Proposed Rules

Federal Register
Vol. 62, No. 141
Wednesday, July 23, 1997

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005, 1007, 1011, and 1046

[Docket No. AO–388–A9, et al.; DA–96–08]

Milk in the Carolina and Certain Other Marketing Areas; Partial Recommended Decision on Proposed Amendments to Marketing Agreements and Orders

7 CFR part	Marketing area	Docket No.
1005	Carolina	AO–388–A9
1007	Southeast	AO–366–A38
1011	Tennessee Valley	AO–251–A40
1046	Louisville-Lexington-Evansville.	AO–123–A67

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This partial recommended decision denies proposed amendments to 4 Federal milk orders in the Southeastern United States involving deductions from the minimum uniform price to producers and the definition of ''producer'' specified in the orders. The decision is based upon public hearings held May 15–16, 1996, in Charlotte, North Carolina, and December 17–18, 1996, in Atlanta, Georgia.

DATES: Comments are due not later than August 22, 1997.

ADDRESSES: Comments (4 copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Nicholas Memoli, Marketing Specialist, Order Formulation Branch, USDA/AMS/Dairy Division, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456, (Tel: 202/690–1932; E-mail:NMEMOLI@USDA.gov).

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

This recommended decision denies the proposed amendments to the order. In any event, the proposals were not intended to have a retroactive effect. Furthermore, even if adopted, the proposed amendments 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, 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 file with the Secretary 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 and request a modification of the order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary 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 Secretary'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.

Small Business Consideration

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612). 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 $500,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purpose of determining which dairy farms are ''small businesses,'' the $500,000 per year criterion was used to establish a production guideline of 326,000 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.

The milk of approximately 8,600 producers is pooled on the Carolina, Southeast, Tennessee Valley and Louisville-Lexington-Evansville milk orders. Of these producers, 95 percent produce below the 326,000-pound production guideline and are considered to be small businesses.

There are 43 handlers operating pool plants under the four orders. Of these handlers, 22 have fewer than 500 employees and qualify as small businesses.

Additionally, under the Regulatory Flexibility Act the agency examines the impact of a proposed rule on small entities. The Agricultural Marketing Service has determined that neither the denial, nor the adoption, of this proposed rule involving deductions from the minimum payments to producers will have a significant economic impact on a substantial number of small entities under current marketing conditions. Dairy farmers are presently receiving the minimum order prices and should continue to do so given the current level of over-order premiums now in effect. Similarly, neither adoption nor denial of the proposed amendments will have any effect on handlers' costs under the orders because handlers are voluntarily paying producer prices in excess of the minimum prices specified in the orders. Furthermore, for the long term, the issue of deductions from minimum payments will be considered as part of the Federal order reform in connection with the Federal Agriculture Improvement and Reform Act of 1996 which requires an examination of the Federal milk order system. The concerns of small businesses will be addressed throughout the review process.

Additionally, neither the denial, nor the adoption, of the proposal to modify the definition of ''producer'' under the 4 orders will have a significant economic impact on a substantial number of small entities. Producer

pooling standards already exist in the 4 orders to assure an adequate association by producers in meeting the fluid milk needs of the markets. Also, the denial of such proposal maintains the existing regulatory burden, and will not place any additional responsibilities on handlers operating under the orders.

Prior documents in this proceeding:

Notice of Hearing: Issued May 1, 1996; published May 3, 1996 (61 FR 19861).

Tentative Partial Final Decision: Issued July 12, 1996; published July 18, 1996 (61 FR 37628).

Interim Amendment of Orders: Issued August 2, 1996; published August 9, 1996 (61 FR 41488).

Extension of Time for Filing Comments to the Tentative Decision: Issued August 16, 1996; published August 23, 1996 (61 FR 43474).

Extension of Time for Filing Comments to the Tentative Decision: Issued October 18, 1996; published October 25, 1996 (61 FR 55229).

Notice of Reopened Hearing: Issued November 19, 1996; published November 25, 1996 (61 FR 59843).

Partial Final Decision: Issued May 12, 1997; published May 20, 1997 (62 FR 27525).

Preliminary Statement

A public hearing was held to consider proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas. 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 (7 CFR Part 900), in Charlotte, North Carolina, on May 15–16, 1996, and in Atlanta, Georgia, on December 17–18, 1996. Notice of the initial hearing was issued on May 1, 1996, and published May 3, 1996 (61 FR 19861).

An interim order amending the orders with regard to transportation credits was issued on August 2, 1996, and published August 9, 1996 (61 FR 41488). The interim amendments became effective on August 10, 1996.

The Department reopened the hearing to hear additional evidence regarding the transportation credit issue and also to hear a related ''producer'' definition proposal. This hearing was held on December 17–18, 1996, in Atlanta, Georgia, following the notice of such reopened hearing issued on November 19, 1996, and published on November 25, 1996 (61 FR 59843).

Interested parties were given until June 17, 1996, to file post-hearing briefs regarding the deductions from the minimum price proposal as published in the **Federal Register** and as modified at the hearing. Regarding the additional proposal concerning the definition of a ''producer'' heard at the reopened hearing, interested parties were given until February 7, 1997, to file post-hearing briefs.

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by the 30th day after publication of this decision in the **Federal Register**. Four 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 material issues on the record of the hearing relate to:

1. Transportation credits for supplemental bulk milk received for Class I use.

2. Deductions from the minimum uniform price to producers.

3. Whether emergency marketing conditions in the 4 regulated marketing areas warrant the omission of a recommended decision with respect to Issue No. 1 and the opportunity to file written exceptions thereto.

4. The definition of producer.

This partial recommended decision deals only with Issues 2 and 4. Issue 1 was discussed in the tentative partial final decision issued July 12, 1996 (61 FR 37628) and has been considered separately in a partial final decision. Issue 3 was discussed in the tentative partial final decision also, and is now moot.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue #2—Deductions From the Minimum Uniform Price to Producers

A proposal by Hunter Farms and Milkco, Inc., seeks to clarify the minimum payment to producers for Federal Milk Orders 1005, 1007, 1011, and 1046. Under the proposal, a handler (except a cooperative acting in its capacity as a handler pursuant to paragraph 9(b) or 9(c)) may not reduce its obligations to producers or cooperatives by permitting producers or cooperatives to provide services which are the responsibility of the handler. According to the proposal, such services include: (1) preparation of producer payroll; (2) conduct of screening tests of tanker loads of milk required by duly constituted regulatory authorities before milk may be transferred to the plant's holding tanks and any other tanker load tests required to establish the quantity and quality of milk received; and (3) any services for processing or marketing of raw milk or marketing of packaged milk by the handler. The proposal should be denied on the basis of this record.

The Vice President of Hunter Farms, which operates plants regulated under Order 5 at High Point and Charlotte, North Carolina, testified that Hunter purchases milk from Piedmont Milk Sales, Carolina-Virginia Milk Producers Association (CVMPA), Mid-America Dairymen, Inc. (Mid-Am), and Cooperative Milk Producers Association. The witness explained that CVMPA and Mid-Am are cooperative associations, while Piedmont Milk Sales is a marketing agent handling the milk of non-member producers.

The witness testified that beginning in late 1994 and through the early fall of 1995, marketing conditions in the Southeast were so competitive among supply organizations that handlers were able to purchase raw milk from producers and cooperatives at Federal minimum order prices without any over-order premiums being charged. With the elimination of over-order premiums, he said, questions arose as to who must pay for services associated with the receipt of milk at regulated plants. He explained that when there were sufficient over-order premiums, it was assumed that the premiums included payment for the services associated with the receipt of milk at the plant. However, from December 1994 until September 1995, he said that competing handlers who received milk from cooperative associations at the minimum order price did not fully compensate the cooperatives for the services that were provided.

The witness stated that when Hunter began purchasing milk from Piedmont at the minimum Federal order price, the market administrator of Order 5 took the position that they must also pay for the services that were provided by the dairy farmers marketing their milk through Piedmont and, therefore, issued underpayment notices to Hunter for milk received from Piedmont for the December 1994 through September 1995 period. He said the market administrator refused to examine the issue of whether cooperative associations which provided similar services for competing handlers also should be compensated for those services.

The witness pointed out that over-order premiums have now returned to Order 5, so the question of what constitutes a minimum payment to producers has become less urgent. He

emphasized, however, that the problem is capable of repetition since premiums in this area could be reduced or disappear entirely. Therefore, he said, it is important to resolve this issue before it arises again.

The witness testified that without a change in the order, when prices paid are at Federal order minimums, handlers purchasing milk from non-member producers will be at a competitive disadvantage for the purchase of raw milk vis-a-vis their competitors who purchase from cooperatives. This will occur, he said, because the market administrator takes the position that cooperatives can provide free services for their customers but non-member producers serving competing handlers cannot provide the same services without charging over-order prices.

Noting that the sale of packaged milk is extremely competitive, the Hunter representative testified that requiring one handler to pay more than another simply because the handler purchases milk from non-member producers results in immediate irreparable harm to the handler paying more for its milk because the handler will lose milk sales. He said that the current policy results in non-uniform prices paid by handlers in violation of the Agricultural Marketing Agreement Act. Not only is this result discriminatory and unfair, he said, it also leads to lower prices for all producers, members as well as non-members, because cooperatives tend to provide more, not fewer, services in competing for sales with non-members. Therefore, he concluded, cooperatives also would benefit from a clarification of the rules defining Federal minimum order prices.

All of the orders involved in this proceeding should be amended to resolve this issue according to the Hunter Vice-President because Hunter and Milkco compete for raw milk procurement and sales of packaged products with handlers from each of the 4 orders. Moreover, he said, premiums returned to all 4 orders at the same time, which indicates that the cooperatives treat handlers in these 4 orders identically.

A second witness representing Hunter Farms and Milkco, Inc., explained the proposal of these handlers in more detail. This witness, a consultant with a long history in Federal milk order regulation, explained that the proposal describes 3 categories of services.

The first service described by the witness is the preparation of a producer payroll report. He said that the orders are fairly uniform as to the requirement for such reports, which show each producer's name and address, the total pounds of milk received from the producer, the average butterfat content of the milk, the price per hundredweight, the gross amount due, the amount and nature of any deductions, and the net amount paid.

A second service described by the witness is the testing of incoming tanker loads of milk, as required by health regulations, to assure the milk meets minimum quality standards. The witness reasoned that if there is a legal requirement for this test to be performed, the cost of the test should be borne by the plant operator. He added that the order requires the plant operator to test and weigh the milk to establish the pounds of milk received and the butterfat content of the milk. The witness noted that in other parts of the country, these tests are handled differently. In the Indiana, Eastern Ohio-Western Pennsylvania, Southern Michigan, and Chicago Regional marketing areas, which provide for component pricing of milk, the market administrator has assumed the function of testing milk for butterfat and other components, and has increased the marketing service charges to non-member producers from 5 to 7 cents to cover these services. He concluded that the market administrators in those areas obviously consider these tests to be a producer responsibility.

The witness stated that there is a somewhat similar situation in Orders 5, 7, 11, and 46 because tests conducted by the market administrators are used to establish the amount of butterfat in milk receipts, which is a basis for payment to the producer. He said that the Department should address this inconsistency by determining whether these tests are the plant operator's responsibility or a producer's responsibility.

The third service described by the witness includes any costs associated with processing raw milk or marketing milk in bulk or packaged form. The addition of this specific order language, he said, would support the historical position of the Department that the handler is responsible for the costs associated with the processing and/or marketing of all milk received.

The witness stressed that the thrust of this proposal is to ensure equality in the cost of milk among regulated handlers. He said that current administrative practice in this area requires handlers receiving milk from non-member producers to absorb the cost of a variety of services which are provided at no extra charge to handlers receiving milk from cooperative associations. Thus, he concluded, these orders are not impacting uniformly on handlers who buy milk from cooperatives versus those handlers who buy from non-members, nor are they being uniformly applied to producers who are members of a cooperative versus those who are not members of a cooperative. By clearly defining what services are the responsibility of plant operators, regardless of the source of the milk received, this lack of uniformity can be corrected, he said.

The General Manager of Carolina-Virginia Milk Producers Association or CVMPA offered qualified support for the Hunter-Milkco proposal. He said that from a philosophical point of view CVMPA would agree that if producers provide the services specified by the proponents—plus any additional services that are provided to a handler by a cooperative association—handlers should be charged the costs associated with these services. He said that, with these modifications, CVMPA could support the proposal.

The witness stated that, to assure that cooperative members are not allowed to pay the cost of services given to handlers, the list of services in the Milkco-Hunter proposal should be expanded to cover tanker washing and tagging, supplying milk to handlers on an irregular delivery schedule, field work, disposing of surplus milk during months when the supply is above local needs, and importing supplemental milk for Class I use during periods of short production.

While expressing the hope that market conditions do not return to the zero over-order prices that existed in 1994 and 1995, the CVMPA General Manager stated that the proposal, as modified by CVMPA's suggestions, could help decrease the likelihood that cooperative members would have to bear the costs resulting from these circumstances. He said CVMPA appreciated Milkco and Hunter Farm's attempt to address these circumstances.

A spokesman for Milkco Inc. testified that Milkco, a fluid milk processing plant located in Asheville, North Carolina regulated under Order 5, receives milk from cooperative associations as well as independent producers marketing their milk through Piedmont Milk Sales. The witness testified in support of Hunter's position as it pertains to proposal number 2 and stated that Milkco received underpayment notices from the market administrator for the December 1994 through October 1995 period on milk received from independent dairy farmers, but did not receive underpayment notices on milk received

under the same or similar conditions from cooperative associations.

Testimony was also offered by a representative of Mid-America Dairymen, Inc. (Mid-Am) involving proposal number two. Mid-Am testified that it was not appropriate for proposal two to be heard under the same procedure as a hearing called to consider a proposal on marketwide service payments. Mid-Am also objected to the narrowness of Hunter-Milkco's proposal. Mid-Am argued that the issue of minimum payments to producers is national in scope, and should not be limited to the 4 Southeastern orders. This issue, Mid-Am suggests, should be addressed by the Secretary within the context of the Federal order reform as required by the 1996 Farm Bill on a national basis. In addition, the Mid-Am representative objected to such proposal on grounds of lack of notice to interested parties.

The administrative law judge presiding over the hearing overruled Mid-Am's objection to hearing proposal number 2, noting that the Secretary had given interested parties the minimum 3-day notice requirement specified in 7 CFR 900.4(a). He also indicated that this proposal, unlike proposal number 1, was being considered on a non-emergency basis and that, accordingly, interested parties had more than adequate time to brief it, discuss it, and consider it.

Briefs

Briefs were submitted by interested parties both in support of and in opposition to this proposal. Proponents, Hunter Farms and Milkco, Inc., submitted a brief in support of their proposal, emphasizing the points made on the hearing record.

Hunter and Milkco maintain that uniform applicability in the treatment of handlers is essential, and any lack of uniformity is in violation of the Agricultural Marketing Agreement Act, as amended. Referring to an earlier proceeding, *In re: Kraftco Corp.*, which dealt with uniform applicability, proponents state that ''* * * all handlers must be treated identically with respect to receipt of services on their entire milk supply in the relevant marketing area.'' It is argued that issuance of underpayment notices only on that milk which was received from independent producers who contracted with a specific marketing agency does not promote uniformity and is discriminatory.

Proponents addressed the issue of uniformity, not only among handlers, but also among producers. Hunter and Milkco state that independent producers may be subject to discriminatory treatment and lose their market as handlers find it cheaper to purchase milk from cooperatives that absorb costs which nonmembers cannot. In addition, it is argued that cooperative associations which provide services free of charge either believe ''* * * they were providing these services as additional services over and above that required by the Federal order, or they knowingly provided services to handlers which were the responsibility of handlers for free * * *''. The decision to perform such services at no charge must be taken into consideration when determining whose responsibility they are.

Hunter and Milkco's brief also addresses the objections made by Mid-Am to this proposal. The handlers maintain that Mid-Am's objection to their proposal based on grounds of lack of notice is unfounded because the notice given was adequate. In addition, Hunter and Milkco argue that the suggestion by Mid-Am that this proposal be considered on a national basis is unjustified. Proponents maintain that the problem which has prompted this proposal is specific to the Federal order under consideration, and no evidence was presented to show that this problem exists in other regions of the United States.

Fleming Companies, Inc., also filed a brief in support of this proposal. Fleming states that ''* * * To the extent such services primarily benefit producers, it is appropriate that producers be authorized to contract for such services, and to allow a deduction for the reasonable value of such services.''

In addition, Fleming writes that as a buyer of milk from both independent producers as well as cooperative associations, it is concerned that without the clarification offered by the proposal, equity among member producers and non-member producers may be jeopardized. Fleming argues that price uniformity may not be maintained if cooperative associations are able to assume the cost of producer-oriented services, but handlers receiving independent milk are not permitted to make a deduction for these services even if authorized by the producer.

A brief filed by Mid-America Dairymen, Inc., emphasized the cooperative's strong opposition to the proposal. Mid-Am argues that the alleged underpayment problems, which the proponents believe will be resolved by such proposal, are not isolated to the Carolina Federal milk marketing order, and that such a problem could occur under any of the other Federal milk marketing orders in a situation when no over-order charges exist. For this reason, Mid-Am believes that this issue should be considered on a national basis. Mid-Am also believes that with the resumption of over-order pricing within the Carolina order, there is no urgent need to adopt the proposed amendments.

In addressing which services are the responsibility of handlers as opposed to those of producers, Mid-Am states that it is clear that the costs for butterfat testing are borne by all producers, and the costs of testing milk in tankers for antibiotics are borne by all handlers regardless of their source of supply. Mid-Am argues that no confusion exists as to who is responsible for these tests and, therefore, they should not be included in the proposed amendments.

Mid-Am concludes its brief by reiterating its request that this issue be remanded to the Secretary for further consideration on a national basis. It suggests that this issue be evaluated under the current review of the Federal Milk Marketing Order system as required by the 1996 Farm Bill.

The Kroger Co. states in its brief that proposal 2 is worthy of study and should be considered by the Secretary in the context of all Federal milk marketing orders. According to Kroger, any decision made on this issue should pertain to all Federal milk marketing orders. Like Mid-Am, Kroger suggests addressing this proposal within the context of the review of the Federal Milk Order Program as mandated by the 1996 Farm Bill.

Conclusion

Federal orders enforce the payment of minimum prices for milk to producers by handlers. Under orders, payment for milk received from producers may not be less than the uniform price as announced each month by the market administrator, except to producers who receive payment from their cooperative association. A cooperative association under the authorizing legislation may blend the net proceeds of its sales of milk for payment to its member producers. The enforcement of minimum prices for milk ensures that each producer receives a uniform proportion of the returns from higher valued fluid (Class I) milk sales as well as the lower returns from milk used in lower class uses.

Payments to a producer by a handler, however, can be reduced to reflect ''proper deductions authorized in writing by such producer.'' Historically, such deductions from minimum milk prices of only two basic types have been permitted. The two types of deductions permitted are (1) payments that are

made by a handler on behalf of the producer to creditors of the producer, and (2) payments that are obligations of the producer in the production of milk and the transportation costs for delivery to the handler's plant. Such creditors for goods and services have included banks, other lenders, feed companies, veterinarians, machinery dealers, etc. Examples of payments associated with the production of milk and the delivery to the handler's plant would include feed, supplies, equipment and hauling. Handlers are not required to make payments to creditors on behalf of producers but are permitted to do so if the deductions are proper and authorized. Such permission recognizes that handlers frequently make payments to producer's creditors as a service to the producers. The term ''proper'' is included to prevent unwarranted deductions from minimum prices for milk.

The authorization by a producer of a certain deduction may not be proper and thus disallowed by the market administrator. Producers cannot give up their rights to receive the uniform price by a deduction that is not of the two types described above.

Additionally, under the 4 orders handlers are required to deduct 5 to 7 cents per hundredweight from payment to independent producers for marketwide services which is paid to the market administrator. This marketwide service fee is used to provide market information and to check the accuracy of the testing and weighing of milk for producers who are not receiving such services from a cooperative association.

The record of this hearing clearly points to a conceptual difference among market participants concerning what constitutes minimum prices to producers. To a large extent, this difference results from changing market conditions, new technologies, and order amendments reflecting these changes. The end result is that interpretations under various orders differ concerning the responsibilities of plant operators and the responsibilities of producers or their cooperative associations.

Proponents would have the Secretary resolve this issue by delineating those services that are the responsibility of plant operators and those services that belong in the domain of producers. Furthermore, proponents apparently would have the Secretary determine a rate for each service so that if a producer or cooperative association provided the service for a plant operator, that plant operator could simply compensate the producer/cooperative according to the rate set forth in the order.

One of the obvious problems in dealing with a proposal of this nature is to determine which services are, in fact, the responsibility of the handler and which are the responsibility of the cooperative association supplying milk to that handler. The record shows that the proponent handlers—Milkco and Hunter— clearly have a different conception of their responsibility than does CVMPA, which agrees with them in principle but differs with them in specifics. While the proponents consider handler responsibilities to be payroll costs, screening of incoming milk, and all costs associated with marketing milk once it enters the plant, CVMPA maintains that those responsibilities should include tanker washing and tagging, ordering milk on an irregular delivery schedule, field work that is provided by the cooperative association, disposing of surplus milk during months when the supply is above local needs, and importing supplemental milk for Class I use during periods of short production.

It is apparent that there is a significant difference of opinion concerning the services for which handlers should be responsible. Although evidence was not presented concerning the rates that should be associated with each of these services, there is no doubt that there would be clear differences of opinion in that area as well.

It would be particularly difficult to establish uniform rates for the services suggested by CVMPA. For example, there was no indication of the cost of providing milk to a handler 4 times per week as opposed to 3 times per week. Similarly, there was no testimony or data concerning the cost of handling a market's surplus milk.

The single issue prompting the Milkco-Hunter proposal was the alleged inequity between handlers buying cooperative association milk at minimum order prices—but with services provided by the cooperative—and handlers buying milk from non-members at minimum order prices but without the services that their competitors received with their cooperative-supplied milk.

At the hearing, proponent's expert witness said that producers should have the right to market their milk through a marketing agent if they so choose. Setting aside the question of the legality of marketing agents under the Sherman Antitrust Act, if a producer contracts with an agent to market his/her milk, some means must be devised to pay that agent for the services provided. This raises the question of whether deductions to the marketing agent authorized in writing by the producer are ''proper'' deductions under the order.

Assuming there is no legal obstacle to the use of a marketing agent, the marketing agent presumably would be the party responsible for selling the producer's milk to a handler and might collect the payment from the handler on behalf of the producer, if the producer has provided this authorization to the marketing agent. In such a case, another question that must be clarified is whether a handler's payment of the minimum order price to a producer's marketing agent should be deemed to be a payment of the minimum order price to the producer, just as it is in the case of a cooperative association.

At the hearing, proponent's expert witness was questioned about the desirability of simply treating all deductions authorized in writing by a producer as ''proper'' deductions. The witness indicated that there have been cases in the past where producers have been coerced—for fear of losing their market—into authorizing deductions that were not proper deductions, as determined by the market administrator. To the extent that this exists, the witness said, the Secretary would not be enforcing minimum uniform prices to handlers.

Provisions dealing with the minimum payment that handlers are required to pay producers are at the core of each milk order. They should be based upon the same policy considerations and should not differ from one order to another. Therefore, we concur with the suggestions made by The Kroger Company and Mid-America Dairymen, Inc., to consider this important issue as part of the Federal order reform.

The record of this hearing demonstrates a clear disagreement among market participants concerning the division of services between producers and handlers. In view of this disagreement, the importance of this issue to the program, the current review of all Federal order provisions in connection with the 1996 Farm Bill, and the lack of a present problem in these four orders, the proposal of Hunter/Milkco should be denied. However, the terms of the proposal, the briefs dealing with the proposal, the relevant transcript and exhibits from the hearing, and this recommended decision should be considered in conjunction with the reform of Federal milk orders mandated by the Federal Agriculture Improvement and Reform Act of 1996.

The 1996 Act requires the Secretary of Agriculture to merge the existing 33 Federal milk orders (currently 32 orders) into no more than 14, and no less than 10, milk orders by April 1,

1999. As part of this process, the Department is undertaking a complete review of all of the provisions in Federal milk orders in an effort to determine which provisions would best meet the needs of the consolidated orders in the next century. This review provides an ideal opportunity to study this important issue. It will incorporate the views and experiences of many different market administrator offices and it will solicit the views of interested parties to comment on the provisions that are recommended for the newly consolidated orders.

As pointed out by Hunter and Milkco in their brief, the underpayment problem which they experienced has been rendered moot with the return of over-order premiums. Although these premiums could again disappear, bringing the uniform pricing issue to the fore once again, this is not likely to happen in the near future. Nevertheless, if this should happen, proponents could request relief through other means pending final resolution of this matter.

Material Issue #4—Definition of Producer

A proposal to modify the definition of producer for Federal Milk Orders 1005, 1007, 1011, and 1046 should also be denied on the basis of the testimony and evidence received at the reopened hearing.

The spokesman for Mid-America Dairymen, Inc. (Mid-Am), Carolina-Virginia Milk Producers Association (CVMPA), and Maryland-Virginia Milk Producers Association, proponents of the proposal to modify the current producer definition, testified that the elimination of the base-excess plans for each of the orders will allow for the pooling of milk not historically associated with these markets. Mid-AM's proposal to further define producer qualification, he stated, aims at minimizing this exposure, which would be detrimental to Southeastern dairy farmers.

The spokesman offered testimony explaining that base-excess plans (included in each of the 4 orders at the time of the reopened hearing, but terminated from each order effective January 1, 1997, as a result of the expiration of legislative authority to include such plans in Federal milk orders) have substantially removed the incentive for a dairy farmer who was associated with another market during the base-building months to become a producer under one of these 4 orders during the base-paying months. He expressed concern that with the elimination of such plans, no provisions would exist to prevent a dairy farmer from pooling any milk diverted or delivered within limits to pool plants under the orders during the former base-paying months.

After explaining the current provisions regarding the definition of producer, the spokesman testified that Mid-Am's proposal is almost identical to Order 46's current provision applicable to producers supplying a country plant, which excludes a person with respect to any milk produced by him or her that is received or diverted from a country plant in any month of March through August, unless at least 60 days' production from such farm was producer milk during the preceding September through February period.

The witness stated that the proposed provisions for the 4 orders will exclude from the producer definition, during the flush production months of February through May, any dairy farmer who delivered more than 40 percent of his or her milk to plants as other than ''producer milk'' during the months of August through November. The proposed provisions, according to the witness, are designed to restrict those producers not normally associated with such orders from pooling their milk during the flush production months when it is not needed to supply fluid needs if they have not pooled such milk during the prior short months when supplies were needed.

In addition, the spokesman stated that for the purpose of determining the percentage of a producer's milk that was pooled during the prior August through November period, deliveries to plants as producer milk under the 4 orders should be considered deliveries under the applicable order. He testified that this proviso is necessary to accommodate: (1) the historical shifting of producers between the 4 orders; (2) the shifting of pool distributing plants; and (3) the shifting of producer milk due to the opening and closing of pool plants in the 4-order area.

The witness also testified that the proposal, as found in the notice of hearing, should be modified to include a new subparagraph in Section 44 of the orders which is necessary to define the classification of the milk received. Also, the witness added that there is a revision to Section 60 involving the pricing of the milk as classified in Section 44. This addition to order language, according to the spokesman, would require the receiving handler to pay into the pool the difference between the Class I price and the Class III price.

When asked about administrative costs associated with the relevant proposal, the witness contended that there should be no noticeable difference between costs associated with the producer qualification proposal and costs associated with the base-excess plan. In conclusion, Mid-Am's spokesman testified that the adoption of such proposal is necessary to foster orderly marketing in the area and protect producer pools of the 4 southeastern orders.

A representative of CVMPA testified that CVMPA fully supports the producer qualification proposal to make sure that high Class I utilization markets in the Southeast do not carry surplus from other surrounding markets resulting in low Class I utilization rates during the flush months of production. He maintained that the proposal benefits producers, processors, and consumers by maintaining fluid supplies, while encouraging the survival of local producers.

A representative from Associated Milk Producers, Inc. (AMPI), Southern Region, a cooperative association representing over 2,500 dairy farmers in the South and Southwest, testified in opposition to Mid-Am's proposal to modify the producer definition of the 4 orders. The witness also maintained that such proposal is not related to the issue of transportation credits, and should, therefore, not be included in the reopened hearing.

According to the spokesman, the current producer pooling requirements under Order 7 are more restrictive than the proposed producer qualification requirements; thus, the proposal actually constructs an additional layer of unnecessary pooling requirements. The witness claimed that no handlers are currently abusing the order by diverting the maximum amount allowable under the provisions of Order 7; otherwise, he argued, such a high percentage of Class I utilization would not be maintained.

AMPI's witness also testified that it is apparent that the proponents intend to replace the base-excess plans in the 4 orders. However, such an alternative is not viable, he argued, because sufficient protection for local producers already exists. While acknowledging the existence of such ''dairy farmers for other market'' provisions in other Federal orders, the spokesman testified that the Southeast markets will not benefit from such a provision. If the proposal is nevertheless adopted, he said, AMPI recommends a modification to the proposal such that milk imported from outside the marketing area that is received at a fully or partially regulated plant during any month of the year must be allocated to Class I and the handler of origin must be compensated at the receiving plant's Class I price.

A second representative from AMPI also testified regarding Mid-AM's proposal to incorporate a ''dairy farmer for other markets'' provision in the 4 orders. She stated that administration of such a provision would create additional costs and place a more serious burden on the cooperative. According to the witness, additional time and resources would be necessary to adapt AMPI's procedures to the new provision, including greater technical and manual assistance.

A representative of Piedmont Milk Sales testified that Piedmont supports the concept that a producer must make his milk available to the Class I market when it is needed in the fall or short period in order to be allowed to pool his milk in the same market during the spring or flush months. He contended that such a limitation assures that the producer who receives the blend price enhanced by the Class I value in those markets has actually earned it.

A spokesman for Fleming Dairy, which operates pool distributing plants in Nashville, Tennessee, and Baker, Louisiana, testified in support of Mid-Am's proposal, but suggested that the producer qualification period should be July through November, rather than August through November.

Additionally, a representative of Barber Pure Milk Co., a pool plant operator in Birmingham, Alabama, and Dairy Fresh Corporation, a pool plant operator in Greensboro, Alabama, testified in support of Mid-AM's producer qualification proposal. He suggested that any milk which is delivered directly from the farm and is received at a pool plant should qualify as producer milk, but any milk which is diverted should not.

Briefs. Select Milk Producers submitted a brief in opposition to the proposed changes in the producer definition. According to Select, a similar proposal was introduced during the Southeast merger proceedings and was subsequently denied due to the lack of justification for such a provision. Select's brief indicated that the pooling standards and diversion limitations provided in the orders give the market administrator enough flexibility to prevent distant milk from being associated with the 4 markets; therefore, a ''dairy farmer for other markets'' provision is not needed in these orders.

A brief filed on behalf of AMPI argued that the ''dairy farmer for other markets'' proposal submitted by Mid-Am and CVMPA and heard at the reopened hearing was in violation of the rules of practice and procedure governing the proceedings of marketing agreements and orders. AMPI maintains that this proposal does not qualify as an issue related to transportation credits, and therefore, should not have been discussed at the reopened hearing. Additionally, AMPI argued that the hearing record lacks the necessary evidence that would support adoption of such proposal. While reiterating its opposition to the additional work associated with implementation of the proposal as testified to at the reopened hearing, AMPI's brief also opposed the notion that in Mid-Am and CVMPA's proposal determination of a producer's eligibility would not only be dependent upon the amount of milk pooled under the order in which the producer is seeking producer status, but also upon the volume of milk pooled by that producer for the subject months in all 4 of the orders. According to AMPI, there is no justification or evidence which supports the proposed ''dairy farmer for other markets'' provision.

CVMPA, one of the proponents of the producer qualification proposal, filed a brief in support of its proposal reiterating the arguments presented during the reopened hearing. In its brief, CVMPA pointed out that its proposal would not create a barrier to entry into these markets as was testified to by a representative of AMPI. CVMPA argued that such a proposal would actually encourage milk to be pooled when local supplies are inadequate to meet Class I needs. While acknowledging that diversion limitations and producer touch-base provisions currently in effect under the subject orders do provide limited Class I utilization protection for the markets, CVMPA argued that these limitations are insufficient to protect producers who have pooled their milk during the fall months from being displaced by producers entering those markets during the spring flush months in order to take advantage of the high Class I utilization percentages reflected in the high blend prices of these southeastern markets.

CVMPA also addressed the argument made by AMPI that the proposal would create an additional administrative burden for both the market administrators' offices and reporting handlers. According to CVMPA, no additional work would be created by the proposal, and the administration of the proposed provision would be easier than that associated with the former base-paying plans. CVMPA also expanded the proposal to allow a producer to qualify as a producer in the spring if his/her farm had not delivered Grade A milk from such farm during the previous August through November period. Furthermore, CVMPA stated that the producer's eligibility should be based upon the proportion of Grade A milk delivered from the farm in the previous fall in order to prevent a producer who is converting from Grade B to Grade A or a producer who lost his/her Grade A permit from being penalized.

A brief was also filed by Mid-Am in support of the proposal to modify the producer definition. In addition to reiterating the arguments testified to during the reopened hearing, Mid-Am's brief stated that the proposed producer qualification provisions are necessary to foster orderly marketing in the area and also to protect the producer pools of the 4 orders. In its brief, Mid-Am also contends that the only opposition to the proposal testified to during the hearing was made by AMPI, which would be prevented from rotating their producers' milk in order to receive transportation credits. Mid-Am requests that the proposed provisions be implemented at the earliest possible date.

Conclusion. The record of the reopened hearing does not clearly demonstrate the need to amend the producer definition of Orders 5, 7, 11, and 46. Current safeguards exist to ensure that sufficient supplies of milk are made available for fluid use without the unwarranted pooling of additional supplies of milk that are not associated with serving the fluid market.

Proponents of this proposal believe that the termination of seasonal base plans will create disorderly marketing conditions in the 4 orders. However, the testimony and evidence received at the December 17–18, 1996, hearing do not sufficiently support this argument. According to the proponents, the termination of seasonal base plans, effective January 1, 1997, removes the incentive for producers to pool their milk during the short months when milk is needed in the Southeast because they will no longer receive the higher base prices for their milk during the following flush months. While it is feared by the proponents that the termination will open up the 4 Southeast markets to those producers not normally associated with such markets, but who seek to take advantage of the high Class I utilization rates, the record was unconvincing in its need for modification of the producer definition for this reason.

It is apparent that the proposal was initiated in response to the elimination of seasonal base plans in Federal milk orders. In other words, the proposed modification of the producer definition is intended to fill the void left by the removal of the base-excess plans. However, changing the producer definition should not be compared to

the incorporation of base plans in the orders. Base plans are instituted in order to level out production throughout the year so that adequate milk supplies are ensured during the short production months, while discouraging surplus supplies in the flush production months. The base plans also did have the effect of preventing producers not normally associated with a market from entering such market during the flush production months because they would have received the low, excess price for their milk. Nevertheless, the removal of base plans does not by itself necessitate amending the orders.

The orders currently have strict pooling requirements. For example, as was testified to at the reopened hearing by AMPI's spokesman, the pooling requirements for Order 7 specify that a producer's milk must be received at least 4 days at a pool plant to be eligible to be pooled during the months of December through June. Additionally, there is a 50 percent diversion limitation in Order 7 to nonpool plants for those same months. The Carolina and Tennessee Valley orders also have diversion limitations for cooperative associations during most months of 25 percent of the total quantity of producer milk. They also maintain pooling requirements specifying how many days a month producer milk must be received at pool plants. The Louisville-Lexington-Evansville order specifies a diversion limitation based upon the number of days that a producer's milk is diverted during a month. The evidence in this proceeding is insufficient to conclude that the current pooling standards will not recognize the seasonally varying needs for milk for fluid use. The creation of additional producer pooling standards is unnecessary and unwarranted on the basis of the record herein and, therefore, the proposal should be denied.

Rulings on Proposed Findings and Conclusions

Briefs and 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.

Dated: July 17, 1997.

Lon Hatamiya,

Administrator, Agricultural Marketing Service.

[FR Doc. 97–19370 Filed 7–22–97; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 545, 550 and 563e

[No. 97–68]

RIN 1550–AB09

Fiduciary Powers of Federal Savings Associations; Community Reinvestment Act

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS) proposes to revise its fiduciary powers regulations in order to promote the more efficient operation and supervision of Federal savings associations' fiduciary activities. The proposed changes are intended to update, clarify, and streamline OTS regulations, to incorporate significant interpretive guidance, and to eliminate unnecessary regulatory burden. OTS proposes these revisions pursuant to the Regulatory Reinvention Initiative of the Vice President's National Performance Review (Reinvention Initiative) and section 303 of the Community Development and Regulatory Improvement Act of 1994 (CDRIA). OTS also proposes to amend its Community Reinvestment Act (CRA) regulations. The proposed change would bring the scope of OTS's CRA regulation into accord with the CRA regulations of the other federal banking agencies. It would exempt from the CRA regulations savings associations that do not perform commercial or retail banking services by granting credit to the public in the ordinary course of business.

DATES: Comments must be received on or before September 22, 1997.

ADDRESSES: Send comments to Manager, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, Attention Docket No. 97–68. These submissions may also be hand-delivered to 1700 G Street, N.W., from 9:00 A.M. to 5:00 P.M. on business days; sent by facsimile transmission to FAX Number (202) 906–7755; or sent by e-mail to public.info@ots.treas.gov. Those commenting by e-mail should include their name and telephone number. Comments will be available for inspection at 1700 G Street, N.W., from 9:00 A.M. until 4:00 P.M. on business days.

FOR FURTHER INFORMATION CONTACT: Larry Clark, Senior Manager, Compliance and Trust Programs, Compliance Policy, (202) 906–5628; Timothy Leary, Counsel (Banking and Finance), (202) 906–7170, or Karen Osterloh, Assistant Chief Counsel, (202) 906–6639, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552.

SUPPLEMENTARY INFORMATION:

II. Background

In 1995, pursuant to the Reinvention Initiative and section 303 of CDRIA, OTS conducted a comprehensive review of its rules and regulations. As part of that review, OTS identified its trust regulations at 12 CFR Part 550 for updating and streamlining.

Part 550 is promulgated under Section 5(n) of the Home Owners' Loan Act (HOLA), 12 U.S.C. 1464(n), which authorizes the Director of OTS to authorize a Federal savings association to exercise fiduciary powers. Congress enacted section 5(n) in order to give Federal savings associations the ''ability to offer trust services on the same basis as national banks'' and to ''enhance the ability of thrifts to offer complete financial service to the consumer.''[1]

As originally enacted, section 5(n) of the HOLA empowered the Federal Home Loan Bank Board (FHLBB), the predecessor agency to OTS, to issue regulations regarding the proper exercise of Federal association trust powers.[2] Pursuant to that authority, the FHLBB issued the current part 550 in December, 1980.[3] These regulations have not been substantially changed since their promulgation.

Since 1980, however, much about Federal savings associations' fiduciary business has changed. These changes have affected the nature and scope of the fiduciary services that associations offer, and the structures and operational methods that associations use to deliver those services. OTS's primary goals in revising part 550 are to accommodate these changes, remove unnecessary regulatory burden, and facilitate the continued development of Federal

[1] S. Rep. 96–368 at 13 (1980), reprinted in 1980 U.S.C.C.A.N. 248. Congress further amended § 5(n) in the Financial Institutions Reform, Recovery and Enforcement Act (''FIRREA'') of 1989. Pub. L. 101–73.

[2] 12 U.S.C. 1464(n)(10)(D)(1980).

[3] 45 FR 82162 (December 15, 1980).