

Billing Code 3410-05-P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1430

RIN 0560-AH83

Milk Income Loss Contract Program and Price Support Program for Milk

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule amends the regulations for the Milk Income Loss Contract (MILC) Program, as authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill), to extend the program from October 1, 2007, through September 30, 2012. This rule also increases the percentage rate for the payment calculation after fiscal year (FY) 2008 and increases the payment quantity limitation of eligible pounds of milk per operation beginning in FY 2009. This rule also provides for an adjustment to the MILC payment rate if feed costs increase above a specified level. This rule is needed to extend the MILC program, which is designed to stabilize and generally enhance milk producer revenue, through FY 2012 and to make changes to that program authorized by the 2008 Farm Bill. This rule also adjusts the milk price support program regulations to specify that support purchases will only be made from manufacturers and not from third parties such as brokers.

EFFECTIVE DATE: December 1, 2008.

FOR FURTHER INFORMATION CONTACT: Danielle Cooke, Special Programs Manager, Price Support Division, FSA, USDA, STOP 0512, 1400 Independence Ave.

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SUPPLEMENTARY INFORMATION

Background

This final rule implements changes in the MILC program enacted in section 1506 in Title I of the 2008 Farm Bill (Public Law 110-246, 7 U.S.C. 8773). It, in effect, permits new contracts to extend the old MILC program first provided for in Section 1502 of the Food Security and Rural Investment Act of 2002 (Public Law 107-171, 7 USC 7982). That program, as amended by subsequent enactments, ended its coverage with milk marketed in September of 2007. The 2008 Farm Bill permits coverage starting with October 2007 marketings carrying through September 2012 marketings. The “old” program, regulations were codified in 7 CFR part 1430. This rule, to provide for the “new” program, modifies 7 CFR part 1430 to:

- Cover marketings during the new period and make changes to the payment rate formula used to calculate payments;
- Change the production limits for payments during specific periods;
- Add applicability of Adjusted Gross Income (AGI) provisions to eligibility requirements; and
- Add provisions to adjust the payment rate if feed costs exceed a specified level.

With certain per year per operation eligibility pound limits, the MILC program provides payments to dairy operations when milk prices fall below a set benchmark. What constitutes an “operation” for purposes of the “new” program, including poundage limits, will be determined as before. All prior participants in the “old” program must sign new contracts. New participants (those not in the “old” program) cannot be affiliated with prior participants. Also, the rule, as required by the 2008 Farm Bill, beginning in FY 2009, sets new eligibility limits tied to the AGI of persons or entities seeking payment. Payees for the relevant year cannot have nonfarm income in excess of \$500,000. AGI rules will cover multi-program regulations to be issued separately.

As indicated, there is a per-operation per year pound limit to the MILC payment eligibility of operations. For FY 2009 (October 1, 2008, through September 30, 2009), FY 2010 (October 1, 2009, through September 30, 2010), FY 2011 (October 1, 2010, through September 30, 2011), and FY 2012 (October 1, 2011, through September 30, 2012), the limit for each fiscal year is 2.985 million pounds. Further, no payments will be made for September 2012 marketings, as specified in the 2008 Farm Bill, if the operation’s cumulative total for FY 2012 is over 2.4 million pounds and if the operation is under that amount the payable marketings for September will be limited to those that will not bring the total over 2.4 million pounds. Payments are computed, however, on a monthly basis. They are made only when the official Federal class I milk marketing order milk price per cwt. for Boston, Massachusetts is less than \$16.94. When the Boston price is under the target, the payment for eligible production will be, for FYs 2009 through 2012, 45 percent of the difference. Otherwise, for September 2012 marketings the percentage will be 34 percent. The pay rate can be raised, by command of the 2008 Farm

Bill, however, if the National Average Feed Dairy Feed Ration Cost as officially computed exceeds \$7.35 per cwt. (\$9.50 per cwt. for September 2012 marketings). If the triggering feed ration amount is exceeded, the benchmark \$16.94 figure for the MILC payment rate calculation will be increased by the percentage amount which is 45 percent of the percentage amount by which the Feed Ration Cost exceeded its own benchmark (\$7.35 or \$9.50, depending on the month involved). Feed Ration Cost is calculated using the same procedures used to calculate the feed components of the estimated price of 16 percent Mixed Dairy Feed per pound as reported in the USDA Agricultural Prices publication. Entire month prices used to calculate feed price ratios for each month will be used. As to the calculation, if for example, the May 2009 Feed Ration Cost exceed by 14 percent the \$7.35 per cwt. benchmark, then the MILC payment benchmark for May 2009 marketings would be increased by 6.3 percent (45% of 14%) and upped by \$1.07 to \$18.01 for May 2009 marketings only.

For purposes of applying the yearly pay limits on pounds per operation, the rule will continue to use a start month concept for each year. The operation must, with limitations set out in the rules, pick a start month for each fiscal year. Once the start month is picked, any marketing in the month and subsequent months of the fiscal year that generate a payment will count against the operation's fiscal year limit. (The special rule for September 2012 has been noted and will not be repeated here.) Generally under the rule, once signup is opened after October 1, 2008, an operation can pick any start month for FY 2008. However, this point is moot because no payments were generated from that fiscal year. Provisions regarding FY 2008 are included in the rule for the sake of completeness. Likewise, under the rule, if the operation signs its new MILC contract

within 30 days of the beginning of the application period for this new FY 2008 through 2012 program it can pick any preceding FY 2009 month as its start month for that period. Also, whenever the operation submits its FY 2008 through 2012 contract, it can pick the month of the submission as the start month for the current fiscal year. Otherwise, for the fiscal year in which the contract is submitted, or for later fiscal years if the operation wants a different start month for a subsequent fiscal year, the rule will be that the month chosen or the start month must be chosen by the 14th of the month preceding the month chosen. Once a month is chosen for a fiscal year, the corresponding month will be the start month for subsequent fiscal years unless affirmatively changed by the operation. No payment will be made for any fiscal year that has ended before the FY 2008 through 2012 program contract is submitted.

Producers to be paid must:

- (1) Sign the contract,
- (2) Provide verifiable data,
- (3) Be actively engaged in milk production for the relevant period,
- (4) Meet the AGI test for payment, and
- (5) Pick the start month for each fiscal year (as indicated, the original start month will be the same for subsequent fiscal years unless changed by the operation).

Dairy operations can apply at FSA county offices, via fax, or at www.fsa.usda.gov/dafp/psd/.

This final rule includes changes in the dates marketed production must be submitted. Editorial changes to the previous regulations are made as well. While the statute in some places suggests that the program may carry beyond FY 2012, the statute

and these regulations limit the covered marketings to those made no later than September, 2012. Also, as before in the program contract, the regulations specify that the payment rules are subject to change, even after the contract is signed, to reflect statutory changes. Also, as indicated, payments are subject to the AGI limits being implemented through a separate rulemaking.

Dairy Product Price Support Program

This rule amends section 1430.2, “Price Support Levels and Purchase Conditions,” to ensure that the Dairy Product Price Support Program supports dairy producers by insuring that manufacturers have sufficient incentive to pay the support rate to producers. CCC will only purchase dairy products from the manufacturer of the product. CCC will no longer purchase eligible dairy products from nonmanufacturers, as the program is not intended to provide a speculative market for third parties.

Notice and Comment

These regulations are exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553), as specified in section 1601(c) of the 2008 Farm Bill, which requires that the regulations be promulgated and administered without regard to those provisions, the Statement of Policy of the Secretary of Agriculture effective July 24, 1971, (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking. Therefore, these regulations are issued as final.

Executive Order 12866

The Office of Management and Budget (OMB) designated this final rule as significant under Executive Order 12866 and, therefore, OMB reviewed this rule. A cost benefit assessment of this rule is summarized below and is available from the contact information listed above.

Summary of Economic Impacts

The MILC program has paid about \$2.5 billion to dairy operations over the five initial years of operation. Annual expenditures during the last two years of the program have totaled over \$350 million in FY 2006 and \$160 million in FY 2007. Expenditures during the period authorized by the 2008 Farm Bill, are expected to be between \$300 and \$400 million based on estimated milk prices during the period. Dairy farm direct payments and Government expenditures will increase commensurately. MILC program impact on milk prices will reduce benefits to dairy farmers, which will result in consumers being able to buy dairy products at lower prices than if the program was not operating.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because CCC is not required to publish a notice of proposed rulemaking for this rule.

Environmental Review

The environmental impacts of this rule were considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4347, the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The

substantive changes to the MILC program, required by the 2008 Farm Bill that are identified in this final rule are non-discretionary. Therefore, FSA has determined that NEPA does not apply to this final rule and no environmental assessment or environmental impact statement will be prepared.

Executive Order 12988

The final rule has been reviewed under Executive Order 12988. This rule preempts State laws that are inconsistent with its provisions. This rule is not retroactive as such, but does apply to marketings in a period that precedes this rule. Before any judicial action may be brought regarding this rule, all administrative remedies must be exhausted.

Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because CCC is not required to publish a notice of proposed rulemaking for

this rule. Further, this rule imposes no unfunded mandates, as defined in UMRA, on any local, State, or tribal government or on the private sector.

Federal Assistance Programs

The title and number of the Federal assistance program in the Catalog of Federal Domestic Assistance to which this final rule applies is 10.051 – Commodity Loans and Loan Deficiency Payments.

Paperwork Reduction Act

The regulations in this rule are exempt from requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35), as specified in section 1601 of the 2008 Farm Bill, which provides that these regulations be promulgated and administered without regard to the Paperwork Reduction Act.

E-Government Act Compliance

CCC is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 1430

Dairy products, Price support programs.

For the reasons discussed above, 7 CFR part 1430 is amended as set forth below.

PART 1430—DAIRY PRODUCTS

1. Revise the authority citation to read as follows:

Authority: 7 U.S.C. 7981, 7982, and 8773; and 15 U.S.C. 714b and 714c.

Subpart A—Price Support Program for Milk

2. Amend § 1430.2, paragraph (a)(2), by adding a sentence at the end to read as follows:

§ 1430.2 Price support levels and purchase conditions.

(a) * * *

(2) * * * Purchases may only be made from eligible offerers

which must be the manufacturer of the product offered and must meet all other conditions set by CCC.

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Subpart B—Milk Income Loss Contract Program

3. Amend § 1430.202 by removing the definitions for “Fiscal Year,” and “Transition Period,” revising the definitions of “Dairy operation,” “Eligible production,” “Participating State,” and “United States,” and adding the definition for “Fiscal Year or FY” to read as follows:

§ 1430.202 Definitions.

* * * * *

Dairy operation means any person or group of persons who as a single unit as determined by CCC, produce and market milk commercially produced from cows, and whose production facilities are located in the United States. In administering this program, for purposes of determining what is a “dairy operation” and its eligibility under this program, those determinations will be made in the same manner as was done for the Dairy Market Loss Assistance (DMLA) contracts in the State in which the dairy is located. New MILC operations, which is to say those operations that did not participate

in the MILC program for marketings prior to FY 2008, must be unaffiliated with any other DMLA or MILC operations.

* * * * *

Eligible production means milk that was produced at a time relevant to this program by cows in the United States and marketed commercially by a producer in a participating State.

* * * * *

Fiscal Year or FY means the year beginning October 1 and ending the following September 30, fiscal years will be designated for this part by year by reference to the calendar year in which it ends. For example, FY 2009 is from October 1, 2008, through September 30, 2009 (inclusive).

* * * * *

Participating State means each of the 50 States in the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

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United States means the 50 States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

* * * * *

4. Amend § 1430.203 as follows:

a. In paragraphs (a) and (f) remove the words “December 1, 2001, through September 30, 2007” and add, in their place, the words “October 1, 2007, through September 30, 2012;”

b. Amend paragraph (f) by removing the period at the end and adding a semicolon in its place; and

c. Revise paragraph (g) and add paragraphs (h) and (i) to read as follows:

§ 1430.203 Eligibility.

* * * * *

(g) Meet all adjusted gross income eligibility requirements of part 1400 of this chapter as regards any person or entity seeking to receive payment under this part. No person or entity may, generally, receive any payment for FY 2009 marketings and subsequent marketings if their nonfarm yearly income for the relevant base period for the relevant marketings as determined under the adjusted gross income rules (as in effect when the payment is sought) is over \$500,000 as determined under this subpart. Further, for entities an otherwise due payment will be reduced commensurately to the extent that any person with an interest in the entity, as determined under the adjusted gross income rules had such income over that limit for the relevant period;

(h) Have submitted a contract during the applicable contract period for FYs 2008 through 2012:

(1) Except for 2009, and subject to the start month provision of § 1430.205, must have for any fiscal year or month for which payments is sought to be paid submitted the FY 2008 through 2012 contract before the end of that fiscal year or month or

(2) For FY 2008 payments, if payments are generated under this part for that fiscal year, must have submitted a contract for the FY 2008 through 2012 program by October 1, 2009 and for FY 2009 the contract must have been submitted by the month for which payment is first sought except to the extent that § 1430.205 explicitly permits the operation to pick a start month in advance of the month in which the contract is submitted; and

(i) Must not, if it did not participate in the preceding MILC program for fiscal years prior to FY 2008, be affiliated with any other dairy operation.

5. In § 1430.205 revise paragraphs (a) through (d) and (g) to read as follows:

§ 1430.205 Selection of starting month.

(a) A dairy operation that enters into a MILC contract with CCC must designate the starting month for each fiscal year for the calculation of payments and pound limits for the operation. Once a start month is chosen for a fiscal year the corresponding month will be the start month for each subsequent fiscal year unless changed by an affirmative request in writing on a form approved by CCC. The production start month must be selected on or before the 14th of the month before the month for which payment is sought. If such date falls on a weekend, the start month selection must be made on the last business day preceding the weekend. A dairy operation cannot select as the start month for payment a month which:

- (1) Has already begun, except as provided in paragraph (c)(1) of this section;
- (2) Has already passed; or
- (3) During which no milk production was produced by the dairy operation.

(b) For FY 2009, if the operation signs its FY 2008 through 2012 MILC contract within 30 days of the beginning of the application period it can pick any preceding FY 2009 month as its start month for that period or can use the normal rule of paragraph (c) of this section to pick the start month.

(c) Except as provided in paragraph (b) of this section, the start month for a fiscal year may only be

(1) For the fiscal year in which the contract is submitted, the month the contract is submitted or

(2) For a fiscal year that has not yet begun, any month, provided that a month may not be selected after the 14th of the preceding month.

(d) Dairy operations may change the production start month on or before the 14th day of the month previously selected.

* * * * *

(g)(1) MILC production start month selections made during the signup period designated by CCC may be made as provided in paragraph (b) of this section, otherwise MILC production start month selections must be made in accordance with paragraph (c) of this section. If a payment rate is not in effect during the production start month selected by the dairy operation, payments to the dairy operation will be issued based on the next consecutive month with a payment rate in effect following the MILC production start month selected by the dairy operation. Production in months in which the pay formula does not produce a payment will not count against the fiscal year's poundage limit for the operation.

(2) Dairy operations with MILC production start months that begin with the month a MILC contract is submitted to FSA or that begin with the first month of the fiscal year with an effective payment rate will receive payments made by CCC consecutively on a monthly basis, if otherwise provided for in this part, until the earlier of the following:

(i) The maximum payment quantity for the fiscal year or month is reached as determined in accordance with § 1430.207 or

(ii) The end of the applicable fiscal year.

* * * * *

6. Amend § 1430.207 by revising paragraph (b) and by adding paragraph (c) to read as follows:

§ 1430.207 Dairy operation payment quantity.

* * * * *

(b) The maximum quantity of eligible production for which dairy operations, per separate and distinct operation, are eligible for payment per fiscal year under this subpart will be:

(1) 2,400,000 pounds (24,000 cwt.) for FY 2008 (October 1, 2007, through September 30, 2008);

(2) 2,985,000 pounds (29,850 cwt.) for FY 2009 (October 1, 2008 through September 30, 2009), FY 2010 (October 1, 2009, through September 30, 2010), FY 2011 (October 1, 2010, through September 30, 2011) and FY 2012 (October 1, 2011, through September 30, 2012), provided further an operation may receive payment for September, 2012, marketings only if its pre-September FY 2012 marketings did not exceed 2,400,000

pounds in which case new marketings that would not put the operation's FY 2012 marketings over 2,400,000 pounds will be eligible for payments otherwise permitted in this rule.

(c) In accordance with these regulations, the Deputy Administrator will determine what is a separate and distinct operation. That decision will be final.

7. In § 1430.208 revise paragraphs (b) through (e) and add paragraph (f) to read as follows:

§ 1430.208 Payment rate and dairy operation payment.

* * * * *

(b) A per-hundredweight payment rate will be determined for the applicable month by:

(1) Subtracting from \$16.94 the Class I milk price per cwt. in Boston;

(2) Multiplying the difference by 34 percent for marketings during the period beginning on October 1, 2007, and ending on September 30, 2008;

(3) Multiplying the difference by 45 percent for marketings during the period beginning on October 1, 2008, and ending on August 31, 2012; and

(4) Multiplying the difference by 34 percent for marketings in September 2012.

(c) The payment rate as calculated as specified in paragraph (b) of this section, will be adjusted to compensate for feed prices when the National Average Dairy Feed Ration Cost for a month is greater than the levels set in paragraphs (c)(1) and (c)(2) of this section. The National Average Dairy Feed Ration Cost per cwt. for each month will be calculated using the same procedures used to calculate the feed components of the estimated price of 16 percent Mixed Dairy Feed per pound noted on page 33 of the

USDA monthly Agricultural Prices publication (including the data and factors noted in footnote 4). The payment rate adjustment for Entire Month feed prices will be determined by increasing \$16.94 by the percentage that is 45 percent of the percentage by which the National Average Dairy Feed Ration Cost exceeds \$7.35 per cwt. (except that \$7.35 will be \$9.50 for September 2012 marketings.)

(d) Each eligible dairy operation payment will be calculated, as determined by the Secretary, by:

(1) Converting whole pounds of milk to hundredweight and

(2) Multiplying the payment rate determined in paragraphs (b) and (c) of this section by the quantity of eligible production marketed by the operation during the applicable month as determined according to §1430.205 and other provisions of this subpart.

(3) Payments to dairy operations will be based on calculated payment rates rounded seven places to the right of the decimal.

(e) Payments under this subpart may be made to a dairy operation only up to the maximum production limitations set in § 1430.207(b) of eligible production per applicable fiscal year.

(f) Dairy operations receiving benefits under this subpart, will receive earned payments on a monthly basis according to the MILC contract, to the extent practicable, not later than 60 days after the later of production evidence and all supporting documents for the applicable month are received by CCC or the entire month National Average Dairy Feed Ration Cost is made available by USDA, as applicable. Payments issued by CCC more than 60 days after the later of all production evidence and supporting

documentation are received by CCC or the entire month National Average Dairy Feed Ration Cost is made available by USDA, whichever is later, will be subject to prompt payment interest as allowed by law. However, CCC will endeavor where possible to make payments within 60 days of the end of the marketing month.

§ 1430.209 [Amended]

8. Amend § 1430.209 in paragraph (a) by removing the words “October 1, 2005, and ending September 30, 2007” and adding in their place the words “October 1, 2007, and ending September 30, 2012.”

§ 1430.211 [Amended]

9. Amend § 1430.211 in paragraph (a) by removing the words “September 30, 2007” and adding, in their place, the words “September 30, 2012.”

10. Amend §1430.212 by revising the section heading and adding paragraph (c) to read as follows:

§ 1430.212 Contract Modifications and Statutory Changes in Program.

* * * * *

(c) Payments otherwise due under this subpart or the program will be adjusted or denied to the extent provided for by a statutory change in program eligibilities or requirements of any kind irrespective of whether the program contract preceded the statutory change. Operations will be given the option of accepting the changes or terminating the contract.

11. Amend § 1430.213 by revising paragraph (a) to read as follows:

§ 1430.213 Reconstitutions.

(a) A dairy operation receiving MILC benefits may reorganize or restructure such that the constitution or makeup of its operation is reconstituted in another organizational framework. However, any operation that reorganizes or restructures after October 1, 2007, is subject to a review by FSA to determine if the operation was reorganized or restructured for the sole purpose of receiving multiple or additional MILC payments.

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Signed in Washington, D.C., on December 1, 2008.

Teresa C. Lasseter,
Executive Vice President,
Commodity Credit Corporation.

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