

The Committee's meeting was widely publicized throughout the spearmint oil industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the October 8, 2003 meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons the opportunity to respond to the proposal, including any regulatory and informational impacts of this action on small businesses. This comment period is deemed appropriate so that a final determination can be made prior to June 1, 2004, the beginning of the 2004–2005 marketing year. All written comments received within the comment period will be considered before a final determination is made on this matter.

#### List of Subjects in 7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements, Spearmint oil.

For the reasons set forth in the preamble, 7 CFR Part 985 is proposed to be amended as follows:

#### PART 985—MARKETING ORDER REGULATING THE HANDLING OF SPEARMINT OIL PRODUCED IN THE FAR WEST

1. The authority citation for 7 CFR part 985 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. A new § 985.223 is added to read as follows:

**[Note:** This section will not appear in the Code of Federal Regulations.]

#### § 985.223 Salable quantities and allotment percentages—2004–2005 marketing year.

The salable quantity and allotment percentage for each class of spearmint oil during the marketing year beginning on June 1, 2004, shall be as follows:

(a) Class 1 (Scotch) oil—a salable quantity of 766,880 pounds and an allotment percentage of 40 percent.

(b) Class 3 (Native) oil—a salable quantity of 773,474 pounds and an allotment percentage of 36 percent.

Dated: January 16, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

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**BILLING CODE 3410-02-P**

accommodations should contact Sue L. Mosley, Market Administrator, at (770) 682-2501; e-mail [smosley@fmmlanta.com](mailto:smosley@fmmlanta.com) before the hearing begins.

**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.

Notice is hereby given of a public hearing to be held at the Westin Atlanta Airport Hotel, 4736 Best Road, Atlanta, GA 30337, (404) 762-7676, beginning at 1 p.m., on Monday, February 23, 2004, with respect to proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Appalachian and Southeast milk marketing areas.

The hearing is called 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).

The purpose of the hearing is to receive evidence with respect to the economic and marketing conditions that relate to the proposed amendments, hereinafter set forth, and any appropriate modifications thereof, to the tentative marketing agreements and to the orders.

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This Act seeks to ensure that, within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. For the purpose of the Act, a dairy farm is 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. Most parties subject to a milk order are considered as a small business. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may suggest modifications of these proposals for the purpose of tailoring their applicability to small businesses.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they

#### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Parts 1005, 1007, and 1094

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

#### Milk in the Appalachian and Southeast Marketing Areas; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreements and Orders

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

**ACTION:** Proposed rule; Notice of public hearing on proposed rulemaking.

**SUMMARY:** A public hearing is being held in response to industry requests to consider proposals to amend the Appalachian and Southeast Federal milk marketing orders. A proposal by Southern Marketing Agency, Inc. (SMA), would merge the Appalachian and Southeast milk marketing areas into a single milk marketing area. A separate SMA proposal and a proposal by The Kroger Company would expand the proposed merged order to include certain currently unregulated counties and cities in the State of Virginia. Also, a proposal submitted by Prairie Farms and Dean Foods Company would create a "Mississippi Valley" milk marketing area by breaking the Southeast order into two orders. Additional proposals that seek to amend certain other terms and provisions of the orders also will be considered at the hearing.

**DATES:** The hearing will convene at 1 p.m. on Monday, February 23, 2004.

**ADDRESSES:** The hearing will be held at the Westin Atlanta Airport Hotel, 4736 Best Road, Atlanta, GA 30337; (404) 762-7676.

#### FOR FURTHER INFORMATION CONTACT:

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

Persons requiring a sign language interpreter or other special

present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (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.

This public hearing is being conducted to collect evidence for the record concerning merging the Appalachian and Southeast milk marketing areas, expanding the proposed merged marketing area, splitting the current Southeast marketing area, or retention of the current Appalachian and Southeast milk marketing areas, or any combination of the above. At the hearing, evidence also will be collected to consider certain proposed amendments to the current orders and all terms and provisions that would be included in a proposed order(s) including definitions, pricing, pooling, reporting, payment dates, transportation credits, and administrative provisions including disposition of administrative funds accumulated under the Appalachian and Southeast milk marketing orders.

Interested parties who wish to introduce exhibits should provide the Presiding Officer at the hearing with (4) copies of such exhibits for the Official Record. Also, it would be helpful if additional copies are available for the use of other participants at the hearing.

#### **List of Subjects in 7 CFR Parts 1005, 1007 and 1094**

##### **Milk marketing orders.**

The authority citation for 7 CFR parts 1005 and 1007 continues to read as follows:

##### **Authority:** 7 U.S.C. 601–674.

The proposed amendments, as set forth below, have not received the approval of the Department.

*Proposed by Southern Marketing Agency, Inc.:*

#### **Proposal No. 1**

This proposal seeks to merge the Appalachian and Southeast milk marketing areas to form a new Southeast milk marketing area (part 1007) by revising provisions of the Southeast milk marketing order.

1. Amend § 1007.2 by revising the Southeast marketing area to read as follows:

#### **§ 1007.2 Southeast marketing area.**

\* \* \* \* \*

#### **Alabama, Arkansas, Georgia, Louisiana, North Carolina, Mississippi, South Carolina, and Tennessee**

All of the States of Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

#### **Florida Counties**

Escambia, Okaloosa, Santa Rosa, and Walton.

#### **Indiana Counties**

Clark, Crawford, Daviess, Dubois, Floyd, Gibson, Greene, Harrison, Knox, Martin, Orange, Perry, Pike, Posey, Scott, Spencer, Sullivan, Vanderburgh, Warrick, and Washington.

#### **Kentucky Counties**

All of the State of Kentucky except for the counties of Boone, Boyd, Bracken, Campbell, Floyd, Grant, Greenup, Harrison, Johnson, Kenton, Lawrence, Lewis, Magoffin, Martin, Mason, Pendleton, Pike, and Robertson.

#### **Missouri Counties**

Barry, Barton, Bollinger, Butler, Cape Girardeau, Carter, Cedar, Christian, Crawford, Dade, Dallas, Dent, Douglas, Dunklin, Greene, Howell, Iron, Jasper, Laclede, Lawrence, Madison, McDonald, Mississippi, New Madrid, Newton, Oregon, Ozark, Pemiscot, Perry, Polk, Reynolds, Ripley, Scott, Shannon, St. Francois, Stoddard, Stone, Taney, Texas, Vernon, Washington, Wayne, Webster, and Wright.

#### **Virginia Counties and Cities**

Buchanan, Dickenson, Lee, Russell, Scott, Tazewell, Washington, and Wise, and the cities of Bristol and Norton.

#### **West Virginia Counties**

McDowell and Mercer.

2. Amend § 1007.7 by revising paragraph (d) and adding a new paragraph (g)(6) to read as follows:

#### **§ 1007.7 Pool Plant.**

\* \* \* \* \*

(d) A plant located within the marketing area or in the State of Virginia that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative association and during the month at least 60 percent of the producer milk of members of such cooperative association is delivered directly from farms to pool distributing plants or is transferred to such plants as a fluid milk product (excluding concentrated milk transferred to a distributing plant for an agreed-upon use other than Class I) from the cooperative's plant.

\* \* \* \* \*

(g) \* \* \*

(6) That portion of a pool plant designated as a "nonpool plant" that is physically separate and operated separately from the pool portion of such plant. The designation of a portion of a regulated plant as a nonpool plant must be requested in writing by the handler and must be approved by the market administrator.

3. Amend § 1007.13 by revising paragraphs (d)(1) and (d)(2), redesignating paragraph (d)(7) as paragraph (d)(8), redesignating paragraph (d)(6) as paragraph (d)(7), adding a new paragraph (d)(6), and revising newly designated paragraph (d)(8) to read as follows:

#### **§ 1007.13 Producer milk.**

\* \* \* \* \*

(d) \* \* \*

(1) In any month of January through June, not less than 15 percent of the production of the producer whose milk is diverted is physically received at a pool plant during the month;

(2) In any month of July through December, not less than 33 percent of the production of the producer whose milk is diverted is physically received at a pool plant during the month;

\* \* \* \* \*

(6) Milk of a dairy farmer shall be eligible for diversion the first day of the month during which the milk of such dairy farmer was physically received as producer milk at a pool plant and the dairy farmer meets the delivery requirements as specified in paragraphs (d)(1) or (2) of this section;

\* \* \* \* \*

(8) The delivery percentage requirements and the diversion percentages in paragraphs (d)(1) through (4) of this section may be increased or decreased by the market administrator 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.

4. Amend § 1007.82 by revising paragraphs (c)(1), (c)(2)(ii), and (c)(2)(iii) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) Bulk milk received from a plant regulated under another Federal order and allocated to Class I milk pursuant to § 1000.44(a)(9); and

(2) \* \* \*

(ii) The dairy farmer was not a "producer" under this order during more than 2 of the immediately preceding months of February through May and not more than 50 percent of the production of the dairy farmer during those 2 months, in aggregate, was received as producer milk under this order during those 2 months; Provided, from the inception of this amendment, any dairy farmer who qualified for payments under the provisions of the former Appalachian Federal Order 1005 or the Southeast Federal Order 1007 shall continue to qualify under these provisions through the following January; and

(iii) The farm on which the milk was produced is not located within the specified marketing area of this order.

\* \* \* \* \*

*Proposed by Southern Marketing Agency, Inc.:*

**Proposal No. 2**

This proposal seeks to combine for the proposed "Southeast" Order the remaining balances of the Producer Settlement Funds, the Transportation Credit Balancing Funds, the Administrative Assessment Funds, and the Marketing Service Funds of the current Appalachian and Southeast milk marketing orders.

*Proposed by Southern Marketing Agency, Inc.:*

**Proposal No. 3**

This proposal seeks to expand the proposed "Southeast" marketing area in Proposal No. 1 to include certain currently unregulated counties and

independent cities in the State of Virginia.

1. Amend § 1007.2 by revising the Virginia counties and cities in the proposed Southeast marketing area to read as follows:

**§ 1007.2 Southeast 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, and Staunton.

\* \* \* \* \*

*Proposed by The Kroger Company:*

**Proposal No. 4**

This proposal seeks to expand the proposed "Southeast" marketing area in Proposal No. 1 to include two currently unregulated counties and two currently unregulated cities in the State of Virginia, and include the current Appalachian marketing area pool plant order language in Proposal No. 1.

1. Amend § 1007.2 by revising the proposed "Southeast" marketing area to read as follows:

**§ 1007.2 Southeast marketing area.**

\* \* \* \* \*

*Alabama, Arkansas, Georgia, Louisiana, North Carolina, Mississippi, South Carolina, and Tennessee*

All of the States of Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

*Florida Counties*

Escambia, Okaloosa, Santa Rosa, and Walton.

*Indiana Counties*

Clark, Crawford, Daviess, Dubois, Floyd, Gibson, Greene, Harrison, Knox, Martin, Orange, Perry, Pike, Posey, Scott, Spencer, Sullivan, Vanderburgh, Warrick, and Washington.

*Kentucky Counties*

Adair, Allen, Anderson, Ballard, Barren, Bath, Bell, Bourbon, Boyle, Breathitt, Breckinridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Carroll, Carter, Casey, Christian, Clark, Clay,

Clinton, Crittenden, Cumberland, Daviess, Edmonson, Elliott, Estill, Fayette, Fleming, Franklin, Fulton, Gallatin, Garrard, Graves, Grayson, Green, Hancock, Hardin, Harlan, Hart, Henderson, Henry, Hickman, Hopkins, Jackson, Jefferson, Jessamine, Knott, Knox, Larue, Laurel, Lee, Leslie, Letcher, Lincoln, Livingston, Logan, Lyon, Madison, Marion, Marshall, McCracken, McCreary, McLean, Meade, Menifee, Mercer, Metcalfe, Monroe, Montgomery, Morgan, Muhlenberg, Nelson, Nicholas, Ohio, Oldham, Owen, Owsley, Perry, Powell, Pulaski, Rockcastle, Rowan, Russell, Scott, Shelby, Simpson, Spencer, Taylor, Todd, Trigg, Trimble, Union, Warren, Washington, Wayne, Webster, Whitley, Wolfe, and Woodford.

*Missouri Counties*

Barry, Barton, Bollinger, Butler, Cape Girardeau, Carter, Cedar, Christian, Crawford, Dade, Dallas, Dent, Douglas, Dunklin, Greene, Howell, Iron, Jasper, Laclede, Lawrence, Madison, McDonald, Mississippi, New Madrid, Newton, Oregon, Ozark, Pemiscot, Perry, Polk, Reynolds, Ripley, Scott, Shannon, St. Francois, Stoddard, Stone, Taney, Texas, Vernon, Washington, Wayne, Webster, and Wright.

*Virginia Counties and Cities*

Buchanan, Campbell, Dickenson, Lee, Pittsylvania, Russell, Scott, Tazewell, Washington, and Wise; and the cities of Bristol, Danville, Lynchburg and Norton.

*West Virginia Counties*

McDowell and Mercer.

2. Amend § 1007.7 by revising paragraph (d) and adding a new paragraph (g)(6) to read as follows:

**§ 1007.7 Pool plant.**

\* \* \* \* \*

(d) A plant located within the marketing area or in the State of Virginia that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative association and during the month at least 60 percent of the producer milk of members of such cooperative association is delivered directly from farms to pool distributing plants or is transferred to such plants as a fluid milk product (excluding concentrated milk transferred to a distributing plant for an agreed-upon use other than Class I) from the cooperative's plant.

\* \* \* \* \*

(g) \* \* \*

(6) That portion of a pool plant designated as a "nonpool plant" that is

physically separate and operated separately from the pool portion of such plant. The designation of a portion of a regulated plant as a nonpool plant must be requested in writing by the handler and must be approved by the market administrator.

*Proposed by Prairie Farms and Dean Foods:*

#### Proposal No. 5

Create a new "Mississippi Valley" marketing area (part 1094) to include Mississippi, Louisiana, Arkansas, western Tennessee, and southern Missouri, with terms and provisions to read as follows:

### PART 1094—MILK IN MISSISSIPPI VALLEY MARKETING AREA

#### Subpart—Order Regulating Handling

##### General Provisions

###### § 1094.1 General provisions.

The terms, definitions, and provisions in part 1000 of this chapter apply to this part 1094. In this part 1094, all references to sections in part 1000 refer to part 1000 of this chapter.

##### Definitions

###### § 1094.2 Mississippi Valley marketing area.

The marketing area means all territory within the bounds of the following states and political subdivisions, including all piers, docks and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed states or political subdivisions:

##### Arkansas, Louisiana, and Mississippi

All of the States of Arkansas, Louisiana, and Mississippi.

##### Missouri Counties

Barry, Barton, Bollinger, Butler, Cape Girardeau, Carter, Cedar, Christian, Crawford, Dade, Dallas, Dent, Douglas, Dunklin, Greene, Howell, Iron, Jasper, Laclede, Lawrence, Madison, McDonald, Mississippi, New Madrid, Newton, Oregon, Ozark, Pemiscot, Perry, Polk, Reynolds, Ripley, Scott, Shannon, St. Francois, Stoddard, Stone, Taney, Texas, Vernon, Washington, Wayne, Webster, and Wright.

##### Tennessee Counties

Benton, Carroll, Chester, Crockett, Decatur, Dyer, Fayette, Gibson, Hardeman, Hardin, Haywood, Henderson, Henry, Lake, Lauderdale,

McNairy, Madison, Obion, Shelby, Tipton, and Weakley.

###### § 1094.3 Route disposition.

*See § 1000.3.*

###### § 1094.4 Plant.

*See § 1000.4.*

###### § 1094.5 Distributing plant.

*See § 1000.5.*

###### § 1094.6 Supply plant.

*See § 1000.6.*

###### § 1094.7 Pool plant.

*Pool plant* means a plant specified in paragraphs (a) through (d) of this section, or a unit of plants as specified in paragraph (e) of this section, but excluding a plant specified in paragraph (g) of this section. The pooling standards described in paragraphs (c) and (d) of this section are subject to modification pursuant to paragraph (f) of this section:

(a) A distributing plant, other than a plant qualified as a pool plant pursuant to paragraph (b) of this section or § 1000.7(b) of any other Federal milk order, from which during the month 50 percent or more of the fluid milk products physically received at such plant (excluding concentrated milk received from another plant by agreement for other than Class I use) are disposed of as route disposition or are transferred in the form of packaged fluid milk products to other distributing plants. At least 25 percent of such route disposition and transfers must be to outlets in the marketing area.

(b) Any distributing plant located in the marketing area which during the month processed at least 50 percent of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) into ultra-pasteurized or aseptically-processed fluid milk products.

(c) A supply plant from which 50 percent or more of the total quantity of milk that is physically received during the month from dairy farmers and handlers described in § 1000.9(c), including milk that is diverted from the plant, is transferred to pool distributing plants. Concentrated milk transferred from the supply plant to a distributing plant for an agreed-upon use other than Class I shall be excluded from the supply plant's shipments in computing the plant's shipping percentage.

(d) A plant located within the marketing area that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative

association and during the month at least 60 percent of the producer milk of members of such cooperative association is delivered directly from farms to pool distributing plants or is transferred to such plants as a fluid milk product (excluding concentrated milk transferred to a distributing plant for an agreed-upon use other than Class I) from the cooperative's plant.

(e) Two or more plants operated by the same handler and located within the marketing area may qualify for pool status as a unit by meeting the total in-area route disposition requirements specified in paragraph (a) of this section and the following additional requirements:

(1) At least one of the plants in the unit must qualify as a pool plant pursuant to paragraph (a) of this section;

(2) Other plants in the unit must process only Class I or Class II products and must be located in a pricing zone providing the same or a lower Class I price than the price applicable at the distributing plant included in the unit pursuant to paragraph (e)(1) of this section; and

(3) A written request to form a unit, or to add or remove plants from a unit, must be filed with the market administrator prior to the first day of the month for which it is to be effective.

(f) The applicable shipping percentages of paragraphs (c) and (d) of this section may be increased or decreased by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipment or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for adjustment either on the market administrator's own initiative or at the request of interested parties if the request is made in writing at least 15 days prior to the date for which the requested revision is desired effective. If the investigation shows that an adjustment of the shipping percentages might be appropriate, the market administrator shall issue a notice stating that an adjustment is being considered and invite data, views, and arguments. Any decision to revise an applicable shipping percentage must be issued in writing at least one day before the effective date.

(g) The term pool plant shall not apply to the following plants:

(1) A producer-handler plant;  
(2) An exempt plant as defined in § 1000.8(e);

(3) A plant qualified pursuant to paragraph (a) of this section which is not located within any Federal order marketing area, meets the pooling

requirements of another Federal order, and has had greater route disposition in such other Federal order marketing area for 3 consecutive months;

(4) A plant qualified pursuant to paragraph (a) of this section which is located in another Federal order marketing area, meets the pooling standards of the other Federal order, and has not had a majority of its route disposition in this marketing area for 3 consecutive months or is locked into pool status under such other Federal order without regard to its route disposition in any other Federal order marketing area; and

(5) A plant qualified pursuant to paragraph (c) of this section which also meets the pooling requirements of another Federal order and from which greater qualifying shipments are made to plants regulated under such other order than are made to plants regulated under the order in this part, or such plant has automatic pooling status under such other order.

#### **§ 1094.8 Nonpool plant.**

See § 1000.8.

#### **§ 1094.9 Handler.**

See § 1000.9.

#### **§ 1094.10 Producer-handler.**

*Producer-handler* means a person who:

(a) Operates a dairy farm and a distributing plant from which there is monthly route disposition in the marketing area;

(b) Receives no fluid milk products, and acquires no fluid milk products for route disposition, from sources other than own farm production;

(c) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products received from own farm production;

(d) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled, and the processing and packaging operations, are the producer-handler's own enterprise and are operated at the producer-handler's own risk;

(e) Has total route disposition and transfers in the form of packaged fluid milk products to other distributing plants during the month that does not exceed 3 million pounds; and

(f) Does not distribute fluid milk products to a wholesale customer who also is serviced by a plant described in § 1094.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized

package with a similar label to the wholesale customer during the month.

#### **§ 1094.12 Producer.**

(a) Except as provided in paragraph (b) of this section, *producer* means any person who produces milk approved by a duly constituted regulatory agency for fluid consumption as Grade A milk and whose milk (or components of milk) is:

(1) Received at a pool plant directly from the producer or diverted by the plant operator in accordance with § 1094.13; or

(2) Received by a handler described in § 1000.9(c).

(b) Producer shall not include:

(1) A producer-handler as defined in any Federal order;

(2) A dairy farmer whose milk is received at an exempt plant, excluding producer milk diverted to the exempt plant pursuant to § 1094.13(d);

(3) A dairy farmer whose milk is received by diversion at a pool plant from a handler regulated under another Federal order if the other Federal order designates the dairy farmer as a producer under that order and that milk is allocated by request to a utilization other than Class I; and

(4) A dairy farmer whose milk is reported as diverted to a plant fully regulated under another Federal order with respect to that portion of the milk so diverted that is assigned to Class I under the provisions of such other order.

#### **§ 1094.13 Producer milk.**

*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:

(a) Received by the operator of a pool plant directly from a producer or a handler described in § 1000.9(c). All milk received pursuant to this paragraph shall be priced at the location of the plant where it is first physically received;

(b) Received by a handler described in § 1000.9(c) in excess of the quantity delivered to pool plants;

(c) Diverted by a pool plant operator to another pool plant. Milk so diverted shall be priced at the location of the plant to which diverted; or

(d) Diverted by the operator of a pool plant or a handler described in § 1000.9(c) to a nonpool plant, subject to the following conditions:

(1) In any month of January through June, not less than 4 days' production of the producer whose milk is diverted is physically received at a pool plant during the month;

(2) In any month of July through December, not less than 10 days'

production of the producer whose milk is diverted is physically received at a pool plant during the month;

(3) The total quantity of milk so diverted during the month by a cooperative association shall not exceed 33 percent during the months of July through December, and 50 percent during the months of January through June, of the producer milk that the cooperative association caused to be delivered to, and physically received at, pool plants during the month;

(4) The operator of a pool plant that is not a cooperative association may divert any milk that is not under the control of a cooperative association that diverts milk during the month pursuant to paragraph (d) of this section. The total quantity of milk so diverted during the month shall not exceed 33 percent during the months of July through December, or 50 percent during the months of January through June, of the producer milk physically received at such plant (or such unit of plants in the case of plants that pool as a unit pursuant to § 1094.7(e)) during the month, excluding the quantity of producer milk received from a handler described in § 1000.9(c);

(5) Any milk diverted in excess of the limits prescribed in paragraphs (d)(3) and (4) of this section shall not be producer milk. If the diverting handler or cooperative association fails to designate the dairy farmers' deliveries that will not be producer milk, no milk diverted by the handler or cooperative association shall be producer milk;

(6) Diverted milk shall be priced at the location of the plant to which diverted; and

(7) The delivery day requirements and the diversion percentages in paragraphs (d)(1) through (4) of this section may be increased or decreased by the market administrator 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 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.

(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.

**§ 1094.14 Other source milk.**

See § 1000.14.

**§ 1094.15 Fluid milk product.**

See § 1000.15.

**§ 1094.16 Fluid cream product.**

See § 1000.16.

**§ 1094.18 Cooperative association.**

See § 1000.18.

**§ 1094.19 Commercial food processing establishment.**

See § 1000.19.

**§ 1094.30 Reports of receipts and utilization.**

Each handler shall report monthly so that the market administrator's office receives the report on or before the 7th day after the end of the month, in the detail and on prescribed forms, as follows:

- (a) With respect to each of its pool plants, the quantities of skim milk and butterfat contained in or represented by:
  - (1) Receipts of producer milk, including producer milk diverted by the reporting handler, from sources other than handlers described in § 1000.9(c);
  - (2) Receipts of milk from handlers described in § 1000.9(c);
  - (3) Receipts of fluid milk products and bulk fluid cream products from other pool plants;
  - (4) Receipts of other source milk;
  - (5) Receipts of bulk milk from a plant regulated under another Federal order, except Federal orders 1005 and 1007, for which a transportation credit is requested pursuant to § 1094.82;
  - (6) Receipts of producer milk described in § 1094.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to that paragraph and the date that such milk was received;
  - (7) For handlers submitting transportation credit requests, transfers of bulk milk to nonpool plants, including the dates that such milk was transferred;
  - (8) Inventories at the beginning and end of the month of fluid milk products and bulk fluid cream products; and
  - (9) The utilization or disposition of all milk and milk products required to be reported pursuant to this paragraph.
- (b) Each handler operating a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports

required by paragraphs (a)(1), (a)(2), (a)(3), (a)(4), and (a)(8) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. The report shall show also the quantity of any reconstituted skim milk in route disposition in the marketing area.

(c) Each handler described in § 1000.9(c) shall report:

(1) The quantities of all skim milk and butterfat contained in receipts of milk from producers;

(2) The utilization or disposition of all such receipts; and

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1094.82, all of the information required in paragraphs (a)(5), (a)(6), and (a)(7) of this section.

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to its receipts and utilization of milk and milk products in such manner as the market administrator may prescribe.

**§ 1094.31 Payroll reports.**

(a) On or before the 20th day after the end of each month, each handler that operates a pool plant pursuant to § 1094.7 and each handler described in § 1000.9(c) shall report to the market administrator its producer payroll for the month, in detail prescribed by the market administrator, showing for each producer the information specified in § 1094.73(e).

(b) Each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1000.76(b) shall report for each dairy farmer who would have been a producer if the plant had been fully regulated in the same manner as prescribed for reports required by paragraph (a) of this section.

**§ 1094.32 Other reports.**

(a) On or before the 20th day after the end of each month, each handler described in § 1000.9(a) and (c) shall report to the market administrator any adjustments to transportation credit requests as reported pursuant to § 1094.30(a)(5), (6), and (7).

(b) In addition to the reports required pursuant to §§ 1094.30, 1094.31 and 1094.32(a), each handler shall report any information the market administrator deems necessary to verify or establish each handler's obligation under the order.

**Classification of Milk**

**§ 1094.40 Classes of utilization.**

See § 1000.40.

**§ 1094.42 Classification of transfers and diversion.**

See § 1000.42.

**§ 1094.43 General classification rules.**

See § 1000.43.

**§ 1094.44 Classification of producer milk.**

See § 1000.44.

**§ 1094.45 Market administrator's reports and announcements concerning classification.**

See § 1000.45.

**Class Prices**

**§ 1094.50 Class prices, component prices, and advanced pricing factors.**

See § 1000.50.

**§ 1094.51 Class I differential and price.**

The Class I differential shall be the differential established for Orleans Parish, Louisiana, which is reported in § 1000.52. The Class I price shall be the price computed pursuant to § 1000.50(a) for Orleans Parish, Louisiana.

**§ 1094.52 Adjusted Class I differentials.**

See § 1000.52.

**§ 1094.53 Announcement of class prices, component prices, and advanced pricing factors.**

See § 1000.53.

**§ 1094.54 Equivalent price.**

See § 1000.54.

**Uniform Prices**

**§ 1094.60 Handler's value of milk.**

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (e) of this section and subtracting from that total amount the value computed in paragraph (f) of this section. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) shall be excluded from pricing under this section.

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts;

(b) Multiply the pounds of skim milk and butterfat overage assigned to each class pursuant to § 1000.44(a)(11) by the

respective skim milk and butterfat prices applicable at the location of the pool plant;

(c) Multiply the difference between the Class IV price for the preceding month and the current month's Class I, II, or III price, as the case may be, by the hundredweight of skim milk and butterfat subtracted from Class I, II, or III, respectively, pursuant to § 1000.44(a)(7) and the corresponding step of § 1000.44(b);

(d) Multiply the difference between the Class I price applicable at the location of the pool plant and the Class IV price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1000.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(3)(i) through (vi) and the corresponding step of § 1000.44(b), excluding receipts of bulk fluid cream products from a plant regulated under other Federal orders and bulk concentrated fluid milk products from pool plants, plants regulated under other Federal orders, and unregulated supply plants;

(e) Multiply the Class I skim milk and Class I butterfat prices applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order; and

(f) For reconstituted milk made from receipts of nonfluid milk products, multiply \$1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class IV price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1000.43(d).

#### **§ 1094.61 Computation of uniform prices.**

On or before the 11th day of each month, the market administrator shall

compute a uniform butterfat price, a uniform skim milk price, and a uniform price for producer milk receipts reported for the prior month. The report of any handler who has not made payments required pursuant to § 1094.71 for the preceding month shall not be included in the computation of these prices, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations.

(a) *Uniform butterfat price.* The uniform butterfat price per pound, rounded to the nearest one-hundredth cent, shall be computed by:

(1) Multiplying the pounds of butterfat in producer milk allocated to each class pursuant to § 1000.44(b) by the respective class butterfat prices;

(2) Adding the butterfat value calculated in § 1094.60(e) for other source milk allocated to Class I pursuant to § 1000.43(d) and the steps of § 1000.44(b) that correspond to § 1000.44(a)(3)(i) and § 1000.44(a)(8) by the Class I price; and

(3) Dividing the sum of paragraphs (a)(1) and (a)(2) of this section by the sum of the pounds of butterfat in producer milk and other source milk used to calculate the values in paragraphs (a)(1) and (a)(2) of this section.

(b) *Uniform skim milk price.* The uniform skim milk price per hundredweight, rounded to the nearest cent, shall be computed as follows:

(1) Combine into one total the values computed pursuant to § 1094.60 for all handlers;

(2) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1094.75;

(3) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(4) Subtract the value of total pounds of butterfat for all handlers. The butterfat value shall be computed by multiplying the sum of the pounds of butterfat in producer milk and other source milk used to calculate the values in paragraphs (a)(1) and (a)(2) of this section by the butterfat price computed in paragraph (a) of this section;

(5) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(i) The total skim pounds of producer milk; and

(ii) The total skim pounds for which a value is computed pursuant to § 1094.60(e); and

(6) Subtract not less than 4 cents and not more than 5 cents.

(c) *Uniform price.* The uniform price per hundredweight, rounded to the nearest cent, shall be the sum of the following:

(1) Multiply the uniform butterfat price for the month pursuant to paragraph (a) of this section times 3.5 pounds of butterfat; and

(2) Multiply the uniform skim milk price for the month pursuant to paragraph (b) of this section times 96.5 pounds of skim milk.

#### **§ 1094.62 Announcement of uniform prices.**

On or before the 11th day after the end of the month, the market administrator shall announce the uniform prices for the month computed pursuant to § 1094.61.

#### **Payments for Milk**

##### **§ 1094.70 Producer-settlement fund.**

See § 1000.70.

##### **§ 1094.71 Payments to the producer-settlement fund.**

Each handler shall make a payment to the producer-settlement fund in a manner that provides receipt of the funds by the market administrator no later than the 12th day after the end of the month (except as provided in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

(a) The total value of milk of the handler for the month as determined pursuant to § 1094.60; and

(b) The sum of the value at the uniform prices for skim milk and butterfat, adjusted for plant location, of the handler's receipts of producer milk; and the value at the uniform price, as adjusted pursuant to § 1094.75, applicable at the location of the plant from which received of other source milk for which a value is computed pursuant to § 1094.60(e).

##### **§ 1094.72 Payments from the producer-settlement fund.**

No later than one day after the date of payment receipt required under § 1094.71, the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1094.71(b) exceeds the amount computed pursuant to § 1094.71(a). If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete the payments as soon as the funds are available.

**§ 1094.73 Payments to producers and to cooperative associations.**

(a) Each handler that is not paying a cooperative association for producer milk shall pay each producer as follows:

(1) *Partial payment.* For each producer who has not discontinued shipments as of the 23rd day of the month, payment shall be made so that it is received by the producer on or before the 26th day of the month (except as provided in § 1000.90) for milk received during the first 15 days of the month at not less than 90 percent of the preceding month's uniform price, adjusted for plant location pursuant to § 1094.75 and proper deductions authorized in writing by the producer.

(2) *Final payment.* For milk received during the month, a payment computed as follows shall be made so that it is received by each producer one day after the payment date required in § 1094.72:

(i) Multiply the hundredweight of producer skim milk received times the uniform skim milk price for the month;

(ii) Multiply the pounds of butterfat received times the uniform butterfat price for the month;

(iii) Multiply the hundredweight of producer milk received times the plant location adjustment pursuant to § 1094.75; and

(iv) Add the amounts computed in paragraph (a)(2)(i), (ii), and (iii) of this section, and from that sum:

(A) Subtract the partial payment made pursuant to paragraph (a)(1) of this section;

(B) Subtract the deduction for marketing services pursuant to § 1000.86;

(C) Add or subtract for errors made in previous payments to the producer; and

(D) Subtract proper deductions authorized in writing by the producer.

(b) One day before partial and final payments are due pursuant to paragraph (a) of this section, each handler shall pay a cooperative association for milk received as follows:

(1) *Partial payment to a cooperative association for bulk milk received directly from producers' farms.* For bulk milk (including the milk of producers who are not members of such association and who the market administrator determines have authorized the cooperative association to collect payment for their milk) received during the first 15 days of the month from a cooperative association in any capacity, except as the operator of a pool plant, the payment shall be equal to the hundredweight of milk received multiplied by 90 percent of the preceding month's uniform price, adjusted for plant location pursuant to § 1094.75.

(2) *Partial payment to a cooperative association for milk transferred from its pool plant.* For bulk fluid milk products and bulk fluid cream products received during the first 15 days of the month from a cooperative association in its capacity as the operator of a pool plant, the partial payment shall be at the pool plant operator's estimated use value of the milk using the most recent class prices available for skim milk and butterfat at the receiving plant's location.

(3) *Final payment to a cooperative association for milk transferred from its pool plant.* For bulk fluid milk products and bulk fluid cream products received during the month from a cooperative association in its capacity as the operator of a pool plant, the final payment shall be the classified value of such milk as determined by multiplying the pounds of skim milk and butterfat assigned to each class pursuant to § 1000.44 by the class prices for the month at the receiving plant's location, and subtracting from this sum the partial payment made pursuant to paragraph (b)(2) of this section.

(4) *Final payment to a cooperative association for bulk milk received directly from producers' farms.* For bulk milk received from a cooperative association during the month, including the milk of producers who are not members of such association and who the market administrator determines have authorized the cooperative association to collect payment for their milk, the final payment for such milk shall be an amount equal to the sum of the individual payments otherwise payable for such milk pursuant to paragraph (a)(2) of this section.

(c) If a handler has not received full payment from the market administrator pursuant to § 1094.72 by the payment date specified in paragraph (a) or (b) of this section, the handler may reduce payments pursuant to paragraphs (a) and (b) of this section, but by not more than the amount of the underpayment. The payments shall be completed on the next scheduled payment date after receipt of the balance due from the market administrator.

(d) If a handler claims that a required payment to a producer cannot be made because the producer is deceased or cannot be located, or because the cooperative association or its lawful successor or assignee is no longer in existence, the payment shall be made to the producer-settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the market

administrator shall make the required payment from the producer-settlement fund to the handler or to the lawful claimant as the case may be.

(e) In making payments to producers pursuant to this section, each pool plant operator shall furnish each producer, except a producer whose milk was received from a cooperative association described in § 1000.9(a) or (c), a supporting statement in such form that it may be retained by the recipient which shall show:

(1) The name, address, Grade A identifier assigned by a duly constituted regulatory agency, and the payroll number of the producer;

(2) The month and dates that milk was received from the producer, including the daily and total pounds of milk received;

(3) The total pounds of butterfat in the producer's milk;

(4) The minimum rate or rates at which payment to the producer is required pursuant to the order in this part;

(5) The rate used in making payment if the rate is other than the applicable minimum rate;

(6) The amount, or rate per hundredweight, and nature of each deduction claimed by the handler; and

(7) The net amount of payment to the producer or cooperative association.

**§ 1094.75 Plant location adjustments for producer milk and nonpool milk.**

For purposes of making payments for producer milk and nonpool milk, a plant location adjustment shall be determined by subtracting the Class I price specified in § 1094.51 from the Class I price at the plant's location. The difference, plus or minus as the case may be, shall be used to adjust the payments required pursuant to §§ 1094.73 and 1094.76.

**§ 1094.76 Payments by a handler operating a partially regulated distributing plant.**

See § 1000.76.

**§ 1094.77 Adjustment of accounts.**

See § 1000.77.

**§ 1094.78 Charges on overdue accounts.**

See § 1000.78.

**Marketwide Service Payments****§ 1094.80 Transportation credit balancing fund.**

The market administrator shall maintain a separate fund known as the *Transportation Credit Balancing Fund* into which shall be deposited the payments made by handlers pursuant to § 1094.81 and out of which shall be made payments due handlers pursuant

to § 1094.82. Payments due a handler shall be offset against payments due from the handler.

**§ 1094.81 Payments to the transportation credit balancing fund.**

(a) On or before the 12th day after the end of the month (except as provided in § 1000.90), each handler operating a pool plant and each handler specified in § 1000.9(c) shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I producer milk assigned pursuant to § 1000.44 by \$0.07 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the total transportation credits disbursed during the prior June-January period. In the event that during any month of the June-January period the fund balance is insufficient to cover the amount of credits that are due, the assessment should be based upon the amount of credits that would have been disbursed had the fund balance been sufficient.

(b) The market administrator shall announce publicly on or before the 5th day of the month (except as provided in § 1000.90) the assessment pursuant to paragraph (a) of this section for the following month.

**§ 1094.82 Payments from the transportation credit balancing fund.**

(a) Payments from the transportation credit balancing fund to handlers and cooperative associations requesting transportation credits shall be made as follows:

(1) On or before the 13th day (except as provided in § 1000.90) after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1094.30(a)(5), bulk milk transferred from a plant fully regulated under another Federal order as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1094.30(a)(6), milk directly from producers' farms as specified in paragraph (c)(2) of this section, a preliminary amount determined pursuant to paragraph (d) of this section to the extent that funds are available in the transportation credit balancing fund. If an insufficient balance exists to pay all the credits computed pursuant to this section, the market administrator shall distribute the balance available in the transportation credit balancing fund by reducing

payments pro rata using the percentage derived by dividing the balance in the fund by the total credits that are due for the month. The amount of credits resulting from this initial proration shall be subject to audit adjustment pursuant to paragraph (a)(2) of this section;

(2) The market administrator shall accept adjusted requests for transportation credits on or before the 20th day of the month following the month for which such credits were requested pursuant to § 1094.32(a). After such date, a preliminary audit will be conducted by the market administrator, who will recalculate any necessary proration of transportation credit payments for the preceding month pursuant to paragraph (a) of this section. Handlers will be promptly notified of an overpayment of credits based upon this final computation and remedial payments to or from the transportation credit balancing fund will be made on or before the next payment date for the following month;

(3) Transportation credits paid pursuant to paragraphs (a)(1) and (2) of this section shall be subject to final verification by the market administrator pursuant to § 1000.77. Adjusted payments to or from the transportation credit balancing fund will remain subject to the final proration established pursuant to paragraph (a)(2) of this section; and

(4) In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1094.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be made to such cooperative association rather than to the operator of the pool plant at which the milk was received.

(b) The market administrator may extend the period during which transportation credits are in effect (*i.e.*, the transportation credit period) to the months of January and June if a written request to do so is received 15 days prior to the beginning of the month for which the request is made and, after conducting an independent investigation, finds that such extension is necessary to assure the market of an adequate supply of milk for fluid use. Before making such a finding, the market administrator shall notify the Director of the Dairy Division and all handlers in the market that an extension is being considered and invite written data, view, and arguments. Any decision to extend the transportation credit period must be issued in writing

prior to the first day of the month for which the extension is to be effective.

(c) Transportation credits shall apply to the following milk:

(1) Bulk milk received from a plant regulated under another Federal order, except Federal orders 1005 and 1007, and allocated to Class I milk pursuant to § 1000.44(a)(9); and

(2) Bulk milk received directly from the farms of dairy farmers at pool distributing plants subject to the following conditions:

(i) The quantity of such milk that shall be eligible for the transportation credit shall be determined by multiplying the total pounds of milk received from producers meeting the conditions of this paragraph by the lower of:

(A) The marketwide estimated Class I utilization of all handlers for the month pursuant to § 1000.45(a); or

(B) The Class I utilization of all producer milk of the pool plant operator receiving the milk after the computations described in § 1000.44;

(ii) The dairy farmer was not a "producer" under the order in this part during more than 2 of the immediately preceding months of February through May and not more than 50 percent of the production of the dairy farmer during those 2 months, in aggregate, was received as producer milk under the order in this part during those 2 months; and

(iii) The farm on which the milk was produced is not located within the specified marketing area of the order in this part or the marketing area of Federal order 1005 (7 CFR part 1005) or Federal order 1007 (7 CFR part 1007).

(d) Transportation credits shall be computed as follows:

(1) The market administrator shall subtract from the pounds of milk described in paragraphs (c)(1) and (2) of this section the pounds of bulk milk transferred from the pool plant receiving the supplemental milk if milk was transferred to a nonpool plant on the same calendar day that the supplemental milk was received. For this purpose, the transferred milk shall be subtracted from the most distant load of supplemental milk received, and then in sequence with the next most distant load until all of the transfers have been offset;

(2) With respect to the pounds of milk described in paragraph (c)(1) of this section that remain after the computations described in paragraph (d)(1) of this section, the market administrator shall:

(i) Determine the shortest hard-surface highway distance between the shipping plant and the receiving plant;

(ii) Multiply the number of miles so determined by 0.35 cent;

(iii) Subtract the applicable Class I differential in § 1000.52 for the county in which the shipping plant is located from the Class I differential applicable for the county in which the receiving plant is located;

(iv) Subtract any positive difference computed in paragraph (d)(2)(iii) of this section from the amount computed in paragraph (d)(2)(ii) of this section; and

(v) Multiply the remainder computed in paragraph (d)(2)(iv) of this section by the hundredweight of milk described in paragraph (d)(2) of this section.

(3) For the remaining milk described in paragraph (c)(2) of this section after computations described in paragraph (d)(1) of this section, the market administrator shall:

(i) Determine an origination point for each load of milk by locating the nearest city to the last producer's farm from which milk was picked up for delivery to the receiving pool plant;

(ii) Determine the shortest hard-surface highway distance between the receiving pool plant and the origination point;

(iii) Subtract 85 miles from the mileage so determined;

(iv) Multiply the remaining miles so computed by 0.35 cent;

(v) Subtract the Class I differential specified in § 1000.52 applicable for the county in which the origination point is located from the Class I differential applicable at the receiving pool plant's location;

(vi) Subtract any positive difference computed in paragraph (d)(3)(v) of this section from the amount computed in paragraph (d)(3)(iv) of this section; and

(vii) Multiply the remainder computed in paragraph (d)(3)(vi) of this section by the hundredweight of milk described in paragraph (d)(3) of this section.

#### Administrative Assessment and Marketing Service Deduction

##### § 1094.85 Assessment for order administration.

See § 1000.85.

##### § 1094.86 Deduction for marketing services.

See § 1000.86.

*Proposed by Prairie Farms and Dean Foods:*

#### Proposal No. 6

This proposal seeks to amend the Producer milk provision of the Appalachian and Southeast marketing areas to 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 the same month.

1. Amend § 1005.13 by adding a new paragraph (e), to read as follows:

##### § 1005.13 Producer milk.

\* \* \* \* \*

(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.

2. Amend § 1007.13 by adding a new paragraph (e), to read as follows:

##### § 1007.13 Producer milk.

\* \* \* \* \*

(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.

*Proposed by Prairie Farms and Dean Foods:*

#### Proposal No. 7

This proposal seeks to amend the Producer-handler provision of the Appalachian and Southeast milk marketing areas.

1. Amend § 1005.10 by revising paragraphs (c) and (d), and adding new paragraphs (e) and (f), to read as follows:

##### § 1005.10 Producer-handler.

\* \* \* \* \*

(c) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products received from own farm production;

(d) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled, and the processing and packaging operations are the producer-handler's own enterprise and are operated at the producer-handler's own risk;

(e) Has total route disposition and transfers in the form of packaged fluid milk products to other distributing plants during the month that does not exceed 3 million pounds; and

(f) Does not distribute fluid milk products to a wholesale customer who also is serviced by a plant described in § 1005.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized package with a similar label to the wholesale customer during the month.

2. Amend § 1007.10 by revising paragraphs (c) and (d), and adding new paragraphs (e) and (f), to read as follows:

##### § 1007.10 Producer-handler.

\* \* \* \* \*

(c) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products received from own farm production;

(d) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled, and the processing and packaging operations are the producer-handler's own enterprise and are operated at the producer-handler's own risk;

(e) Has total route disposition and transfers in the form of packaged fluid milk products to other distributing plants during the month that does not exceed 3 million pounds; and

(f) Does not distribute fluid milk products to a wholesale customer who also is serviced by a plant described in § 1005.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized package with a similar label to the wholesale customer during the month.

*Proposed by Michael Sumners, Dairy Producer, Paris, TN:*

#### Proposal No. 8

Amend the *Producer-handler* definition in the current Appalachian and Southeast orders to allow producer-handlers to purchase a regulated amount of milk to balance their supply—ten percent of the producer's monthly milk production during December through May and 30 percent during June through November.

*Proposed by Dairy Programs, Agricultural Marketing Service:*

#### Proposal No. 9

For all Federal Milk Marketing Orders, make such changes as may be necessary to make the entire marketing agreements and the orders conform with any amendments thereto that may result from this hearing.

Copies of this notice of hearing and the orders may be procured from the Market Administrator of each of the aforesaid marketing areas, or from the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250, or may be inspected there.

Copies of the transcript of testimony taken at the hearing will not be available for distribution through the Hearing Clerk's Office. If you wish to purchase a copy, arrangements may be made with the reporter at the hearing.

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decision-making process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

Office of the Secretary of Agriculture; Office of the Administrator, Agricultural Marketing Service; Office of the General Counsel; Dairy Programs, Agricultural Marketing Service (Washington office) and the Offices of all Market Administrators.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

Dated: January 16, 2004.

**A.J. Yates,**

Administrator, Agricultural Marketing Service.

[FR Doc. 04-1402 Filed 1-20-04; 10:30 am]

BILLING CODE 3410-02-P

## POSTAL RATE COMMISSION

### 39 CFR Part 3001

[Docket No. RM2004-1; Order No. 1389]

#### Definition of Postal Service

**AGENCY:** Postal Rate Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission hereby provides notice that it is initiating a proposed rulemaking for the purpose of adding a definition of the term "postal service" to its rules of practice. This change is intended, among other things, to clarify Commission jurisdiction and thereby minimize the need for ad hoc determinations.

**DATES:** Initial comments are due March 1, 2004; reply comments are due April 1, 2004.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system, which can be accessed at <http://www.PRC.gov>.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, 202-789-6820.

#### SUPPLEMENTARY INFORMATION:

##### Regulatory History

68 FR 14437 (March 25, 2003)

The Commission's rules of practice and procedure, 39 CFR 3001.1 *et seq.*, do not define the term "postal service."

Historically, this omission has created little confusion or controversy. Of late, however, that would appear no longer to be the case. See PRC Order No. 1388, January 16, 2004. Consequently, in the interests of administrative efficiencies, the Commission proposes to amend its rules to define the term "postal service."

#### 1. Background

In only a relatively few proceedings has the Commission been called upon to consider, for jurisdictional purposes, the meaning of the term "postal service." The first instance involved special services, over which, the Postal Service had contended, it had unilateral rate setting authority. In Docket No. R76-1, following the District Court's decision in *Associated Third Class Mailer Users v. U.S. Postal Service*,<sup>1</sup> the Commission addressed the issue of which special services fell within its rate jurisdiction. In considering those that might properly be characterized as "postal services," the Commission determined that:<sup>2</sup>

[s]pecial postal services "that is, those which fall within the ambit of § 3622—are services other than the actual carriage of mail but supportive or auxiliary thereto. They enhance the value of service rendered under one of the substantive mail classes by providing such features as added security, added convenience or speed, indemnity against loss, correct information as to the current address of a recipient, etc.

Nearly two decades elapsed before the Commission again confronted the issue as presented in a series of complaints filed in 1995 and thereafter.<sup>3</sup> In Docket No. C95-1, the Commission considered a complaint concerning shipping and handling charges for orders placed with the Postal Service Philatelic Fulfillment Service Center. Finding first that complaints regarding fees for postal services fell within the scope of section 3662, the Commission dismissed the complaint based on the court's reasoning in *Associated Third Class Mailer Users v. U.S. Postal Service*, *supra*.<sup>4</sup> Specifically, the Commission found that the handling and shipping of catalog orders placed with the Philatelic Fulfillment Service Center were not closely related to the delivery of mail and, thus, charges for those services did

<sup>1</sup> *Associated Third Class Mailer Users v. U.S. Postal Service*, 405 F.Supp. 1109 (D. D.C. 1973); *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570 (D.C. Cir. 1976); *vacated on other grounds*, 434 U.S. 884 (1977).

<sup>2</sup> PRC Op. R76-1, Vol. 1, June 30, 1976, at 266-67 (footnote omitted).

<sup>3</sup> Jurisdictional issues were addressed in Docket No. MC78-3 concerning the Postal Service's request for a recommended decision to establish an Electronic Computer Originated Mail subclass.

<sup>4</sup> PRC Order No. 1075, September 11, 1995, at 4-5.

not constitute fees for postal services under section 3662.<sup>5</sup>

Subsequently, Docket No. C96-1 involved a complaint that the Postal Service was operating and charging fees for a packaging service (Pack & Send) that had not been submitted to the Commission for a recommended decision.<sup>6</sup> The complainant, a coalition comprised of organizations and individuals doing business in the Commercial Mail Receiving Agency industry, alleged, *inter alia*, that the Postal Service was charging rates that did not conform with the policies of the Postal Reorganization Act. In reviewing the record and the parties' arguments, the Commission recognized that "there are a variety of analytical lenses through which potential relationships to customary postal functions may be usefully viewed."<sup>7</sup> To that end, the Commission analyzed whether Pack & Send service should be characterized as a postal or nonpostal service by, among other things, considering its relationship to the Postal Service's nonpostal statutory functions, its intrinsic and structural features, and the correlation between its use and subsequent mailing. Based on its analyses, the Commission found Pack & Send to be a postal service due to, among other things, its direct structural relationship to the provision of postal services (as a wholly new method of accepting mailable matter for delivery) as well as its intrinsic value as an added-value service available for certain categories of parcel service offered by the Postal Service.<sup>8</sup>

In Docket No. C99-1, United Parcel Service filed a complaint contending that the Postal Service was providing a new service, Post Electronic Courier Service (Post ECS), in violation of the Act.<sup>9</sup> Post ECS service, a pilot program available only to licensees, offered an

<sup>5</sup> *Id.* at 5.

<sup>6</sup> See Complaint of Coalition Against Unfair USPS Competition, Docket No. C96-1, May 23, 1996.

<sup>7</sup> PRC Order No. 1145, December 16, 1996, at 12 (footnote omitted).

<sup>8</sup> *Id.* at 18-19; see also *id.* at 11-18. Following this finding, the Commission held further proceedings in Docket No. C96-1 in abeyance pending a filing by the Postal Service requesting a recommended decision concerning Pack & Send service, or the filing of a notice by the Service indicating that the packaging service was discontinued. *Id.* at 25. Further proceedings proved unnecessary as the Postal Service chose to discontinue Pack & Send service. PRC Order No. 1171, April 25, 1997.

<sup>9</sup> See Complaint of United Parcel Service, Docket No. C99-1, October 5, 1998. UPS's complaint was based on three claims: (a) That the service may only be established pursuant to sections 3622 and 3623 of the Act; (b) that the provision of the service at no charge violates sections 3622(b)(3) and 3622(b)(4); and (c) that Post ECS represents a change in the nature of postal services affecting service on a nationwide or substantially nationwide basis.