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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1150

[Docket No. AMS-DA-08-2004; DA-06-04]

National Dairy Promotion and Research Program; Section 610 Review

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Confirmation of regulations.

SUMMARY: This document summarizes the results of an Agricultural Marketing Service (AMS) review of the National Dairy Promotion and Research Program (National Dairy Program) conducted under the Dairy Promotion and Research Order (Dairy Order), under the criteria contained in Section 610 of the Regulatory Flexibility Act (RFA). Based upon its review, AMS has determined that the Dairy Order should be continued without change.

FOR FURTHER INFORMATION CONTACT: Interested persons may obtain a copy of the review. Requests for copies should be sent to Whitney Rick, Chief, Promotion and Research Branch, Dairy Programs, 1400 Independence Avenue, SW., Stop 0233—Room 2958—South Building, Washington, DC 20250-0233, (202) 720-6909, e-mail: Whitney.Rick@usda.gov or by accessing our Web site at <http://www.ams.usda.gov/dairy/dairyrp.htm>.

SUPPLEMENTARY INFORMATION: The Dairy Production Stabilization Act of 1983 [7 U.S.C. 4501-4513] (Dairy Act) authorized the Dairy Order [7 CFR Part 1150], a national dairy producer program designed to develop and finance promotion, research, and nutrition education programs to maintain and expand markets and uses for milk and dairy products. Annual reports concerning the activities

conducted under the order are required by statute at 7 U.S.C. 4514.

The National Dairy Program became effective on March 23, 1984, when the Dairy Order was issued. The National Dairy Program is funded by a mandatory assessment of 15 cents per hundredweight on all milk marketed in the 48 contiguous states. Producers can receive a credit of up to 10 cents a hundredweight for payments made to any State or regional dairy product promotion, research or nutrition education programs which is certified as a qualified program pursuant to the Dairy Order.

The Dairy Order provides for the establishment of the National Dairy Promotion and Research Board (National Dairy Board), which is composed of 36 members appointed by the Secretary of Agriculture. Each member represents one of thirteen Regions in the 48 contiguous States. The members of the National Dairy Board serve 3-year terms and are eligible to be appointed to two consecutive terms.

AMS published in the **Federal Register** its plan on February 18, 1999 (64 FR 8014), and most recently updated its plan on March 24, 2006 (71 FR 14827), to review certain regulations using criteria contained in Section 610 of the RFA (5 U.S.C. 601-612). Given that many AMS regulations impact small entities, AMS decided as a matter of policy to review certain regulations which, although they may not meet the threshold requirement under Section 610 of the RFA, warrant review.

The 610 Review was undertaken to determine whether the Dairy Order should be continued without change, amended, or rescinded (consistent with the objectives of the Dairy Act) to minimize any significant economic impact of rules upon a substantial number of small entities. AMS has considered the continued need for the Dairy Order; the nature of complaints or comments received from the public concerning the Dairy Order; the complexity of the Dairy Order; the extent to which the Dairy Order overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local government rules; and the length of time since the Dairy Order has been evaluated or the degree to which technology, economic conditions, or

other factors have changed in the area affected by the Dairy Order.

A Notice of Review and Request for Written Comments was published in the **Federal Register** on February 28, 2006, (71 FR 9978). Thirty-two written comments were received and are discussed below.

Of the thirty-two comments received, ten comments recommended that the Dairy Order be terminated or re-evaluated. Of those comments, several suggested that non-assessment of imported dairy products were a reason that the program should be discontinued because importers were receiving the benefit of a domestic assessment but were not required to pay assessments. The 2002 Farm Bill (Pub. L. 107-171) amended the Dairy Act to include assessment of imports. A provision also was added to ensure that implementation of an order was consistent with international trade obligations. However, the term United States continued to be defined as the forty-eight contiguous states in the continental United States. Taking into account the narrow definition of United States in implementing the importer provisions of the Dairy Act, USDA concluded that the definition of United States should be amended in the Dairy Act to include Alaska, Hawaii, the District of Columbia and Puerto Rico. Therefore, as part of USDA's 2007 Farm Bill proposal, we have included language that would change the definition of United States in the Dairy Act to include all 50 States, the District of Columbia, and Puerto Rico. When the Dairy Act is amended, USDA intends to resume implementation of the import provisions of the Dairy Act.

Several of these commenters suggested that the assessment should be voluntary as opposed to mandatory. The Dairy Act provides for mandatory assessments. USDA has determined mandatory assessments to finance national generic programs benefits all parties involved. Mandatory assessments ensure that assessments are incurred in a fair and equitable manner and that activities under a program can be administered effectively.

Several commenters also recommended mandatory referendums and the abolition of bloc-voting, whereby a cooperative votes on behalf of its membership in referenda. Section 4507(b) of the Dairy Act requires the

Secretary to hold a referendum on request of a representative group comprising 10 percent or more of the number of producers and importers subject to the Dairy Order to determine whether producers and importers favor the suspension or termination of the Order. We believe a 10 percent threshold avoids unnecessary costs to the industry, while allowing for a referendum if sufficient interest is determined. Additionally, with regard to bloc-voting, Section 4508 of the Dairy Act authorizes cooperative bloc-voting. However, a cooperative is required to inform producers of procedures to follow to cast an individual ballot should the producer choose to do so.

One comment suggested that the program violated the commenter's First Amendment right of free speech. However, in June 2005, the Supreme Court ruled in *Johanns, Secretary of Agriculture, v. Livestock Marketing Association* that generic commodity research and promotion programs are considered "government speech" and, therefore, are not subject to First Amendment challenges.

Two comments suggested that the National Dairy Program is used to lobby and conduct activities that are not in the best interest of producers. We disagree. Section 4504(j) of the Dairy Act and Section 1150.154 of the Dairy Order prohibit the use of assessment funds for the purpose of lobbying or influencing governmental action or policy. No funds collected pursuant to the Dairy Order are used for the purpose of lobbying or influencing governmental policy or action. Further, an annual report to Congress is required under 7 U.S.C. 4514 describing activities conducted under the Order and accounting for the receipt and disbursement of all funds received by the Board including an independent analysis of the effectiveness of the program.

Several comments suggested that dairy farmers be permitted to elect members of the National Dairy Board and that the Board is representative of only large farm interests. We disagree. The Dairy Act provides that producer members of the Board be appointed by the Secretary from nominations submitted by organizations certified in accordance with the Act. Similar provisions concerning nominations appear in other generic commodity and promotion programs. The Dairy Act further provides that if the Secretary determines that a substantial number of milk producers are not members, or their interests are not represented by an eligible organization, the nominations may be made in the manner authorized by the Secretary. Additionally, the Dairy

Act and Dairy Order require the Secretary to consider size, geography, and other factors when making appointments to ensure that all producers are represented. Similar criteria are considered in determining eligible organizations.

In contrast, twenty-two comments expressed support for the Dairy Order, recognizing the need and advantages which the National Dairy Program provides to dairy farmers at a State level. Further, the same comments noted that the National Dairy Program invests farmer funds into research and promotion of dairy products, therefore, increasing the economic viability of the products produced and contributing to dairy producer profits.

Another comment from a producer recognized that the National Dairy Program works effectively and cooperatively on a national, State, and regional level. Additionally, this producer noted that they are a small dairy farm (150 registered Holsteins, half which are milk cows) and believed that the National Dairy Program contributes effectively to dairy farmer profitability and has minimal impact on small producers and other entities.

Several of the supporting comments noted vast producer support for the National Dairy Program and recognized that the National Dairy Program was vital to increasing dairy consumption and maintaining and increasing profitability for the farmer. Since the program began in 1983, total dairy consumption has increased by more than 35 percent according to USDA.

Another supporting comment noted that the National Dairy Program increases sales; provides greater opportunity for brands and businesses to compete for their share of the beverage category; protects small producers from being severely disadvantaged against large competitors that could undermine industry growth; and, in general builds a more favorable economic environment for farmers, processors, and everyone with a stake in the industry. Additionally, the same commenter wrote that the National Dairy Program has very little adverse impact on small businesses. In fact, the program helps the small producer by protecting the small producer from being severely disadvantaged by larger competition. The paperwork requirements imposed on the farmer are minimal and the assessment is collected as part of the milk-purchase transaction by the purchaser.

One comment submitted by a Qualified Program expressed support for the National Dairy Program and recognized that the program was vital to

maintaining and increasing profitability for the farmer and increasing dairy consumption. Additionally, the commenter referenced payments made to State or regional dairy checkoff programs (10 cents per hundredweight) and how such payments support promotion and research programs which directly benefit farmers at the local level. However, the commenter noted that program funds should be used to address pre-harvest dairy production practices and was critical of USDA's policy prohibiting use of program funds for this type of research. Sections 111(j) of the Act and Sections 1150.115 and 1150.161(a)(2) of the Dairy Order are clear that the program's focus is on increasing human consumption of milk and dairy products not on non-human consumption or on improving production or processing efficiencies. This is consistent with the statute's congressional intent.

The Dairy Order is not unduly complex and AMS has not identified regulations that duplicate, overlap, or conflict with the Dairy Order. Over the years, changes to the Dairy Order have been made to reflect current industry operating practices and to solve current industry problems to the extent possible. The program is independently evaluated every year to determine the effectiveness of its programs and the results are reported annually to Congress.

Based upon the review, AMS has determined that the Dairy Order should be continued without change. AMS plans to continue working with the dairy industry in maintaining an effective program.

Dated: April 8, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

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