cost for processing fluid milk is represented by the applicable FMMO make allowances contained in 7 CFR 1000.50. The DDP will use the FMMO make allowances in the Class III and IV price formulas to reflect manufacturing costs for Class III and IV products, as they are based on surveyed cost data of wholesale Class III and IV products and are generally accepted by industry stakeholders as appropriate cost estimates. For Class I and II products, however, the Department lacks data on manufacturing costs. As such, the lowest make allowance, Class IV, will be the representative manufacturing cost for Class I and II products. It is reasonable to expect that Class I and II products have different manufacturing costs than Class IV products due to different processing requirements. USDA is seeking comments on manufacturing costs for these classes of products. If submitted data demonstrates that actual Class I and II manufacturing costs differ significantly from the Class IV make allowance, then the Class I and II manufacturing costs could be amended in the final rule. If the public

comment period results in updated make allowances for Class I and Class II products, the amended make allowances will not be retroactive to the effective date of this rule.

As explained in the *Background* section, the program will not reimburse additional processing costs for bulk products purchased and further processed. Processors purchasing bulk dairy commodity products for further processing will receive the same manufacturing cost reimbursement as described above. When these processors buy bulk product, it is on a per-pound basis. It is reasonable to assume the price they paid for the bulk product represented both the fluid milk value (which they are being reimbursed for as described earlier) and the cost to convert the fluid milk into the bulk commodity. Therefore, eligible dairy products made from bulk dairy commodity products also will be eligible for manufacturing cost reimbursement.

The transportation cost reimbursement will be based on the U.S. monthly average diesel fuel price⁸ for the month the donation was made, a fuel economy factor of 6.1 miles per gallon⁹, and the shortest hard-surface distance from the plant that processed the donated eligible dairy product to the eligible distributor's physical distribution location. These factors are based on relevant government transportation statistics which are similar to those used in FMMOs with transportation credits, the Appalachian¹⁰ and Southeast¹¹ Orders Transportation reimbursement will only be paid if the EDO incurred the transportation cost, which will be verified on audit.

Section 762(h) of the CAA requires the Secretary to make supplemental reimbursements to EDOs receiving reimbursements under the MDRP from January 1, 2020, to the date when DDP program funds are no longer available. AMS recognizes an

⁸ U.S. Energy Information Administration (EIA), 2021; Gasoline and Diesel Fuel Update for August 16, 2021. <https://www.eia.gov/petroleum/gasdiesel/>, accessed August 23, 2021.

⁹ United States Department of Transportation, 2021; Combination Truck Fuel Consumption Data. <https://www.bts.gov/browse-statistical-products-and-data/freight-facts-and-figures/combination-truck-fuel-consumption>, accessed August 23, 2021.

¹⁰ 7 CFR 1005.82 and 1005.83

¹¹ 7 CFR 1007.82 and 1007.83

EDO under MDRP will also be eligible under DDP. Further, eligible dairy products under MDRP also qualify as eligible dairy products under DDP (notably, fluid milk products). Since DDP reimburses at a higher rate than MDRP, a supplemental reimbursement is needed to properly use funds for and fulfill the purposes of both programs. Section 1147.109 provides the process AMS will follow to make a supplemental reimbursement to EDOs receiving reimbursement under MDRP. An EDO with an already approved Plan under MDRP does not need to apply to DDP. AMS will automatically reimburse the eligible dairy organization the difference between the reimbursement it received under MDRP and the reimbursement it is eligible to receive for the same product under DDP, calculated in § 1147.108. New applicants to the DDP that donate fluid milk products will be automatically enrolled in MDRP. Upon approval, AMS will make reimbursements under the MDRP provisions and then supplemental reimbursements under the DDP provisions.

Administrative Provisions

Section 762(g) of the CAA requires AMS to publish donation activity for the program. Accordingly, § 1147.200 provides that AMS will periodically report on its publicly accessible website the aggregated donation activity under this program. Such information will include types and volume of product donated, as well as remaining available funds. AMS also will post on its publicly accessible website the Plan and Claim Form templates to be submitted for program participation.

Section 762(e) of the CAA prohibits the sale of eligible dairy products donated under the DDP back into commercial markets and specifies that eligible distributors who violate that prohibition will not be eligible for future participation in the DDP. Section 1147.204 implements the statutory prohibition and penalty for violation. In addition, the program prohibits reimbursement for donated eligible dairy products made in conjunction with marketing or promotional events.

Section 762(f) of the CAA directs the Secretary to conduct appropriate reviews or audits to ensure the integrity of the DDP. Under section 762(d)(3)(B) of the CAA, the Secretary is further authorized to verify the accuracy of submitted documentation through spot checks and audits. Section 1147.206 provides that AMS will verify the proper delivery of and payment for donated eligible dairy products. Specifically, AMS will ensure the donated eligible dairy products were delivered to the eligible distributor and the accuracy of the reimbursed value paid to the EDO. The section further provides for the review, audit, and spot checks of information submitted.

As mentioned in the above discussions, § 1147.208 requires AMS to maintain confidentiality regarding information collected to administer the program and to use the information only for program purposes.

A books and records provision is included in § 1147.209 to ensure the EDO maintains necessary records to be made available to AMS upon request in conjunction with an audit.

Section 1147.210 specifies that dairy products sold or donated under any other USDA commodity purchase or donation program, other than the MDRP, are not eligible for reimbursement under the DDP. From time to time, USDA may purchase dairy 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 DDP is to reduce food waste by encouraging the donation of additional dairy products through eligible distributors. Thus, eligible dairy organizations who have received compensation for dairy product purchases under other USDA programs may not receive reimbursements for the same dairy products under the DDP.

Exemption from Notice and Comment

Rules “relating to public property, loans, grants, benefits, or contracts” are not subject to the rulemaking requirement of the Administrative Procedure Act at 5 U.S.C.

553. *See* 5 U.S.C. 553(a)(2). Thus, AMS is publishing this interim final rule without previously publishing a proposed rule because this rule relates to a benefit. Additionally, AMS finds it has good cause to do so because providing prior notice and an opportunity for comment are impracticable, unnecessary, or contrary to the public interest under 5 U.S.C. 553(b)(B).

In determining whether a program is a “benefits” program, courts consider whether “benefits” are clearly and directly involved in the agency action. *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070 at 1083-84 (D.C. Cir. 1978). The purpose of the DDP is to facilitate timely donation of eligible dairy products and to prevent and minimize food waste by enabling dairy organizations to partner with public or private non-profit organizations. The overall purpose of the DDP is similar to other federal programs that provide food and nutrition assistance to individuals and families in need. Furthermore, the DDP fulfills two needs: 1) the donated dairy products can provide food and nutrition to eligible recipients, as determined by eligible distributors (public or private non-profit organizations); and 2) the eligible dairy organizations are able to participate in a program where they can receive reimbursement for donating dairy products to those determined to be in need. In addition, under the DDP, the public or private non-profit organization determines whether the recipients qualify for the donated dairy products based on their established criteria. As such, individuals and families in need of dairy products are able to receive these dairy products through donation. AMS is issuing regulations to establish and administer the DDP, a program that is clearly and directly involved in the disbursement of benefits, and thus is exempt under section 553(a)(2) from the notice and comment requirements of the APA.

Furthermore, the APA provides that an agency is not required to conduct notice-and comment rulemaking when the agency, for good cause, finds that notice and comment is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C.

553(b)(B). As part of the government's pandemic response, USDA began the Farmers to Families Food Box Program as an emergency relief effort to respond to severe market disruptions and increased food insecurity caused by the pandemic. The program lasted from May 15, 2020, through May 31, 2021, during which time it distributed dairy products equivalent to more than 2.5 billion pounds of milk to those in need. The end of the Food Box program means there is an unmet demand for dairy products in feeding organizations previously met by government purchases through the Food Box Program. The DDP is designed to encourage the donation of dairy products to meet that demand through private partnerships between EDOs and Eligible Distributors. Due to the recent end of the Food Box program, there is an immediate need to implement the DDP so that donations can begin and meet that demand.

In addition, Section 762 of the statute provides for emergencies or disaster declarations to be considered as a substantial factor in donation Plan submissions. As the 2021 hurricane and wildfire season has already begun, the DDP could facilitate donations in the possible event of upcoming emergencies or natural disasters that could create an immediate need to provide food assistance to impacted individuals and families.

Additionally, Congress mandated that the Secretary establish and administer the DDP no later than 60 days after enactment of the CAA. In light of this mandated time frame and the importance of distributing donated dairy products as quickly as possible to individuals and families, the normal rulemaking process would be impracticable unnecessary, and contrary to the public interest. Therefore, AMS finds there is good cause to forgo the notice-and-comment requirements in the APA for this rulemaking.

As a rule relating to a benefit, the APA requirement that regulations be published at least 30 days before the effective date does not apply. Additionally, this requirement also does not apply when an agency finds good cause not to delay the effective date. *See* 5 U.S.C. 553(d)(3). The same reasons why there is good cause to dispense with notice

and comment are applicable to AMS's decision to make this rule effective one day after publication.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. Chapter 35), AMS has requested approval of new information collection and recordkeeping requirements for the DDP and comments are invited on this new information collection. All comments received on this information collection will be summarized and included in the final request for Office of Management and Budget (OMB) approval.

Title: Establishment of a Dairy Donation Program

OMB Number: 0581-NEW

Expiration Date of Approval: This is a NEW collection.

Type of Request: Approval of New Information Collection.

Abstract: The Consolidated Appropriations Act of 2021 mandated establishment of a Dairy Donation Program to reimburse EDOs for milk used to make eligible dairy products donated to non-profit groups for distribution to recipient individuals and families. Under the program, EDOs account to a Federal milk marketing order (FMMO) by filling a report reflecting the eligible dairy products manufactured. Entities not already filing FMMO report will be required to submit a Report of Receipts and Utilization. All partnerships must submit a Dairy Donation and Distribution Plan and Eligible Distributor Certification Form describing the process the partnership would use to process, transport, store, and distribute eligible product to an eligible distributor. Once approved, the EDO can file a Reimbursement Claim Form to receive reimbursement for the donated eligible dairy products.

Dairy Donation and Distribution Plan

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Eligible dairy organizations.

Estimated Number of Respondents: 150.

Estimated Number of Responses: 300.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Burden on Respondents: 300 hours.

Eligible Distributor Certification Form

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 15 minutes per response.

Respondents: Eligible distributors.

Estimated Number of Respondents: 300.

Estimated Number of Responses: 300.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 75 minutes.

Reimbursement Claim Form

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 2 hours per response.

Respondents: Eligible dairy organizations.

Estimated Number of Respondents: 150.

Estimated Number of Responses: 1,200.

Estimated Number of Responses per Respondent: 8.

Estimated Total Annual Burden on Respondents: 2,400 hours.

Report of Receipts and Utilization

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Eligible dairy organizations.

Estimated Number of Respondents: 15.

Estimated Number of Responses: 90.

Estimated Number of Responses per Respondent: 6.

Estimated Total Annual Burden on Respondents: 90 hours.

Comments: Comments are invited on: (1) Whether the proposed collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

AMS estimates 150 respondents will form a total of 300 partnerships. Each participating partnership will be required to submit a Dairy Donation and Reimbursement Plan and Eligible Distributor Certification Form once, there will not be an annual renewal requirement. AMS estimates 1 hour to complete a Dairy Donation and Distribution Plan. Accompanying the Plan, the eligible distributor will be required to submit and sign an Eligible Distributor Certification Form, which AMS anticipates will take 15 minutes.

AMS estimates ten percent of the 150 EDO participants do not already account to a FMMO by filing a report. Therefore, approximately 15 respondents will need to account to a FMMO by filing a Report of Receipts and Utilization Form. All other EDOs will have already accounted to a Federal Order through their normal report filing through its existing association with a Federal milk marketing order. AMS estimates 1 hour to complete the form. Filing of this form will not cause an EDO to become regulated by a Federal milk marketing order.

Reimbursement Claim Forms can be submitted any time after Plan approval and will be processed on a quarterly basis. AMS estimated that to capture efficiencies respondents will submit Reimbursement Claim Forms no more than once per quarter and it will take 2 hours to complete the form per quarter. Assuming the reporting burden will be completed by an administrative assistant employee, at an hourly salary rate of \$21, AMS estimates the following annual reporting costs per participating partnership: for the first year of participation, the annualized cost is \$196.10 (the Plan, Certification Form, and four Claim Forms); for the subsequent years of participation, the annualized cost is \$169.60 (four Claim Forms). Entities needing to account to a Federal Order by filing a Report of Receipts and Utilization Form will experience an additional annual burden of \$127.20 (6 responses per year). EDOs also are required to maintain books and records, for a period of 3 years, to be made available to AMS upon request in conjunction with an audit to verify the donations for which the EDO received reimbursement were in fact made. These records are part of normal business records and do not require additional records to be created. Such records include production records to verify yield computations and product code dates for donated manufactured products, or delivery documentation to verify EDO incurred a transportation expense.

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. Forms can be found at <http://www.ams.usda.gov/ddp> and filed through email at ddp@usda.gov.

Statutory and Regulatory Authority

Section 762 of the Consolidated Appropriations Act of 2021 mandates that AMS establish and administer a Dairy Donation Program (7 CFR part 1147). The program is

intended to facilitate the timely donation of eligible dairy products and prevent and minimize food waste.

Executive Orders 12866 and 13563

USDA is issuing this rule in conformance with Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximizes net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. AMS has determined this action, mandated by Congress, meets the requirements set forth in the Consolidated Appropriations Act of 2021 to facilitate donation of eligible dairy products and prevent and minimize food waste.

AMS is seeking comments on the economic impacts of this action on the industry, including availability of information or data that may demonstrate if and how DDP reimbursements affect the market.

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 or to target specific regions in need of milk donations.

Ultimately, AMS determined that because the program’s primary purpose is to reduce waste associated with the disposition of surplus milk, the industry would be best served by allowing those with the capacity to process surplus milk and who are in a position to make donations to apply for the program without consideration of geographic location.

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	2021	7%	FY 2021-2026
	0	2021	3%	
Costs—				
Annualized Monetized (\$millions/year)	0	2021	7%	FY 2021-2026
	0	2021	3%	
Transfers—From the Federal Government to an eligible partnership				
Annualized Monetized (\$millions/year)	\$71.91	2021	7%	FY 2021-2026
	\$68.92	2021	3%	

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

In the normal course of transporting, delivering, and processing milk, a small volume of milk is “lost” each month. In the FMMO system, “normal losses” are estimated to be 0.25 percent of the total participating milk annually. Under certain conditions, an additional volume of milk cannot make it to market due to extraordinary circumstances, such as extreme weather, plant capacity issues, and market disruptions. This volume above “normal losses” is identified as “excess losses” in this analysis. According to FMMO statistics, “excess losses” averaged 0.12 percent of the annual volume of milk participating in the FMMO program from 2016 through 2020. In 2020, the COVID-19 pandemic resulted in higher levels of milk that could not make it to market, amounting to 0.32 percent of the milk that participated in the FMMO program. In

conducting an economic analysis, AMS assumed that milk classified as “excess losses” could be made into eligible dairy products and donated under the DDP.

To estimate the volume of excess milk that may be donated under the program, the 5-year average rate of 0.12 percent was applied to the projected 2021 U.S. milk production volume. Thus, it is assumed that approximately 273.2 million pounds of milk would be available for dairy processors to make into eligible dairy products for donation to eligible distributors. No data exists from which AMS could estimate how much bulk commodity product could be available for secondary processors to purchase and further process into eligible dairy products for donation to eligible distributors, so that scenario was not considered in the economic analysis. AMS is seeking public comment on data from which to estimate how much bulk commodity product could be available for secondary processors to purchase and further process for donation.

AMS estimated the amounts of butterfat and skim solids in the forecasted product volumes available for donation. The product mix included fluid milk, soft products, cheese, butter, and nonfat dry milk powder volumes, based on the volume of available dairy farmer milk. The set of products utilizes approximately all the butterfat and skim solids present in the milk available for donation. In the case of butter and nonfat dry milk powder, both products can be made from a given amount of milk. Butter requires a large amount of butterfat, while powder utilizes very little butterfat but a large amount of the nonfat solids.

The DDP will reimburse EDOs for eligible dairy product donations for the input cost paid for the fluid milk or bulk dairy commodity product, manufacturing cost, and transportation cost. Total reimbursement must be between the highest FMMO Class I value (Dade county, Florida) and the Class IV value (assumed the lowest classified value). This analysis projected 2021 class prices based on USDA’s March 2021 *World Supply and Demand Estimates* (WASDE), using the FMMO price formulas. Under those

assumptions, AMS estimates the program could expend between \$52.1 million and \$68.7 million annually.

Furthermore, eligible dairy product donations made under the MDRP are eligible to receive a supplemental reimbursement for donations made starting on January 1, 2020, onward. Supplemental reimbursement is calculated at the difference between the DDP and MDRP reimbursement values. The net value of these retroactive reimbursements is estimated at \$0.5 million, assuming the highest FMMO minimum Class I value at the time the milk for the donation was purchased.

Total 2021 U.S. milk production was estimated to be 227.3 billion pounds (WASDE, March 2021). As described above, AMS estimates that 273.2 million pounds (0.12 percent) of excess milk (additional supply) would be available to be processed and donated through the DDP. Consequently, AMS does not anticipate this small additional processing volume will impact milk prices. It is likely there will be instances where dairy processors already donating dairy products to non-profit feeding organizations become eligible for reimbursement through DDP. However, those donations are not new production volume to be priced. That is, they would represent dairy products already processed and priced accordingly somewhere in the dairy supply chain. Furthermore, the DDP does not intend to reimburse for the full cost of processing and delivering donated dairy products but rather encourages excess milk to be used and not wasted.

This program is expected to have a negligible impact on retail dairy product sales. Typically, populations that receive dairy products from non-profit feeding organizations do so when they cannot buy dairy products at retail outlets. Additionally, the DDP reimbursement rate does not cover all processing and transportation costs; therefore, it would not be a financially prudent decision to divert milk from retail outlets to donations. The following table provides examples of costs included and excluded from reimbursement under the DDP. This is not an all-inclusive listing but is intended to

demonstrate how dairy product donations through this program are not expected to be a substitute for retail dairy product sales.

Table 2—Examples of Costs Included and Excluded		
Cost Factor	Includes	Does NOT Include
Input	<ul style="list-style-type: none"> · Minimum classified price of milk used in the donated eligible dairy product 	<ul style="list-style-type: none"> · Any contractually obligated monies, over the minimum classified value, due to producers.
		<ul style="list-style-type: none"> · Assessments for promotion and research programs, if applicable.
Manufacturing	<ul style="list-style-type: none"> · Applicable FMMO manufacturing make allowance, representative of the following costs: 	<ul style="list-style-type: none"> · Additional ingredient costs (i.e. fruit for fruit-flavored yogurt)
	<ul style="list-style-type: none"> o Processing Labor 	<ul style="list-style-type: none"> · Storage and inventory costs
	<ul style="list-style-type: none"> o Utilities 	<ul style="list-style-type: none"> · Costs of participating in the mandatory Dairy Product Mandatory Reporting Program.
	<ul style="list-style-type: none"> o Non-Labor 	
	<ul style="list-style-type: none"> o General and Administrative 	
	<ul style="list-style-type: none"> o Packaging into a commodity volume 	
Transportation	<ul style="list-style-type: none"> · Fuel: Shortest hard surface mileage * monthly diesel price * 6.1 miles per gallon 	<ul style="list-style-type: none"> · Vehicle maintenance
		<ul style="list-style-type: none"> · Vehicle depreciation
		<ul style="list-style-type: none"> · Licensing and other administrative fees

In addition, DDP is a voluntary program and reimbursements occur after donations are made. Donations made through this program will be done privately without donation volumes being announced in advance. Therefore, AMS has determined the impact on dairy markets will not be as significant on the markets when compared to making advanced announcements on expected donation volume.

Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601-612), AMS has considered the economic impact of the action on small entities. Accordingly, AMS has prepared this 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 farms are 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 dairy processors, varies based on the type of dairy product manufactured. Small dairy processors are defined as having between 750 and 1,250 or fewer employees, depending on the product made.

According to the 2017 USDA National Agricultural Statistics Service (NASS) Census Report, there were 39,303 farms with milk sales. AMS estimates that 36,158 farms, or 92 percent, would be considered small businesses. Dairy farmers of all sizes may benefit from the program as it will encourage donations of dairy products, which contain milk purchased from them. DDP is designed to reduce food waste by providing alternative outlets for milk to be utilized in donated products instead of being dumped due to oversupply. Often, milk is dumped from smaller dairy farms that are more costly to service because their pickups may be less than a full tanker load and/or they may be located farther from major trucking routes. By providing cost reimbursement for donated

products, the DDP incentivizes processors to pick up and process the milk into products for donation rather than having it dumped.

AMS estimates that approximately 3,000 plants manufacture dairy products in the United States, owned by approximately 1,500 entities. According to AMS calculations, about 10 percent are operated by dairy farmer cooperatives, while the remaining are independently owned. AMS believes 1,500 to be the universe of EDOs that could participate in the DDP. Of this universe of potential EDOs, 90 percent would be considered small businesses, based on total employee numbers.

Participating in the DDP will not unduly or disproportionately burden small dairy processing entities. All entities, regardless of size, can apply for the program if they file a report with a Federal milk marketing order and incur a qualified expense as defined by program provisions. Program provisions are administered without regard for business size. The paperwork required to participate asks for information that is part of normal business records.

The definition of an eligible distributor is a public or private non-profit feeding organization that distributes or coordinates distribution of donated eligible dairy products to recipient individuals and families. Eligible distributors, regardless of size, can voluntarily participate in the DDP if they form a partnership with an eligible dairy organization. The information collection burden for eligible distributors is minimal as they must only complete the Plan form with the partnering EDO. 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 small entities. Program provisions will be applied uniformly to both large and small businesses and are not expected to burden small entities unduly or disproportionately.

Executive Order 13175

This interim final rule has been reviewed under 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 implication, including regulation, 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.

Tribal governments operating non-profit organizations feeding recipient individuals and families could qualify as eligible distributors and thus benefit from participation in the DDP. The regulatory burden from participating would be minimal, estimated at 15 minutes for completing an Eligible Distributor Certification Form.

AMS has assessed the impact of this proposed rule on Indian tribes and determined that this rule would not have tribal implications that require consultation under Executive Order 13175. AMS hosts a quarterly teleconference with tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed. Information about the DDP will be shared during an upcoming quarterly call, and tribal leaders will be informed about the interim final rule and the opportunity to submit comments. AMS will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided as needed with regards to the DDP.

Executive Order 12988

This rule has been reviewed under Executive Order 12988 – Civil Justice Reform. This final rule may have retroactive effect. Dairy donations made starting January 1, 2020, prior to the effective date of the rule may be eligible for reimbursement if the eligible partnership's Donation and Distribution Plan is approved and if the partnership

meets all other program requirements. Dairy donations made prior to 2020 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. The DDP will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

Civil Rights Review

AMS has considered the potential civil rights implications of this rule on minorities, women, and persons with disabilities to ensure that no person or group shall be discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This review included persons that are employees of the entities who are subject to these regulations. This interim final rule does not require affected entities to relocate or alter their operations in ways that could adversely affect such persons or groups. Further, this rule does not deny any persons or groups the benefits of the program or subject any persons or groups to discrimination.

AMS found no evidence this voluntary program and the associated interim final rule will cause adverse or disproportionate impacts on minorities, women, and persons with disabilities. AMS's analysis found no evidence that a potential impact will affect dairy farmers or processors in any protected groups, or that these impacts will be different than any participating general population of dairy farmers and processors.

Executive Order 13132

AMS has examined the effects of provisions in this interim final rule on the relationship between the Federal Government and the States, as required by Executive Order 13132 on "Federalism." The DDP will reimburse EDOs for eligible dairy products donated to eligible distributors. The DDP will not preempt any State or local laws,

regulations, or policies pertaining to the sale, manufacturing or distribution of milk or dairy products within States.

List of Subjects

7 CFR part 1146

Milk, Donations, Reporting and recordkeeping requirements.

7 CFR part 1147

Dairy, Donations, Food waste, Emergency, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, AMS is amending 7 CFR Chapter X as follows:

Part 1146 – MILK DONATION REIMBURSEMENT PROGRAM

1. The authority for part 1146 continues to read as follows:

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

2. In part 1146, revise all references to “Milk Donation and Distribution Plan” to read “Dairy Donation and Distribution Plan”.

3. Amend § 1146.1 by revising the term “eligible dairy organization” and adding the term “qualified expense” in alphabetical order to read as follows:

§ 1146.1 Definitions

* * * * *

Eligible dairy organization means a dairy farmer, either individually or as part of a cooperative, or a dairy processor that:

- (1) Accounts to a Federal Milk Marketing Order; and
- (2) Incurs a qualified expense described in § 1146.1.

* * * * *

Qualified expense means the cost incurred to purchase fresh fluid milk product or bulk dairy commodity product for processing into eligible dairy products.

* * * * *

4. Revise § 1146.102 to read as follows:

§ 1146.102 Dairy donation and distribution plans.

Eligible partnerships must submit a completed Dairy Donation and Distribution Plan to AMS in the form and manner established by AMS to be eligible for program consideration. The completed Dairy Donation and Distribution Plan must include:

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

(b) The entity type and contact information for the eligible dairy organization;

(c) Banking information and tax identification number for the eligible dairy organization;

(d) An affirmation signed by the eligible dairy organization regarding the type(s) of products to be donated and its ability to process and transport eligible dairy products consistent with the commodity specifications under § 1146.3; and

(e) An Eligible Distributor Certification Form signed by the eligible distributor regarding its ability to store and distribute donated eligible dairy products to recipient individuals and families.

5. Revise § 1146.106 to read as follows:

§ 1146.106 Reimbursement Claims.

(a) In order for the eligible dairy organization to receive reimbursement pursuant to § 1146.108, the eligible partnership must submit a Reimbursement Claim Form and appropriate supporting documentation to AMS.

(1) *Required information.* Each Reimbursement Claim Form associated with an approved Dairy Donation and Distribution Plan must include:

(i) The type and amount of eligible dairy products donated to the eligible distributor;

- (ii) The physical location(s) of the plant(s) that processed the donated dairy products;
- (iii) The date the eligible dairy products were processed;
- (iv) The date the eligible dairy products were shipped to the eligible distributor;
- (v) The respective sell-by, best-by, or use-by date(s) for the donated dairy products; and
- (vi) Other information as needed on the Reimbursement Claim Form to calculate reimbursement.

(2) *Appropriate verifying documentation.* Each Reimbursement Claim Form must be accompanied by documents verifying that the donation(s) reported in the form were made. Such documentation may include, but is not limited to, copies of processing records, shipping records, bills of lading, warehouse receipts, distribution records, or other documents demonstrating the reported amount of eligible dairy products were processed, donated, and distributed in accordance with the approved Dairy Donation and Distribution Plan and Eligible Distributor Certification Form and as reported on the Reimbursement Claim Form.

(3) *Deadline for funding.* To be considered for reimbursement, eligible dairy products must be donated from January 1, 2020, until program funds are expended.

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

6. Add part 1147 to read as follows:

PART 1147 – DAIRY DONATION PROGRAM

Subpart A – General Provisions

Sec.

1147.1 Definitions

1147.3 Commodity specifications

Subpart B – Program Participation

Sec.

1147.100 Program eligibility

1147.102 Dairy donation and distribution plans

1147.104 Review and approval
1147.106 Reimbursement claims
1147.108 Reimbursement calculation
1147.109 Supplemental reimbursements

Subpart C – Administrative Provisions

Sec.

1147.200 Program announcement
1147.204 Prohibitions
1147.206 Enforcement
1147.208 Confidentiality
1147.209 Books and records
1147.210 Milk for other programs
1147.212 Expiration of this part

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Subpart A – General Provisions

§ 1147.1 Definitions.

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

Eligible dairy organization means a dairy farmer, either individually or as part of a cooperative, or a dairy processor that:

- (1) Accounts to a Federal Milk Marketing Order; and
- (2) Incurs a qualified expense described in § 1147.1.

Eligible dairy product means a dairy product primarily made from milk, including fluid milk, produced and processed in the United States and meeting the specifications referenced in § 1147.3.

Eligible distributor means a public or private non-profit feeding organization distributing or coordinating distribution of donated eligible dairy products to recipient individuals and families.

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

Program means the Dairy Donation Program established in this part.

Qualified expense means the cost incurred to purchase fresh fluid milk product or bulk dairy commodity product for processing into eligible dairy products.

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

§ 1147.3 Commodity specifications.

Eligible dairy organizations must comply with all applicable Federal, State, and local laws, executive orders, and rules and regulations related to its performance under this program. To qualify under the program eligible dairy products must meet the following requirements:

(a) Made primarily from cow's (bovine) milk produced in the United States;

(b) Packaged in consumer-sized packaging;

(c) Meet the applicable provisions for dairy products in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et. seq.), as amended. Grade 'A' dairy products shall meet the applicable provisions of the current edition of the Pasteurized Milk ordinance; and

(d) Have a sell-by, best-by, or use-by date no sooner than 12 days from the date the eligible dairy product is delivered to the eligible distributor.

Subpart B – Program Participation

§ 1147.100 Program eligibility.

An eligible dairy organization must be a member of an approved eligible partnership pursuant to § 1147.1 to be eligible to receive reimbursement related to eligible dairy product donations, subject to the requirements and limitations specified in §§ 1147.102 and 1147.104.

§ 1147.102 Dairy donation and distribution plans.

Eligible partnerships must submit a completed Dairy Donation and Distribution Plan to AMS in the form and manner established by AMS to be eligible for program

consideration. The completed Dairy Donation and Distribution Plan must include:

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

(b) The entity type and contact information for the eligible dairy organization;

(c) Banking information and tax identification number for the eligible dairy organization;

(d) An affirmation signed by the eligible dairy organization regarding the type(s) of product to be donated and its ability to process and transport eligible dairy products consistent with the commodity specifications under § 1147.3; and

(e) An Eligible Distributor Certification Form signed by the eligible distributor regarding its ability to store and distribute donated eligible dairy products to recipient individuals and families.

§ 1147.104 Review and approval.

(a) *Program application and review.* Within 15 business days of the submitted Dairy Donation and Distribution Plan and Eligible Distributor Certification Form, AMS will review the submitted application and notify the applicant regarding approval or disapproval for program participation.

(1) The review will include the following considerations:

(i) The process the eligible partnership will use for donation, processing, transportation, temporary storage, and distribution of eligible dairy products;

(ii) The extent to which the Dairy Donation and Distribution Plan promotes the donation of eligible dairy products and prevents and minimizes food waste.

(2) AMS will prioritize approval or disapproval of a Plan for which AMS determines a public health emergency or disaster to be a substantial factor in its submission.

(b) *Plan approval.* Subject to the provisions in paragraph (a) of this section, AMS will determine whether to approve or disapprove Dairy Donation and Distribution Plans for eligible dairy products donated from January 1, 2020, until program funds are expended.

§ 1147.106 Reimbursement claims.

(a) In order for the eligible dairy organization to receive reimbursement pursuant to § 1147.108, the eligible partnership must submit a Reimbursement Claim Form and appropriate supporting documentation to AMS.

(1) *Required information.* Each Reimbursement Claim Form associated with an approved Dairy Donation and Distribution Plan must include:

(i) The type and amount of eligible dairy products donated to the eligible distributor;

(ii) The physical location(s) of the plant(s) that processed the donated dairy products;

(iii) The date the eligible dairy products were processed;

(iv) The date the eligible dairy products were shipped to the eligible distributor;

(v) The respective sell-by, best-by, or use-by date(s) for the donated dairy products; and

(vi) Other information as needed on the Reimbursement Claim Form to calculate reimbursement.

(2) *Appropriate verifying documentation.* Each Reimbursement Claim Form must be accompanied by documents verifying that the donation(s) reported in the form were made. Such documentation may include, but is not limited to, copies of processing records, shipping records, bills of lading, warehouse receipts, distribution records, or other documents demonstrating the reported amount of eligible dairy products were processed, donated, and distributed in accordance with the approved Dairy Donation and

Distribution Plan and Eligible Distributor Certification Form and as reported on the Reimbursement Claim Form.

(3) *Eligibility period.* To be considered for reimbursement, eligible dairy products must have been donated on or after January 1, 2020, until program funds are expended.

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

§ 1147.108 Reimbursement calculation.

(a) For each eligible dairy product donated by an eligible dairy organization with an approved Dairy Donation and Distribution Plan, the amount of reimbursement under § 1147.106 for the donated eligible dairy product shall be the sum of the values of the input cost, the manufacturing cost, and the transportation cost.

(1) The input cost shall be the monthly Federal Milk Marketing Order minimum classified value pursuant to 7 CFR 1000.50 of the fresh fluid milk product (raw milk, skim milk, cream, or concentrate fluid product) or fluid milk equivalent of the bulk dairy commodity product used to make the donated eligible dairy product pursuant to 7 CFR 1000.40 for the month of processing.

(2) The manufacturing cost shall be the manufacturing allowance, on a hundredweight basis, pursuant to 7 CFR 1000.50 for the milk used to produce the donated eligible dairy product pursuant to 7 CFR § 1000.40 —

- (i) If a Class I product, the Class IV manufacturing allowance applies;
- (ii) If a Class II product, the Class IV manufacturing allowance applies;
- (iii) If a Class III product, the Class III manufacturing allowances applies; or
- (iv) If a Class IV product, the Class IV manufacturing allowances applies.

(3) The transportation cost shall be determined by the following:

(i) The published average U.S. Energy Information Administration average U.S. diesel fuel price for the month the donation was made;

(ii) The shortest hard-surface distance, in miles, from the plant processing the donated eligible dairy product to the eligible distributor; and

(iii) The fuel economy rate of 5.5 miles per gallon.

(b) Reimbursement, on a per hundredweight basis, made pursuant to paragraph (a) of this section may not exceed the Class I price pursuant to 7 CFR 1000.50, 1000.52, and 1006.51 for Dade County, Florida.

§ 1147.109 Supplemental reimbursements.

(a) The Secretary shall make a supplemental reimbursement to an eligible dairy organization reimbursed under the Milk Donation Reimbursement Program (7 CFR 1146.108) during the period beginning on January 1, 2020, and ending on the date on which funds under § 1147.202 are no longer available.

(b) A supplemental reimbursement described in paragraph (a) shall be the difference between:

(1) The reimbursement for eligible dairy products calculated under § 1147.108, and

(2) The reimbursement for eligible milk under the Milk Donation Reimbursement Program (7 CFR 1146.108).

Subpart C – Administrative Provisions

§ 1147.200 Program announcement.

(a) AMS will announce the opportunity to participate in the Dairy Donation Program on the AMS website. The announcement will specify the manner and form in which program applications should be submitted. AMS will periodically announce on its website a report describing the donation activity under this program.

(b) There is no deadline for eligible parties to submit a Dairy Donation and Distribution Plan. AMS will accept and consider Plans on a continuing basis.

§ 1147.204 Prohibitions.

(a) *Prohibition in general.* An eligible distributor receiving eligible dairy products donated under the Dairy Donation Program may not sell the donated dairy products back into commercial markets.

(b) *Prohibition on marketing or promotional event.* Dairy products donated in conjunction with a marketing or promotional event are prohibited from reimbursement.

(c) *Prohibition on profit-making.* An eligible dairy organization cannot make a profit from reimbursements received from the Dairy Donation Program.

(d) *Prohibition on future participation.* An eligible partnership that AMS determines has violated the prohibition in paragraph (a), (b), or (c) shall not be eligible for any future participation in the Dairy Donation Program.

§ 1147.206 Enforcement.

Where applicable, AMS will verify an eligible dairy organization's payment of the input cost. AMS will also conduct spot checks, reviews, and audits of the reports and documentation submitted pursuant to § 1147.106(a) to verify accuracy and to ensure the integrity of the Dairy Donation Program.

§ 1147.208 Confidentiality.

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

§ 1147.209 Books and records.

Each eligible dairy organization shall maintain and retain records of its operations and make such records and its facilities available to AMS as necessary to ensure the integrity of the Dairy Donation Program.

(a) *Records to be maintained and made available.* Each eligible dairy organization must maintain and make available records of its operations (including, but not limited to, records of donations, processing, packaging, and disposition of donated eligible dairy products) that are necessary to verify whether it met program requirements.

(b) *Retention of records.* All records required under the paragraph (a) shall be retained by the eligible dairy organization for a period of 3 years to begin at the end of the month to which such records pertain.

§ 1147.210 Milk for other programs.

Eligible dairy products sold or donated under other commodity or food assistance programs administered by the United States Department of Agriculture, except as pursuant to 7 CFR 1146, is not eligible for reimbursement under the Dairy Donation Program in this part.

§ 1147.212 Expiration of this part.

This part expires September 1, 2023, unless extended by notification in the Federal Register.

Erin Morris,
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