

Proposed Rules

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131

[Docket No. AO-14-A73, et al.; DA-03-10]

Milk in the Northeast and Other Marketing Areas; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreements and Orders

7 CFR part	Marketing area	AO Nos.
1001 ...	Northeast	AO-14-A73
1005 ...	Appalachian	AO-388-A14
1006 ...	Florida	AO-356-A37
1007 ...	Southeast	AO-366-A43
1030 ...	Upper Midwest	AO-361-A38
1032 ...	Central	AO-313-A47
1033 ...	Mideast	AO-166-A71
1124 ...	Pacific Northwest ...	AO-368-A34
1126 ...	Southwest	AO-231-A67
1131 ...	Arizona Las-Vegas	AO-271-A39

AGENCY: Agricultural Marketing Service, USDA.

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

SUMMARY: A national public hearing is being held to consider proposals seeking to amend the Class I fluid milk product definition of all Federal milk marketing orders.

DATES: The hearing will convene at 8 a.m. on Monday, June 20, 2005.

ADDRESSES: The hearing will be held at Sheraton Station Square Hotel, 300 West Station Square Drive, Pittsburgh, PA 15219-1122. Telephone Number: (412) 261-2000.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, Stop 0231-Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail address: gino.tosi@usda.gov.

Persons requiring a sign language interpreter or other special accommodations should contact David Z. Walker, Market Administrator, at (330) 225-4758; email address: dwalker@fmnaclev.com before the hearing begins.

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

Notice is hereby given of a public hearing to be held at Sheraton Station Square Hotel, 300 West Station Square Drive, Pittsburgh, Pennsylvania beginning at 8 a.m., on Monday, June 20, 2005, with respect to proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Northeast and other marketing areas.

The hearing is called pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

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

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This Act seeks to ensure that, within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. For the purpose of the Act, a dairy farm is a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. Most parties subject to a milk order are considered as a small business. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may suggest modifications of these proposals for the purpose of tailoring their applicability to small businesses.

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

The Agricultural Marketing Agreement Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (Department) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Interested parties who wish to introduce exhibits should provide the Presiding Officer at the hearing with (6) copies of such exhibits for the Official Record. Also, it would be helpful if additional copies are available for the use of other participants at the hearing.

List of Subjects in 7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131

Milk marketing orders.

PARTS 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, AND 1131—[AMENDED]

The authority citation for 7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131 continues to read as follows:

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

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

Proposed by Dairy Farmers of America, Inc.*Proposal No. 1*

This proposal seeks to amend the fluid milk product definition to include products formulated using milk or milk solids for beverage consumption by removing the 6.5 percent nonfat milk solids standard.

1. Amend § 1000.15 by revising paragraphs (a) and (b)(1), to read as follows:

§ 1000.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, fluid milk product means any product containing milk or milk products in fluid or frozen form containing less than 9 percent butterfat that are intended to be used as beverages, including any beverage products that are flavored, cultured, modified with added nonfat solids, sterilized, concentrated, or reconstituted. As used in this part, the term concentrated milk means milk that contains not less than 25.5 percent, and not more than 50 percent, total milk solids.

(b) * * *

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers, and whey; and

* * * * *

Proposal No. 2

This proposal seeks to amend the fluid milk product definition to include any dairy ingredient, including whey, when calculating the milk contained in a product on a protein-equivalent or nonfat solids equivalent basis.

Proposed by O-AT-KA Milk Products Cooperative, Inc.*Proposal No. 3*

This proposal seeks to amend the fluid milk product definition by adding a true-protein standard. In determining the protein content and milk equivalent of a product, the proposal seeks to include all dairy solids—such as caseinates, milk protein concentrates and whey protein—and non-dairy sources while pricing only the milk equivalent of the dairy solids. Furthermore, this proposal seeks to add exemptions for alcoholic beverages containing dairy ingredients and formulas prepared for dietary use (meal replacements or nutritional supplements) having a true-protein content from any source greater than 6.2 percent on a protein-equivalent basis.

1. Amend § 1000.15 by revising paragraph (b)(1), redesignating paragraph (b)(2) as paragraph (b)(4), and adding new paragraphs (b)(2) and (b)(3) to read as follows:

§ 1000.15 Fluid milk product.

* * * * *

(b) * * *

(1) Plain or sweetened evaporated milk/skim milk and sweetened condensed milk/skim milk,

(2) The following products packaged in containers that are shelf stable at ambient temperatures:

(i) Formulas especially prepared for infant feeding;

(ii) Formulas especially prepared for meal replacement and contain at least 25 percent of the Daily Values per serving reference amounts defined by the Food and Drug Administration in 21 CFR 101.9 for calories and protein and at least 16 of the 25 listed vitamins and minerals.

(iii) Formulas especially prepared for high protein drinks and have a true protein solids content greater than 8 percent.

(iv) Beverages that contain alcohol and are licensed by the Federal Tax and Trade Bureau, U.S. Department of the Treasury, and

(v) Packaged milk products that are specifically formulated and labeled for animal use.

(3) Any product that contains by weight less than 6.5 percent nonfat milk solids and 2.24 percent true protein. Provided further that all protein sources (including non-dairy sources) will be included in establishing the true protein content of the beverage product.

* * * * *

Proposed by Select Milk Producers Inc. and Continental Dairy Products, Inc.*Proposal No. 4*

This proposal seeks to amend the fluid milk product definition by including only stand-alone beverages that are determined by a skim-equivalent standard, removing the 6.5 percent nonfat milk solids standard, and excluding other dairy products in fluid form that are not intended to be used as stand-alone beverages.

1. Amend § 1000.15 by revising paragraphs (a) and (b)(1), redesignating paragraph (b)(2) as paragraph (b)(3), and adding new paragraphs (b)(2) and (c), to read as follows:

§ 1000.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, fluid milk product means any product containing milk or milk products in fluid or frozen form

that is intended to be used as a stand-alone beverage. Fluid milk product includes any beverage products that are flavored, cultured, modified with added nonfat solids, sterilized, concentrated, or reconstituted. As used in this part, the term concentrated milk means milk that contains not less than 25.5 percent and not more than 50 percent total milk solids.

(b) * * *

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers, and whey;

(2) Products such as half-and-half, light cream, heavy cream, and whipping creams which, although fluid in form, are not intended for use as stand-alone beverages; and

(3) * * *

(c) The quantity of milk that is used in a product defined in paragraph (a) of this section shall be determined on a skim-equivalent basis.

Proposed by H.P. Hood LLC*Proposal No. 5*

This proposal seeks to amend the fluid milk product definition to include any product that, based upon substantial evidence as determined by the Department, directly competes with other fluid milk products and whose classification would enhance producer revenues.

1. Amend § 1000.15 by revising paragraph (b)(2), to read as follows:

§ 1000.15 Fluid milk product.

* * * * *

(b) * * *

(2) The quantity of skim milk equivalent in any modified product specified in paragraph (a) of this section that is greater than an equal volume of an unmodified product of the same nature and butterfat content, provided that any product that would otherwise be excluded from the fluid milk product definition because it contains by weight less than 6.5 percent nonfat milk solids will nonetheless be deemed a fluid milk product if the Department makes a written determination, based on substantial evidence, that:

(i) The product directly competes with other fluid milk products; and

(ii) Treating the product as a fluid milk product will enhance producer revenues under the orders, taking into account both the revenues generated by the minimum class price resulting from that classification and the impact of that class price on consumer demand for the

product and the substitution of non-dairy ingredients.

Proposal No. 6

As an alternative to Proposal 5, this proposal seeks to amend the fluid milk product definition by authorizing, but not requiring, the Department to determine a product's nonfat milk solids content by applying only a skim milk equivalent standard with respect to any dried dairy ingredient.

1. Amend § 1000.15 by revising paragraph (b)(2), to read as follows:

§ 1000.15 Fluid milk product.

* * * * *

(b) * * *

(2) The quantity of skim milk equivalent in any modified product specified in paragraph (a) of this section that is greater than an equal volume of an unmodified product of the same nature and butterfat content, provided that, in determining whether a product contains by weight less than 6.5 percent nonfat milk solids, the Department shall be authorized, but not required to apply that test on a skim milk equivalent basis only with respect to any dairy ingredient utilized in dried form.

Proposed by National Milk Producers Federation

Proposal No. 7

This proposal seeks to amend the fluid milk product definition by removing the reference to the 6.5 percent nonfat milk solids standard and whey, and adopting a milk protein standard.

1. Amend § 1000.15 by revising paragraph (b)(1), to read as follows:

§ 1000.15 Fluid milk product.

* * * * *

(b) * * *

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers, and any product that contains by weight less than 2.25 percent milk protein; and

* * * * *

Proposed by The Dannon Company Inc.

Proposal No. 8

This proposal seeks to amend the fluid milk product definition by excluding yogurt-containing beverages.

1. Amend § 1000.15 by revising paragraph (b)(1), to read as follows:

§ 1000.15 Fluid milk product.

* * * * *

(b) * * *

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers, yogurt-containing beverages, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

* * * * *

Proposed by General Mills, Inc.

Proposal No. 9

This proposal seeks to amend the fluid milk product definition to exclude drinkable food products with no more than 2.2 percent skim milk protein provided the product contains at least 20 percent yogurt (nonfat yogurt, lowfat yogurt or yogurt) by weight.

Proposed by Novartis Nutrition Corporation

Proposal No. 10

This proposal seeks to amend the fluid milk product definition to exclude formulas prepared for dietary use by removing the words "(meal replacement) that are packaged in hermitically-sealed containers." The proposal removes the 6.5 percent nonfat milk solids standard.

1. Amend § 1000.15 by revising paragraph (b)(1), to read as follows:

§ 1000.15 Fluid milk product.

* * * * *

(b) * * *

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use, and whey; and

* * * * *

Proposed by Hormel Foods, LLC

Proposal No. 11

This proposal seeks to amend the fluid milk product definition and the corresponding classification of milk utilization provision to exclude health-care beverages as fluid milk products.

1. Amend § 1000.15 by revising paragraph (b)(1) to read as follows:

§ 1000.15 Fluid milk product.

* * * * *

(b) * * *

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding, nutrient enhanced (fortified) formulas especially prepared for the health care industry or dietary use (meal replacement) that are

packaged in hermetically-sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

* * * * *

2. Amend § 1000.40 by revising paragraph (b)(2)(vi) to read as follows:

§ 1000.40 Classes of utilization.

* * * * *

(b) * * *

(2) * * *

(vi) Formulas especially prepared for infant feeding; nutrient enhanced (fortified) formulas especially prepared for the health care industry, or dietary use (meal replacement) that are packaged in hermetically-sealed containers;

* * * * *

Proposed by Dairy Programs, Agricultural Marketing Service

Proposal No. 12

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

Copies of this notice of hearing and the orders may be procured from the Market Administrator of each of the aforesaid marketing areas, or from the Hearing Clerk, United States Department of Agriculture, STOP 9200—Room 1083, 1400 Independence Avenue, SW., Washington, DC 20250—9200, or may be inspected there.

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

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

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

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

Dated: April 6, 2005.

Kenneth C. Clayton,

*Acting Administrator, Agricultural Marketing
Service.*

[FR Doc. 05-7271 Filed 4-11-05; 8:45 am]

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