

regulations currently allow abbreviated reviews. Regulations at 7 CFR 246.18(a)(1)(ii) identify adverse actions that are subject to abbreviated administrative reviews. This section specifies that the State agency must provide abbreviated administrative reviews to vendors who appeal a WIC disqualification that is based on a FSP CMP for hardship, as well as a WIC disqualification or CMP based on a mandatory sanction imposed by another WIC State agency. Imposition of a CMP in lieu of a reciprocal disqualification is similar to these adverse actions for which a State agency must provide an abbreviated review. Under the proposed revision, a State agency would retain the option to provide a full administrative review as stated in regulations at 7 CFR 246.18(a)(1)(ii).

*Confidentiality of Vendor Information (7 CFR 246.26(e))*

Regulations at 7 CFR 246.26(e) restrict the use or disclosure of information that individually identifies a vendor, except for the vendor's name, address and authorization status, to persons directly connected with the administration or enforcement of WIC or FSP; persons directly connected with the administration or enforcement of any Federal or State law; or vendors who are subject to an adverse action.

This rule proposes to amend the regulations at 7 CFR 246.26(e) to expand the types of vendor information allowed for general release that would not be subject to confidentiality restrictions. This additional information would include a vendor's telephone number, Web site and e-mail address, WIC identification number, and store type (e.g., retail, commissary, pharmacy, etc.). Allowing WIC State agencies to provide participants with vendors' telephone numbers and Web site and/or email addresses would assist participants with locating authorized vendors in their neighborhood or local service area. Knowing a vendor's store type also would enable participants to determine where to transact their food instruments.

The proposed rule would also allow WIC State agencies to issue public notices of vendor disqualifications (including the length of disqualification and the reason for the disqualification) and to provide the information to authorized vendors and program participants. The FSP, which has such authority and periodically issues public notices on retailer disqualifications, has found that disclosing this information serves as a strong deterrent to retailer fraud and abuse. The Department believes that issuing public notices of

WIC vendor disqualifications would deter vendor fraud and abuse in the WIC Program as well. Publicizing this information also would alert program participants when the WIC Program no longer authorizes a particular vendor.

The Department considers this amendment to regulations at 7 CFR 246.26(e) to be in the best interests of the Program. Notwithstanding this change, the Department continues to believe that limiting the use and disclosure of confidential vendor information encourages vendors to provide the information that State agencies need in order to authorize and monitor vendors and to maintain effective investigative techniques.

**List of Subjects in 7 CFR Part 246**

Food assistance programs, Food donations, Grant programs—Social programs, Infants and children, Maternal and child health, Nutrition education, Public assistance programs, WIC, Women.

Accordingly, 7 CFR part 246 is proposed to be amended as follows:

**PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN**

1. The authority citation for Part 246 continues to read as follows:

**Authority:** 42 U.S.C. 1786.

2. In § 246.16a:

a. Amend paragraph (j)(2) by removing the word “or” at the end of the paragraph;

b. Amend paragraph (j)(3) by removing the period at the end of the paragraph and adding in its place a semicolon followed by the word “or”; and

c. Add paragraph (j)(4).

The addition reads as follows:

**§ 246.16a Infant formula cost containment.**

\* \* \* \* \*

(j) \* \* \*

(4) Require infant formula manufacturers to provide gratis infant formula, services, or other items.

\* \* \* \* \*

3. In § 246.18, add a new paragraph (a)(1)(ii)(I) to read as follows:

**§ 246.18 Administrative review of State agency actions.**

(a) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(I) A civil money penalty imposed in lieu of disqualification based on a Food Stamp Program disqualification (§ 246.12(l)(i)(vii)).

\* \* \* \* \*

**§ 246.26 [Amended]**

4. In § 246.26, amend the first sentence of the introductory text of paragraph (e) by removing the words “and authorization status” and by adding, in their place, the words “, telephone number, website/email address, authorization status, WIC identification number, and disqualification information (including the length of the disqualification and the reason for the disqualification).”

Dated: July 20, 2005.

**Roberto Salazar,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 05-14873 Filed 7-26-05; 8:45 am]

**BILLING CODE 3410-30-P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1033**

[Docket No. AO-166-A72; DA-05-01-A]

**Milk in the Mideast Marketing Area; Tentative Partial Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and Order**

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

**ACTION:** Proposed rule.

**SUMMARY:** This tentative partial decision adopts on an interim final and emergency basis proposals that would amend certain features of the pooling standards of the Mideast milk marketing order. Specifically, this decision will: (1) Prohibit the ability to simultaneously pool the same milk on the Mideast Federal milk order and on a marketwide equalization pool administered by another government entity; (2) lower the diversion limit standards; and (3) increase the performance standards for supply plants. A separate decision will be issued that will address proposals to deter the de-pooling of milk, adopt transportation credits and clarify the *Producer* definition of the order. This decision requires determining if producers approve the issuance of the amended order on an interim basis.

**DATES:** Comments should be submitted on or before September 26, 2005.

**ADDRESSES:** Comments (6 copies) should be filed with the Hearing Clerk, STOP 9200—Room 1031, United States Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250-9200. You may send your comments by the electronic process available at the Federal e-Rulemaking portal: <http://>

[www.regulations.gov](http://www.regulations.gov) or by submitting comments to [amsdairycomments@usda.gov](mailto:amsdairycomments@usda.gov). Reference should be made to the title of action and docket number.

**FOR FURTHER INFORMATION CONTACT:**

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

**SUPPLEMENTARY INFORMATION:** This tentative partial decision proposes to adopt amendments which would prohibit the ability to simultaneously pool the same milk on the Mideast Federal milk order and on a marketwide pool administered by another government entity. Additionally, this decision proposes to adopt amendments that would increase supply plant shipping standards and lower diversion limits.

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.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. It 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.

The Agricultural Marketing Agreement Act of 1937 (the Act), as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (USDA) 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 USDA 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 USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

**Regulatory Flexibility Act and Paperwork Reduction Act**

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

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

During March 2005, the month during which the hearing occurred, there were 9,767 dairy producers pooled on, and 36 handlers regulated by, the Mideast order. Approximately 9,212 producers, or 94.3 percent, were considered small businesses based on the above criteria. On the processing side, approximately 26 handlers, or 72.2 percent, were considered small businesses.

The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk and plants that have a reasonable association with and are consistently serving the fluid needs of the Mideast milk marketing area. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. Therefore, the proposed amendments will not have a significant economic

impact on a substantial number of small entities.

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

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

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This rulemaking proceeding does not duplicate, overlap or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

**Prior Documents in This Proceeding**

*Amendment to Public Hearing on Proposed Rulemaking:* Issued March 1, 2005; published March 3, 2005 (70 FR 10337).

*Notice of Hearing:* Issued February 14, 2005; published February 17, 2005 (70 FR 8043).

**Preliminary Statement**

Notice is hereby given of the filing with the Hearing Clerk of this tentative partial decision with respect to the proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Mideast marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of

marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, United States Department of Agriculture, Room 1031-Stop 9200, 1400 Independence Avenue, SW., Washington, DC 20250-9200, by September 26, 2005. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. While no evidence was received that specifically addressed these issues, some of the evidence encompassed entities of various sizes.

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Mideast marketing area. The hearing was held, 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 proposed amendments set forth below are based on the record of a public hearing held in Wooster, Ohio, on March 7-10, 2005, pursuant to a notice of hearing issued February 14, 2005, published February 17, 2005 (70 FR 8043), and an amendment to the hearing notice issued March 1, 2005, published March 3, 2005 (70 FR 10337).

The material issues on the record of the hearing relate to:

1. Pooling Standards
  - A. Standards for *Producer Milk*.
    - a. Simultaneous pooling of milk on the order and on a marketwide pool administered by another government entity.
    - b. Diversion Limit Standards.
  - B. Supply Plant Performance Standards.
2. Determination as to whether emergency marketing conditions exist that warrant the omission of a recommended decision and the opportunity to file written exceptions.

### Findings and Conclusions

This tentative partial decision specifically addresses proposals, published in the hearing notice as Proposals 1 and 2, along with a portion of Proposal 3, seeking to change the performance standards and producer milk provisions of the order. The portion of Proposal 3, that would

provide a definition of "temporary loss of Grade A approval", Proposals 4-8, that would establish provisions to deter the "de-pooling" of milk, and Proposal 9 that would establish transportation credits will be addressed in a separate decision. The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

#### 1. Pooling Standards

##### A. Standards for Producer Milk

Three proposals were presented at the hearing that would amend certain features of the *Producer milk* provision of the Mideast order. A proposal, published in the hearing notice as Proposal 1, seeking to eliminate the ability to simultaneously pool the same milk on the Mideast Federal milk order and on a marketwide equalization pool administered by another government entity, commonly referred to as "double dipping," should be adopted immediately. Additionally, a portion of a proposal published in the hearing notice as Proposal 2, seeking to seasonally adjust the percentage of total receipts a pool plant could divert to nonpool plants to 50 percent for the months of August through February and to 60 percent for the months of March through July should be adopted immediately. Proposal 3, which sought to adjust the number of days of the milk production of a producer that must be physically received at a Mideast order pool plant before being eligible for diversion to a nonpool plant, commonly referred to as "touching base", was abandoned at the hearing and will no longer be referenced in this proceeding.

Proponents contend that milk has been simultaneously pooled on the Mideast order and on a marketwide pool administered by another government entity since January of 2000, and although no milk is currently simultaneously pooled on the Mideast order and a marketwide pool administered by another government entity, the possibility exists and provisions should be adopted to eliminate its occurrence. Additionally, proponents contend that inadequate limits on the amount of milk that pool plants can divert to non-pool plants is allowing large volumes of milk to be pooled on the Mideast order that does not demonstrate a reliable and consistent service to the fluid milk needs of the order.

The Mideast order currently does not prohibit the simultaneous pooling of the same milk on the order and on a marketwide equalization pool operated by another government entity. Although

no milk is currently simultaneously pooled on the Mideast order and a marketwide equalization pool operated by another government entity, the situation has occurred in the past.

The current *Producer milk* provision of the Mideast order considers the milk of a dairy farmer to be producer milk when the milk has been delivered to a pool plant of the order. As a condition for pooling the milk of a producer diverted to a nonpool plant on the Mideast order, a dairy farmer must ship two days' milk production to a pool plant during each of the months of December through July. This standard is applicable only if two days' milk production was not shipped to a Mideast pool plant in each of the previous months of August through November. A producer must also deliver two days' milk production to a pool plant during the months of August through November in order for the milk diverted to nonpool plants to be pooled. A pool handler may not divert more than 60 percent of its total receipts to a nonpool plant during the months of August through February and no more than 70 percent of its total receipts during the months of March through July.

Proposals 1 and 2 were submitted by Dairy Farmers of America (DFA), Michigan Milk Producers Association (MMPA), Dairylea Cooperative Inc. (Dairylea) and the National Farmers Organization (NFO). DFA is a member owned Capper-Volstead cooperative of 13,500 farms that produce milk in 49 states. MMPA is a member owned Capper-Volstead cooperative of 1,350 farms producing milk in four states. Dairylea is a member owned Capper-Volstead cooperative of 2,400 farms producing milk in seven states. NFO is a member owned Capper-Volstead cooperative with over 1,500 members in 18 states. Hereinafter, this decision will refer to DFA, MMPA, Dairylea and NFO collectively as the "Cooperatives."

A witness appearing on behalf of the Cooperatives testified that adoption of Proposal 1 would eliminate the potential for the same milk to be simultaneously pooled on the Mideast Federal milk order and on a marketwide pool administered by another government entity. The witness referred to this practice as "double dipping" and as a practice resulting in disorderly marketing conditions. The witness noted that regulatory action has been taken in the Northeast, Central, Upper Midwest, Pacific Northwest and Arizona-Las Vegas Federal milk marketing orders to prohibit the practice. The witness testified that little milk is currently associated with the

Mideast marketing order that is simultaneously pooled by another government entity, but should be prohibited in the same manner as in other Federal milk marketing order areas. The Cooperatives noted in their post-hearing briefs that no opposition to adoption of Proposal 1 was received at the hearing.

A witness appearing on behalf of Dean Foods (Dean) testified in support of Proposal 1. Dean Foods owns and operates several distributing plants regulated by the Mideast order. The witness testified that double dipping should be prohibited in the Mideast order in the same manner as in other Federal orders. In their post-hearing brief, Dean added that if the ability to simultaneously pool milk is eliminated, the wording of the order language should be similar to the order language used to prohibit simultaneous pooling in the Central and Upper Midwest orders.

Continental Dairy Products (Continental) noted support for adoption of Proposal 1 in their post-hearing brief. Continental is a member owned Capper-Volstead cooperative that pools milk on the Mideast order. Continental was of the opinion that double dipping should be prohibited for the Mideast marketing area as it has been in other Federal milk marketing orders.

A witness appeared on behalf of the Cooperatives in support of the portion of Proposal 2 that would lower the diversion limit standards. The witness was of the opinion that current diversion limit standards are inadequate and have resulted in milk pooled on the order which does not demonstrate regular and consistent performance in supplying the Class I needs of the marketing area. The witness cited market administrator data showing that during the months of January through February and August through December of 2004, many pool distributing plants and cooperative handlers diverted more than 50 percent of their total milk receipts to nonpool plants. Adoption of the portion of Proposal 2 to limit diversions to no more than 50 percent of total milk receipts in August through February and 60 percent in March through July for distributing plants and cooperative handlers would increase shipments to distributing plants and raise returns for Mideast producers, the witness noted.

A witness for MMPA appeared on behalf of the Cooperatives in support of the portion of Proposal 2 that would lower diversion limit standards. The witness was of the opinion that an adjustment to the diversion limit

standards will serve to decrease market reserves and increase proceeds for producers servicing the needs of the fluid market on a regular and consistent basis.

Several independent and cooperative member dairy farmers whose milk is pooled in the Mideast order also testified in support of the portion of Proposal 2 that would adjust diversion limit standards. Most were of the opinion that adjusting diversion limit standards will serve to more adequately identify the milk that is serving the needs of the Mideast order fluid market.

A witness appearing on behalf of Prairie Farms Dairy (Prairie Farms) testified that they were not in support of, nor in opposition to, adoption of the portion of Proposal 2 that would adjust diversion limits. Prairie Farms is a member owned Capper-Volstead cooperative that pools milk on the Mideast order.

A witness appeared on behalf of White Eagle Cooperative Federation (White Eagle) and "constituent members" in opposition to the portion of Proposal 2 that would lower diversion limit standards. The members of White Eagle Cooperative Federation include White Eagle Cooperative Association, Alto Dairy Cooperative, Scioto Cooperative, and Erie Cooperative Association. White Eagle Cooperative Federation also identified Superior Dairy, United Dairy, Family Dairies USA, Dairy Support Inc., Guggisberg Cheese and Brewster Cheese as constituent members.

The White Eagle witness testified that lowering diversion limit standards will decrease the volume of milk that manufacturing plants can pool, and will remove milk located in Wisconsin, Illinois, Minnesota and Iowa from pooling on the Mideast order. The witness was of the opinion that when the volume of milk pooled in manufacturing uses is decreased, producer milk that supplies manufacturing plants can face decreased returns. In their post-hearing brief White Eagle reiterated that lowering diversion limit standards will decrease returns to producers whose milk is marketed through White Eagle.

A consultant witness provided additional testimony on behalf of White Eagle in opposition to lowering the diversion limit standards of the order. The witness testified that reducing the diversion limit standards would disadvantage small cooperatives that pool milk on the Mideast order. The witness was of the opinion that lowering the diversion limit standards would increase the market power of large cooperatives and milk processors

over small cooperatives and milk processors.

The consultant White Eagle witness relied on Market Administrator data to demonstrate the effects of a 10 percent reduction in the diversion limit standards for the period of 2003–2004. The witness stated that if the proposed diversion limit standards had been effective for the month of October 2004, the total volume of milk pooled in the Mideast market would have been reduced by 4.1 percent. The witness hypothesized that the reduction in milk volume pooled would have increased the PPD by about 2 cents per hundredweight (cwt.) for milk remaining pooled, but would have decreased the relative PPD by about \$0.73 per cwt. on the milk that was not able to be pooled because of lowered diversion limit standards. The witness noted that the majority of the milk not pooled would have been milk usually pooled by small cooperatives. Accordingly, the witness was of the opinion that lowering the diversion limit standards of the Mideast order should not be adopted until additional analysis is done on the possible negative effects on small cooperatives and processors.

#### B. Supply Plant Performance Standards

Several proposed changes to the supply plant pooling provisions of the Mideast order, contained in Proposal 2, should also be adopted immediately. The lack of adequate performance standards in the current supply plant pooling provisions allow large volumes of milk to be pooled on the order that do not demonstrate a regular service to the Class I needs of the market causing an unwarranted decrease in the order's blend price.

Specifically, the following amendments should be adopted immediately: (1) Increasing supply plant performance standards for § 1033.7(c) by 10 percentage points, from 30 percent to 40 percent, for all months, (2) increasing performance standards for supply plants operated by a cooperative association under § 1033.7(d) by five percentage points, from 30 percent to 35 percent, for the month of August, and by 10 percentage points, from 30 percent to 40 percent, for the months of September through November, and (3) increasing performance standards for a supply plant with a marketing agreement with a cooperative under § 1033.7(e) by 10 percentage points, from 35 percent to 45 percent, for the months of August through November.

Currently, the Mideast order provides that a supply plant must ship 30 percent of its total monthly receipts to a pool

distributing plant in order for the plant and all of the receipts of the plant to be pooled for the month. This same standard applies to supply plants owned and operated by a cooperative association. A supply plant operated under a marketing agreement with a cooperative, however, must ship 35 percent of total receipts to a pool distributing plant in every month of the year in order for the plant and all the receipts of the plant to be pooled.

A witness appeared on behalf of the Cooperatives in support of the portion of Proposal 2 that raises the performance standards for supply plants. The Cooperatives witness was of the opinion that supply plant performance standards are inadequate and in need of review and adjustment. Current supply plant performance standards, the witness testified, allow for more milk to be associated with the Mideast pool than is needed. Relying on market administrator data, the witness noted that the projected Class I utilization of the Mideast order of 58.9 percent, specified during Federal order reform, had only been achieved in one month since January 2000. The witness stressed that the Mideast order has ample reserve milk supplies located within the marketing area, but that milk located outside of the marketing area that is being pooled on the order is lowering the proceeds of producers who are consistently serving the fluid needs of the market.

The Cooperatives witness was of the opinion that increasing supply plant performance standards will provide greater incentive to deliver local milk supplies to the Class I market than the current standards. The witness was of the opinion that returns to producers are increased the shorter the distance milk must travel to distributing plants because transportation costs are lower.

The Cooperatives witness testified that the costs of transporting and procuring milk for Class I use is not being borne equally by all producers whose milk is pooled on the order even though Class I returns are shared by all. The witness added that increasing supply plant performance standards would prevent milk that does not service the fluid needs of the market from sharing in the additional proceeds generated from fluid sales in the marketing area.

The Cooperatives witness relied on market administrator data which showed an increase in the volume of milk pooled on the Mideast order from states outside the marketing area including Illinois, Iowa, Minnesota and Wisconsin. The witness testified that although the volume of milk pooled

from states outside of the Mideast marketing area has increased, the volume of milk pooled from states within the marketing area has remained constant. The witness added that the increase in the volume of milk pooled from states outside of the marketing area has not resulted in increased volumes of milk shipped to the order's pool distributing plants. When milk that does not service the needs of the Mideast fluid market is pooled from areas outside the states comprising the Mideast marketing area, the witness stressed, the blend price received by Mideast order producers who regularly demonstrate service to the fluid market is lowered.

The Cooperatives witness relied on market administrator data to illustrate that supply-demand relationships for milk in five different regions of the Mideast marketing area—Northern Ohio, Southern Ohio, Michigan, Indiana and Pennsylvania indicate that there is sufficient locally produced milk to meet the needs of the fluid market. According to the witness, only in the Southern Ohio/Southern Indiana region do total Class I sales exceed the total amount of milk locally supplied. The witness attributed the deficit local milk supply in Southern Ohio/Southern Indiana to local milk being shipped to the Appalachian milk marketing area.

The Cooperatives witness was also of the opinion that a "hard" 40 percent standard on cooperative owned supply plant shipments to distributing plants during the fall months is superior to using the "rolling annual average" method currently provided by the order. The witness added that if a cooperative owned supply plant shipped 40 percent of its total receipts to distributing plants during the fall months, the "rolling annual average" method could be used during the remainder of the year.

The Cooperatives witness testified that the performance standards for supply plants in the Mideast order were increased as a result of a previous Federal order hearing in 2001, but was of the opinion that the market is in need of further refinement. The witness emphasized that while there is a seasonal need for supplemental milk across certain regions of the Mideast market, the current standards allow far more milk to associate with the market than is reasonably warranted. The witness added that increasing supply plant performance standards will increase returns for Mideast dairy farmers who do regularly and consistently service the needs of the fluid market.

A witness appearing on behalf of Dean was also in support of increasing

supply plant performance standards. Dean testified at the hearing, and reiterated in their post-hearing brief, that increasing supply plant performance standards will serve to better identify the milk that demonstrates a consistent ability to service the fluid milk needs of the market.

In their post-hearing brief, Dean proposed a modification to Proposal 2 regarding cooperative owned supply plants. Specifically, Dean suggested that a cooperative owned supply plant should be located within the geographic boundaries of the Mideast marketing area and that qualifying shipments to distributing plants or nonpool plants must be classified as Class I.

A witness from MMPA appearing on behalf of the Cooperatives modified a portion of Proposal 2 at the hearing. The witness testified that Proposal 2 should increase the performance standards for a cooperative owned supply plant by 5 percentage points, from 30 to 35 percent of total receipts, for the month of August, and by 10 percentage points, from 30 to 40 percent of total receipts for the months of September through November. The witness was of the opinion that an increase in performance standards are needed in order to ensure that the proceeds generated from Class I sales are shared among those who regularly supply the needs of the fluid market.

The MMPA witness testified that their cooperative exceeded the current 30 percent performance standard (from 35 percent to 41 percent of total receipts) during the preceding months of August through November. The MMPA witness testified that they are in support of a "hard" performance standard during the August through November period, rather than the use of the annual rolling average provision currently provided for in all months by the order for cooperative owned supply plants. The witness also noted that if market conditions warrant a higher degree of performance, the Market Administrator has the authority to increase the performance standard.

Several independent and cooperative member dairy farmers whose milk is pooled in the Mideast order also testified in support of increasing supply plant performance standards. Most were of the opinion that increasing supply plant performance standards will more adequately identify what milk is consistently serving the needs of the Mideast fluid market.

A witness appeared on behalf of Smith Dairy in general support of any proposal that would serve to address the reduction of producer pay prices in the

Mideast order and any proposals that will better identify milk that provides service to the Mideast fluid market. Smith Dairy operates two distributing plants regulated by the Mideast order that are primarily supplied by independent dairy farmers.

A witness appearing on behalf of White Eagle testified in opposition to increasing supply plant performance standards at the hearing and reiterated this position in their post-hearing brief. White Eagle is of the opinion that increasing supply plant shipping standards will displace milk from outside of the geographic boundaries of the Mideast marketing area that has historically supplied the milk needs of the Mideast market.

### Discussion/Findings

The record of this proceeding finds that several amendments to the pooling standards of the Mideast order should be adopted immediately to better identify the milk of producers that should share in the order's marketwide pool proceeds and to establish more appropriate performance measures for providing regular and consistent service in meeting the market's fluid needs. Currently, milk located outside the Mideast marketing area that does not demonstrate regular and consistent performance in supplying the needs of the Class I market is able to qualify for pooling on the Mideast order and share in the increased revenues arising from Class I sales in the marketing area. The vast majority of this milk is pooled on the order at low classified use-values and in turn lowers the blend price to those producers who regularly and consistently supply the Class I needs of the Mideast market. Such milk is not demonstrating a reasonable level of performance in servicing the Class I market to receive the additional revenue arising from Class I use of the Mideast marketing area and therefore should not be pooled.

The pooling standards of all Federal milk marketing orders, including the Mideast order, are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market and to provide the criteria for identifying the milk of those producers who are reasonably associated with the market as a condition for receiving the order's blend price. The pooling standards of the Mideast order are represented in the *Pool Plant, Producer*, and the *Producer milk* provisions of the order and are performance based. Taken as a whole, these provisions are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market and provide

the criteria for determining the producer milk that has demonstrated reasonable measures of service to the Class I market and thereby should share in the marketwide distribution of pool proceeds.

Pooling standards that are performance based provide the only viable method for determining those eligible to share in the marketwide pool. It is primarily the additional revenue generated from the higher-valued Class I use of milk that adds additional income, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should be the ones to share in the returns arising from higher-valued Class I sales.

Pooling standards are needed to identify the milk of those producers who are providing regular and consistent service in meeting the Class I needs of the market. If a pooling provision does not reasonably accomplish this end, the proceeds that accrue to the marketwide pool from fluid milk sales are not properly shared with the appropriate producers. The result is the unwarranted lowering of returns to those producers who actually incur the costs of servicing the fluid needs of the market.

Pool plant standards, specifically standards that provide for the pooling of milk through supply plants, need to reflect the supply and demand conditions of the marketing area. This is important because producers whose milk is pooled, regardless of utilization, receives the order's blend price. When the pooling provisions of the order result in pooling milk that cannot reasonably be considered as regularly and consistently serving the fluid needs of the market, it is appropriate to re-examine those standards.

The geographic boundaries of the Mideast order are not intended to limit or define which producers, which milk of those producers, or which handlers should enjoy the benefits of being pooled on the order. What is important and fundamental to all Federal orders, including the Mideast order, is the proper identification of those producers, the milk of those producers, and handlers that should share in the proceeds arising from Class I sales in the marketing area. The Mideast order's current pooling standards, specifically supply plant performance standards and diversion limit standards for producer milk do not reasonably accomplish this fundamental objective.

Since the 1960's, the Federal milk order program has recognized the harm and disorder that results to both producers and handlers when the same

milk of a producer is simultaneously pooled on more than one Federal order, commonly referred to as "double-dipping". In the past, this situation caused price differences between producers and gave rise to competitive equity issues. The need to prevent "double-dipping" became critically important as distribution areas expanded and orders merged.

When the same milk can be simultaneously pooled on a marketwide equalization pool operated by a government entity and on a Federal milk marketing order, it has the same undesirable outcomes as pooling the same milk on two Federal orders which was corrected many years ago. The Mideast order recently has experienced "double-dipping" and it is clear that the Mideast order should be amended to prevent the ability to pool the same milk on the order and on a marketwide equalization pool operated by another government entity. This action is consistent with other recent Federal order amendatory actions regarding the simultaneous pooling of the same milk on a Federal order and on other government operated programs.

The hearing record clearly indicates that the milk of producers that does not regularly and consistently service the needs of the fluid market is able to pool on and receive the Mideast order's blend price. Inadequate diversion limit standards are allowing large volumes of milk to be diverted to non-pool manufacturing plants located far from the marketing area; and inadequate supply plant performance standards also enable milk which has insufficient physical association with the market and which does not demonstrate regular and consistent service to the Class I needs of the marketing area to be pooled on the Mideast order.

The Federal milk order system has consistently recognized that there is a cost incurred by producers in servicing an order's Class I market, and the order's blend price is the compensation to producers for performing such services. The amended pooling provisions will ensure that milk seeking to be pooled and receive the order's blend price will regularly and consistently service the marketing area's Class I needs. Consequently, the adopted pooling provisions will ensure the more equitable sharing of revenue generated from Class I sales among the appropriate producers.

Accordingly, supply plant performance standards should be increased by 10 percentage points, from 30 percent to 40 percent of total receipts, for all months; cooperative owned supply plant performance

standards should be increased by 10 percentage points, from 30 percent to 40 percent of total receipts, for the months of September through November.

Additionally, cooperative owned supply plant performance standards for the month of August should be increased by five percentage points, from 30 percent to 35 percent of total receipts, as proposed in MMPA's modification of Proposal 2. These standards will be met using the "rolling annual average" standard during December through July and the "hard" standard during August through November as proposed in Proposal 2. Also, as suggested by Dean in their post-hearing brief, a cooperative owned supply plant must be located in the marketing area. Limiting a cooperative owned supply plant to only those that are located within the marketing area is consistent with other pooling conveniences afforded to other supply plants. For example, system pooling of supply plants that regularly and consistently perform in supplying the Class I needs of the marketing area are a legitimate reserve supply source of milk and are restricted to supply plants located within the marketing area. Qualifying shipments, as already specified in the order, may only include shipments of Class I milk to distributing plants or non-pool plants.

Performance standards for a supply plant with a marketing agreement with a cooperative should be increased by 10 percentage points, from 35 percent to 45 percent of total receipts, for the months of August through November.

Changes are necessary in the standards of the amount of milk that can be diverted from pool plants to nonpool plants to ensure that milk pooled on the order is part of the legitimate reserve supply of Class I handlers. The hearing record evidence clearly reveals that large volumes of milk that are not part of the legitimate reserve supply of the pooling handler can be reported as diverted milk by the pooling handler and receive the order's blend price.

Providing for the diversion of milk is a desirable and needed feature of an order because it facilitates the orderly and efficient disposition of milk when not needed for fluid use. However, it is necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process. Associating more milk than is actually part of the legitimate reserve supply of the pooling handler unnecessarily reduces the potential blend price paid to dairy farmers who regularly and consistently service the market's Class I needs. Without reasonable diversion limit provisions,

the order's performance standards are weakened and give rise to disorderly marketing conditions. Accordingly, diversion limit standards for pool plants should be lowered by ten percentage points, from 60 percent to 50 percent for the months of August through February, and from 70 percent to 60 percent for the months of March through July.

### *3. Determination of Emergency Marketing Conditions*

Evidence presented at the hearing and in post-hearing briefs establishes that current pooling standards of the Mideast order are inadequate and are eroding the blend price received by producers who are regularly and consistently serving the Class I needs of the Mideast marketing area and should be amended on an emergency basis. The unwarranted erosion of the blend price stems from inadequate supply plant standards and the lack of appropriate limits on diversions of milk. Additionally, the ability of a handler to pool the same milk on the Mideast Federal milk order and on a marketwide equalization pool administered by another government entity serves to potentially further erode the order's blend price.

Consequently, it is determined that emergency marketing conditions exist and the issuance of a recommended decision is being omitted. The record clearly establishes a basis as noted above for amending the order on an interim basis and the opportunity to file written exceptions to the proposed amended order remains.

In view of these findings, an interim final rule amending the order will be issued as soon as the procedures are completed to determine the approval of producers.

### **Rulings on Proposed Findings and Conclusions**

Briefs, proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

### **General Findings**

The findings and determinations hereinafter set forth supplement those that were made when the Mideast order

was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the aforesaid marketing agreement and order:

(a) The interim marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

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

(c) The interim marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

### **Interim Marketing Agreement and Interim Order Amending the Order**

Annexed hereto and made a part hereof are two documents—an Interim Marketing Agreement regulating the handling of milk and an Interim Order amending the order regulating the handling of milk in the Mideast marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered, that this entire tentative partial decision and the interim order and the interim marketing agreement annexed hereto be published in the **Federal Register**.

### **Determination of Producer Approval and Representative Period**

The month of March, 2005 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Mideast marketing area is approved or favored by producers, as defined under the terms of the order as hereby proposed to be amended, who during such representative period were

engaged in the production of milk for sale within the aforesaid marketing area.

It is hereby directed that a referendum be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300–311), to determine whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Mideast marketing area is approved by producers, as defined under the terms of the order (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

The representative period for the conduct of such referendum is hereby determined to be March, 2005.

The agent of the Department to conduct such referendum is hereby designated to be David Z. Walker, Market Administrator.

**List of Subjects in 7 CFR Part 1033**

Milk Marketing order.

Dated: July 21, 2005.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

**Interim Order Amending the Order Regulating the Handling of Milk in the Mideast Marketing Area**

This interim order shall not become effective until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

**Findings and Determinations**

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

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Mideast marketing area. The hearing was held 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 (7 CFR part 900).

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

(1) The said order as hereby amended, and all of the terms and conditions

thereof, will tend to effectuate the declared policy of the Act;

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

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

**Order Relative to Handling**

*It is therefore ordered,* that on and after the effective date hereof, the handling of milk in the Mideast marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The authority citation for 7 CFR part 1033 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

**PART 1033—MILK IN THE MIDEAST AREA**

1. Section 1033.7 is amended by:

- (a) Revising paragraph (c) introductory text.
- (b) Revising the introductory text to paragraph (d).
- (c) Revising paragraph (d)(2).
- (d) Revising paragraph (e)(1).

*The revisions read as follows:*

**§ 1033.7 Pool plant.**

(c) A supply plant from which the quantity of bulk fluid milk products shipped to, received at, and physically unloaded into plants described in paragraph (a) or (b) of this section as a percent of the Grade A milk received at the plant from dairy farmers (except dairy farmers described in § 1033.12(b)) and handlers described in § 1000.9(c), as reported in § 1033.30(a), is not less than 40 percent of the milk received from dairy farmers, including milk diverted pursuant to § 1033.13, subject to the following conditions:

- (d) A plant located in the marketing area and operated by a cooperative association if, during the months of December through July 30 percent, during the month of August 35 percent

and during the months of September through November 40 percent or more of the producer milk of members of the association is delivered to a distributing pool plant(s) or to a nonpool plant(s) and classified as Class I. Deliveries for qualification purposes may be made directly from the farm or by transfer from such association’s plant, subject to the following conditions:

(1) \* \* \*

(2) The 30 percent delivery requirement for the months of December through July may be met for the current month or it may be met on the basis of deliveries during the preceding 12-month period ending with the current month.

\* \* \* \* \*

(e) \* \* \*

(1) The aggregate monthly quantity supplied by all parties to such an agreement as a percentage of the producer milk receipts included in the unit during the months of August through November is not less than 45 percent and during the months of December through July is not less than 35 percent;

\* \* \* \* \*

2. Section 1033.13 is amended by:

(a) Revising paragraph (d)(4).

(b) Adding paragraph (e).

The revisions read as follows:

**§ 1033.13 Producer milk.**

\* \* \* \* \*

(d) \* \* \*

(4) Of the total quantity of producer milk received during the month (including diversions but excluding the quantity of producer milk received from a handler described in § 1000.9(c) or which is diverted to another pool plant), the handler diverted to nonpool plants not more than 50 percent in each of the months of August through February and 60 percent in each of the months of March through July.

\* \* \* \* \*

(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 plan imposed under the authority of another government entity.

**Marketing Agreement Regulating the Handling of Milk in the Mideast Marketing Area**

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions

referred to in paragraph I hereof, as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1033.1 to 1033.86 all inclusive, of the order regulating the handling of milk in the Mideast marketing area (7 CFR part 1033) which is annexed hereto; and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of \_\_, 2005, \_\_ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Address) \_\_\_\_\_

(Seal)

Attest

[FR Doc. 05-14769 Filed 7-26-05; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2005-21968; Directorate Identifier 2005-NM-077-AD]

RIN 2120-AA64

#### Airworthiness Directives; Boeing Model 757-200, -200CB, and -300 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 757-200, -200CB, and -300 series airplanes. This proposed AD would require repetitive detailed inspections for proper functioning of the girt bar leaf springs for the escape slides at passenger doors 1, 2, and 4, and corrective actions if necessary. This proposed AD is prompted by a report that the escape slides failed to deploy correctly during an operator's tests of the escape slides. We are proposing this AD to prevent escape slides from disengaging from the airplane during deployment or in use, which could result in injuries to passengers or flightcrew.

**DATES:** We must receive comments on this proposed AD by September 12, 2005.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, Room PL-401, Washington, DC 20590.

- By fax: (202) 493-2251.
- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, PO Box 3707, Seattle, Washington 98124-2207.

You can examine the contents of this AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Room PL-401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA-2005-21968; the directorate identifier for this docket is 2005-NM-077-AD.

**FOR FURTHER INFORMATION CONTACT:**

David Crotty, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM-150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 917-6422; fax (425) 917-6590.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA-2005-21968; Directorate Identifier 2005-NM-077-AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you can visit <http://dms.dot.gov>.

#### Examining the Docket

You can examine the AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647-5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System (DMS) receives them.

#### Discussion

We have received a report indicating that the escape slides failed to deploy correctly during an operator's tests on Boeing Model 757-200, -200CB, and -300 series airplanes. Further examination showed that the girt bar, which attaches the deployed escape slide to the airplane floor, did not stay attached to the floor fitting. When an escape slide is being deployed, sliders on the forward and aft ends of the girt bar engage with the floor fittings and are held in place by leaf springs. The airplane manufacturer and operators have found that it is possible for the leaf