# **Proposed Rules**

Federal Register

Vol. 60, No. 188

Thursday, September 28, 1995

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

#### **DEPARTMENT OF AGRICULTURE**

### Agricultural Marketing Service

7 CFR Part 1131

[Docket No. AO-271-A32; DA-92-24]

Milk in the Central Arizona Marketing Area; Decision on Proposed Amendments to Marketing Agreement and Order

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This decision revises the definition of producer-handler to prohibit deliveries of fluid milk products to a wholesale customer if the customer is also receiving the same products in the same-sized package with a similar label from a fully or partially regulated handler during the month. It also clarifies the limits and sources of supplemental supplies of producerhandlers. Finally, the decision removes the "associated producer" and "associated producer milk" provisions. The decision is based on proposals presented at a public hearing held in Phoenix, Arizona, on February 2–3,

## 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, (202) 690–1932.

**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.

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities.

The amended order will promote orderly marketing of milk by producers and regulated handlers.

These proposed amendments have been reviewed under Executive Order 12278, Civil Justice Reform. This rule is not intended to have retroactive effect. If adopted, this proposed 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 file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Prior Documents in This Proceeding

Notice of Hearing: Issued December 21, 1992; published December 30, 1992 (57 FR 62241).

Recommended Decision: Issued December 15, 1993; published December 22, 1993 (57 FR 67703).

Extension of Time for Filing Exceptions: Issued February 4, 1994; published February 14, 1994 (59 FR 6916).

Revised Recommended Decision: Issued November 4, 1994; published November 14, 1994 (59 FR 56414).

#### **Preliminary Statement**

A public hearing was held to consider proposed amendments to the marketing agreement and the order regulating the handling of milk in the Central Arizona (Order 1131) marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7

U.S.C. 601–674), and the applicable rules of practice (7 CFR Part 900), in Phoenix, Arizona, on February 2–3, 1993. Notice of such hearing was issued on December 21, 1992, and published December 30, 1992 (57 FR 62241).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on December 15, 1993, and November 4, 1994, issued a recommended decision and a revised recommended decision, respectively, containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the revised recommended decision are hereby approved and adopted and are set forth in full herein, subject to the following modifications:

1. The proposed pool payment by a producer-handler that was provided for in the proposed amendments to §§ 1131.60 and 1131.71 has been dropped;

2. A new paragraph (a)(3) has been added to the producer-handler definition (§ 1131.10) which prohibits a producer-handler from distributing fluid milk products to a wholesale customer who also is receiving the same product in the same-sized package with a similar label from a fully or partially regulated handler during the month; and

3. The discussion of Issue No. 1 in the findings and conclusions has been revised to reflect these changes.

The material issues on the record of hearing relate to:

- 1. The definition and treatment of producer-handlers;
- 2. The definition and treatment of associated producers; and
- 3. Conforming changes and nonsubstantive changes.

# Findings and Conclusions

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

1. The definition and treatment of producer-handlers. The order should be amended to prohibit producer-handlers (P–Hs) from distributing fluid milk products to wholesale customers <sup>1</sup> who

<sup>&</sup>lt;sup>1</sup> As used in the amended order, the term "wholesale customer" means distributors or jobbers, stores that are owned or leased by others, or institutions such as schools, hospitals, prisons, and nursing homes. It does not mean retail sales to consumers at the P-H's dock, at the P-H's own