

Dated: September 25, 2005.

**Michael Chertoff,**

*Secretary.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 1005 and 1007

[Docket No. AO-388-A15 and AO-366-A44; DA-03-11]

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

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This partial final rule amends the Appalachian and Southeast marketing orders. Specifically, the final rule expands the Appalachian milk marketing area, eliminates the ability to simultaneously pool the same milk on the Appalachian or Southeast order and on a State-operated milk order that has marketwide pooling, and amends the transportation credit provisions of the Southeast and Appalachian orders. The amendments are based on record evidence of a public hearing held February 2004. More than the required number of dairy farmers approved the issuance of the amended orders.

**EFFECTIVE DATE:** November 1, 2005.

**FOR FURTHER INFORMATION CONTACT:**

Antoinette M. Carter, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement, STOP 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-3465, e-mail address: [antoinette.carter@usda.gov](mailto:antoinette.carter@usda.gov).

**SUPPLEMENTARY INFORMATION:** This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the rule.

The Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601-674) provides that administrative proceedings must be exhausted before parties may file suit in

court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Act and Paperwork Reduction Act

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

For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During February 2004, the month in which the hearing was held, the milk of 7,311 dairy farmers was pooled on the Appalachian (Order 5) and Southeast (Order 7) milk orders (3,395 Order 5 dairy farmers and 3,916 Order 7 dairy farmers). Of the total, 3,252 dairy farmers (or 96 percent) and 3,764 dairy farmers (or 96 percent) were considered small businesses on the Appalachian and Southeast orders, respectively.

During February 2004, there were a total of 36 plants associated with the

Appalachian order (25 fully regulated plants, 7 partially regulated plants, 1 producer-handler, and 3 exempt plants) and a total of 51 plants associated with the Southeast order (32 fully regulated plants, 6 partially regulated plants, and 13 exempt plants). The number of plants meeting the small business criteria under the Appalachian and Southeast orders were 13 (or 36 percent) and 13 (or 25 percent), respectively.

The final rule will expand the Appalachian milk marketing area to include 25 unregulated counties and 15 unregulated cities in the State of Virginia that currently are not in any Federal milk marketing area. Adopted amendments to the producer milk provisions of the Appalachian and Southeast milk orders will prevent producers who share in the proceeds of a state marketwide pool from simultaneously sharing in the proceeds of a Federal marketwide pool on the same milk. In addition, this final rule amends the transportation credit provisions of the Appalachian and Southeast orders.

The final rule amendments that will expand the Appalachian marketing area will likely continue to regulate under the Appalachian order two fluid milk distributing plants located in Roanoke, Virginia, and Lynchburg, Virginia, and shift the regulation of a distributing plant located in Mount Crawford, Virginia, from the Northeast order to the Appalachian order.

The amendments will allow the Kroger Company's (Kroger) Westover Dairy plant, located in Lynchburg, Virginia, that competes for a milk supply with other Appalachian order plants to continue to be regulated under the order if it meets the order's minimum performance standards. The plant has been regulated by the Appalachian order since January 2000. In addition, the adopted amendments will remove the disruption that occurs as a result of the Dean Foods Company's (Dean Foods) Morningstar Foods plant, located in Mount Crawford, Virginia, shifting its regulatory status under the Northeast order.

The Appalachian order currently contains a "lock-in" provision that provides that a plant located within the marketing area that meets the order's minimum performance standard will be regulated by the Appalachian order even if the majority of the plant's Class I route sales are in another marketing area. The expansion of the Appalachian marketing area along with the lock-in provision will regulate fluid milk distributing plants physically located in the marketing area that meet the order's minimum performance standard even if

the majority of their sales are in another Federal order marketing area. Accordingly, the amendments will regulate three distributing plants under the Appalachian order: Kroger's Westover Dairy, located in Lynchburg, Virginia; Dean Foods' Morningstar Foods plant, located in Mount Crawford, Virginia; and National Dairy Holdings' Valley Rich Dairy, located in Roanoke, Virginia. Based on Small Business Administration criteria these are all large businesses.

This final rule contains amendments to the transportation credit provisions of the Appalachian and Southeast orders. The Appalachian and Southeast orders contain provisions for a transportation credit balancing fund from which payments are made to handlers to partially offset the cost of moving bulk milk into each marketing area to meet fluid milk demands.

The amendments included in this final rule will increase the maximum rate of the transportation credit assessment of the Appalachian and Southeast orders by 3 cents per hundredweight. Specifically, the amendments will increase the maximum rate of assessment for the Appalachian order from 6.5 cents per hundredweight to 9.5 cents per hundredweight while increasing the maximum rate of assessment for the Southeast order from 7 cents per hundredweight to 10 cents per hundredweight. Increasing the transportation assessment rates will tend to minimize the exhaustion of the transportation credit balancing fund when there is a need to import supplemental milk from outside the marketing areas to meet Class I needs.

Currently, the Appalachian and Southeast orders provide that transportation credits shall apply to the milk of a dairy farmer who was not a "producer" under the order during more than two of the immediately preceding months of February through May but not more than 50 percent of the milk production of the dairy farmer, in aggregate, was received as producer milk under the order during those two months. The adopted amendments contained in this final rule will provide the Market Administrator of the Appalachian order and the Market Administrator of the Southeast order the discretionary authority to adjust the 50 percent milk production standard.

This final rule will prohibit the simultaneous pooling of the same milk on the Appalachian or Southeast milk marketing orders and on a State-operated order that provides for the marketwide pooling of milk. Since the 1960's, the Federal milk order program

has recognized the harm and disorder that result to both producers and handlers when the same milk of a producer is simultaneously pooled on more than one Federal order. When this occurs, producers do not receive uniform minimum prices, and handlers receive unwarranted competitive advantages.

The need to prevent "double pooling" became critically important as distribution areas expanded, orders merged, and a national pricing surface was adopted. Milk already pooled under a State-operated program and able to simultaneously be pooled under a Federal order has essentially the same undesirable outcomes that Federal orders once experienced and subsequently corrected. Thus, amendments to eliminate the "double pooling" of the same milk on the Appalachian or Southeast order and a State-operated milk order that has marketwide pooling are included in this final rule.

The amendments contained in this final rule will be applied to all Appalachian and Southeast order participants (producers and handlers), which consist of both large and small business. Since the adopted amendments in this final rule will be subject to all the orders' producers and handlers regardless of their size, the provisions are not expected to provide a competitive advantage to any participant. Accordingly, the amendments will not have a significant economic impact on a substantial number of small entities.

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

This action does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler

that is smaller than the industry average.

*Prior documents in this proceeding:*  
*Notice of Hearing:* Issued January 16, 2004; published January 23, 2004 (69 FR 3278).

*Partial Recommended Decision:*  
Issued May 13, 2005; published May 20, 2005 (70 FR 29410).

*Partial Final Decision:* Issued September 15, 2005; published September 21, 2005 (70 FR 55458).

### Findings and Determinations

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

The following findings are hereby made with respect to each of the aforesaid orders:

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the specified marketing areas.

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

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

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

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

(4) All milk and milk products handled by handlers, as defined in the order as hereby amended, are in the

current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

(b) *Additional Findings.* It is necessary and in the public interest to make these amendments to the Appalachian and Southeast orders effective November 1, 2005. This effective date will ensure the timely implementation of the amendments. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing areas.

The amendments to these orders are known to handlers. The partial final decision containing the proposed amendments to these orders was issued on September 15, 2005.

The changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making these amendments effective November 1, 2005. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C 551–559.)

(c) *Determinations.* It is hereby determined that:

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

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

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

**List of Subjects in 7 CFR Parts 1005 and 1007**

Milk marketing orders.

**Order Relative to Handling**

■ *It is therefore ordered*, that on and after the effective date hereof, the handling of milk in the Appalachian and Southeast marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders,

as mended, and as hereby further amended, as follows:

**PART 1005—MILK IN THE APPALACHIAN MARKETING AREA**

■ 1. The authority citation for 7 CFR part 1005 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Section 1005.2 is amended by revising the Virginia counties and cities to read as follows:

**§ 1005.2 Appalachian marketing area.**

\* \* \* \* \*

**Virginia Counties and Cities**

Alleghany, Amherst, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Campbell, Carroll, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Henry, Highland, Lee, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe; and the cities of Bedford, Bristol, Buena Vista, Clifton Forge, Covington, Danville, Galax, Harrisonburg, Lexington, Lynchburg, Martinsville, Norton, Radford, Roanoke, Salem, Staunton, and Waynesboro.

\* \* \* \* \*

■ 3. Section 1005.13 is amended by revising the introductory text and adding a new paragraph (e) to read as follows:

**§ 1005.13 Producer milk.**

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk) and butterfat contained in milk of a producer that is:

\* \* \* \* \*

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

**§ 1005.81 [Amended]**

■ 4. In § 1005.81(a), remove “\$0.065” and add, in its place, “\$0.095”.

**§ 1005.82 [Amended]**

■ 5. In § 1005.82, paragraph (b) is amended by removing the words “Director of the Dairy Division” and adding, in their place, the words “Deputy Administrator of Dairy Programs” and adding a new paragraph (c)(2)(iv) to read as follows:

**§ 1005.82 Payments from the transportation credit balancing fund.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iv) The market administrator may increase or decrease the milk production standard specified in paragraph (c)(2)(ii) of this section if the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the market administrator shall investigate the need for the revision either on the market administrator’s own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must be issued in writing at least one day before the effective date.

\* \* \* \* \*

**PART 1007—MILK IN THE SOUTHEAST MARKETING AREA**

■ 6. The authority citation for 7 CFR part 1007 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 7. Section 1007.13 is amended by revising the introductory text and adding a new paragraph (e) to read as follows:

**§ 1007.13 Producer milk.**

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk) and butterfat contained in milk of a producer that is:

\* \* \* \* \*

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

**§ 1007.81 [Amended]**

■ 8. In § 1007.81(a), remove “\$0.07” and add, in its place, “\$0.10”.

**§ 1007.82 [Amended]**

■ 9. In § 1007.82, paragraph (b) is amended by removing the words “Director of the Dairy Division” and adding, in their place, the words “Deputy Administrator of Dairy Programs” and adding a new paragraph (c)(2)(iv) to read as follows:

**§ 1007.82 Payments from the transportation credit balancing fund.**

\* \* \* \* \*

(c) \* \* \*  
(2) \* \* \*

(iv) The market administrator may increase or decrease the milk production standard specified in paragraph (c)(2)(ii) of this section if the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the market administrator shall investigate the need for the revision either on the market administrator's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must be issued in writing at least one day before the effective date.

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Dated: October 7, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05-20525 Filed 10-7-05; 12:57 pm]

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**DEPARTMENT OF AGRICULTURE**

**Rural Housing Service**

**Rural Business-Cooperative Service**

**Rural Utilities Service**

**Farm Service Agency**

**7 CFR Part 1902**

**Disbursement of Funds**

**AGENCIES:** Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Agencies are revising their disbursement of funds regulations. This action is necessary since existing regulations do not accurately reflect the current disbursement methodologies employed by the Agencies. The intended effect is to simplify and update the regulations; to eliminate reference to the obsolete Loan Disbursement System; clarify Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration (NCUA) insurance coverage; and eliminate reference to the now defunct Federal Savings and Loan Insurance Corporation (FSLIC). These amended regulations are

to ensure the Agencies' field offices have current guidance on the disbursement methods available and supervised bank accounts.

**EFFECTIVE DATE:** October 12, 2005.

**FOR FURTHER INFORMATION CONTACT:** Ronald Gianella, Staff Accountant, Office of the Deputy Chief Financial Officer, Policy and Internal Review Division, U.S. Department of Agriculture, STOP 33, P.O. Box 200011, St. Louis, Missouri 63120, telephone: (314) 457-4298.

**SUPPLEMENTARY INFORMATION:**

**Classification**

This action is not subject to the provisions of Executive Order 12866 since it involves only internal Agency management. This action is not published for prior notice and comment under the Administrative Procedure Act since it involves only internal Agency management and publication for comment is unnecessary and contrary to the public interest.

**Programs Affected**

The Catalog of Federal Domestic Assistance programs impacted by this action are as follows:

- 10.353—National Rural Development Partnership
- 10.405—Farm Labor Housing Loans and Grants
- 10.410—Very Low to Moderate Income Housing Loans
- 10.411—Rural Housing Site Loans and Self-Help Housing Land Development Loans
- 10.415—Rural Rental Housing Loans
- 10.417—Very Low-Income Housing Repair Loans and Grants
- 10.420—Rural Self-Help Housing Technical Assistance
- 10.421—Indian Tribes and Tribal Corporation Loans
- 10.427—Rural Rental Assistance Payments
- 10.433—Rural Housing Preservation Grants
- 10.438—Section 538 Rural Rental Housing Guaranteed Loans
- 10.441—Technical and Supervisory Assistance Grants
- 10.442—Housing Application Packaging Grants
- 10.444—Direct Housing Natural Disaster Loans and Grants
- 10.445—Direct Housing Natural Disaster
- 10.446—Rural Community Development Initiative
- 10.760—Water and Waste Disposal Systems for Rural Communities
- 10.761—Technical Assistance and Training Grants
- 10.762—Solid Waste Management Grants

10.763—Emergency Community Water Assistance Grants

10.766—Community Facilities Loans and Grants

10.767—Intermediary Relending Program

10.768—Business and Industry Loans

10.769—Rural Business Enterprise Grants

10.770—Water and Waste Disposal Loans and Grants (Section 306C)

10.771—Rural Cooperative Development Grants

10.772—Empowerment Zones Program

10.773—Rural Business Opportunity Grants

10.775—Renewable Energy Systems and Energy Efficiency Improvements Program

10.854—Rural Economic Development Loans and Grants

**Intergovernmental Consultation**

Programs with Catalog of Federal Domestic Assistance numbers 10.353, 10.405, 10.411, 10.415, 10.420, 10.421, 10.427, 10.433, 10.760, 10.763, 10.766, 10.767, 10.768, 10.769, 10.770, 10.771, 10.773, and 10.854 are subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Programs with Catalog of Federal Domestic Assistance numbers 10.410, 10.417, 10.438, 10.441, 10.442, 10.444, 10.445, 10.446, 10.761, 10.762, 10.772, 10.775 are excluded from the scope of Executive Order 12372.

**Civil Justice Reform**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) Unless otherwise specifically provided, all State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division (7 CFR part 11) must be exhausted before litigation against the Department is instituted.

**Paperwork Reduction Act**

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and were assigned OMB control number 0575-0184 in accordance with the Paperwork Reduction Act of 1995. No person is required to respond to a collection of information unless it displays a valid OMB control number. This rule does not impose any new