# Rules and Regulations

Federal Register
Vol. 76, No. 53
Friday, March 18, 2011



## FEDERAL LABOR RELATIONS AUTHORITY

### 5 CFR Part 5901

### Supplemental Standards of Ethical Conduct for Employees of the Federal Labor Relations Authority

**AGENCY:** Federal Labor Relations Authority (FLRA).

**ACTION:** Final rule.

**SUMMARY:** The Federal Labor Relations Authority (FLRA), with the concurrence of the Office of Government Ethics (OGE), is adopting as final, without change, the interim FLRA rule that supplements the executive-branch-wide Standards of Ethical Conduct (Standards) issued by OGE and, with certain exceptions, requires FLRA employees to obtain approval before engaging in outside employment.

**DATES:** This final rule is effective March 18, 2011.

**FOR FURTHER INFORMATION CONTACT:** Rosa M. Koppel, Solicitor, at *rkoppel@flra.gov*, fax: (202) 343–1007.

**SUPPLEMENTARY INFORMATION:** The FLRA published, with OGE concurrence, an interim rule in 75 FR 79261, on December 20, 2010, governing the conduct of FLRA employees and requested comments. No comments were received. The FLRA has determined, with OGE concurrence, to adopt the interim rule as final without change. The interim rule being adopted as final provides that an FLRA employee, other than a special Government employee, must obtain approval before engaging in outside employment. The rule defines outside employment and sets out the procedure for seeking approval. The rule also provides that the Designated Agency Ethics Official (DAEO) or alternate DAEO may exempt certain categories of employment from the prior approval requirement.

For a detailed section analysis of this final rule, see the preamble of the interim rule as published in 75 FR 79261.

#### Regulatory Flexibility Act

The FLRA has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. chapter 6, that this rulemaking will not have a significant economic impact on a substantial number of small entities because it primarily affects FLRA employees.

#### Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. chapter 35, does not apply because this rulemaking does not contain information collection requirements subject to the approval of the Office of Management and Budget.

#### Congressional Review Act

The FLRA has determined that this rule is not a rule as defined in 5 U.S.C. 804, and thus, does not require review by Congress.

#### List of Subjects in 5 CFR Part 5901

Conflict of interest, Government employees.

#### Authority and Issuance

Accordingly, the Federal Labor Relations Authority, with the concurrence of the Office of Government Ethics, is adopting the interim rule adding 5 CFR chapter XLIX, consisting of part 5901, which was published at 75 FR 79261 on December 20, 2010, as a final rule without change.

Dated: March 9, 2011.

**Carol Waller Pope,**

*Chairman, Federal Labor Relations Authority.*

Approved: March 11, 2011.

**Robert I. Cusick,**

*Director, Office of Government Ethics.*

[FR Doc. 2011–6335 Filed 3–17–11; 8:45 am]

**BILLING CODE 6727–01–P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 1150

**[Docket No. DA–08–07: AMS–DA–08–0050]**

**RIN 0581–AC87**

### National Dairy Promotion and Research Program; Final Rule on Amendments to the Order

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

**ACTION:** Final rule.

**SUMMARY:** This document implements amendments to the Dairy Promotion and Research Order (Order). This action is pursuant to the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) and the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill). The 2002 Farm Bill mandates that the Order be amended to implement an assessment on imported dairy products to fund promotion and research and to add importer representation, initially two members, to the National Dairy Promotion and Research Board (Board). The 2008 Farm Bill specifies a mandatory assessment rate of 7.5 cents per hundredweight of milk, or equivalent thereof, on dairy products imported into the United States. This final rule, in accordance with the 2008 Farm Bill, also amends the term "United States" in the Dairy Production Stabilization Act of 1983 (Act) to mean all States, the District of Columbia, and the Commonwealth of Puerto Rico. Producers in these areas will be assessed 15 cents per hundredweight for all milk produced and marketed.

**DATES:** *Effective Dates:* These amendments are effective April 1, 2011 except for § 1150.152(b) which is effective August 1, 2011.

**FOR FURTHER INFORMATION CONTACT:** Whitney Rick, USDA, AMS, Dairy Programs, Promotion and Research Branch, Stop 0233–Room 2958–S, 1400 Independence Avenue, SW., Washington, DC 20250–0233, (202) 720–6909, *Whitney.Rick@ams.usda.gov.*

**SUPPLEMENTARY INFORMATION:** This final rule is being issued pursuant to the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4501–4514), Public Law 98–180, enacted November 29, 1983, as amended May 13, 2002, by Public Law

107–171 and further amended June 18, 2008, by Public Law 110–246. Prior Documents in this proceeding: Proposed Rule and Opportunity to File Comments, Including Written Exceptions, on Proposed Amendments to the Order: Issued May 12, 2009; published May 19, 2009 (74 FR 23359).

**Executive Orders 12866 and 13563**

This rule has been determined to be significant pursuant to Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. The updated cost-benefit analysis for this final rule is available at *http://www.ams.usda.gov/dairyimportassessment.*

A requirement of 7 U.S.C. 4514 and 6407 requires the U.S. Department of Agriculture to conduct an independent analysis of the dairy checkoff programs. The independent analysis, conducted by Cornell University, has consistently shown that the program has had a positive and statistically significant impact on per capita dairy consumption. Specifically, generic advertising and promotion of dairy products increases both the quantities consumed and prices. For 2008, it was estimated the farm milk price was $0.21 to $0.26 per hundredweight higher and the quantity demanded was 2.3 percent higher because of the program. Results from this analysis show that the average Benefit-Cost Ratios for the Dairy Program was 5.49 (nonfat solids basis) and 7.07 (milk fat basis) from 1998 through 2008. This means that each dollar invested in generic dairy marketing by dairy farmers during the period would return between $5.49 and $7.07, on average, in net revenue to farmers. Additionally, the Report to Congress estimates the elasticity of advertising to be .034 on a nonfat basis and 0.027 on a fat basis. For further details, see *http://www.ams.usda.gov/AMSv1.0/FindaReporttoCongress.*

Assessments to U.S. dairy producers under the Order are relatively small compared to producer revenue. If dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico had paid assessments of $0.15 per hundredweight of milk marketed in 2008, it is estimated that $1.1 million would have been paid. This is about 0.5 percent of the $195 million total value of milk produced and marketed in these areas.

The total of assessments collected from importers under the National Dairy Promotion and Research Program are expected to be relatively small compared to the value of dairy imports. If importers had been assessed $0.075 per hundredweight, or equivalent thereof, for imported dairy products in 2008 as specified in this rule, it is estimated that about $4.9 million would have been paid. This is about 0.2 percent of the $2.6 billion value of the dairy products imported in 2008.

Examination of import volumes for 2008 indicates that tariff rate quotas (TRQs) constrain dairy imports in varying degrees. TRQs do not seem to be a significant hindrance to the volume imported for many dairy products. Significant quantities of dairy products imported are not subject to TRQs.

The U.S. Dairy Export Council, a subsidiary of the Board, directs a global ingredients program and promotes dairy ingredients domestically and U.S. dairy ingredients internationally. Through importer representation on the Board and possible establishment of qualified dairy product promotion, research, or nutrition education programs (qualified programs) by importers, imported products could be promoted to a greater extent than under the current program.

**Civil Rights Analysis**

The potential civil rights implications of this rule on affected parties have been considered to ensure that no person or group shall be discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This review included persons that are employees of the entities that are subject to these regulations. This final rule does not require affected entities to relocate or alter their operations in ways that could adversely affect such persons or groups. Moreover, the amendments would not exclude from participation any persons or groups, deny any persons or groups the benefits of the program, or subject any persons or groups to discrimination.

**Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not intended to have a retroactive effect. Section 4512(a) of the Act provides that nothing in the National Dairy Promotion and Research Program (National Program) may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

The Dairy Production Stabilization Act of 1983 (Act) authorizes the National Program. The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 4509 of the Act, any person subject to the 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 the Order or to be exempted from the Order. A person subject to an Order 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 person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

**Executive Order 13175**

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

**Executive Order 13132**

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. USDA has determined that this final rule conforms with the Federalism principles set forth in the Executive Order, and that this final rule does not have Federalism implications.

**Regulatory Flexibility Act**

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this final rule will not have a significant economic impact on a substantial number of small entities. The purpose of the Regulatory Flexibility Act is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

The Dairy Production Stabilization Act of 1983 authorizes a national program for dairy product promotion, research and nutrition education. Congress found that it is in the public interest to authorize the establishment of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace

and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

As directed by the 2008 Farm Bill, approximately 360 producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico will become subject to the provisions of the Order as of the effective date of this final rule. The Small Business Administration [13 CFR 121.201] defines small dairy producers as those having annual receipts of not more than $750,000 annually. Most of the producers who will become subject to the provisions of the Order are considered small entities.

Assessments to dairy producers under the Order are relatively small compared to producer revenue. If dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico had paid assessments of $0.15 per hundredweight of milk marketed in 2008, it is estimated that $1.1 million would have been paid. This is about 0.5 percent of the $195 million total value of milk produced and marketed in these areas.

The assessment for dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico will be collected by persons who pay the producers for milk produced and marketed, and the money will be remitted to the Board.[1] These responsible persons, usually milk handlers, incur the costs of calculating the assessment due from each dairy producer; forwarding a form monthly to the Board; and sending checks or other negotiable instruments of legal tender to the Board and designated qualified programs. The responsible persons maintain any records that are necessary to account for the collection of the 15-cent assessment. Books and records for producers and persons collecting assessments subject to the Order shall be maintained for two years beyond the fiscal period of their applicability. These books and records would be made available to employees or agents of the Board or the Department for inspection during normal business hours if necessary for verification purposes.

For the purpose of the Regulatory Flexibility Act, a dairy products manufacturer is a small business if it has fewer than 500 employees. For purposes of determining a milk handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant is considered a large business even if the local plant has fewer than 500 employees. While the number of anticipated responsible persons collecting assessments under the Order in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico are not known, it is expected that most would be considered small businesses.

According to U.S. Customs and Border Protection (CBP), there were about 3,000 importers of dairy products listed in § 1150.152 (b) in 2007 and 2008. Although data is not available concerning the sizes of these firms, it is reasonable to assume that most of them would be considered small businesses. Although many types of businesses import dairy products, the most common classification for dairy product importers is Grocery and Related Product Merchant Wholesalers (North American Industry Classification System, category 4244). The Small Business Administration [13 CFR 121.201] defines such entities with fewer than 100 employees as small businesses. According to 2006 statistical data from the U.S. Census Bureau, 95.2 percent of these types of businesses had fewer than 100 employees (*http://www.census.gov/econ/susb/*).

This final rule imposes minimal reporting and recordkeeping requirements on importers subject to the Order. Books and records for importers subject to the Order shall be maintained for two years beyond the calendar year in which the import occurs. These books and records would be made available only to the Secretary for inspection during normal business hours if necessary for verification purposes. The proposed rule would have required importers subject to the Order to make books and records available to the Board, but this will not be required as a result of changes in this final rule. This rule requires importers to calculate assessments due based upon documentation concerning the cow's milk solids content of the imported products. Products shall be assessed at the rate of $0.01327 per kilogram of cow's milk solids.

In many cases, the importer would have this documentation on hand as part of normal business practice. Importers must maintain books and records sufficient to verify that products have been properly classified according to the Harmonized Tariff Schedule (HTS). For some HTS codes, this includes books and records indicating that the milk solids content falls within a certain range. Default assessment rates listed in the proposed rule are eliminated in this final rule.

Assessments to importers under the Order are expected to be relatively small compared to the value of dairy imports. If importers had been assessed $0.075 per hundredweight of milk, or equivalent thereof, on imported dairy products in 2008, as specified in this rule, it is estimated that about $4.9 million would have been paid. This is about 0.2 percent of the $2.6 billion value of the imported dairy products.

This final rule provides for organizations that conduct qualified programs to receive assessment funds as designated by individual importers. Additionally, this final rule includes a provision that permits importers and organizations of importers, as approved by the Secretary, to nominate importer representatives to the Board. Such organizations would generally consist of importers who are considered mostly small entities.

**Paperwork Reduction Act**

Information collection requirements and recordkeeping provisions contained in 7 CFR part 1150 have been previously approved by the Office of Management and Budget and assigned OMB Control Number 0581–0093 under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Section 1601 of the 2002 Farm Bill (Pub. L. 107–171) and section 1601 of the 2008 Farm Bill (Pub. L. 110–246) exempt this rule from the Paperwork Reduction Act. Although exempted, the requirements of the Paperwork Reduction Act were considered in developing the provisions of this final rule. The information collection requirements are minimal but essential to carry out the intent of the Dairy Production Stabilization Act of 1983. The final amended Order provisions have been carefully reviewed and every effort has been made to minimize recordkeeping costs or requirements.

Under the final amended Order provisions, importers will be responsible to pay assessments. CBP will serve as the collecting agent for assessments on imported dairy products and will remit the assessments to the Board. Importers will be required to provide records to the Secretary on occasions when additional information is needed as evidence of compliance, or in cases when the importer seeks a reimbursement of assessments. Such records must be retained for at least two years beyond the calendar year of their applicability.

Additionally, each person making payment to a producer for milk produced in the United States and marketed for commercial use collects an assessment for all such milk handled.

[1] Any producer that sells milk directly to consumers shall remit the assessment directly to the Board.

These responsible persons calculate the assessments due from each dairy producer. Under the final amended Order provisions, responsible persons making payments to dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico will be required to collect and remit assessments and file reports with the Board. The Order imposes certain recordkeeping requirements on responsible persons; however, information required under the Order could be compiled from currently maintained records. Any producer marketing milk of that producer's own production directly to consumers is a responsible person. Such records must be retained for at least two years beyond the calendar year of their applicability.

The forms by which producer information is to be collected require the minimum information necessary to effectively carry out the requirements of the Order. There are no training requirements for individuals filling out reports and remitting assessments to the Board. The forms are designed to be simple and easy to understand, placing as small a burden as possible on the persons required to file the information.

The timing and frequency of collecting information are intended to meet the needs of the National Program while minimizing the amount of work necessary to fill out the required reports. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers and responsible persons who are subject to the provisions of the Order. Therefore, there is no practical method for collecting the required producer information without the use of these forms.

The assessment places a minimal burden on newly regulated producers or importers who seek to direct monies to qualified programs. The amount of time required to designate to a qualified program is estimated to be 15 minutes to prepare a written request. Qualified programs are certified by the Secretary to receive assessment money from producers and importers for the purpose of promoting dairy products.

The amended Order provisions would place a minimal burden on newly regulated producers or importers who seek nomination to serve on the Board. Importers and producers would be required to complete a background information form for submission to the Secretary. The estimated time for completing the form is 30 minutes, which includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the form. Additionally, there would be minimal burden on importer organizations that voluntarily request to be approved by the Secretary to participate in the National Program by making nominations to the Board. The estimated time for reporting this is 30 minutes.

Currently, a producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) certificate and thus only produces products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, shall be exempt from the payment of assessments. The final rule provides that an importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation, would likewise be exempt from the payment of assessments. The Order places a minimal burden on a producer or importer applying for such an exemption. The producer or importer must provide a request to the Board, on a form provided by the Board, at any time initially and annually thereafter. The documentation is the same for importers as for producers.

In addition, there are some requirements for information from importers that are occasional. For example, if an importer files for reimbursement or applies for reimbursement of assessments from the Secretary for an overpayment, circumstances dictate the time that it would take for the importer to gather the information necessary to make the claim. Assembling and transmitting the necessary documentation to the Secretary would place a minimal burden on importers.

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

**Background**

The Dairy Production Stabilization Act of 1983 (Act) authorizes the Order for dairy product promotion, research, and nutrition education as part of a comprehensive strategy to increase human consumption of milk and dairy products and to reduce milk surpluses. The National Program functions to strengthen the dairy industry's position in the marketplace by maintaining and expanding domestic and foreign consumption of fluid milk and dairy products.

Section 1505 of the 2002 Farm Bill requires that the Order be amended to implement a mandatory assessment on dairy products imported into the United States and that the assessment be submitted to CBP at the time entry documents are filed.

Section 1507 of the 2008 Farm Bill amended the term "United States" in section 4502(1) of the Act to mean all of the States, the District of Columbia, and the Commonwealth of Puerto Rico. This amendment requires that Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico be added to the existing regions of the Board and that producers in these areas be assessed 15 cents per hundredweight on all milk produced and marketed commercially.

Section 10607 of the 2002 Farm Bill provides for an exemption from payment of assessments by organic milk producers and importers of organic dairy products. Section 1150.157 of the Order currently provides the specific requirements necessary for producers to receive the exemption. *See* 70 FR 2744 for a complete discussion of implementation of the provisions of section 10607 of the 2002 Farm Bill as it relates to promotion and research programs for other agricultural commodities. The same reasoning in 70 FR 2744 is applied in this final rule and, accordingly, provides for an exemption for dairy importers.

A producer that operates under an approved National Organic Program (NOP) (7 CFR part 205) certificate and thus only produces products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, would be exempt from the payment of assessments. An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205), and is not a split operation, also would be exempt from the payment of assessments. To receive the exemption, producers and importers of products labeled as 100 percent organic, and who do not produce or market any non-organic products, would provide a request to the Board, on a form provided by the Board, at any time initially and annually thereafter.

Additionally, the 2002 Farm Bill amendments authorize importers to have representation on the Board. Initially, importers are required to be represented by two importers appointed by the Secretary. Thereafter, importer representation on the Board will be adjusted at least once every three years, if necessary, to reflect the volume of imports relative to domestic production of milk. The amendments also specify

that importer assessments may not be used for foreign market promotion and that they be implemented in a manner consistent with United States trade obligations.

The 2002 Farm Bill specifies that the assessment be 15 cents per hundredweight, or equivalent thereof, on dairy products imported into the United States. However, this rate was changed with the 2008 Farm Bill; section 1507 specifies that the assessment will be 7.5 cents per hundredweight of milk, or the equivalent thereof. The assessment is equivalent to one-half the payment domestic dairy farmers are required to remit.

Finally, the 2002 Farm Bill amended the policy statement in the Act to make it clear that the purpose of the program is to expand the consumption of dairy products, whether produced domestically or imported. A program that promotes the substitution of a dairy product from one source with a dairy product from another source would not be consistent with this policy. Likewise, the Board and the Department will consider carefully whether any brand advertising or promotion would have a detrimental effect on other brands of dairy products before giving approval. No program would be approved if it would negatively affect similar domestic or imported dairy products.

Subtitle F of Title 1 of the 2002 Farm Bill at section 1601 and Subtitle F of Title 1 of the 2008 Farm Bill at section 1601 provide for the implementation timeframe and the promulgation of these regulations without regard to the Paperwork Reduction Act (44 U.S.C. chapter 35); the Statement of the Policy of the Secretary of Agriculture, effective July 24, 1971 (36 FR 13804); and the notice and comment provisions of section 533 of Title 5, United States Code. However, due to the interest of affected parties, a proposed rule was published in the **Federal Register** [74 FR 3359] on May 19, 2009, inviting comments. Interested parties were provided 30 days to comment on the proposed amendments.

The Department received 189 comments from individuals, trade organizations, importer organizations, domestic dairy producers, domestic and foreign dairy cooperatives, foreign governments, domestic and foreign dairy companies, a foreign dairy promotion board, State governments, attorneys, and international trading companies. The issues raised in the comments that resulted in the greatest changes from the proposed rule concerned the use of default assessment rates and concerns over confidentiality and business information associated with compliance, enforcement, and recordkeeping. Other provisions changed or clarified in the final rule relate to milk solids content; Harmonized Tariff Schedule codes; qualified programs; referendum provisions; organic exemptions; duties of the board; and definitions of CBP, importer, and qualified programs.

The 2002 Farm Bill mandates that the import assessment be implemented in a manner consistent with United States trade obligations. USDA has consulted with the Office of the United States Trade Representative to ensure that this final rule is consistent with the international trade obligations of the Federal Government.

**Summary of Comments and Changes From the Proposed Rule**

*Default Assessment Rates*

Under the proposed rule, an importer with adequate documentation concerning the milk solids content of an imported dairy product would pay an assessment based upon milk solids content. Further, the proposed rule stated that an importer without adequate documentation concerning the milk solids content of an imported dairy product would pay a default assessment rate per HTS code. For most products, the default assessment rate for each HTS code would have been based upon estimated maximum milk solids content.

Several commenters objected to the proposal to set default rates at the maximum milk solids content for most products. The commenters argued that this would be unequal treatment for importers in comparison to domestic producers. The Department does not agree with the commenters' unequal treatment assertions. However, the Department has determined that in order to provide one clear and consistent method for importers to calculate the assessment, to simplify program administration, and to best effectuate the purposes of the Act, default assessment rates should not be included in the Order provisions. Accordingly, importers will be required to pay based upon cow's milk solids content of imported dairy products.

Since the mandatory 7.5-cents assessment is per one hundred pounds of milk, this final rule applies a standard rate of assessment per unit of milk solids. On average during the period January 2006 through December 2007, a hundredweight of U.S. producer milk contained 12.45 pounds of milk solids (3.68 percent butterfat and 8.77 percent nonfat milk solids). Since the assessment rate stated in the 2008 Farm Bill is 7.5 cents per hundredweight of milk or its equivalent, this final rule establishes the assessment rate per volume of imported milk solids as $0.00602 per pound ($0.075/12.45 pounds) or $0.01327 per kg (1 kg = 2.204623 pounds.) This rate shall be applied to the cow's milk solids content for any imported product listed in the table displayed in section 1150.152(b)(1).

Several commenters also indicated that in some cases it is overly burdensome for the importer to obtain documentation concerning the milk solids content of the imported dairy products. The Department disagrees with these comments. Where documentation of cow's milk solids content is not presently available, the importer could ask the seller or manufacturer to provide such information. Cow's milk solids product content could be communicated to the importer through an invoice, packing slip, bill of lading, laboratory test results, a letter from the manufacturer on the manufacturer's letterhead, or similar documents.

*Compliance and Enforcement*

Several commenters recommended that the final rule be amended to include provisions restricting access to confidential business information provided in connection with import assessments. As proposed, the rule gave the Board the discretion to verify milk solids content reported by importers to the CBP to determine if additional money is due the Board or if an amount is due to an importer. The commenters noted that the verification of milk solids content of some products requires more specific information on product composition than is currently required under applicable labeling and import regulations. Specifically, one commenter noted that verifying the calculation of the milk solids content of a particular product requires revealing the exact proportion of constituent components of that product, and as such, verification reports are likely to contain confidential, proprietary, and commercially sensitive data. In light of this, this section is modified to require the Secretary, not the Board, to verify information reported by importers.

Section 1150.171(b) of the proposed rule would require importers of dairy products to submit reports as requested by the Board or the Department as necessary to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of

the imported dairy products pursuant to § 1150.152(b). The proposed rule indicated that each importer of dairy products shall maintain and make available for inspection by employees of the Board and the Secretary such books and records to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of the import dairy products. As noted in the earlier discussion regarding provisions restricting access to confidential business information provided in connection with import assessments, these sections are hereby modified so that only the Secretary has access to confidential information. With this rule, CBP shall forward assessments directly to the Board. CBP shall provide information concerning the payments of individual importers to USDA instead of the Board. Additionally, each importer of dairy products shall maintain and make available for inspection by the Secretary, not the Board, such books and records as needed to verify provisions pursuant to § 1150.152(b) have been carried out correctly.

*Costs and Benefits; National Treatment; and U.S. Trade Obligations*

Several commenters argued that import assessments would amount to unfair treatment because some imported products will not benefit to the same extent as others. While not all imported dairy products are promoted, or receive little promotion, the same situation similarly exists with domestic dairy production; the Board does not specifically promote all dairy products. This is evidenced in the cost-benefit analysis, noting that the Board does not specifically advertise or promote ice cream, even though dairy farmers pay a 15-cent per hundredweight assessment for milk used in the production of ice cream. Other examples would be food preparations, infant formula, and milk chocolate, all of which contain dairy products. Thus, the import assessment will be collected on all specified imported dairy products and imported products containing cow's milk solids, whether or not the Board chooses to promote such products. The National Program provides benefits relative to all dairy products, whether or not they are specifically promoted. With increased dairy consumption, the market for milk solids tightens. Prices are higher for the entire array of products that contain milk solids, both domestic and imported. Even products that are not directly promoted through the National Program receive this benefit.

It is important to note that not all domestic producers or importers would receive benefits equally. Some importers may benefit more than others due to the portfolio of dairy products promoted by the Board. An equivalent case can be made for domestic dairy producers. A dairy producer in a region with high cheese production may benefit from cheese promotions more than a dairy producer in a low cheese production area. Some commenters argued that dairy producers would receive equal benefits from the National Program because most of the milk is pooled under the Federal milk marketing order system or a similar State program. However, the Federal milk marketing order system and similar State programs do not cover all milk marketed and do not set the prices that dairy producers receive; rather, they require handlers to pay minimum prices. Handlers may, and often do, pay producers or their cooperative more than minimum prices required by the pools. Furthermore, pools in different regions of the country vary in milk utilization, and thus minimum prices required by the pools may reflect different levels of benefits from the National Program.

One commenter noted that the current dairy promotion program primarily promotes fluid milk sales, and to a lesser degree, sales of American-style cheeses. The commenter also stated that the U.S. does not import fluid milk from Mexico, and that Mexican-style cheese imported into the U.S. is far different than American-style cheeses. To that end, the commenter noted that imports of dairy products from Mexico are primarily specialized proteins (and specialty cheese) which are mainly used in food products that are not dairy products and that the current promotion program would not benefit them or the products they import. Similarly, another commenter noted that a large proportion of imported dairy products into the U.S. are ingredients with a variety of applications, some dairy and some non-dairy in nature. It was argued that these imported ingredients will not benefit from the promotion program, particularly when used in non-dairy products.

With respect to the aforementioned comments, and as correctly noted by one of the commenters, domestic producers are assessed per hundredweight on all milk produced and marketed commercially, and the disposition or final usage of the raw milk is not a fact in determining the assessment. Likewise, the Farm Bills require an assessment on imported dairy products, regardless of the final disposition of the product or usage. Additionally, contrary to the comments provided by some commenters; the current National Program does promote dairy ingredients by marketing dairy ingredient benefits to food and beverage manufacturers and to help launch new or improved products. The National Program offers a variety of insights on ingredient marketing, nutrition, processing and testing. In 2008, the National Program spent approximately $4.9 million on ingredient research and promotion. Furthermore, importers would benefit from potentially higher prices. Also, with the changes to the provision of the Order made by this final rule, imported dairy products and ingredients could be promoted to a greater extent than with the current National Program.

Several commenters also indicated that 2007, the year considered by the cost-benefit analysis for the proposed rule, was an anomalous year. Had data from other years been examined, the commenters indicated the Department would have observed that Tariff Rate Quotas (TRQs) would have been of a greater restraint. For the final rule, the cost-benefit analysis has been updated based upon data from 2008. Similarly, the Department found that TRQs seem to constrain dairy imports in varying degrees for some products, but not for others.

With respect to TRQs, one commenter proposed that importers be refunded for any year in which the TRQ fill rate for a particular product exceeds 85 percent. At this level, the commenter asserted that imports are constrained, limiting the benefits of the National Program. It is important to note that TRQs are rarely 100-percent filled due to licensing requirements of imported dairy products. However, the fact that a TRQ is filled or nearly filled is not a clear indication that importers do not receive benefits from the National Program. It is reasonable to conclude that some TRQs would have had lesser fill rates without the National Program. Furthermore, importers potentially benefit from the generally higher prices brought about by the National Program. For these reasons, the commenter's proposal is not adopted.

In varying degrees of detail, several opponents of the proposed rule claimed that implementation of an assessment on imported dairy products would be a potential violation of the national treatment obligations under the World Trade Organization (WTO). Opponents of the import assessment asserted several reasons, including several references to potential violations of the General Agreement on Trade and Tariffs (GATT). As required by Section 4503(d)

of the Act, the Secretary has consulted with the Office of the United States Trade Representative (USTR) to ensure that the Order is implemented in a manner consistent with the international trade obligations of the Federal Government.

*Neutral Promotion of Dairy Products With Respect to Origin*

With the passage of the 2002 Farm Bill, the policy statement in the Act was amended to make it clear that the purpose of the National Program is to expand the consumption of dairy products, whether produced domestically or imported. A program that promotes the substitution of a dairy product from one source with a dairy product from another source for consumption in the U.S. market is not consistent with this policy. Several commenters suggested that the proposed changes only generally remove the requirement that programs promote products of the United States, but indicated the changes are not sufficiently clear that going forward that they must be neutral with respect to country of origin. Additionally, the commenters suggested that the Board and Dairy Management Inc. (DMI), the staffing and management organization for the National Program, would have to ensure that any of its activities, including salaries and expenses from conducting export promotion marketing or coordination and management of export promotion, that are funded all or in-part by the Board would be neutral with respect to State or country of origin, including any promotion tools. Further, the commenters suggested that the Order require AMS to certify the neutrality of all policies and activities of the National Program prior to the distribution of any importer assessment monies to the Board. Several commenters also raised concerns that the "Real Seal" and other programs that are only available to domestic products, if not eliminated or completely revised, would, in their view, adversely affect conditions of competition for imports, thereby potentially violating GATT Article III:4.

AMS provides the day-to-day oversight for all activities related to the National Program. AMS oversight activities include reviewing and approving DMI and the Board's budgets, budget amendments, contracts, advertising campaigns, investment plans, and all materials developed for public distribution. Additionally, AMS ensures that all expenditure of promotion funds is consistent with the Act and the Order, and the Agency's other responsibilities relate to nominating and appointing Board members, amending the orders, conducting referenda, and conducting periodic program audits. Further, AMS representatives attend full Board meetings, committee meetings, and other staff and member meetings of consequence to the National Program. Given AMS's extensive oversight activity and policies relating to program review, it is neither necessary nor appropriate to implement additional provisions at this time to ensure appropriate expenditure of funds with respect to neutrality. Additionally, as of the effective date of these amendments, all of the National Program's activities will be consistent with respect to neutrality and country of origin. Several commenters accurately noted that by striking the words "produced in the United States" from the definition of milk, programs like the "Real Seal" and "3-A-Day" partners, and promotional offers will become available to international dairy brands and importers. Such programs will no longer be allowed to refer specifically to domestically produced dairy products if funded by the Board. Also research carried out with assessment funds would be available to all of the importers subject to the assessment.

Additionally, commenters raised concerns about other specific National Program activities, such as the promotion of American artisanal cheese and "The New Look of School Milk" program. As of the effective date of these amendments, all of these activities must comply with the new policy statement with respect to neutrality and country of origin.

Separately, several commenters raised the concern of whether or not the prohibitions and restrictions with respect to neutrality apply to qualified programs and the promotion of State brands. Section 4512(a) of the Act (Administrative Provisions) states "Nothing in this subchapter may be construed to preempt or supersede any other program relating to dairy product promotion organized and adopted under the laws of the United States or any State." This statutory policy provides qualified programs with as much freedom to continue their present operation and is consistent with a coordinated effort. As such, the policy is retained and qualified programs may continue to promote State brands. Research has shown that promotion of State brands, to the extent they reflect a type of brand, can increase dairy category sales and is consistent with the intent of the Act to raise the demand and consumption for dairy products generally. Review and/or approval authority of the Board and the Department regarding branded advertising or promotion by qualified State or regional programs will remain as it presently exists and is not modified under this proceeding. Several commenters questioned whether this proceeding would impact the ability of qualified programs to build demand for locally produced milk and dairy products; it does not. Similarly, this does not impact the ability of importer qualified programs to build demand for imported dairy products.

One commenter questioned whether the provision striking the use of the words "produced in the United States" was contrary to the recently implemented Country of Origin Labeling (COOL) legislation (7 U.S.C. 1638–1638d). COOL provisions require certain food retailers (supermarkets and grocery stores) to provide additional information (country of origin information) to consumers on specific food items at the point of purchase. COOL does not apply to dairy products. The COOL program is not related to this proceeding and there are no applicable provisions or requirements that overlap with this final rule.

*Export and Foreign Market Promotion*

As provided in the 2008 Farm Bill, the Board's budget may provide for the expenditure of revenues available to the Board to develop international markets for, and to promote within such markets, the consumption of dairy products produced or manufactured in the United States through 2012. Several commenters questioned how importers would be assured that their assessments would not be used to fund development of foreign markets for U.S. products. Commenters also suggested that allowing up to 100 percent of domestic producer assessments to go into export promotion could result in allowing import assessments to pay more than their "share" of domestic promotion thereby subsidizing the export promotion activities. They also noted that if uncapped levels of domestic assessments are allowed to go into export promotion, import assessments could fund a disproportionate share, up to 100 percent, of the domestic program and therefore, underwrite the domestic gains to producers.

Accordingly, some commenters proposed that USDA should track imported dairy products on a milk equivalent basis as a percentage of domestic commercial disappearance. The commenters noted that if imports are 5 percent of the domestic market, for instance, then the Board must fund 95 percent of domestic promotion from

U.S. dairy producers. Other commenters suggested that the Order should state that the funds for foreign market promotion in any year cannot exceed the level of the year prior to the beginning of import assessments, plus the level of increase in producer checkoff contribution in the previous year. These proposals are not adopted because the Act specifically states that the Order shall provide the authority for the Board to expend in the maintenance and expansion of foreign markets an amount not to exceed the amount collected from the United States producers for a fiscal year. Dairy product market share is not the authorized measure in determining the amount of the Board's expenditure on export and foreign market promotion.

Section 4501(b) of the Act states that domestic promotion under the National Program must include imported dairy products, and section 4504(e)(2) of the Act states that with respect to foreign market efforts, "* * * the Board's budget may provide for the expenditure of revenues available to the Board to develop international markets for, and to promote within such markets, the consumption of dairy products produced or manufactured in the United States." For clarification, with this final rule, section 1150.140(n) has been expanded to indicate that the duties of the Board are to encourage the coordination of programs of promotion, research, and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand: (1) Domestic markets and domestic uses for fluid milk and dairy products produced in the United States or imported into the United States; and (2) foreign markets and foreign uses for fluid milk and dairy products produced in the United States.

Notwithstanding the aforementioned, the USDA Report to Congress as required in section 4514(4) of the Act must provide an accounting for the receipt and disbursement of all funds received by the Board. This includes funds received from importers. AMS will require the Board to provide an accounting and evaluation of all activities targeted at the promotion of imported dairy products to be included in its annual Report to Congress.

*Products To Be Assessed*

Commenters argued that the proposed rule included assessments on products that fall outside the scope of accepted international definitions for dairy products. Several commenters suggested limiting the number of products to be assessed to those in Chapter 4 of the HTS, referring to the Explanatory Notes (ENs) for the definitions in the "General" section for Chapter 4.[2] The Department does not agree that the ENs define dairy products, but rather they simply define the products that are to be covered under Chapter 4. One commenter indicated that the only products that should be included are those that would be defined as a milk product or a composite milk product under Codex Alimentarius standards. The Codex Alimentarius Commission was established in 1963 to reduce trade barriers and facilitate trade in safe foods of a defined quality. The WTO utilizes the Codex standards with the goals of formulating and harmonizing international food standards, ensuring their global compliance, and resolving trade disputes. The Codex milk and milk product standards cover a number of dairy products, including but not limited to butter, milkfat products, evaporated milk, condensed milk, edible casein products, milk powders, dairy fat spreads, whey cheeses, processed cheeses, and numerous varieties of natural cheeses. However, the definitions of "milk and milk products" in the Codex standards are not germane to the definition of "dairy products" in the final rule as these products will be assessed consistent with the definition of dairy products as defined by the Act. Therefore, this suggestion also is not adopted.

In this final rule, 265 of the 266 HTS codes listed in section 1150.152(b) of the proposed rule are adopted. HTS code number 1901.90.9082 is for corn-soya milk blends that do not contain over 5.5 percent by weight of butterfat and are not considered dairy products as described in additional note 1 to Chapter 4 of the HTS. After consultation with CBP, it is concluded that products imported under this HTS code would not likely contain milk solids. Accordingly, products imported under this HTS code are not included in the import assessment.

*Proposal for Payments To Be Remitted to USDA*

Several interested parties suggested alternatives that would require import assessments first to be remitted to the Department rather than to the Board after submission to CBP. These alternatives are not adopted. Section 4504(g)(6)(A) of the Act specifically states that the order shall provide that each importer of imported dairy products shall pay an assessment to the Board in the manner prescribed by the Order.

*Establishment and Membership/Term of Office*

The Order is administered by a 36-member Board appointed by the Secretary representing 13 geographic regions of the United States. In order to complement the current geographical make up of the existing regions, the proposed rule indicated that each of the four new jurisdictions be added to the region of closest geographic proximity. No comments were received in opposition to this proposal, and it is adopted as proposed.

Therefore, Alaska is added to Region 1, currently comprised of Oregon and Washington; Hawaii is added to Region 2, currently California; and the District of Columbia and the Commonwealth of Puerto Rico are added to Region 10, currently comprised of Florida, Georgia, North Carolina, South Carolina and Virginia. Each person making payment to a producer in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico for milk produced and marketed for commercial use, is required to collect an assessment on all milk handled for the account of the producer at the rate of 15 cents per hundredweight and must remit the assessment to the Board. Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, must remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight. Each person responsible for the remittance of the assessment for milk marketings from producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico must remit to the Board not later than the last day of the month following the month in which the milk was marketed.

Several interested parties raised concern regarding proposed importer representation on the Board. In accordance with the Act, the proposed rule indicates that importers will initially be represented by two importer representatives. Assessments collected from importers will be held in escrow until importer representatives are appointed. The interested parties proposed that the Order should provide for permanent representation of at least two importers or importer representatives on the Board. This proposal is not adopted. The 2002 Farm

[2] In understanding the language of the HTS, ENs, which are drafted by the World Customs Organization, may be utilized. Although not dispositive, ENs provide a commentary on the scope of each heading of the HTS, and are the official interpretation of the Harmonized System at the international level. (See the U.S. Treasury decision number 80 from 1989, 54 FR 35127, 35128, August 23, 1989).

Bill specifies that the Secretary shall review once every three years the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years. On the basis of the review, the Secretary shall reapportion the importer representation on the Board to reflect the proportional share of the U.S. market by domestic production and imported dairy products. As noted in the proposed rule, in order to provide a basis for comparison of domestic production of dairy products to imported products, estimated total milk solids will be used. Statistics for total milk solids of domestic dairy products are published annually by USDA National Agricultural Statistics Service. The calculation of total milk solids for imported products for reapportionment purposes would be the same as the calculation of total milk solids for assessment purposes.

In response to commenter's requests for specific information regarding importer representation and appointment to the Board, the Secretary will issue a separate notice in the **Federal Register** and a news release seeking nominations for importer representatives to the Board at a future date to be determined. The Secretary will appoint two individuals from those nominated to serve as the initial importer representatives on the Board. In order to properly stagger the two terms, the importer representative terms of office dates [Section 1150.132(a)(2)] are modified and one importer representative will serve a term ending October 31, 2013, and one importer representative will serve a term ending October 31, 2014.

Importer nominations may be submitted by individual importers of dairy products and by organizations representing dairy importers, as approved by the Secretary. Nominees must be importers of dairy products and subject to the assessment to fund the National Program. The primary considerations in determining if organizations adequately represent importers of dairy products shall be whether its membership consists primarily of importers of dairy products and whether a substantial interest of the organization is in the importation of dairy products and the promotion of the nutritional attributes of dairy products. Individual importers submitting nominations to represent importers on the Board must establish, to the satisfaction of the Secretary that the person submitting the nomination is an importer of dairy products. Approval of importers and organizations representing importers will occur in a manner prescribed by the Secretary. An importer means a person that imports dairy products into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles dairy products outside of the United States for sale in the United States, and who is listed as the importer of record for such dairy products.

Several interested parties also raised concerns regarding sufficient importer representation on the Board's Executive Committee. The Board's current Executive Committee is comprised of all members of the Board. Section 1150.140(b) of this rule specifically provides that the Board's Executive Committee be comprised of membership that equally reflect each of the different geographic regions in the United States in which milk is produced and importer representation on the Board. Accordingly, this provision is made final without modifications.

One commenter questioned importer representation of two seats on the Board, citing that domestic producers in regions 1, 8, 10, and 13 collectively represent a significant number of producers and production and accordingly are afforded only one seat. The Act and the Order are clear with respect to the formulas used to determine the number of members from each region of the Board. The number of members for each region on the Board is determined by dividing the total pounds of milk produced in the United States for the calendar year previous to the date of review by 36, which provides a factor of pound of milk per member, and then dividing the total pounds of milk for each region by such factor. With respect to importer representation, the law states clearly that importers initially shall be represented by two members.

Several commenters requested additional information and guidance as to how decisions are made by the Board or how conflicts are resolved with respect to conflicting promotions. Currently, joint committees of the Board are responsible for setting program priorities, planning activities and projects, and evaluating results. With respect to decisions, the Board's current by-laws state that any action of the Board requires the concurring votes of at least a majority of those present and voting. Importer representatives on the Board will take part in this process upon appointment.

*Importer Contributions to Qualified Programs*

Several interested parties recommended that USDA hold in escrow any funds earmarked by an importer for contribution to a qualified program until importer programs are qualified by the Secretary. Further, several commenters noted that the proposed rule does not specify how assessments above the 5 cents are to be directed if a qualified program is not designated. Commenters also noted that the purposes of the rule would be best met if the qualified portion were held until it could be disbursed pro rata to all qualified programs relating to imported products.

Currently, if a producer does not designate or if the producer's paying handler does not establish that producer's participation in a qualified program, the full assessment is remitted to the Board. Similarly, if an importer does not designate or if participation in a qualified program is not established, the Board would retain the full assessment. Accordingly, the commenters' suggested alternative provisions to hold the qualified programs' portion relating to imported products and disburse pro rata, or until an importer qualified program is established, would not be appropriate and are not adopted.

The proposed rule stated that importers will be required to submit 7.5 cents per hundredweight of milk, or equivalent thereof, on imported dairy products to the Board, of which an importer may direct the Board to forward up to 2.5 cents per hundredweight of milk, or equivalent thereof, to a qualified program. Commenters stated that domestic milk producers are required to send only one-third of their assessment to the Board, whereas importers would be required to contribute two-thirds of their assessment to the Board. The commenters also suggested that as proposed, the Order does not comply with international obligations that dictate fairness and "equal treatment" towards imported products. One commenter argued that importers will disproportionally support operations of the Board, while domestic U.S. milk producers will disproportionately enjoy the benefits of Board promotions.

The proposed provisions specify that the rate of assessment is 7.5 cents per hundredweight, or equivalent thereof, on imported dairy products, but that an importer can instruct the Board to direct up to 2.5 cents per hundredweight for contributions to a qualified program. The Act requires domestic producers to

pay 15 cents per hundredweight to the Board, and allows them to receive a credit up to 10 cents per hundredweight of the assessment when contributing to qualified programs. In effect, this provision requires that all domestic producers contribute 5 cents per hundredweight of milk to the Board. Likewise, this rule requires importers to pay an equivalent amount to the Board. With this final rule, an importer may inform the Secretary to direct the Board to forward up to 2.5 cents per hundredweight of milk, or the equivalent thereof, to a qualified program. As indicated by one commenter, importers are not required to provide any greater assessment to the overall national promotion program than are domestic producers. Alternatives to allow an importer to direct two-thirds of the 7.5 cents per hundredweight of milk, or equivalent thereof, to a qualified program are not adopted.

One commenter questioned whether or not the amount of money designated for importer organizations to conduct promotion, research, or nutrition education programs will equate with the same level of assessments collected with respect to imported product. Importers only are permitted to designate up to 2.5 cents of the 7.5 cents per hundredweight of milk, or milk equivalent thereof, to qualified programs. By law, 5 cents must go to the Board, and therefore the amount of money designated for importer organizations cannot equal the same level of assessments collected on imported dairy products.

The final rule differs from the proposed rule with respect to an importer's designation to a qualified program. With the proposed rule, the importer would have instructed the Board to forward payments to a qualified program. With this final rule, the importer will notify the Secretary to direct the Board to forward payments to a qualified program. The Secretary will compute the funds due each qualified program. This change was made in order to maintain confidentiality of importer records concerning import quantity volumes and quantities of milk solids imported.

One commenter noted that the proposed rule states that any organization which conducts a dairy product promotion and research or nutrition education program authorized by Federal or State law may apply for certification so that producers may receive credit for contributions to such programs, and whether the credit treatment should also be extended to imported product where producers in the country of origin have contributed to generic dairy promotional programs. As indicated in the proposal, the credit only applies to contributions to programs operating under Federal or State laws of the United States or that have been an active and ongoing producer program before enactment of the Act. Therefore, no provisions are included to extend credit allowances for contributions to dairy product promotion programs in foreign countries.

*Importer Establishment of Qualified Programs*

Several commenters noted that while the proposed rule modifies the Order language regarding qualified programs to include those financed primarily by importers, the process by which a program becomes qualified imposes a great burden on importers. These commenters stated that the requirement that the qualified program be authorized under State or Federal law, or has been active and on-going prior to enactment of the Act, will be difficult for importers to achieve since there are no such importer organizations that predate the Act. Additionally, several commenters indicated that authorization under State or Federal law requires that the program be specifically enabled by a state legislature or Congress. One commenter proposed specific language modifying section 1150.153 to include new provisions applicable specifically for importers, noting the Act does not provide any detailed definition of State and regional programs. Additionally, several commenters suggested that the Department revisit this section, citing whether the authority for the Secretary to give credit to national organizations exists under the Order.

The Order currently provides in § 1150.153 that any organization which conducts a State or regional dairy product promotion, research, or nutrition education program that has been active and ongoing before enactment of the Act, or is operated under the laws of the United States or any State, may apply to the Secretary for certification so that producers may receive credit for contributions to such programs towards assessments owed by the producer.

The proposed rule provided that an organization authorized by Federal or state law or an organization that had been active and ongoing before enactment of the Act may apply to the Secretary for certification of qualification so that producers or importers may direct contributions to such programs. While AMS disagrees with any suggestion in the comments that the proposed provisions regarding qualified programs were not authorized by statute or consistent with the Order, we conclude, taking into account comments received, that section 1150.153 should be further revised to add reference to any importer organizations that conduct dairy product promotion, research, or nutrition education programs. Organizations seeking to become an importer qualified program need only submit an application provided by USDA to the Secretary and meet the four criteria as outlined in section 1150.153 to be approved. The process is equivalent to the process used by domestic organizations seeking to become a qualified dairy producer program. The revision would provide a more practical and reasonable option for importers to direct contributions to such programs. Miscellaneous clarifying changes are made to sections 1150.152, 1150.153, and the definition of qualified program in section 1150.153 to retain existing order language with regard to producer organizations to more clearly state provisions concerning qualified programs and credits for producers and for importers.

*Referendum*

Several commenters suggested that in order for the Department to provide due process for those importers of dairy products and dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico that will become subject to the assessment, a referendum must be held to determine whether or not those affected parties support implementation of the assessment. Commenters assert that implementation of the assessment without conducting a referendum is a violation of the Equal Protection guarantees of the Fifth Amendment. Expressing a different view, several commenters also noted that the Congressional mandate to require an assessment on both domestic production and on imported dairy products has been a matter of law in the United States since 2002.

The Act specifies the circumstances under which a referendum may be conducted. Section 4507(b) of the Act states, "* * * after September 30, 1985, the Secretary may conduct a referendum at any time, and shall hold a referendum on request of a representative group comprising 10 per centum or more of the number of producers and importers subject to the order, to determine whether the producers and importers subject to the order, favor the termination or suspension of the order." The Act does not provide for the

conduct of a referendum on proposed changes to the Order, as stated by a number of commenters. The 2002 and 2008 Farm Bills provide for the promulgation and implementation of these regulations without regard to notice and comment provisions of section 533 of Title 5, United States Code. Accordingly, no changes are made as a result of the comments received.

The proposed rule did not include necessary changes to include importers under "Subpart—Procedure for Conduct of Referenda in Connection with the Dairy Promotion and Research Order." With this final rule, the appropriate changes have been made.

*Definitions*

The proposed rule included definitions for three new terms and definition revisions of three terms to reflect the provisions of the Act. The terms "United States" and "milk" are reproduced verbatim from the Act. The terms "CBP" and "importer" were modified slightly from the language of the Act for clarity. The term "qualified program" was modified to reflect that importer programs may be established that are not necessarily State or regional in scope. The definition of "qualified program" has been changed from the proposed rule in that it refers to section 1150.153, which has changes from the proposed rule as previously discussed.

Several commenters objected to the removal of "produced in the United States" from the term milk, due to the impact this change necessitates in the requirement that dairy products be promoted neutrally and without respect to origin. Additionally, commenters objected to modification of the term "United States" which would necessitate inclusion of producers in Hawaii, Alaska, the District of Columbia, and the Commonwealth of Puerto Rico in the program without providing a referendum on amendments to the program as other U.S. contributors were given. For the reasons stated in previous discussions of comments, the definition changes to the Order are not changed as a result of the comments received.

*Organic Exemption*

Several commenters suggested that the current organic exemption, as applied to domestic dairy producers, would almost never be available to imports because importers rarely import organic products exclusively, but rather a combination of organic and non-organic products. Consequently, those commenters suggested the proposed Order include a provision to exempt organic dairy product imports from the assessment. The 2002 Farm Bill, section 10607 states, "A person that produces and markets solely 100 percent organic products, and that does not produce any conventional or nonorganic products, shall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm." In the final rule (70 FR 2744, January 14, 2005), AMS determined that the phrase "produces and markets" should apply to the function the person performs that compels the payment of an assessment. For importers, this means to import the commodity. Accordingly, this final rule subjects dairy importers to similar provisions and is consistent with other research and promotion programs for other agricultural commodities. The proposal to exempt organic dairy product imports is not adopted. However, after further review, this final rule adds an additional provision to the organic exemption provisions in section 1150.157 to allow for a reimbursement of assessments collected by the CBP. This provision is similar to the added provision regarding reimbursement of assessments collected on U.S. produced milk solids or milk solids other than cow's milk discussed in the following section. A clarifying change also is made to this section.

*Exclusion of Milk Solids of U.S. Origin*

Under the proposed rule, milk solids of U.S. origin would have been excluded from the calculation of dairy import assessments. However, after additional consideration, AMS determined that it is more reasonable and appropriate to include milk solids of U.S. origin in the calculation of dairy importer assessments and allow importers to apply for reimbursement from the Secretary. This final rule includes new language in section 1150.155 to state that any importer of dairy products against whose imports an assessment has been collected under section 1150.152(b) and who believes that such assessment or any portion of such assessment was made on U.S.-produced milk solids or milk solids other than cow's milk may apply to the Secretary for a reimbursement. The importer would be required to submit proof to the Secretary that the import was produced with U.S.-produced milk solids or milk solids other than cow's milk.

*Effective Date*

A commenter representing customs brokers and forwarders indicated that it will take considerable time for customs brokers to make software changes necessary to calculate import assessments. According to the commenter, brokers are typically allotted 90 days to make any program changes. Upon further consideration and taking into account that CBP collects importer assessments, we believe that 120 days is reasonable. Therefore, the effective date for implementing 1150.152(b), Importer Assessments, shall be the first day of the month following 120 days after publication of this rule.

*Miscellaneous Order Provisions*

As noted in the discussion of Neutral Promotion of Dairy Products with Respect to Origin, the Board will be required to make available all domestic promotion programs and materials to all assessed parties. One commenter proposed an additional provision be added to section 1150.140 [Duties of the Board] to clearly state that all domestic promotional programs be available to all assessed parties. Section 1150.139(e) of the Order gives the Board the authority to disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other system. The proposed rule modified this subsection of the Order to extend the Board's information dissemination authority to include importers and importer organizations. An additional provision as recommended by the commenter is not necessary and is therefore not adopted.

In paragraph 1150.152(a)(6) and section 1150.187, obsolete language and references have been deleted.

Additionally, for good cause, AMS has determined that it is necessary to set an effective date of less than 30 days for adoption of the provisions regarding nomination and appointment of importer representatives to the Board. This will enable the Secretary to solicit, appoint, and seat importers representatives on the Board in an efficient and expedient manner.

**List of Subjects in 7 CFR Part 1150**

Dairy products, Milk, Promotion, Research.

For the reasons set forth in the preamble, 7 CFR part 1150 is amended as follows:

## PART 1150—DAIRY PROMOTION PROGRAM

■ 1. The authority citation for 7 CFR part 1150 continues to read as follows:

**Authority:** 7 U.S.C. 4501–4514 and 7 U.S.C. 7401.

■ 2. Section 1150.106 is revised to read as follows:

**§ 1150.106 United States.**

*United States* means all of the States, the District of Columbia, and the Commonwealth of Puerto Rico.

■ 3. Section 1150.109 is revised to read as follows:

**§ 1150.109 Qualified program.**

*Qualified program* means any dairy product promotion, research or nutrition education program which is certified as a qualified program pursuant to § 1150.153.

■ 4. Section 1150.111 is revised to read as follows:

**§ 1150.111 Milk.**

*Milk* means any class of cow's milk.

■ 5. Sections 1150.120 through 1150.122 are added to read as follows:

**§ 1150.120 Imported dairy product.**

*Imported dairy product* means any product that is imported into the United States under any of the Harmonized Tariff Schedule (HTS) classification numbers listed in § 1150.152(b)(1).

**§ 1150.121 Importer.**

*Importer* means a person that imports imported dairy products into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles dairy products outside of the United States for sale in the United States, and who is listed as the importer of record for such dairy products.

**§ 1150.122 CBP.**

*CBP* means the United States Customs and Border Protection of the Department of Homeland Security.

■ 6. Section 1150.131 is revised to read as follows:

**§ 1150.131 Establishment and membership.**

(a) There is hereby established a National Dairy Promotion and Research Board.

(b) Thirty-six members of the Board shall be United States producers. For purposes of nominating producers to the Board, the United States shall be divided into thirteen geographic regions and the number of Board members from each region shall be as follows:

(1) One member from region number one comprised of the following States: Alaska, Oregon and Washington.

(2) Eight members from region number two comprised of the following States: California and Hawaii.

(3) Four members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah and Wyoming.

(4) Four members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

(5) Two members from region number five comprised of the following States: Minnesota, North Dakota and South Dakota.

(6) Five members from region number six comprised of the following State: Wisconsin.

(7) Two members from region number seven comprised of the following States: Illinois, Iowa, Missouri and Nebraska.

(8) One member from region number eight comprised of the following States: Alabama, Kentucky, Louisiana, Mississippi and Tennessee.

(9) Three members from region number nine comprised of the following States: Indiana, Michigan, Ohio and West Virginia.

(10) One member from region number ten comprised of the following States: Commonwealth of Puerto Rico, District of Columbia, Florida, Georgia, North Carolina, South Carolina, and Virginia.

(11) Two members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Two members from region number twelve comprised of the following State: New York.

(13) One member from region number thirteen comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

(c) Two members of the Board shall be importers who are subject to assessments under § 1150.152(b).

(d) The Board shall be composed of milk producers and importers appointed by the Secretary either from nominations submitted pursuant to § 1150.133 or in accordance with § 1150.136. A milk producer may be nominated only to represent the region in which such producer's milk is produced.

(e) At least every five years, and not more than every three years, the Board shall review the geographic distribution of milk production volume throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of regions and/or a modification of the number of producer members from regions in order to best reflect the geographic distribution of milk production volume in the United States.

(f) At least once every three years, after the initial appointment of importer representatives on the Board, the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years and, on the basis of that review, if warranted, reapportion the importer representation on the Board to reflect the proportional shares of the United States market served by domestic production and imported dairy products. The basis for comparison of domestic production of dairy products to imported products shall be estimated total milk solids. The calculation of total milk solids of imported dairy products for reapportionment purposes shall be the same as the calculation of total milk solids of imported dairy products for assessment purposes.

(g) In determining the volume of milk produced and total milk solids of dairy products produced in the United States, the Board and Secretary shall utilize the information received by the Board pursuant to § 1150.171(a) and data published by the Department.

■ 7. In § 1150.132, paragraph (a) is revised to read as follows:

**§ 1150.132 Term of office.**

(a) The members of the Board shall serve for terms of three years, except that:

(1) The members appointed to the initial Board shall serve proportionately, for terms of one, two and three years.

(2) The 2 importer members initially appointed to the Board shall serve until October 31, 2013, and October 31, 2014.

* * * * *

■ 8. In § 1150.133, paragraphs (a), (c), and (d) are revised, and a new paragraph (e) is added to read as follows:

**§ 1150.133 Nominations.**

* * * * *

(a) The Secretary shall solicit nominations for producer representation on the Board from all eligible organizations. For nominations of producers, if the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, such eligible organizations, the Secretary shall also solicit nominations from such producers through general farmer organizations or by other means.

* * * * *

(c) An eligible producer organization may submit nominations only for positions on the Board that represent regions in which such eligible organization can establish that it represents a substantial number of producers. If there is more than one Board position for any such region, the organization may submit nominations for each position.

(d) Where there is more than one eligible organization representing

producers in a specific geographic region, the organizations may caucus and jointly nominate producers for each position representing that region on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary nominations for each appointment to be made to represent that region.

(e) Nominations for representation of importers may be submitted by:

(1) Organizations that represent importers of dairy products, as approved by the Secretary. The primary considerations in determining if organizations adequately represent importers of dairy products shall be whether its membership consists primarily of importers of dairy products and whether a substantial interest of the organization is in the importation of dairy products and the promotion of the nutritional attributes of dairy products; and

(2) Individual importers of dairy products. Individual importers submitting nominations to represent importers on the Board must establish to the satisfaction of the Secretary that the persons submitting the nominations are importers of dairy products.

■ 9. In § 1150.134, the introductory text and paragraph (b) are revised to read as follows:

**§ 1150.134 Nominee's agreement to serve.**

Any producer or importer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

* * * * *

(b) Disclose any relationship with any organization that operates a qualified program or has a contractual relationship with the Board; and

* * * * *

■ 10. Section 1150.135 is revised to read as follows:

**§ 1150.135 Appointments.**

From the nominations made pursuant to § 1150.133, the Secretary shall appoint the members of the Board on the bases of representation provided for in §§ 1150.131(b) and 1150.131(c).

■ 11. In § 1150.139, paragraph (e) is revised to read as follows:

**§ 1150.139 Powers of the Board.**

* * * * *

(e) To disseminate information to producers, producer organizations, importers, and importer organizations through programs or by direct contact utilizing the public postage system or other systems;

* * * * *

■ 12. In § 1150.140, paragraphs (b) and (n) are revised to read as follows:

**§ 1150.140 Duties of the Board.**

* * * * *

(b) To appoint from its members an executive committee whose membership shall equally reflect each of the different geographic regions in the United States in which milk is produced and importer representation on the Board, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

* * * * *

(n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand:

(1) domestic markets and domestic uses for fluid milk and dairy products produced in the United States or imported into the United States; and

(2) foreign markets and foreign uses for fluid milk and dairy products produced in the United States.

■ 13. In § 1150.151, new paragraph (c) is added to read as follows:

**§ 1150.151 Expenses.**

* * * * *

(c) The Board is authorized to expend up to the amount of the assessments collected from United States producers to promote dairy products produced in the United States in foreign markets.

■ 14. Section 1150.152 is revised to read as follows:

**§ 1150.152 Assessments.**

(a) *Domestic Assessments.* (1) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use, or the equivalent thereof, and shall remit the assessment to the Board.

(2) Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(3) In determining the assessment due from each producer pursuant to § 1150.152(a)(1) and (a)(2), a producer who is participating in a qualified program(s) under § 1150.153 shall receive a credit for contributions to such program(s), but not to exceed 10 cents per hundredweight of milk marketed.

(4) In order for a producer described in § 1150.152(a)(1) to receive the credit authorized in § 1150.152(a)(3), either the producer or a cooperative association on behalf of the producer must establish to the person responsible for remitting the assessment to the Board that the producer is contributing to a qualified program under § 1150.153. Producers who contribute to a qualified program directly (other than through a payroll deduction) must establish with the person responsible for remitting the assessment to the Board, with validation by the qualified program, that they are making such contributions.

(5) In order for a producer described in § 1150.152(a)(2) to receive the credit authorized in § 1150.152(a)(3), the producer and the applicable qualified program must establish to the Board that the producer is contributing to the qualified program.

(6) The collection of assessments pursuant to § 1150.152(a)(1) and (a)(2) shall begin with respect to milk marketed on and after the effective date of this section and shall continue until terminated by the Secretary.

(7) Each person responsible for the remittance of the assessment pursuant to § 1150.152(a)(1) and (a)(2) shall remit the assessment to the Board not later than the last day of the month following the month in which the milk was marketed.

(8) Money remitted to the Board shall be in the form of a negotiable instrument made payable to "National Dairy Promotion and Research Board." Remittances and reports specified in § 1150.171(a) shall be mailed to the location designated by the Secretary or the Board.

(b) *Importer Assessments.* (1) Each importer of dairy products identified in the following table, except for as provided for in § 1150.157, is responsible for paying an assessment of 7.5 cents per hundredweight of U.S. milk, or equivalent thereof. The importer shall use the assessment rate of $0.01327 per kilogram (kg) of milk solids to calculate and pay the assessment.

| HTS Nos. for dairy import assessment | HTS Nos. for dairy import assessment | HTS Nos. for dairy import assessment |
|---|---|---|
| 0401.10.0000 | 0406.10.3400 | 0406.90.1200 |
| 0401.20.2000 | 0406.10.3800 | 0406.90.1600 |
| 0401.20.4000 | 0406.10.4400 | 0406.90.1800 |
| 0401.30.0500 | 0406.10.4800 | 0406.90.3100 |
| 0401.30.2500 | 0406.10.5400 | 0406.90.3200 |
| 0401.30.5000 | 0406.10.5800 | 0406.90.3300 |
| 0401.30.7500 | 0406.10.6400 | 0406.90.3600 |
| 0402.10.1000 | 0406.10.6800 | 0406.90.3700 |
| 0402.10.5000 | 0406.10.7400 | 0406.90.4100 |
| 0402.21.0500 | 0406.10.7800 | 0406.90.4200 |
| 0402.21.2500 | 0406.10.8400 | 0406.90.4600 |
| 0402.21.3000 | 0406.10.8800 | 0406.90.4800 |
| 0402.21.5000 | 0406.20.1500 | 0406.90.4900 |
| 0402.21.7500 | 0406.20.2400 | 0406.90.5200 |
| 0402.21.9000 | 0406.20.2800 | 0406.90.5400 |
| 0402.29.1000 | 0406.20.3110 | 0406.90.6600 |
| 0402.29.5000 | 0406.20.3190 | 0406.90.6800 |
| 0402.91.1000 | 0406.20.3300 | 0406.90.7200 |
| 0402.91.3000 | 0406.20.3600 | 0406.90.7400 |
| 0402.91.7000 | 0406.20.3900 | 0406.90.7600 |
| 0402.91.9000 | 0406.20.4400 | 0406.90.7800 |
| 0402.99.1000 | 0406.20.4800 | 0406.90.8200 |
| 0402.99.3000 | 0406.20.5100 | 0406.90.8400 |
| 0402.99.4500 | 0406.20.5300 | 0406.90.8600 |
| 0402.99.5500 | 0406.20.6100 | 0406.90.8800 |
| 0402.99.7000 | 0406.20.6300 | 0406.90.9000 |
| 0402.99.9000 | 0406.20.6500 | 0406.90.9200 |
| 0403.10.1000 | 0406.20.6700 | 0406.90.9300 |
| 0403.10.5000 | 0406.20.6900 | 0406.90.9400 |
| 0403.10.9000 | 0406.20.7100 | 0406.90.9500 |
| 0403.90.0400 | 0406.20.7300 | 0406.90.9700 |
| 0403.90.1600 | 0406.20.7500 | 0406.90.9900 |
| 0403.90.2000 | 0406.20.7700 | 1517.90.5000 |
| 0403.90.4110 | 0406.20.7900 | 1517.90.6000 |
| 0403.90.4190 | 0406.20.8100 | 1702.11.0000 |
| 0403.90.4500 | 0406.20.8300 | 1702.19.0000 |
| 0403.90.5100 | 0406.20.8500 | 1704.90.5400 |
| 0403.90.5500 | 0406.20.8700 | 1704.90.5800 |
| 0403.90.6100 | 0406.20.8900 | 1806.20.2090 |
| 0403.90.6500 | 0406.20.9100 | 1806.20.2400 |
| 0403.90.7400 | 0406.30.0500 | 1806.20.2600 |
| 0403.90.7800 | 0406.30.1400 | 1806.20.2800 |
| 0403.90.8500 | 0406.30.1800 | 1806.20.3400 |
| 0403.90.9000 | 0406.30.2400 | 1806.20.3600 |
| 0403.90.9500 | 0406.30.2800 | 1806.20.3800 |
| 0404.10.0500 | 0406.30.3400 | 1806.20.8100 |
| 0404.10.1100 | 0406.30.3800 | 1806.20.8200 |
| 0404.10.1500 | 0406.30.4400 | 1806.20.8300 |
| 0404.10.2000 | 0406.30.4800 | 1806.20.8500 |
| 0404.10.5010 | 0406.30.5100 | 1806.20.8700 |
| 0404.10.5090 | 0406.30.5300 | 1806.20.8900 |
| 0404.10.9000 | 0406.30.6100 | 1806.32.0400 |
| 0404.90.1000 | 0406.30.6300 | 1806.32.0600 |
| 0404.90.3000 | 0406.30.6500 | 1806.32.0800 |
| 0404.90.5000 | 0406.30.6700 | 1806.32.1400 |
| 0404.90.7000 | 0406.30.6900 | 1806.32.1600 |
| 0405.10.1000 | 0406.30.7100 | 1806.32.1800 |
| 0405.10.2000 | 0406.30.7300 | 1806.32.6000 |
| 0405.20.2000 | 0406.30.7500 | 1806.32.7000 |
| 0405.20.3000 | 0406.30.7700 | 1806.32.8000 |
| 0405.20.4000 | 0406.30.7900 | 1806.90.0500 |
| 0405.20.6000 | 0406.30.8100 | 1806.90.0800 |
| 0405.20.7000 | 0406.30.8300 | 1806.90.1000 |
| 0405.20.8000 | 0406.30.8500 | 1806.90.1500 |
| 0405.90.1020 | 0406.30.8700 | 1806.90.1800 |
| 0405.90.1040 | 0406.30.8900 | 1806.90.2000 |
| 0405.90.2020 | 0406.30.9100 | 1806.90.2500 |
| 0405.90.2040 | 0406.40.4400 | 1806.90.2800 |
| 0406.10.0400 | 0406.40.4800 | 1806.90.3000 |
| 0406.10.0800 | 0406.40.5400 | 1901.10.1500 |
| 0406.10.1400 | 0406.40.5800 | 1901.10.3000 |
| 0406.10.1800 | 0406.40.7000 | 1901.10.3500 |
| 0406.10.2400 | 0406.90.0810 | 1901.10.4000 |
| 0406.10.2800 | 0406.90.0890 | 1901.10.4500 |

| HTS Nos. for dairy import assessment |
|---|
| 1901.20.0500 |
| 1901.20.1500 |
| 1901.20.2000 |
| 1901.20.2500 |
| 1901.20.3000 |
| 1901.20.3500 |
| 1901.20.4000 |
| 1901.20.4500 |
| 1901.20.5000 |
| 1901.90.2800 |
| 1901.90.3400 |
| 1901.90.3600 |
| 1901.90.4200 |
| 1901.90.4300 |
| 1901.90.7000 |
| 2105.00.1000 |
| 2105.00.2000 |
| 2105.00.3000 |
| 2105.00.4000 |
| 2106.90.0600 |
| 2106.90.0900 |
| 2106.90.2400 |
| 2106.90.2600 |
| 2106.90.2800 |
| 2106.90.3400 |
| 2106.90.3600 |
| 2106.90.3800 |
| 2106.90.6400 |
| 2106.90.6600 |
| 2106.90.6800 |
| 2106.90.7200 |
| 2106.90.7400 |
| 2106.90.7600 |
| 2106.90.7800 |
| 2106.90.8000 |
| 2106.90.8200 |
| 2202.90.1000 |
| 2202.90.2400 |
| 2202.90.2800 |
| 3501.10.1000 |
| 3501.10.5000 |
| 3501.90.6000 |
| 3502.20.0000 |

(2) The assessment on imported dairy products shall be paid by the importer to CBP at the time of entry summary for any products identified in § 1150.152(b)(1).

(3) The assessments collected by CBP pursuant to § 1150.152(b)(2) of this section shall be transferred to the Board in compliance with an agreement between CBP and the Secretary.

(4) The Secretary, at his or her discretion, shall verify the information reported by importers to CBP to determine if additional money is due the Board or an amount is due to an importer based on the quantity imported and the milk solids content per unit. In the case of money due to an importer from the Board, the Board will issue payment promptly to the importer. In the case of money due from the importer to the Board, the Secretary will send an invoice for payment directly to the importer. The remittance will be due to the Secretary upon receipt of the invoice. The Secretary will promptly forward such payments received to the Board.

(5) If an importer elects to have funds remitted to a qualified program(s), the importer shall inform the Secretary of such designation by sending a letter to an address provided by the Secretary. Importer remittances for qualified program(s) shall not exceed 2.5 cents per hundredweight of milk, or equivalent thereof, of the 7.5 cents per hundredweight of milk, or equivalent thereof, paid by the importer pursuant to § 1150.152(b)(1). The Secretary shall compute the funds due for each qualified program designated by importers and direct the Board to forward such funds to each qualified program.

(6) Assessments collected on imported dairy products shall not be used for foreign market promotion of United States dairy products.

(7) Any money received by the Board pursuant to § 1150.152(b)(1) before the Secretary appoints the initial importer representatives to the Board shall not be spent by the Board but shall be held in escrow until such appointment.

(8) The collection of assessments pursuant to § 1150.152(a) and (b) shall continue until terminated by the Secretary.

■ 15. In § 1150.153, revise the section heading and paragraphs (a) (b)(2), (b)(3), (b)(4), and (b)(5), and remove the phrase "State or regional" from paragraphs (c) introductory text, (c)(2), (c)(2)(i), (c)(2)(ii), and (c)(2)(iii), and (c)(2)(iv) to read as follows:

**§ 1150.153 Qualified dairy product promotion, research or nutrition education programs.**

(a) Any producer organization that conducts a State or regional dairy product promotion, research or nutrition education program, authorized by Federal or State law; or has been an active and ongoing producer program before enactment of the Act; or is an importer organization that conducts a promotion, research, or nutrition education program may apply to the Secretary for certification of qualification so that:

(1) Producers may receive credit pursuant to § 1150.152(a)(3) for contributions to such program; and

(2) The Board may remit payments designated by importers pursuant to § 1150.152(b)(5).

(b) * * *

(2) Except for producer programs operated under the laws of the United States or any State, and except for importer programs, have been active and ongoing before enactment of the Act;

(3) For producer organizations, be financed primarily by producers, either individually or through cooperative associations, or for importer organizations, be financed primarily by importers;

(4) Not use a private brand or trade name in its advertising and promotion of dairy products unless the Board recommends and the Secretary concurs that such preclusion should not apply;

(5) Certify to the Secretary that any requests from producers or importers for refunds under the program will be honored by forwarding to either the Board or a qualified program designated by the producer or importer that portion of such refunds equal to the amount that otherwise would be applicable to that program pursuant to § 1150.152(a)(3) or (b)(5); and

* * * * *

■ 16. Section 1150.155 is revised to read as follows:

**§ 1150.155 Adjustment of accounts.**

(a) Whenever the Board or the Department determines through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board in accordance with 1150.152(a), such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1150.152(a). Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

(b) Any importer of dairy products against whose imports an assessment has been collected under § 1150.152(b) who believes that such assessment or any portion of such assessment was made on milk solids of U.S. origin or milk solids other than cow's milk may apply to the Secretary for a reimbursement. The importer would be required to submit satisfactory proof to the Secretary that the importer paid the assessment for milk solids from milk produced from the U.S. or milk solids other than cow's milk solids. The Secretary will instruct the Board to send such reimbursement to the importer.

■ 17. In § 1150.156, paragraph (a) is revised to read as follows:

**§ 1150.156 Charges and penalties.**

(a) *Late-payment charge.* Any unpaid assessments due to the Board pursuant to § 1150.152 shall be increased 1.5 percent each month beginning with the day following the date such assessments

were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid.

(1) For the purpose of this section, any assessment pursuant to § 1150.152(a) that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

(2) For the purpose of this section, any assessment not collected by CBP at the time entry summary documents are filed by the importer is considered to be past due. If CBP does not collect an assessment from an importer, the importer shall be responsible for paying the assessment and any late charges to the Secretary in the form of a negotiable instrument made payable to "USDA." The payment shall be mailed to a location designated by the Secretary or sent in an electronic form approved by the Secretary.

* * * * *

■ 18. Section 1150.157 is revised to read as follows:

**§ 1150.157 Assessment exemption.**

(a) A producer described in § 1150.152(a)(1) and (a)(2) who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (h) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for exemption under this section, a producer pursuant to § 1150.152 (a)(1) and (a)(2) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as the producer continues to be eligible for the exemption.

(c) A producer request for exemption shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary.

(d) If a producer described in § 1150.152(a)(1) and (a)(2) complies with the requirements of this section, the Board will grant an assessment exemption and issue a Certificate of Exemption to the producer within 30 days. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer described in paragraph (c) of this section shall provide a copy of the Certificate of Exemption to each person responsible for remitting assessments to the Board on behalf of the producer pursuant to § 1150.152(a).

(f) The person responsible for remitting assessments to the Board pursuant to § 1150.152(a) shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board pursuant to § 1150.172(a).

(g) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic dairy products—on a form provided by the Board—at any time initially and annually thereafter as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer. The Board will issue the importer a 9-digit alphanumeric Harmonized Tariff Schedule (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation.

(h) The exemption will apply not later than the last day of the month following the Certificate of Exemption issuance date.

(i) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

(j) Importers who are exempt from assessment in paragraph (g) of this section shall be eligible for reimbursement of assessments collected by the CBP and may apply to the Secretary for a reimbursement. The importer would be required to submit satisfactory proof to the Secretary that the importer paid the assessment on exempt organic products.

■ 19. Section 1150.171 is revised to read as follows:

**§ 1150.171 Reports.**

(a) Each producer marketing milk of that producer's own production directly to consumers and each person making payment to producers and responsible for the collection of the assessment under § 1150.152(a) shall be required to report at the time for remitting assessments to the Board such information as may be required by the Board or by the Secretary. Such information may include but not be limited to the following:

(1) The quantity of milk purchased, initially transferred or which, in any other manner, are subject to the collection of the assessment;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of hundredweights of milk multiplied by 15 cents; and

(4) The date any assessment was paid.

(b) Importers of dairy products shall submit reports as requested by the Secretary as necessary to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of the imported dairy products pursuant to § 1150.152(b)(1).

■ 20. Section 1150.172 is revised to read as follows:

**§ 1150.172 Books and records.**

(a) Each producer who is subject to this subpart, and other persons subject to § 1150.171(a), shall maintain and make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued

hereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

(b) Each importer of dairy products shall maintain and make available for inspection by the Secretary such books and records to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of the imported dairy products. Such records shall be retained for at least two years beyond the calendar period of their applicability. Such information may include but not be limited to invoices, packing slips, bills of lading, laboratory test results, and letters from the manufacturer on the manufacturer's letterhead stating the milk solids content of imported dairy products.

■ 21 Section 1150.187 is revised to read as follows:

**§ 1150.187 Paperwork Reduction Act assigned number.**

The information collection and recordkeeping requirements contained in §§ 1150.133, 1150.152, 1150.153, 1150.171, 1150.172, and 1150.273 of these regulations (7 CFR part 1150) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. chapter 35 and have been assigned OMB Control Number 0581–0093 as appropriate.

Dated: March 14, 2011.

**David R. Shipman,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 2011–6322 Filed 3–17–11; 8:45 am]

**BILLING CODE 3410–02–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 326 and 334

**RIN 3064–AD76**

### Procedures for Monitoring Bank Secrecy Act Compliance and Fair Credit Reporting: Technical Amendments

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is adopting a final rule to update cross-references in its anti-money laundering program and Fair Credit Reporting Act rules, to conform to changes in the numbering of the Department of the Treasury's rules that implement the Bank Secrecy Act.

**DATES:** Effective March 18, 2011.

**FOR FURTHER INFORMATION CONTACT:** Division of Risk Management Supervision and Consumer Protection: Debra Novak (202) 898–6641; Legal Division: Carl Gold, Counsel, (202) 898–8702; Richard M. Schwartz, Counsel, (202) 898–7424.

**SUPPLEMENTARY INFORMATION:** As required by section 8(s) of the Federal Deposit Insurance Act, 12 U.S.C. 1818(s), the FDIC's regulation, 12 CFR 326.8, requires every State nonmember bank to establish and maintain procedures reasonably designed to assure and monitor its compliance with the requirements of the Bank Secrecy Act ("BSA"), 31 U.S.C. 5311 *et seq.,* and the regulations implementing that statute ("BSA regulations"). In addition, the FDIC has regulations, 12 CFR part 334, which implement the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* The Financial Crimes Enforcement Network (FinCEN), an arm of the Department of the Treasury, recently amended the BSA regulations to reorganize and move them from 31 CFR Part 103 to Chapter X of Title 31 of the CFR. 75 FR 65806 *et seq.* (Oct. 26, 2010). Effective March 1, 2010, the BSA regulations governing State nonmember banks (as well as other federally-insured depository institutions) are contained in 31 CFR part 1010 *et seq.*

To conform to this change, the FDIC is amending a general cross-reference to the BSA regulations in 12 CFR 326.8, and specific cross-references to the Customer Identification Program ("CIP"), 31 CFR 103.121, in 12 CFR 326.8, 12 CFR 334.82, and Appendix J to Part 334. The CIP regulation, which is substantively unchanged, is now found at 31 CFR 1020.220.

#### Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. 553(b) provides that a final regulation may be issued without prior notice or an opportunity for comment when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The FDIC finds that good cause exists as the regulatory amendments are nonsubstantive, and therefore notice and public procedure are unnecessary. 5 U.S.C. 553(d) provides that the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, with some exceptions. Since this is not a substantive rule, the rule is effective immediately upon publication in the **Federal Register**.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required. See 5 U.S.C. 603 and 604. As noted previously in the **SUPPLEMENTARY INFORMATION** section, the FDIC has determined, for good cause, that it is unnecessary to publish a notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

#### Paperwork Reduction Act

There are no information collection requirements in this final rule.

#### List of Subjects in 12 CFR Parts 326 and 334

Banks, banking, Currency, Insured nonmember banks, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the FDIC hereby amends 12 CFR chapter III as follows:

## PART 326—MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT COMPLIANCE

■ 1. The authority citation for part 326 continues to read as follows:

**Authority:** 12 U.S.C. 1813, 1815, 1817, 1818, 1819 (Tenth), 1881–1883; 31 U.S.C. 5311–5314 and 5316–5332.2.

■ 2. Revise § 326.8 to read as follows:

**§ 326.8 Bank Security Act compliance.**

(a) *Purpose.* This subpart is issued to assure that all insured nonmember banks as defined in 12 CFR 326.1 establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR Chapter X.

(b) *Compliance procedures—*

(1) *Program requirement.* Each bank shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations issued by the Department of Treasury at 31 CFR Chapter X. The compliance program shall be written, approved by the bank's