

## DEPARTMENT OF AGRICULTURE

## Agricultural Marketing Service

## 7 CFR Parts 1005, 1007, and 1046

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

**Milk in the Carolina and Certain Other Marketing Areas; Order Amending the Orders**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

**SUMMARY:** This final rule amends three Federal milk orders in the Southeastern United States. The amendments modify certain provisions of the orders regarding transportation credits which were implemented on an interim basis in order to reimburse handlers for the cost of importing bulk milk into these markets for fluid use when local supplies are insufficient to meet fluid needs. More than two-thirds of the producers in the Carolina, Southeast, and Louisville-Lexington-Evansville markets approved the adoption of the rules. Producers in the Tennessee Valley market disapproved the Tennessee Valley milk order as amended, resulting in the proposed termination of such milk order to be handled in a separate rulemaking action.

EFFECTIVE DATE: August 1, 1997.

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

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

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

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the 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. 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.

The transportation credit provisions, adopted on an interim basis effective August 10, 1996, were based upon proposals that were considered at a public hearing held May 15-16, 1996, in Charlotte, North Carolina. The proposed modifications to the interim amendments are based upon exceptions to the interim rules and additional testimony heard at a reopened hearing held December 17-18, 1996, in Atlanta, Georgia.

**Small Business Consideration**

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$500,000, 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 \$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 7,000 producers is pooled on the Carolina, Southeast, 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 38 handlers operating pool plants under the three orders. Of these

handlers, 19 have fewer than 500 employees and qualify as small businesses.

The final rules amending the transportation credit provisions will promote orderly marketing of milk by producers and regulated handlers operating within the 3 marketing areas. This rule eliminates the provision which provides for the transfer of funds from the producer-settlement fund to the transportation credit balancing fund when the latter is insufficient to cover the amount of credits to be distributed to handlers for a given month. Thus, the possibility of a reduction of uniform prices resulting from transportation credits will no longer exist.

This final rule also modestly increases the handler assessment from 6 cents to 6.5 cents per hundredweight of Class I producer milk in the Carolina market and to 7 cents per hundredweight in the Southeast market, but maintains the current 6-cent assessment in the Louisville-Lexington-Evansville market. A 6-cent per hundredweight assessment translates to approximately one-half cent per gallon of milk. The one-half to one cent assessment increase in Federal Orders 1005 and 1007 will not negatively impact small businesses.

At present, all handlers regulated under the 3 milk orders involved in this proceeding file a monthly report of receipts and utilization with the market administrator. The proposed amendments will not significantly add to the amount of information required to be reported by those handlers requesting transportation credits. The estimated time to collect, aggregate, and report this information will vary directly with the amount of milk for which credits are requested, but should not be significant.

**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:* Issued August 16, 1996; published August 23, 1996 (61 FR 43474).

*Extension of Time for Filing Comments:* 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

The adoption of the amended orders is based on a producer referendum held in the Louisville-Lexington-Evansville market and a polling of cooperatives in the Carolina and Southeast markets. More than two-thirds of the producers in the Carolina, Southeast and Louisville-Lexington-Evansville markets approved the adoption of the orders as amended. In a poll of cooperatives conducted for the Tennessee Valley market, the order, as amended, was disapproved by more than one-third of the producers eligible to vote. Accordingly, a notice of proposed termination for the Tennessee Valley marketing area will be forthcoming as a result of the producers' vote of disapproval.

A question arises with the possible termination of the Tennessee Valley order. The transportation credit provisions for Orders 5, 7, 11, and 46 were adopted simultaneously for these 4 orders. Because of the overlap in supply areas for these markets, producers in any of the marketing areas of the 4 orders are ineligible for transportation credits under any of the other 3 orders. With the possible termination of Order 11, a question may arise concerning the interpretation of Section 82(c)(2)(ii) in the interim amendments or Section 82(c)(2)(iii) in the final decision amendments as set forth in the **Federal Register** of May 20, 1997, at 62 FR 27525. In either case, the language of those paragraphs in Orders 5, 7, and 46 states that "the farm on which the milk was produced is not located within the specified marketing areas of this order or the marketing areas of" the other 3 orders involved in this proceeding. Thus, Orders 5, 7, and 46 refer to "the Order 11 marketing area."

If Order 11 is terminated, the question that arises is whether a producer located in the former Tennessee Valley marketing area is still ineligible for a transportation credit under Orders 5, 7, and 46. The Department maintains that the reference to the Order 11 marketing area was merely a convenient geographic reference used in lieu of repeating a lengthy list of counties and cities. Accordingly, the language referring to the marketing area of Federal Order 11 will continue to be interpreted as the territory defined in the Tennessee Valley order.

### Findings and Determinations

The findings and determinations hereinafter set forth supplement those

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

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

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

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

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

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

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

(b) Additional Findings. It is necessary in the public interest to make these amendments to the Carolina, Southeast, and Louisville-Lexington-Evansville orders effective August 1, 1997. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing areas.

The amendments to these orders are known to handlers. The partial final decision containing the proposed amendments to these orders was issued on May 12, 1997.

The changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists

for making these order amendments effective August 1, 1997. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C. 551-559.)

(c) Determinations. It is hereby determined that:

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

(2) The issuance of this order amending the Carolina, Southeast, and Louisville-Lexington-Evansville orders is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in each of the respective orders as hereby amended;

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

### List of Subjects in 7 CFR Parts 1005, 1007, and 1046

Milk marketing orders.

### Order Relative to Handling

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

1. The authority citation for 7 CFR Parts 1005, 1007, and 1046 reads as follows:

**Authority:** 7 U.S.C. 601-674.

### PART 1005—MILK IN THE CAROLINA MARKETING AREA

2. In § 1005.30, paragraphs (a)(7) and (a)(8) are redesignated, respectively, as paragraphs (a)(8) and (a)(9), new paragraph (a)(7) is added, and paragraphs (a)(5), (a)(6), and (c)(3) are revised to read as follows:

#### § 1005.30 Reports of receipts and utilization.

\* \* \* \* \*

(a) \* \* \*

(5) Receipts of bulk milk from a plant regulated under another Federal order,

except Federal Orders 1007, 1011, and 1046, for which a transportation credit is requested pursuant to § 1005.82, including the date that such milk was received;

(6) Receipts of producer milk described in § 1005.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to that paragraph and the date that such milk was received;

(7) For handlers submitting transportation credit requests, transfers of bulk milk to nonpool plants, including the dates that such milk was transferred;

\* \* \* \* \*

(c) \* \* \*

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1005.82, all of the information required in paragraphs (a)(5), (a)(6), and (a)(7) of this section.

#### **§ 1005.32 [Amended]**

3. In § 1005.32, a new paragraph (a) is added to read as follows:

#### **§ 1005.32 Other reports.**

(a) On or before the 20th day after the end of each month, each handler described in § 1005.9 (a), (b), and (c) shall report to the market administrator any adjustments to transportation credit requests as reported pursuant to § 1005.30(a) (5), (6), and (7).

\* \* \* \* \*

#### **§ 1005.61 [Amended]**

4. In § 1005.61, paragraph (a)(4) is removed and paragraphs (a)(5) and (a)(6) are redesignated as paragraphs (a)(4) and (a)(5), respectively.

5. § 1005.77 is revised to read as follows:

#### **§ 1005.77 Adjustment of accounts.**

(a) Whenever verification by the market administrator of payments by any handler discloses errors made in payments to the producer-settlement fund pursuant to § 1005.71 or to the transportation credit balancing fund pursuant to § 1005.81, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 15 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler pursuant to § 1005.72 or § 1005.82, the market administrator shall make payment to such handler within 15 days or, in the case of the transportation credit balancing fund, as soon as funds

become available. If a handler is due additional payment for a month in which payments to handlers were prorated pursuant to § 1005.82(a), the additional payment pursuant to this section shall be multiplied by the final proration percentage computed in § 1005.82(a)(2).

(b) Whenever verification by the market administrator of the payment by a handler to any producer or cooperative association for milk received by such handler discloses payment of less than is required by § 1005.73, the handler shall pay such balance due such producer or cooperative association not later than the time of making payment to producers or cooperative associations next following such disclosure.

#### **§ 1005.78 [Amended]**

6. In the introductory text of § 1005.78, the number "1005.81," is added following the number "1005.77,".

7. In § 1005.81, paragraph (c) is removed and paragraphs (a) and (b) are revised to read as follows:

#### **§ 1005.81 Payments to the transportation credit balancing fund.**

(a) On or before the 12th day after the end of the month, each handler operating a pool plant and each handler specified in § 1005.9 (b) and (c) shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I producer milk assigned pursuant to § 1005.44 by \$0.065 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the total transportation credits disbursed during the prior June–January period. In the event that during any month of the June–January period the fund balance is insufficient to cover the amount of credits that are due, the assessment should be based upon the amount of credits that would have been disbursed had the fund balance been sufficient.

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

8. § 1005.82 is revised to read as follows:

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

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

(1) On or before the 13th day after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1005.30(a)(5), bulk milk transferred from another order plant as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1005.30(a)(6), milk directly from producers' farms as specified in paragraph (c)(2) of this section, a preliminary amount determined pursuant to paragraph (d) of this section to the extent that funds are available in the transportation credit balancing fund. If an insufficient balance exists to pay all of the credits computed pursuant to this section, the market administrator shall distribute the balance available in the transportation credit balancing fund by reducing payments prorata using the percentage derived by dividing the balance in the fund by the total credits that are due for the month. The amount of credits resulting from this initial proration shall be subject to audit adjustment pursuant to paragraph (a)(2) of this section;

(2) The market administrator shall accept adjusted requests for transportation credits on or before the 20th day of the month following the month for which such credits were requested pursuant to § 1005.32(a). After such date, a preliminary audit will be conducted by the market administrator, who will recalculate any necessary proration of transportation credit payments for the preceding month pursuant to paragraph (a) of this section. Handlers will be promptly notified of an overpayment of credits based upon this final computation and remedial payments to or from the transportation credit balancing fund will be made on or before the next payment date for the following month;

(3) Transportation credits paid pursuant to paragraph (a) (1) and (2) of this section shall be subject to final verification by the market administrator pursuant to § 1005.77. Adjusted payments to or from the transportation credit balancing fund will remain subject to the final proration established pursuant to paragraph (a)(2) of this section; and

(4) In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1005.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this

section shall be made to such cooperative association rather than to the operator of the pool plant at which the milk was received.

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

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

(1) Bulk milk received from a plant regulated under another Federal order, except Federal Orders 1007, 1011, and 1046, and allocated to Class I milk pursuant to § 1005.44(a)(12); and

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

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

(A) The marketwide estimated Class I utilization of all handlers for the month pursuant to § 1005.45(a); or

(B) The Class I utilization of all producer milk of the pool plant operator receiving the milk after the computations described in § 1005.44;

(ii) The dairy farmer was not a "producer" under this order during more than 2 of the immediately preceding months of January through June and not more than 50 percent of the production of the dairy farmer during those 2 months, in aggregate, was received as producer milk under this order during those 2 months. However, if January and/or June are months in which transportation credits are disbursed pursuant to paragraph (a) of this section, these months shall not be included in the 2-month limit provided in this paragraph; and

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

the marketing areas of Federal Orders 1007, 1011, or 1046, or within the Kentucky counties of Allen, Barren, Metcalfe, Monroe, Simpson, and Warren.

(d) Transportation credits shall be computed as follows:

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

(2) With respect to the pounds of milk described in paragraph (c)(1) of this section that remain after the computations described in paragraph

(d)(1) of this section, the market administrator shall:

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

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

(iii) Subtract the other order's Class I price applicable at the shipping plant's location from the Class I price applicable at the receiving plant as specified in § 1005.53;

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

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

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

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

Alternatively, the milk hauler that is transporting the milk of producers described in paragraph (c)(2) of this section may establish an origination point following the last farm pickup by stopping at the nearest independently-operated truck stop with a certified truck scale and obtaining a weight certificate indicating the weight of the truck and its contents, the date and time of weighing, and the location of the truck stop;

(ii) Determine the shortest hard-surface highway distance between the receiving pool plant and the truck stop or city, as the case may be;

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

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

(v) If the origination point determined pursuant to paragraph (d)(3)(i) of this section is in a Federal order marketing area, subtract the Class I price applicable at the origination point pursuant to the provisions of such other order (as if the origination point were a plant location) from the Class I price applicable at the distributing plant receiving the milk. If the origination point is not in any Federal order marketing area, determine the Class I price at the origination point based upon the provisions of this order and subtract this price from the Class I price applicable at the distributing plant receiving the milk;

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

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

## PART 1007—MILK IN THE SOUTHEAST MARKETING AREA

9. In § 1007.30, paragraphs (a)(7) and (a)(8) are redesignated, respectively, as paragraphs (a)(8) and (a)(9), new paragraph (a)(7) is added, and paragraphs (a)(5), (a)(6), and (c)(3) are revised to read as follows:

### § 1007.30 Reports of receipts and utilization.

\* \* \* \* \*

(a) \* \* \*

(5) Receipts of bulk milk from a plant regulated under another Federal order, except Federal Orders 1005, 1011, and 1046, for which a transportation credit is requested pursuant to § 1007.82, including the date that such milk was received;

(6) Receipts of producer milk described in § 1007.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to that paragraph and the date that such milk was received;

(7) For handlers submitting transportation credit requests, transfers of bulk milk to nonpool plants, including the dates that such milk was transferred;

\* \* \* \* \*

(c) \* \* \*

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1007.82, all of the information required in paragraphs (a)(5), (a)(6), and (a)(7) of this section.

\* \* \* \* \*

10. In § 1007.32, a new paragraph (a) is added to read as follows:

**§ 1007.32 Other reports.**

(a) On or before the 20th day after the end of each month, each handler described in § 1007.9 (a), (b), and (c) shall report to the market administrator any adjustments to transportation credit requests as reported pursuant to § 1007.30(a) (5), (6), and (7).

\* \* \* \* \*

**§ 1007.61 [Amended]**

11. In § 1007.61, paragraph (a)(4) is removed and paragraphs (a)(5) and (a)(6) are redesignated as paragraphs (a)(4) and (a)(5), respectively.

**§ 1007.78 [Amended]**

12. In the introductory text of § 1007.78, the number "1007.81," is added following the number "1007.78,".

**§ 1007.81 [Amended]**

13. In § 1007.81, paragraph (c) is removed and paragraphs (a) and (b) are revised to read as follows:

**§ 1007.81 Payments to the transportation credit balancing fund.**

(a) On or before the 12th day after the end of the month, each handler operating a pool plant and each handler specified in § 1007.9 (b) and (c) shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I producer milk assigned pursuant to § 1007.44 by \$0.07 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the total transportation credits disbursed during the prior June-January period. In the event that during any month of the June-January period the fund balance is insufficient to cover the amount of credits that are due, the assessment should be based upon the amount of credits that would have been disbursed had the fund balance been sufficient.

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

**§ 1007.82 [Amended]**

14. § 1007.82 is revised to read as follows:

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

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

(1) On or before the 13th day after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1007.30(a)(5), bulk milk transferred from an other order plant as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1007.30(a)(6), milk directly from producers' farms as specified in paragraph (c)(2) of this section, a preliminary amount determined pursuant to paragraph (d) of this section to the extent that funds are available in the transportation credit balancing fund. If an insufficient balance exists to pay all of the credits computed pursuant to this section, the market administrator shall distribute the balance available in the transportation credit balancing fund by reducing payments prorata using the percentage derived by dividing the balance in the fund by the total credits that are due for the month. The amount of credits resulting from this initial proration shall be subject to audit adjustment pursuant to paragraph (a)(2) of this section;

(2) The market administrator shall accept adjusted requests for transportation credits on or before the 20th day of the month following the month for which such credits were requested pursuant to § 1007.32(a). After such date, a preliminary audit will be conducted by the market administrator, who will recalculate any necessary proration of transportation credit payments for the preceding month pursuant to paragraph (a) of this section. Handlers will be promptly notified of any payment adjustments based upon this final computation and remedial payments to or from the transportation credit balancing fund will be made on or before the next payment date for the following month;

(3) Transportation credits paid pursuant to paragraph (a) (1) and (2) of this section shall be subject to final verification by the market administrator pursuant to § 1007.77. Adjusted payments to or from the transportation credit balancing fund will remain subject to the final proration established pursuant to paragraph (a)(2) of this section; and

(4) In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1007.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be made to such cooperative association rather than to the operator of the pool plant at which the milk was received.

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

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

(1) Bulk milk received from a plant regulated under another Federal order, except Federal Orders 1005, 1011, and 1046, allocated to Class I milk pursuant to § 1007.44(a)(12); and

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

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

(A) The marketwide estimated Class I utilization of all handlers for the month pursuant to § 1007.45(a); or

(B) The Class I utilization of all producer milk of the pool plant operator receiving the milk after the computations described in § 1007.44;

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

if January and/or June are months in which transportation credits are disbursed pursuant to paragraph (a) of this section, these months shall not be included in the 2-month limit provided in this paragraph; and

(iii) The farm on which the milk was produced is not located within the specified marketing area of this order or the marketing areas of Federal Orders 1005, 1011, or 1046, or within the Kentucky counties of Allen, Barren, Metcalfe, Monroe, Simpson, and Warren.

(d) Transportation credits shall be computed as follows:

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

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

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

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

(iii) Subtract the other order's Class I price applicable at the shipping plant's location from the Class I price applicable at the receiving plant as specified in § 1007.52;

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

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

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

(i) Determine an origination point for each load of milk by locating the nearest city to the last producer's farm from which milk was picked up for delivery to the receiving pool plant. Alternatively, the milk hauler that is transporting the milk of producers described in paragraph (c)(2) of this

section may establish an origination point following the last farm pickup by stopping at the nearest independently-operated truck stop with a certified truck scale and obtaining a weight certificate indicating the weight of the truck and its contents, the date and time of weighing, and the location of the truck stop;

(ii) Determine the shortest hard-surface highway distance between the receiving pool plant and the truck stop or city, as the case may be;

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

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

(v) If the origination point determined pursuant to paragraph (d)(3)(i) of this section is in a Federal order marketing area, subtract the Class I price applicable at the origination point pursuant to the provisions of such other order (as if the origination point were a plant location) from the Class I price applicable at the distributing plant receiving the milk. If the origination point is not in any Federal order marketing area, determine the Class I price at the origination point based upon the provisions of this order and subtract this price from the Class I price applicable at the distributing plant receiving the milk;

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

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

#### **PART 1046—MILK IN THE LOUISVILLE-LEXINGTON-EVANVILLE MARKETING AREA**

21. In § 1046.30, paragraphs (a)(7) and (a)(8) are redesignated, respectively, as paragraphs (a)(8) and (a)(9), new paragraph (a)(7) is added, and paragraphs (a)(5), (a)(6), and (c)(3) are revised to read as follows:

##### **§ 1046.30 Reports of receipts and utilization.**

\* \* \* \* \*

(a) \* \* \*

(5) Receipts of bulk milk from a plant regulated under another Federal order, except Federal Orders 1005, 1007, and 1011, for which a transportation credit is requested pursuant to § 1046.82, including the date that such milk was received;

(6) Receipts of producer milk described in § 1046.82(c)(2), including the identity of the individual producers whose milk is eligible for the

transportation credit pursuant to that paragraph and the date that such milk was received;

(7) For handlers submitting transportation credit requests, transfers of bulk milk to nonpool plants, including the dates that such milk was transferred;

\* \* \* \* \*

(c) \* \* \*

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1046.82, all of the information required in paragraphs (a)(5), (a)(6), and (a)(7) of this section.

\* \* \* \* \*

22. In § 1046.32, paragraph (c) is redesignated as paragraph (d) and a new paragraph (c) is added to read as follows:

##### **§ 1046.32 Other reports.**

\* \* \* \* \*

(c) On or before the 20th day after the end of each month, each handler described in § 1046.9 (a), (b), and (c) shall report to the market administrator any adjustments to transportation credit requests as reported pursuant to § 1046.30(a) (5), (6), and (7).

\* \* \* \* \*

##### **§ 1046.61 [Amended]**

23. In § 1046.61, paragraph (a)(4) is removed and paragraphs (a)(5) and (a)(6) are redesignated as paragraphs (a)(4) and (a)(5), respectively.

24. § 1046.77 is revised to read as follows:

##### **§ 1046.77 Adjustment of accounts.**

(a) Whenever verification by the market administrator of payments by any handler discloses errors made in payments to the producer-settlement fund pursuant to § 1046.71 or to the transportation credit balancing fund pursuant to § 1046.81, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 15 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler pursuant to § 1046.72 or § 1046.82, the market administrator shall make payment to such handler within 15 days or, in the case of the transportation credit balancing fund, as soon as funds become available. If a handler is due additional payment for a month in which payments to handlers were prorated pursuant to § 1046.82(a), the additional payment pursuant to this section shall be multiplied by the final

proration percentage computed in § 1046.82(a)(2).

(b) Whenever verification by the market administrator of the payment by a handler to any producer or cooperative association for milk received by such handler discloses payment of less than is required by § 1046.73, the handler shall pay such balance due such producer or cooperative association not later than the time of making payment to producers or cooperative associations next following such disclosure.

**§ 1046.78 [Amended]**

25. In § 1046.78, the number "1046.81," is added following the number "1046.77,".

26. In § 1046.81, paragraph (c) is removed and paragraphs (a) and (b) are revised to read as follows:

**§ 1046.81 Payments to the transportation credit balancing fund.**

(a) On or before the 15th day after the end of the month, each handler operating a pool plant and each handler specified in § 1046.9 (b) and (c) shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I producer milk assigned pursuant to § 1046.44 by \$0.06 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the total transportation credits disbursed during the prior June–January period. In the event that during any month of the June–January period the fund balance is insufficient to cover the amount of credits that are due, the assessment should be based upon the amount of credits that would have been disbursed had the fund balance been sufficient.

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

27. Section 1046.82 is revised to read as follows:

**§ 1046.82 Payments from the transportation credit balancing fund.**

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

(1) On or before the 16th day after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and

reported pursuant to § 1046.30(a)(5), bulk milk transferred from another order plant as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1046.30(a)(6), milk directly from producers' farms as specified in paragraph (c)(2) of this section, a preliminary amount determined pursuant to paragraph (d) of this section to the extent that funds are available in the transportation credit balancing fund. If an insufficient balance exists to pay all of the credits computed pursuant to this section, the market administrator shall distribute the balance available in the transportation credit balancing fund by reducing payments prorata using the percentage derived by dividing the balance in the fund by the total credits that are due for the month. The amount of credits resulting from this initial proration shall be subject to audit adjustment pursuant to paragraph (a)(2) of this section;

(2) The market administrator shall accept adjusted requests for transportation credits on or before the 20th day of the month following the month for which such credits were requested pursuant to § 1046.32(c). After such date, a preliminary audit will be conducted by the market administrator, who will recalculate any necessary proration of transportation credit payments for the preceding month pursuant to paragraph (a) of this section. Handlers will be promptly notified of an overpayment of credits based upon this final computation and remedial payments to or from the transportation credit balancing fund will be made on or before the next payment date for the following month;

(3) Transportation credits paid pursuant to paragraph (a) (1) and (2) of this section shall be subject to final verification by the market administrator pursuant to § 1046.77. Adjusted payments to or from the transportation credit balancing fund will remain subject to the final proration established pursuant to paragraph (a)(2) of this section; and

(4) In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1046.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be made to such cooperative association by the pool plant operator pursuant to § 1046.73(f)(2).

(b) The market administrator may extend the period during which transportation credits are in effect (i.e.,

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

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

(1) Bulk milk received from a plant regulated under another Federal order, except Federal Orders 1005, 1007, and 1011, and allocated to Class I milk pursuant to § 1046.44(a)(12); and

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

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

(A) The marketwide estimated Class I utilization of all handlers for the month pursuant to § 1046.45(a); or

(B) The Class I utilization of all producer milk of the pool plant operator receiving the milk after the computations described in § 1046.44;

(ii) The dairy farmer was not a "producer" under this order during more than 2 of the immediately preceding months of January through June and not more than 50 percent of the production of the dairy farmer during those 2 months, in aggregate, was received as producer milk under this order during those 2 months. However, if January and/or June are months in which transportation credits are disbursed pursuant to paragraph (a) of this section, these months shall not be included in the 2-month limit provided in this paragraph; and

(iii) The farm on which the milk was produced is not located within the specified marketing area of this order or the marketing areas of Federal Orders 1005, 1007, or 1011, or within the Kentucky counties of Allen, Barren, Metcalfe, Monroe, Simpson, and Warren.

(d) Transportation credits shall be computed as follows:

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

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

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

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

(iii) Subtract the other order's Class I price applicable at the shipping plant's location from the Class I price applicable at the receiving plant as specified in § 1046.52;

(iv) Subtract any positive difference computed in paragraph (d)(2)(iii) of this

section from the amount computed in paragraph (d)(2)(ii) of this section; and

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

(3) For milk described in paragraph (c)(2) of this section, the market administrator shall:

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

Alternatively, the milk hauler that is transporting the milk of producers described in paragraph (c)(2) of this section may establish an origination point following the last farm pickup by stopping at the nearest independently-operated truck stop with a certified truck scale and obtaining a weight certificate indicating the weight of the truck and its contents, the date and time of weighing, and the location of the truck stop;

(ii) Determine the shortest hard-surface highway distance between the receiving pool plant and the truck stop or city, as the case may be;

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

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

(v) If the origination point determined pursuant to paragraph (d)(3)(i) of this section is in a Federal order marketing area, subtract the Class I price applicable at the origination point pursuant to the provisions of such other order (as if the origination point were a plant location) from the Class I price applicable at the distributing plant receiving the milk. If the origination point is not in any Federal order marketing area, determine the Class I price at the origination point based upon the provisions of this order and subtract this price from the Class I price applicable at the distributing plant receiving the milk;

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

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

Dated: July 17, 1997.

**Michael V. Dunn,**

*Assistant Secretary for Marketing and Regulatory Programs.*

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