

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1140**

[Docket No. DA-00-06]

**Proposed Rule for Forward Pricing Pilot Program and Opportunity to File Comments****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule establishes a pilot program which would exempt handlers regulated under the Federal milk order program from paying producers and cooperative associations the minimum Federal order price(s) for that portion of their milk for non-fluid use that is under forward contract. Establishment of the pilot program is required by a November 1999 amendment to the Agricultural Marketing Agreement Act of 1937 (AMAA).

**DATES:** Comments must be submitted on or before March 16, 2000.

**ADDRESSES:** Comments should be submitted to Nicholas Memoli, Order Formulation Branch, Dairy Programs, USDA/AMS, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456. Comments also may be sent by fax to (202) 690-0552 or by e-mail to Nicholas.Memoli@usda.gov.

All comments submitted in response to this proposal will be available for public inspection at the USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2968, South Building, 14th and Independence Avenue, S.W., Washington, D.C. during normal business hours (7 CFR 1.27(b)). Anyone wishing to view the comments is requested to make an appointment in advance by calling Richard M. McKee at (202) 720-4392.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Memoli, Marketing Specialist, Order Formulation Branch, USDA/AMS/Dairy Programs, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 690-1932, e-mail address Nicholas.Memoli@usda.gov.

The USDA Fact Sheet and other information on the proposed pilot program is available from market administrators' offices or can be downloaded from our web site ([www.ams.usda.gov/dairy](http://www.ams.usda.gov/dairy)).

**SUPPLEMENTARY INFORMATION:** This proposed rule would implement an amendment to the AMAA which directs the Secretary of Agriculture to establish

a temporary pilot program for forward contracting of milk under Federal milk marketing orders. The effect of this amendment is to permit a handler to pay producers or cooperative associations a negotiated price, rather than the minimum Federal order price, for milk that is under forward contract. The amendment appears in Section 3 of H.R. 3428 of the 106th Congress, as enacted by Section 1001(a)(8) of Public Law 106-113 (113 Stat. 1536). It was signed into law on November 29, 1999. The amendment specifies that the pilot program shall only apply to federally regulated milk that is not classified as Class I milk or otherwise intended for fluid use and that is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in federally regulated milk. The pilot program expires December 31, 2004.

**Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. If adopted, the proposed rule would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to judicial challenge to the provisions of this rule.

**Executive Order 12866**

The Department is issuing this proposed rule in conformance with Executive Order 12866. This proposed rule is not economically significant for the purposes of Executive Order 12866.

The forward pricing pilot program is a voluntary program that will permit a handler and a producer to negotiate prices that may be below the minimum order prices that would otherwise apply to such milk. Some producers, proprietary handlers, and cooperative associations now negotiate forward contracts on part or all of their milk. The pilot program will expand the opportunities to engage in forward contracting by exempting participating proprietary handlers from the minimum prices to producers and cooperative associations required under Federal milk marketing orders. These regulations would not affect the ability of cooperative associations to forward contract with their members.

**The Regulatory Flexibility Act and the Effects on Small Businesses**

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agricultural

Marketing Service (AMS) has considered the economic impact of the proposed rule on small entities and has prepared this initial regulatory flexibility analysis.

The legal basis for the proposed rule is set forth in an amendment to the AMAA signed into law on November 29, 1999, that directs the Secretary of Agriculture to establish the dairy forward pricing pilot program. The Secretary was directed "to establish a temporary pilot program under which milk producers and cooperatives are authorized to voluntarily enter into forward price contracts with milk handlers."

The pilot program would provide the dairy industry, which has experienced substantial price volatility in recent years, with another tool to deal with such volatility. With the phase-down of the dairy price support program to a safety-net program, the prices of dairy products have fluctuated to a much greater extent than they did during the prior 20 years. This price fluctuation has created problems for processors of manufactured dairy products (*e.g.*, butter, nonfat dry milk, and cheese), the dairy farmers who supply these processors, and the retailers, school systems, and other public institutions who provide these products to consumers.

Under the Small Business Administration's definition of a "small business," a dairy farm is a small business if it has less than \$500,000 in gross annual sales and a handler is a small business if it has fewer than 500 employees. As of February 2000 under the Federal milk order program, there are 142 cooperative associations representing approximately 63,000 dairy farmers. In addition, there are 11,600 dairy farmers who are not affiliated with any cooperative association. Of these nonmember producers, 10,900 meet the SBA's definition of a small business.

There are nearly 1,000 milk plants that are regulated under the Federal milk order program. Based on the best data available, approximately one-third of these plants would be classified as small businesses. These requirements are further discussed in the Paperwork Reduction Act section.

The recordkeeping and reporting requirements for this proposed rule are minimal. At the present time, any handler that enters into a forward contract with a producer presumably has written proof for such an arrangement. Under the proposed pilot program, a handler would be required to submit a copy of each forward contract with a producer to the market administrator of the order in which the

handler's plant is regulated. In addition, the handler would be required to attach a disclosure statement to each forward contract. The disclosure statement, which would be attached to general guidelines concerning the contracting process, would have to be signed by each dairy farmer entering into a forward contract. The disclosure statement explains that a dairy farmer entering into a forward contract under the pilot program forfeits his or her right to receive the minimum order price(s) for that portion of their milk that is under contract for the duration of the contract period.

In drafting the proposed rule, the Department considered whether any limit should be established for the amount of milk that a dairy farmer could forward contract. We decided not to impose such a limit because we did not wish to interfere with a dairy farmer's desire to forward contract all of his or her milk. Also, in order to gain as much knowledge as possible about the types of forward contracts that might be offered by handlers, we believe it is beneficial to allow handlers and dairy farmers to decide between themselves how much milk to put under forward contract and how much milk to keep under minimum Federal order pricing.

Since the forward contracting of milk may be new to many dairy farmers, the Department decided to incorporate two provisions, in addition to the disclosure statement, to help dairy farmers adjust to the new program. First, the proposed rule requires that each forward contract under the pilot program must contain a clause that gives a dairy farmer 3 days to change his or her mind about forward contracting their milk. If a dairy farmer does change his or her mind after signing a forward contract, the farmer would be required to contact the handler with whom he or she had contracted by the 3rd business day following the date that the contract was signed.

The proposed rule would also limit the contract period for first-time contracts under the pilot program to 6 months. The reason for limiting the initial contract period is to give producers a chance to familiarize themselves with this new way of pricing their milk.

The Department does not believe that the forward pricing pilot program would unduly burden small entities or impair their ability to compete in the marketplace. In fact, by providing another tool to reduce price risk, the proposed pilot program may aid small businesses in competing with larger entities that have the ability to use existing futures and options markets,

and other means, to reduce their price risks. The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with the proposed rule.

Comments are specifically requested on the impact of this proposed rule on small businesses in addition to other aspects of the rule discussed above and throughout this document.

#### **Paperwork Reduction Act of 1995**

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) for emergency approval. Due to a 15-day comment period for the proposed rule, a separate 60-day notice seeking public comment on the information collection will be published with regard to permanent approval.

Under the proposed pilot program for the forward contracting of milk under Federal milk orders, a one-page disclosure statement was designed so that the Secretary's representatives administering the pilot program can be certain that dairy farmers have entered into the pilot program voluntarily. The disclosure statement would be attached to a fact sheet containing general guidelines to help the dairy farmer understand the forward contracting process. It also explains to the dairy farmer that the program is voluntary and that by entering into the program with a handler, the dairy farmer will be forfeiting his or her right to the minimum prices provided under the order. The form should take no more than 15 minutes to be read, understood, and signed by a dairy farmer. We estimate that the number of dairy farmers involved would be approximately 8,000, and the total annual time burden would not exceed 2,000 hours.

Handlers would be required to submit their forward contracts under the pilot program to their respective market administrator's office. There are two reasons for this. First, the market administrator must be able to review the contract to ensure it is signed and to verify that it complies with the regulations proposed here. Second, the Department is required to conduct a study of forward contracting under the pilot program to determine the impact on milk prices paid to producers in the United States. This study must be submitted to Congress no later than April 30, 2002. In order to do such a study, the Secretary will have to review, summarize, and evaluate the different types of contracts that were written

under the pilot program. The time required for handlers to prepare and submit copies of contracts would approximate 30 minutes per contract. Of the less than 700 manufacturing plants associated with Federal orders, fewer than 300 would be anticipated to participate with a total annual burden of 500 hours.

#### **Discussion of Proposed Rules Applicable to Pilot Program**

Under the rules proposed here to administer the pilot program, a proprietary handler will not be subject to the order minimum prices with respect to payments to dairy farmers and cooperative associations for milk under forward contract that does not exceed the handler's Class II, III, and IV utilization for the month in the market where the handler's plant or plants are regulated. (In the rule proposed here, this amount of milk is defined as "eligible milk." For convenience in the discussion that follows, a handler's combined Class II, III, and IV utilization will be referred to as the handler's eligible milk.) In the case of a multi-plant handler, the handler's Class II, III, and IV utilization would be combined together for all of the handler's plants regulated under one order. On a monthly basis if a handler's forward contracts exceed that amount, the handler would only be exempt from paying the order's minimum price(s) on its quantity of eligible milk.

The proposed rule leaves the determination of which producers' milk is over-contracted to the handler. If the handler fails to make this determination, the market administrator would prorate the over-contract milk to each producer and cooperative association having a contract with the handler.

Although handlers participating in the pilot program would not be required to pay producers and cooperative associations the order's minimum uniform or component prices for contract milk, they would still be required to account to the pool for all milk they receive at the respective order's minimum class prices. In the case of milk received by transfer from a cooperative association's pool plant, a handler may forward contract for all such transferred milk that is not used in Class I and would be exempt from paying the cooperative the minimum class prices for contract milk.

Any handler participating in the pilot program would still be required to file all of the reports that are now required under an order. This includes reports of receipts and utilization of milk and monthly payroll reports that show all

information now required under the orders.

Handlers participating in the pilot program would have to submit to the market administrator a copy of each contract for which it is claiming exemption from the order's minimum pricing. This contract must be signed prior to the first day of the first month for which the contract applies and would have to be received by the market administrator by the 15th day of that month. It would be the responsibility of each handler to give to each contracting dairy farmer or cooperative association a disclosure statement informing them of the nature of the pilot program and providing them with certain information that they should consider before entering into a forward contract. The disclosure statement would have to be signed on the same date as the contract by the dairy farmer or cooperative association representative and would have to be returned to the market administrator together with the contract by the 15th day of the month. Any contract that is submitted to the market administrator without the disclosure statement would be considered to be invalid for the purpose of being exempt from the order's minimum pricing and would be returned to the handler.

Each forward contract submitted to the market administrator must contain a provision that gives the dairy farmer signing the contract 3 business days in which to change his or her mind about forward contracting their milk. At midnight on the 3rd business day following the contract date, the contract would become irrevocable.

If a producer wishes to cancel a forward contract within the 3-day period, he or she would have to notify the handler in writing. Such notification could be faxed, e-mailed, or mailed, but it would have to be in the possession of the handler by midnight of the 3rd business day following the contract date. A copy of the notification should be retained by the producer together with evidence verifying its date and time of receipt.

The first time that a producer or cooperative association forward contracts under this pilot program the contract would be limited to 6 months. Thereafter, the producer or cooperative association could enter into forward contracts with proprietary handlers for whatever period they wish so long as the contract does not extend beyond December 31, 2004. If a handler violates this rule by submitting to the market administrator a contract that is longer than 6 months, the market administrator would return the contract to the handler and the handler would not be exempt

from minimum order pricing with respect to that contract. The reason for proposing to limit the initial contract period is to give producers a chance to familiarize themselves with this new way of pricing their milk.

Payments specified under a forward contract would have to be made on the same dates as order payments which they replace. In addition, the basis for pricing milk under a forward contract would be the same basis that is used to price milk under the respective order regulating the pooling of such milk. For example, under the 4 orders that provide for skim milk and butterfat pricing (*i.e.*, Parts 1005, 1006, 1007, and 1131), forward contracts would have to be written in terms of skim milk and butterfat pricing. On the other hand, in the 7 markets providing for component pricing of milk (*i.e.*, Parts 1001, 1030, 1032, 1033, 1124, 1126, and 1135), forward contracts under the pilot program would have to be written in terms of the component pricing provided under those orders.

Consideration was given to leaving the pricing and payment for milk under forward contracts open. However, this approach was considered to be undesirable for several reasons. First, with respect to the timing of payments, nearly every handler entering into forward contracts would have some milk that is subject to minimum order pricing. It is highly unlikely that these handlers would establish a dual accounting and payment system even if they thought that different payment dates would be preferable to those specified under the order. Second, if handlers paid producers under contract at different times than producers not under contract, this disparate treatment could cause problems which might influence the success of the pilot program for reasons entirely apart from more predictable pricing. Third, from an administrative standpoint, we believe that it would be much easier to administer the pilot program if payments are made on the same day as minimum order payments. Also, we believe that the program would be easier for producers to understand if payments continue to be made on the dates with which they have grown accustomed.

With respect to the form of pricing—*i.e.*, skim milk/butterfat versus component—we believe that it would be unduly confusing and administratively burdensome to allow contract milk to be priced on a different basis than milk subject to minimum order pricing. Market administrator offices are set up to test milk according to the way it is priced under the order. While they may be able to test milk on some other basis,

such testing could result in additional labor, possibly the purchase of additional equipment, and perhaps additional training of market administrator personnel. Finally, disparate pricing of milk to a producer could be confusing, especially if over-contracted milk has to be repriced using minimum order pricing.

Since this pilot program is authorized through an amendment to the AMAA, it is reasonable to conclude that if the pilot program results in disorderly marketing conditions, the program would be in conflict with the objectives of the Act and would have to be modified to remedy such conflict.

Participation in the pilot program must be entirely voluntary on the part of dairy farmers and handlers. If the Department believes that the program is being used to coerce dairy farmers into signing contracts providing for prices that, on average, are consistently below minimum order prices, steps would be taken to halt such practices. One indication that such practices could be occurring would be complaints from dairy farmers that they were dropped because they refused to sign a forward contract with a handler. Another indication might be manifested by the replacement of one group of dairy farmers with another group of dairy farmers who have entered into forward contracts with the handler. It is conceivable that some farmers might intentionally enter into a forward contract that would consistently provide a price below the minimum order price simply to get their milk pooled on a particular market. This type of activity would undermine the concept of minimum prices to dairy farmers and lead to the type of conditions that the AMAA was enacted to remedy. Should these types of activities occur after the pilot program becomes effective, the Secretary would consider amending, suspending, or terminating the pilot program.

Additional information about the pilot program is included in the Department's program announcement. The information is also available on the Dairy Programs' web site ([www.ams.usda.gov/dairy](http://www.ams.usda.gov/dairy)) and is available from local market administrator offices.

A 15-day comment period is provided in this proposed rule. This comment period is deemed appropriate because: (1) In enacting the legislation authorizing the pilot program, Congress intended that it be established early this year; (2) the dairy industry is anticipating, and has already been preparing to take part in, the pilot program; and (3) the program represents

another means which the industry may need to deal with price volatility.

For the reasons set forth in the preamble, it is proposed that Title 7 of Chapter X of the CFR be amended by adding a new Part 1140 as follows:

**PART 1140—DAIRY FORWARD PRICING PILOT PROGRAM**

**Subpart A—Definitions**

Sec.

1140.1 General definitions.

**Subpart B—Rules Governing Forward Contracts**

1140.2 Rules governing forward contracts.

*Authority:* 7 U.S.C. 601, *et seq.*

**Subpart A—Definitions**

**§ 1140.1 General definitions.**

(a) *Pilot program* means the dairy forward pricing pilot program provided by an amendment to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601, *et seq.*) signed into law on November 29, 1999 (Section 3 of H.R. 3428 of the 106th Congress, as enacted by section 1001(a)(8) of Public Law 106–113 (113 Stat. 1536)).

(b) *Eligible milk* means the quantity of milk equal to a handler's Class II, III, and IV utilization during the month, combining all pool plants of a single handler that are regulated under a single Federal order.

(c) *Forward contract* means an agreement covering the terms and conditions for the sale of milk from a producer defined in section 12 of Parts 1001 through 1135 to a handler defined in § 1000.9.

(d) *Contract milk* means the producer milk covered by a forward contract.

(e) *Disclosure statement* means the following statement which must be signed and returned to the market administrator by each producer entering into a forward contract with a handler before the market administrator will recognize the terms and conditions provided in such contract.

**Disclosure Statement**

I am voluntarily entering into a forward contract with \_\_\_\_\_ (handler's name). I have been given a copy of the contract and I have received the USDA's Pilot Program Fact Sheet to which this disclosure statement was attached. By signing this form, I understand that I am forfeiting my right to receive the order's minimum uniform or component prices for that portion of my milk that is under forward contract for the duration of the contract. I also understand that my milk will be priced in accordance with the terms and conditions of the contract.

Printed Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Address: \_\_\_\_\_

Producer No: \_\_\_\_\_

(f) *Other definitions.* Any term used in this part that is defined in Parts 1000–1135 is incorporated in this part.

**Subpart B—Rules Governing Forward Contracts**

**§ 1140.2 Rules governing forward contracts.**

(a) A handler that operates one or more pool plants may enter into forward contracts with producers or cooperative associations for the handler's *eligible milk* received at such plants and be exempt from the minimum payment provisions that would apply to such milk in section 73 of Parts 1001 through 1135 for the period of time covered by the contract, except that a contract with a producer or cooperative association participating for the first time in this pilot program may not exceed 6 months. In no event shall a forward contract executed pursuant to this part extend beyond December 31, 2004.

(b) Forward contracts must be signed and dated by the contracting handler and producer (or cooperative association) prior to the first day of the first month for which they are to be effective and must be in the possession of the market administrator by the 15th day of that month. The *disclosure statement* provided in § 1140.2(e) must be signed on the same date as the contract by each producer or cooperative association entering into a forward contract under the pilot program and this signed disclosure statement must be attached to each contract submitted to the market administrator.

(c) Each forward contract submitted for approval must contain a clause that allows the dairy farmer signing the contract to revoke the contract by notifying the handler in writing within 3 business days. This written notification, which may be faxed, mailed, or E-mailed, must be in the possession of the handler by midnight of the 3rd business day following the signing of the contract. The producer is responsible for verifying the time and date of receipt of this notification.

(d) In the event that a handler's contract milk exceeds the handler's *eligible milk* for any month in which the specified contract price(s) are below the order's minimum prices, the handler must designate which producer milk shall not be contract milk. If the handler does not designate the owners of the over-contracted milk, the market administrator shall prorate the over-contracted milk to each producer and cooperative association having a forward contract with the handler.

(e) Payments for milk covered by a forward contract must be made on the same dates as payments for milk that is not under forward contract under the respective Federal order.

(f) The basis for pricing milk under forward contract must be the same basis—but not at the same rate or level—as is used to price milk that is not under forward contract under the respective order. Under orders providing for skim milk and butterfat pricing, forward contracts must price milk on the basis of skim milk and butterfat, and under orders with component pricing of milk, forward contracts must price milk according to the components priced under the respective order.

(g) Handlers participating in the pilot program will continue to be required to file all reports that are currently required under the respective marketing orders and will continue to be required to account to the pool for all milk they receive at their respective order's minimum class prices.

(h) Nothing in this part shall impede the contractual arrangements that exist between a cooperative association and its members.

Dated: February 25, 2000.

**Richard M. McKee,**

*Deputy Administrator, Dairy Programs.*

[FR Doc. 00–4920 Filed 2–29–00; 8:45 am]

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**DEPARTMENT OF ENERGY**

**Office of Energy Efficiency and Renewable Energy**

**10 CFR Part 431**

[Docket No. EE–RM–STD–00–100]

RIN No. 1904–AB06

**Energy Efficiency Program for Commercial and Industrial Equipment: Efficiency Standards for Commercial Heating, Air Conditioning and Water Heating Equipment**

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of preliminary screening analysis.

**SUMMARY:** The Energy Policy and Conservation Act, as amended by the Energy Policy Act of 1992 (EPCA), establishes energy efficiency standards for certain commercial heating, air conditioning and water heating