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## NORTHEAST DAIRY COMPACT COMMISSION

### 7 CFR Part 1306

#### Over-Order Price Regulation

**AGENCY:** Northeast Dairy Compact Commission.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Compact Over-order Price Regulation to establish a reserve fund for reimbursement to school food authorities. The reserve fund is required to implement the previously issued regulation exempting certain milk sold by school food authorities from the Over-order Price Regulation.

**EFFECTIVE DATE:** September 10, 1998.

**ADDRESSES:** Northeast Dairy Compact Commission, 43 State Street, P.O. Box 1058, Montpelier, Vermont 05601.

**FOR FURTHER INFORMATION CONTACT:** Kenneth M. Becker, Executive Director, Northeast Dairy Compact Commission at the above address or by telephone at (802) 229-1941, or by facsimile at (802) 229-2028.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Northeast Dairy Compact Commission (the "Commission") was established under authority of the Northeast Interstate Dairy Compact ("Compact"). The Compact was enacted into law by each of the six participating New England states as follows: Connecticut—Pub. L. 93-320; Maine—Pub. L. 89-437, as amended, Pub. L. 93-274; Massachusetts—Pub. L. 93-370; New Hampshire—Pub. L. 93-336; Rhode Island—Pub. L. 93-106; Vermont—Pub. L. 93-57. In accordance with Article I, Section 10 of the United States Constitution, Congress consented to the Compact in Pub. L. 104-127 (FAIR ACT), Section 147, codified at 7 U.S.C. 7256. Subsequently, the United

States Secretary of Agriculture, pursuant to 7 U.S.C. 7256(1), authorized implementation of the Compact. The Compact empowers the Commission to promulgate and enforce "rules and regulations as it deems necessary to implement any provisions of this compact, or to effectuate in any other respect the purposes of this compact." Article III, Section 7. The Compact authorizes the Compact Commission to consider adopting a compact Over-order Price Regulation. Article IV, Section 9. A *compact over-order price* is defined as:

A minimum price required to be paid to producers for Class 1 milk established by the Commission in regulations adopted pursuant to sections nine and ten of this compact, which is above the price established in federal marketing orders or by state farm price regulation in the regulated area. Such price may apply throughout the region or in any part or parts thereof as defined in the regulations of the Commission.

Article II, Section 2(8).

The regulated price authorized by the Compact is actually an incremental amount above, or "over-order" the minimum price for the same milk established by Federal Milk Market Order I. The price regulation establishes the minimum procurement price to be paid by fluid milk processors for milk that is ultimately utilized for fluid milk consumption in the New England region. Price regulation also provides for payment of a uniform "over-order" price, out of the proceeds of the price regulation, to dairy farmers making up the New England milkshed, regardless of the utilization of their milk. See, e.g., Compact, Art. IV, Sections 9 and 10.

Pursuant to its rulemaking authority under Article V, Section 11 of the Compact, the Commission concluded an informal rulemaking process and voted to adopt a Compact Over-order Price Regulation. See, 62 FR 29626 (May 30, 1997). The Commission subsequently amended and extended the Compact Over-order Price Regulation. See, 62 FR 62810 (November 25, 1997). The Commission further amended the Over-order Price Regulation relative to certain milk sold by school food authorities in New England. See 63 FR 10104 (February 27, 1998). The current Compact Over-order Price Regulation is codified at 7 CFR 1300 through 1308.

Article V, Section 11 of the compact delineates the administrative procedure the Commission must follow in

deciding whether to adopt or amend a price regulation. That section requires the Commission to conduct an informal rulemaking proceeding governed by section four of the federal Administrative Procedures Act ("APA"), as amended, 5 U.S.C. 553, to provide interested persons with an opportunity to present data and views. The informal rulemaking proceeding must include public notice and opportunity to participate in a public hearing and to present written comment. In addition, section 553(d) of the APA provides that "publication or service of a substantive rule shall be made not less than 30 days before its effective date," subject to several enumerated exceptions, including situations where the agency finds "good cause" for dispensing with this requirement. See, 5 U.S.C. 553(d)(3). To the extent that this rule is viewed as a substantive rule, the Commission finds that there is good cause for dispensing with the 30-day waiting period of 553(d) because compliance is impracticable, unnecessary, and contrary to the public interest.

The Commission emphasizes that this rule merely implements the February 27, 1998 final rule adopted by the Commission after a comprehensive administrative process, including public hearing, notice-and-comment rulemaking, and a producer referendum, as well as a full 30-day notice period prior to the effective date. See, 63 FR 10104 (February 27, 1998).

Additionally, the Commission has entered into a Memorandum of Understanding between the Compact Commission and the appropriate state agencies of the participating states, as required by the previously issued rule, which establishes the procedure for providing reimbursement to the school food service programs. See, 7 CFR 1301.13. This rule implements that reimbursement procedure.

On June 11, 1998 the Commission issued a notice of proposed rulemaking<sup>1</sup>

<sup>1</sup> 63 FR 31943 (June 11, 1998). In this same notice of proposed rulemaking, the Commission also proposed to exclude milk from the pool which is either diverted or transferred, in bulk, (not including bulk transfers of skimmed milk and condensed milk) out of the Compact regulated area. The Commission is continuing its deliberations on these proposed rules to Parts 1301 and 1304 regarding diverted and transferred milk, and is holding an additional public hearing and has extended the comment period on these proposals

Continued

to amend the Compact Over-Order Price Regulation to establish a reserve fund for reimbursement to school food authorities. The reserve fund established by this rule is simply the administrative mechanism selected by the Commission, in its discretion, and incorporated into the Memorandum of Understanding with the participating states pursuant to 7 CFR 1301.13, for implementing the previously-issued regulation exempting certain milk sold by school food authorities from the Over-Order Price Regulation.<sup>2</sup>

The Northeast Dairy Compact Commission held a public hearing to receive testimony on the proposed rules at 9:00 AM on July 1, 1998 at the Capitol Center for the Arts, Governor's Hall, 44 South Main Street, Concord, New Hampshire. Pursuant to Article VI(D) of the Commission's Bylaws, additional comments and exhibits were received until 5:00 PM on July 15, 1998.

Based on the oral testimony and written comments and exhibits received, the Commission hereby amends the current Over-Order Price Regulation, 7 CFR 1306.3, to establish a reserve fund for reimbursement to school food authorities.

## II. Summary and Analysis of Issues and Comments

The Commission held its deliberative meeting on August 5, 1998<sup>3</sup> to duly consider all oral and written comments received at the public hearing held on July 1, 1998 and the additional comments received by the Commission's published comment deadline of July 15, 1998<sup>4</sup> and to

until 5:00 p.m. September 16, 1998. See, 63 FR 43891 (August 17, 1998).

<sup>2</sup> The regulation provides: "Effective April 1, 1998, all fluid milk distributed by handlers in eight-ounce containers under open and competitive bid contracts for the 1998-1999 contract year with School Food Authorities in New England, as defined by 7 CFR 210.2, to the extent that the school authorities can demonstrate and document that the costs of such milk have been increased by operation of the Compact Over-Order Price Regulation. In no event shall such increase exceed the amount of the Compact over-order obligation. Documentation of increased costs shall be in accordance with a memorandum of understanding entered into between the Compact Commission and the appropriate state agencies not later than May 1, 1998. The memorandum of understanding shall include provisions for certification by supplying vendor/processors that their bid and contract cost structures do in fact incorporate the over-order price obligation, in whole or in part, and provisions for defining the components of cost structure to be provided in support of such certification. The memorandum shall also establish the procedure for providing reimbursement to the school food service programs, including the scheduling of payments and the amount to be escrowed by the Commission to account for such payments." 7 CFR 1301.3.

<sup>3</sup> Public notice of this meeting was published at 63 FR 40069 (July 27, 1998).

<sup>4</sup> 63 FR 31943 (June 11, 1998).

deliberate and act on the proposed amendments to the Over-order regulation.

### *School Milk Reserve Regulation*

The Commission's Regulations Administrator, Carmen Ross, testified at the public hearing on July 1, 1998 and explained the issue and why the proposed amendment was needed. Mr. Ross testified that in order to implement the regulation<sup>5</sup> promulgated by the Commission providing a reimbursement to school food authorities for certain milk sold in eight-ounce containers, the Over-Order Price Regulation must be amended to establish a reserve account.<sup>6</sup>

The proposed regulation authorizes the Commission to establish the reserve fund necessary to process any qualified reimbursement claims that are submitted by school food authorities. The proposed regulation also authorizes the Commission to return any surplus funds from this reserve account to the producer-settlement fund.<sup>7</sup>

### *Discussion of Comments*

A total of ten individuals submitted oral and/or written public comments. Of the total comments received, six commenters<sup>8</sup> supported the proposed rule relating to establishing a reserve account for reimbursement of school food authorities, no commenters opposed the proposed amendment. The Commission adopts the rule as proposed.

## III. Summary and Explanation of Findings

Article V, Section 12 of the Compact directs the Commission to make four findings of fact before an amendment of the Over-Order Price Regulation can become effective. Each required finding is discussed below.

### *a. Whether the Public Interest Will Be Served by the Amendments*

The first finding considers whether the amendment of the Compact Over-Order Price Regulation to establish a reserve fund for the reimbursement to school food authorities serves the public interest. The Commission reaffirms its prior finding that the establishment of an exemption mechanism for milk sold in eight-ounce containers by school food service programs serves the public interest.<sup>9</sup> For all of the same reasons the Commission adopted the previous

regulation,<sup>10</sup> the Commission finds that the public interest will be served by amending the Over-Order Price Regulation to provide for a reserve fund to implement that regulation.

### *b. The Impact on the Price Level Needed To Assure a Sufficient Price to Producers and an Adequate Local Supply of Milk*

The second finding considers the impact of the amendment on the level of producer price needed to cover the costs of production and to assure an adequate local supply of milk for the inhabitants of the regulated area and for manufacturing purposes.<sup>11</sup>

The Commission reaffirms its prior findings regarding the sufficiency of pay prices for milk needed to meet the New England market demand.<sup>12</sup> The Commission previously concluded that, although amending the Compact Over-order Price Regulation to exempt certain milk sold by school food authorities would decrease the producer pay price, the price regulation would nevertheless remain at a sufficient level to assure that producer costs of production are covered and to elicit an adequate supply of fluid milk for the region.<sup>13</sup> The Commission now reaffirms this finding and further concludes that the establishment of a reserve account to implement the school milk exemption will assure producers of a sufficient price and will elicit an adequate local supply of milk.

### *c. Whether the Major Provisions of the Order, Other Than Those Fixing Minimum Milk Prices, Are in the Public Interest and Are Reasonably Designed To Achieve the Purposes of the Order*

The third finding requires a determination of whether the provisions of the regulation other than those establishing minimum milk prices are in the public interest. The amendment serves to implement the prior regulation establishing an exemption from the price regulation for certain milk sold by school food authorities. Therefore, the matter of the public interest is addressed under the first required finding and not under this finding. In any event, the Commission concludes that the price regulation, as hereby amended, remains in the public interest

<sup>10</sup> See, footnote 2 for text of the regulation.

<sup>11</sup> As noted in prior rulemaking proceedings, the Commission limits its assessment to issues relating to the fluid milk market. 62 FR 29632 (May 30, 1997); 62 FR 62812 (November 25, 1997); and 63 FR 10109 (February 27, 1998).

<sup>12</sup> 62 FR 29632-29637 (May 30, 1997); 62 FR 62812-62817 (November 25, 1997); and 63 FR 10109-10110 (February 27, 1998).

<sup>13</sup> 63 FR 10110 (February, 27, 1998).

<sup>5</sup> 63 FR 10104 (February 27, 1998).

<sup>6</sup> Carmen Ross, Tr. at 22-23.

<sup>7</sup> Ross Tr. at 22-23.

<sup>8</sup> Wellington Tr. at 62, and on behalf of Agri-mark and Dairyalea WC 11; Ellinwood Tr. at 99; Berthiaume at WC 5, 7; Graves at WC 14; and Beach at WC 17.

<sup>9</sup> 63 FR 10106-10110 (February 27, 1998).

in the manner contemplated by this finding.

*d. Whether the Terms of the Proposed Amendment Are Approved by Producers*

The fourth finding, requiring the determination of whether the amendment has been approved by producer referendum pursuant to Article V. Section 13 of the Compact is invoked in this instance given that the amendment will affect the level of the price regulation on the producer side. In this final rule, as in the previous final rules, the Commission makes this finding premised upon certification of the results of the producer referendum. The procedure for the producer referendum and certification of the results is set forth in 7 CFR part 1371.

Pursuant to 7 CFR 1371.3 and the referendum procedure certified by the Commission, a referendum was held during the period of August 14 through August 24, 1998. All producers who were producing milk pooled in Federal Order #1 or for consumption in New England, during March, 1998, the representative period determined by the Commission, were deemed eligible to vote. Ballots were mailed to these producers on or before August 14, 1998 by the Federal Order #1 Market Administrator. The ballots included an official summary of the Commission's action. Producers were notified that, to be counted, their ballots had to be returned to the Commission offices by 5:00 p.m. on August 24, 1998. The ballots were opened and counted in the Commission offices on August 25, 1998 under the direction and supervision of Mae S. Schmidle, Vice-Chair of the Commission and designated "Referendum Agent."

Twelve Cooperative Associations were notified of the procedures necessary to block vote by letter dated August 6, 1998. Cooperatives were required to provide prior written notice of their intention to block vote to all members on a form provided by the Commission, and to certify to the Commission that 1) timely notice was provided, and 2) that they were qualified under the Capper-Volstead Act. Cooperative Associations were further notified that the Cooperative Association block vote had to be received in the Commission office by 5:00 p.m. on August 24, 1998. Certified and notarized notification to its members of the Cooperative's intent to block vote or not to block vote had to be mailed by August 18, 1998 with notice mailed to the Commission offices no later than August 20, 1998.

*Notice of Referendum Results*

On August 25, 1998 the duly authorized referendum agent verified all ballots according to procedures and criteria established by the Commission. A total of 4,240 ballots were mailed to eligible producers. All producer ballots and cooperative block vote ballots received by the Commission were opened and counted. Producer ballots and cooperative block vote ballots were verified or disqualified based on criteria established by the Commission, including timeliness, completeness, appearance of authenticity, appropriate certifications by cooperative associations and other steps taken to avoid duplication of ballots. Ballots determined by the referendum agent to be invalid were marked "disqualified" with a notation as to the reason.

Block votes cast by Cooperative Associations were then counted. Producer votes against their cooperative associations block vote were then counted for each cooperative association. These votes were deducted from the cooperative association's total and were counted appropriately. Ballots returned by cooperative members who cast votes in agreement with their cooperative block vote were disqualified as duplicative of the cooperative block vote.

Votes of independent producers not members of any cooperative association were then counted.

The referendum agent then certified the following:

A total of 4,240 ballots were mailed to eligible producers.

A total of 3,265 ballots were returned to the Commission.

A total of 43 ballots were disqualified—late, incomplete or duplicate.

A total of 3,222 ballots were verified.

A total of 3,128 verified ballots were cast in favor of the price regulation.

A total of 94 verified ballots were cast in opposition to the price regulation.

Accordingly, notice is hereby provided that of the verified ballots cast, 3,222, 97.1%, or 3,128, a minimum of two-thirds were in the affirmative.

Therefore, the Commission concludes that the terms of the proposed amendment is approved by producers.

**IV. Good Cause for Effective Date Within 30 Day Notice Period**

The Administrative Procedure Act, 5 U.S.C. 553(d), requires that the Compact Commission publish a substantive rule not less than 30 days before its effective date, except that this time period is not required for a substantive rule which grants or recognizes an exemption or

relieves a restriction or as otherwise provided by the agency for good cause found and published with the rule. In the event this final rule is viewed as a substantive rule, the Commission concludes that there is good cause for non-compliance with the 30-day advance publication provision of 553(d) and publishes this final rule on September 1, 1998, with an effective date of September 10, 1998.

The Commission previously adopted a regulation exempting certain milk sold by school food authorities from the Compact Over-order Price Regulation and published that final rule on February 27, 1998 with an effective date of April 1, 1998, more than 30 days after its publication.<sup>14</sup> That exemption was duly promulgated with full compliance of all applicable notice, hearing and comment provisions of the Administrative Procedure Act.<sup>15</sup> That exemption regulation also required the Commission to take appropriate steps to enter into a memorandum of understanding with the appropriate state agencies and thus to "establish the precise mechanics of the reimbursement procedure." 63 FR at 10108. *See also*, Proposed Rule, 63 FR 31943, 31944 (June 11, 1998) (confirming that the Commission "has entered into a Memorandum of Understanding with each of the six New England states regarding the school milk reimbursement program.")

In addition, the prior exemption regulation was approved by producers pursuant to a producer referendum conducted in February 1998. The producer referendum procedure<sup>16</sup> requires the Compact Commission to distribute a ballot to each producer eligible to cast a ballot in the referendum. The ballot must include a description of the terms and conditions of the referendum and an official copy of the proposed regulation or amendment. This final rule merely recognizes and implements the previously approved regulation and this final rule was also approved by producer referendum conducted in August 1998.

The commission determines that compliance with the 30-day waiting period, in this instance, is excused for three separate reasons: it is (1) impracticable, (2) unnecessary, and (3) contrary to the public interest. *See, e.g.*,

<sup>14</sup> 63 FR 10104 (February 27, 1998).

<sup>15</sup> *See*, 63 FR 10104, 10105 (February 27, 1998) (describing administrative proceedings culminating in the adoption of the rule exempting certain school milk from the operation of the Over-order Price Regulation.)

<sup>16</sup> Compact Commission Bylaws, Article VI, section I, 7 C.F.R. Part 1371.

*Service Employees Intern. Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1994) (good cause exemption to § 553(d) includes situations where compliance is impracticable, unnecessary, or contrary to the public interest); *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982) (same).

(1) It would be impracticable to provide the thirty-day interval because the previously published amendment exempting certain school milk for the 1998–1999 school year applies to milk being distributed to schools opening in New England in August. The full thirty-day notice would not allow the Commission to set aside the funds from the August pool, paid in September, although the potential liability to eligible school food authorities would be established with the opening of the 1998–1999 school year; and

(2) The full thirty-day notice is unnecessary because this amendment merely affects the mathematical computations necessary to implement the existing rule exempting school milk from the Compact Over-order obligation; and

(3) Due to increases in federal market Class I milk prices, there will be no Compact Over-order pool for September, paid in October, from which to reserve funds to implement the school milk exemption. Therefore, the full thirty-day notice requirement would be contrary to the public interest, as found by the Commission in adopting both the underlying school milk exemption regulation, and this amendment which implements that regulation, because the Commission could not begin to establish the reserve account until well into the 1998–1999 school year. Thus, the otherwise required thirty-day notice procedure would seriously impair the effectiveness of the amendment.

Finally, the purpose of the procedural requirement that a rule be published thirty days prior to its effective date is to permit those affected by the amendment a reasonable amount of time to prepare to take whatever action is prompted by the final rule. In this instance, the amendment merely implements a rule that all affected people have had notice of since publication of the school milk exemption regulation on February 27, 1998. The only action required by the amendment is to be taken by the Commission through the establishment of a reserve account. Those most affected by the amendment are (1) the school food authorities whose interests are best served by the Commission funding the reserve account as soon possible after the opening of the 1998–

1999 school year, and (2) the producers, all of whom have received ballots in February 1998 and August 1998 to vote on, and approve, the adoption of the school milk exemption and its implementation. For all of these reasons, the full thirty-day notice period is not required.

#### IV. Required Findings of Fact

Pursuant to Compact Article V. Section 12, the Compact Commission hereby finds:

(1) That the public interest will be served by the amendment of minimum milk price regulation to dairy farmers under Article IV to establish a reserve fund for reimbursement to school food authorities.

(2) That a level price of \$16.94 (Zone 1) to dairy farmers under Article IV will assure that producers supplying the New England market receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.

(3) That the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

(4) That the terms of the proposed amendments are approved by producers pursuant to a producer referendum as required by Article V. section 13.

#### List of Subjects in 7 CFR Part 1306

Milk.

#### Codification in Code of Federal Regulations

For reasons set forth in the preamble, the Northeast Dairy Compact Commission amends 7 CFR Chapter XIII as follows:

#### PART 1306—COMPACT OVER-ORDER PRODUCER PRICE

1. The authority for part 1306 continues to read as follows:

**Authority:** 7 U.S.C. 7256.

2. In § 1306.3 redesignate paragraphs (d) through (f) as paragraphs (e) through (g) and add new paragraph (d) to read as follows:

#### § 1306.3 Computation of basic over-order producer price.

\* \* \* \* \*

(d) Beginning with the August 1998 pool, subtract from the total value computed pursuant to paragraph (a) of this section, an amount estimated by the Commission for the purpose of retaining a reserve for payment of obligations

pursuant to § 1301.13(e) of this chapter. Surplus funds from this reserve shall be returned to the producer-settlement fund.

\* \* \* \* \*

Dated: August 26, 1998.

**Kenneth M. Becker,**

*Executive Director.*

[FR Doc. 98–23427 Filed 8–31–98; 8:45 am]

BILLING CODE 1650–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 179

[Docket No. 98N–0392]

#### Irradiation in the Production, Processing and Handling of Food; Correction

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of August 17, 1998 (63 FR 43875). The document amended FDA's regulations on labeling requirements for foods treated with irradiation. The document was published with some errors. This document corrects those errors.

**EFFECTIVE DATE:** September 1, 1998.

**FOR FURTHER INFORMATION CONTACT:** Carolyn C. Harris, Office of Policy (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–2994.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 98–21998, appearing on page 43875, in the **Federal Register** of August 17, 1998, the following corrections are made: On page 43875, in the first column, under the document headings, “Docket” is corrected to read “Docket”; in the first column, under the “ADDRESSES” caption, beginning in the fourth line “12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857” is corrected to read “5630 Fishers Lane, rm. 1061, Rockville, MD 20852”.

Dated: August 26, 1998.

**William K. Hubbard,**

*Associate Commissioner for Policy Coordination.*

[FR Doc. 98–23398 Filed 8–31–98; 8:45 am]

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