

ALTERNATIVE FEDERAL ORDER RULEMAKING PROCEDURES

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During the 20th century, there has been tremendous growth in the role of administrative agencies within the executive branch of the federal government to develop regulations that implement the laws passed by Congress. This is likely due to the increased complexity of the policy issues involved. It is also due to recognition that an administrative agency is necessary to develop regulations which can be flexible to changing conditions without passing new laws.

The Agricultural Marketing Agreements Act of 1937 (AMAA) is a law that gives the Secretary of Agriculture significant authority to consider the economic condition of the dairy industry, and with the participation of the dairy industry, develop complex regulations called milk marketing orders. The development of these regulations under federal milk marketing orders has been the subject of considerable concern in recent times, however. In some instances it has taken several years to propose and implement changes to federal orders. Some have suggested that the procedures themselves are part of the problem. Questions have been raised as to whether current rulemaking processes provide adequate opportunity for meaningful public input while allowing agencies to implement the rules in a timely manner.

Recently, the Federal Agriculture Improvement and Reform act of 1996 (1996 FAIR Act) required that the Secretary would use an "informal" process of rulemaking to expedite implementation of the marketing order reforms mandated in the bill. It's not just federal order rulemaking that has been criticized, however. Changes to federal rulemaking procedures have also been recommended in the National Performance Review (NPR), under the guidance of Vice President Al Gore. One of the goals within the NPR was to recommend procedural reforms that were neither pro-regula-

tion nor anti-regulation, but which would produce better regulation.

This leaflet reviews the current procedures for promulgating federal milk marketing orders. It also describes the informal process granted to USDA in the 1996 FAIR Act, an alternative method that has been proposed by the NPR, and the California procedure for creating or amending milk orders. These alternatives to the current process could provide for a faster timeline, greater consensus building, and a less cumbersome route to rulemaking under federal orders.

Current USDA Procedures for Developing, Issuing, and Amending a Federal Milk Marketing Order

Informal rulemaking is used by most regulatory agencies and is a three-step process. The agency, often with legislative or industry input: 1) decides that a regulation needs to be issued or changed, 2) publishes a proposed rule and gives the public an opportunity to comment, and 3) considers the comments submitted and issues a final rule. This is the type of rulemaking used by the Food and Drug Administration for issuing product standards and labeling.

The AMAA, however, requires the use of "formal" rulemaking procedures in the formation of new marketing orders. USDA has also used formal rulemaking to amend existing federal milk orders as well. These rulemaking procedures are governed by the federal Administrative Procedure Act (APA) and the United States Department of Agriculture's (USDA) Rules of Practice and Procedure. Formal rulemaking involves a quasi-judicial process with a hearing, judge, witnesses, cross-examination, and necessitates agency decision-making based solely on the hearing record. The typical process for creating or amending a milk marketing order is described below and is discussed in greater detail in Leaflet O-2.

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Proposals and Pre-Hearing Procedures

New marketing orders, as well as amendments to existing orders, are generally proposed by dairy farmers, through their cooperative associations. However, they may be proposed by anyone, including the Secretary of Agriculture. When USDA receives a proposal for a new order, it is handled by the Dairy Division of the Agricultural Marketing Service (AMS).

The Dairy Division conducts a preliminary investigation of the facts relating to general economic conditions in the market and recommends to the Secretary that a hearing on the proposal be called or denied. Once a hearing has been called, any further discussion of the proposals with USDA officials is considered “ex parte” (literally meaning “one side absent”) and is prohibited outside of the hearing until after the final decision is made. Procedural matters, however, may be discussed at any time.

A notice is sent to interested parties requesting alternative proposals relevant to the issue. After the alternative proposals have been reviewed, a notice of public hearing is issued and published in the *Federal Register*. The official notice gives the time and place at which the hearing will be held and contains what will and will not be subject to discussion and possible change. Proposals that are not covered by the notice may not be discussed at the hearing.

Hearing

The hearing is held in the market area for which the order is proposed. Its purpose is to collect information on the economic and marketing conditions within that area. At the hearing, all interested parties, including producers, consumers, and milk dealers, are given an opportunity to present facts and views on the potential effects of the proposed order or amendment and its provisions. Cross-examination of witnesses by the judge, USDA marketing specialist, or other interested persons is allowed to clarify facts in a witness’ testimony.

All of the testimony is taken under oath or by affirmation and is reported verbatim. It is the responsibility of the specialist to be sure the record reflects adequate data upon which a decision by USDA can be based. At the close of the hearing, a time is set during which written briefs may be filed.

Except for official documents, the public hearing record is the sole source of information that can be used by the marketing specialist for analyzing the issues.

Recommended Decision

The recommended decision is prepared by the marketing specialist and is based solely on the facts presented at the public hearing. It is a preliminary statement of the reasons for the issuance of the order.

This provides an opportunity for those affected by the order to make comments before the final decision is drafted. A draft of the decision is reviewed and approved within the Dairy Division as well as the Office of the General Counsel. Others within USDA may also play a role in the review process.

The decision is published in the *Federal Register* and mailed to everyone known to be interested in the proceedings. A specified period of time is allowed for persons to file written exceptions to the findings and conclusions of the decision. This step in the agency’s rulemaking process can be omitted in emergency situations.

Final Decision

Once the comments have been reviewed and any changes are made, a final decision and final order are issued by the Secretary. The final decision presents the reasons for accepting or denying proposals advanced at the hearings and includes rulings on exceptions to the recommended decision. The final order contains the provisions which are presented to producers for their approval.

Producer Referendum

The support of two-thirds of the number of eligible producers or the affirmative vote of producers who supplied two-thirds of the milk regulated by the marketing order in a given time period is needed for a vote in an order. Qualified cooperatives may bloc vote for their membership. If it is an amendment to an existing order, an actual vote is only required in orders where less than two thirds of the producers are in cooperatives. Otherwise, simply a poll of the coops representing producers in the order is taken. A poll or vote taken for amendments to an existing order is actually for the entire order, not just the amendment. Therefore, a vote that failed to obtain sufficient support would bring an end to the entire order. This rule limits the ability for producers to pick and choose which amendments they like and gives the Secretary greater leverage in balancing producer interests with the public interest standards required in the AMAA.

Suspension or Termination

In the case of emergency situations, the Secretary may act to suspend or revise particular provisions without following the usual procedures. When this is done, it usually pertains to relatively minor provisions, is temporary, and has widespread support.

Informal Rulemaking in the Federal Order Reform Process

Based on the criticism from the industry regarding the delays in making changes to federal orders, Con-

gress, in the 1996 FAIR Act, required the Secretary of Agriculture to make changes within a certain time period and to use informal rulemaking to consolidate and amend the federal orders. If the process is not completed by April 1999, the authority of USDA to collect fees for the purpose of administering the orders is eliminated and funding will have to come from other sources in USDA's budget. The only exception to the timetable is if there is litigation.

The most explicit requirement in the 1996 FAIR Act is for the Secretary to consolidate market order areas from the current 31, to between 10 and 14 marketing areas. However, additional issues intended by Congress for review included alternative ways to determine class I price levels in the new areas, and a replacement of the basic formula price. USDA has embarked on a thorough review of federal order provisions, has created committees within the Dairy Division to make recommendations, and engaged universities to perform studies of possible options for reform.

The informal procedure used by the Secretary will deviate from the normal practices and procedures just described in formal rulemaking in other ways:

- A hearing is not required under informal rulemaking. There may be one or more meetings to discuss proposals and options, but the input sought by USDA will largely be taken from written comments by interested parties.
- USDA has taken a more proactive role in issuing announcements of possible options for changes and even some of their own preferences in order to encourage industry feedback prior to publishing the proposed rule.
- Since there was no hearing, the rules for *ex parte* discussions with USDA officials did not commence until after the proposed rule (recommended decision) was published in the *Federal Register*. This has provided the opportunity for industry interaction with USDA in the development of a proposed rule.

Some argue that USDA could use this informal process in future amendments to orders without rewriting the AMAA. The AMAA appears to set different criteria for issuance and formation of a new order versus simply amending an existing one. The language in the AMAA that authorizes amendments is less explicit regarding the process and appears to envision giving the Secretary greater discretion in the process of making amendments. An additional basis for this contention is that USDA currently uses informal rulemaking when making amendments in the fruit and vegetable marketing orders. The amendatory authority in those orders is based on the same sections of the AMAA that allows for amendment of federal milk orders.

Negotiated Rulemaking

The use of informal rulemaking does not necessarily guarantee successful rulemaking. One of the recommendations put forth in the NPR review of rulemaking procedures was for agencies to encourage consensus-based rulemaking. They noted that the traditional informal or formal rulemaking processes have tended too often to encourage adversarial, uncooperative behavior by people who might be adversely affected by the proposed rule. This posture more often than not leads to protracted litigation. To counter the trend, the Administrative Conference of the United States (ACUS) developed a consensus-based approach called negotiated rulemaking. This procedure is not unlike the process used by committees and boards advising the Secretary on amendments to fruit and vegetable orders.

Negotiated rulemaking emerged in the 1980s as an alternative to traditional procedures for drafting proposed regulations. The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and the various interest groups to negotiate the text of the proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making trade-offs to achieve an acceptable outcome on the issues of greatest importance to them. If they do reach a consensus, the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished.

Negotiated rulemaking takes place during the drafting stage of agency rulemaking, prior to issuance of the notice and the opportunity for the public to comment. Under the ordinary rulemaking procedure, the industry and USDA do not work on drafting proposals together. Typically, there is little opportunity for interchange of views among the parties. Negotiated rulemaking offers such an opportunity. The following is how negotiated rulemaking operates.

Convening Stage

The decision to use negotiated rulemaking involves several steps. First, someone must propose that a rule be considered for negotiated rulemaking. Although the proposal usually comes from within the agency, it may also come from an outside affected party or Congress. Second, the agency will usually hire a convener, or neutral party, to determine what issues are likely to be raised by the rule and which parties would be sufficiently interested in it to need to be represented. Third, if it appears that negotiated rulemaking will be recommended, the agency will publish a notice in the *Federal Register*. The notice would normally state what issues are expected to be deliberated, would list the various parties that have been contacted, and would

invite public comment. Also included would be a proposed agenda and schedule for completing the work of the negotiating committee and an explanation of how a person may apply or nominate another person for membership on the committee.

Establishment of the Committee

The size of the negotiated rulemaking committee is usually limited to 25 members, unless the agency head determines that a greater number of members are necessary for the functioning of the committee or to achieve balanced membership. At least one member of the committee should represent the agency. The representatives of the interested parties are chosen by the interests themselves.

Once a committee is constituted, it has substantial control over its mode of operation, composition, uses of resources, and the terms of its timing and dissolution. At the outset, each committee adopts its own protocols and all decisions are made by consensus.

Facilitator

The agency may nominate either a person from the federal government or a person from outside the federal government to serve as facilitator for the negotiations of the committee. The choice is subject to the approval of the committee by consensus. If a committee does not approve the agency's nominee for facilitator, the committee will select, by consensus, a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee. The facilitator will chair the meetings of the committee in an impartial manner, assist the members of the committee in conducting discussions and negotiations, and manage the keeping of minutes and records as is required.

Report of the Committee

If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee will transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus.

Negotiations complement, but do not replace the conventional process. They take place within the formal rulemaking format described above. The agency commits to publishing the committee's consensus as a proposed rule, so long as that consensus is consistent with the agency's statutory authority.

California's Procedures for Amending Orders

California is not a part of the federal milk marketing order program. It does, however, have its own state-run milk marketing order which regulates the two pricing areas (Northern and Southern California Milk Stabilization and Marketing Plans) and a separate statewide Milk Pooling Plan for milk within the state. Some have pointed to the California program as one which allows for timely changes to regulations. The procedures for creating and amending the state's orders are described below.

Submission of Petition

In California, any interested person may enter a petition to amend the Milk Stabilization or Milk Pooling plans. Upon receipt of the petition, the California Department of Food and Agriculture (CDFA) has 15 days to respond as to whether or not there will be hearing held on the petition. The petition is reviewed by specialists in the Dairy Marketing or Milk Pooling Branch. If CDFA fails to respond within the allotted time period, they must hold a hearing on the petition.

Congressional Review of Rulemaking

Since the 1985 Farm Bill, and the legislative changes made to Class I differentials in some federal order markets, Congress has increasingly involved itself in the federal order process. The FAIR Act language calls for certain mandated changes and USDA is required to report to Congress on the progress of the reform process.

In a relatively little-noted piece of legislation, Congress enacted in 1996 the Small Business Regulatory Enforcement Fairness Act. In this statute, Congress gave itself a provision called Congressional Review of Agency Rulemaking. It gives any member of Congress sixty days to review major new regulations before they are implemented. There is also the authority given to Congress to use joint resolutions on an expedited basis to disapprove such rules. It is not known if some in Congress might use this new law to try to veto federal order changes.

It can be argued that part of the success of the milk order program in the past has been that the Dairy Division marketing experts in USDA administered the program, and the industry worked within the regulatory system, without significant congressional involvement. The increased level of political considerations that are inevitably brought by congressional activism, however, could complicate rather than simplify the process of rulemaking in federal milk marketing orders.

Comparison of Current and Alternative Rulemaking Procedures

Current Formal Rulemaking	Informal Rulemaking	Negotiated/Informal Rulemaking	California
1. Secretary of Agriculture introduces and/or receives proposal for hearing.	1. Secretary of Agriculture introduces or receives proposals.	1. Secretary of Agriculture introduces or receives proposals.	1. Secretary of Food and Agriculture introduces and/or receives petition for hearing.
2. Secretary investigates its merit.	2. Secretary investigates its merit.	2. Secretary investigates its merit.	2. Secretary has 15 days to investigate its merit and accept or deny a hearing.
3. Secretary issues notice of hearing or denies petition. <i>Ex parte</i> discussion is prohibited.	3. Secretary may call informational meetings and/or publish preliminary options for comment on possible changes.	3. Secretary gives notice that an industry committee to develop a consensus on the proposal(s) will be formed.	3. Secretary issues notice of hearing and requests alternative proposals.
4. Interested parties present evidence at hearing. Witnesses are cross-examined by opposing parties.	4. USDA considers comments and any additional proposals.	4. Committee develops report on the proposal indicating whether consensus was achieved.	4. A pre-hearing workshop is held where proposals are explained, CDFA provides analysis of alternatives and further data may be requested.
5. Interested parties file briefs.	5. USDA issues proposed rule recommended decision in <i>Federal Register</i> for comment.	5. Secretary proceeds under informal rulemaking to publish a proposed rule.	5. Interested parties present evidence at a hearing under time limits. Cross-examination only by Hearing Panel.
6. USDA reviews and evaluates the hearing record.	6. USDA considers comments.	6. USDA considers comments.	6. Witnesses may file post-hearing briefs within 10 days.
7. USDA issues recommended decision.	7. USDA issues final rule.	7. USDA issues final decision.	7. CDFA has 62 days from the close of the hearing to implement a decision. Decision issued 10 days prior to implementation.
8. Interested parties file exceptions.	8. Technically speaking, informal rulemaking does not require a referendum—USDA is using one in the case of Federal Order reform.	8. Final order is effected or terminated. (Permanent AMAA law does require producer approval.)	8. No referendum is held on pricing issues. A referendum on pooling issues is held when substantive changes are made.
9. USDA reconsiders decision in light of exceptions.			
10. USDA issues final decision.			
11. Producers approve or disapprove by vote or polling co-ops (amendments).			
12. Final Order is effected or Order is terminated.			

Pre-Hearing Procedures

The scheduled date of the hearing is at the discretion of CDFA. Typically, the time period between the notice of hearing and the hearing is about 40 days. Notice of the hearing is completed through several different methods. There is a mailing list of interested parties that includes producers, handlers, and anyone else who has requested to be on the list. Also, press releases are distributed to the media and a notice is placed on the official bulletin board in the Dairy Marketing Branch office.

During the first 10 days following the notice, CDFA accepts alternative proposals and recommenda-

tions. At 20 days, the initial proposal and any alternative proposals are analyzed at a pre-hearing workshop. The workshop is presented by CDFA, and it is attended by the interested parties. After 30 days, the Department makes any revisions to the analysis of the proposals and makes the exhibit data available to the public. At 40 days after the release of the notice, the hearing is held.

Hearing

The hearing takes place before a hearing panel which consists of CDFA staff who are involved in administering the plan. A CDFA official not involved in the decision acts as hearing judge. The hearing is not

time-limited but usually takes less than one day. At the hearing, those presenting testimony are allotted a specific amount of time to develop their argument. The initial petitioner is granted 60 minutes, those who presented alternative proposals are granted 30 minutes, and other interested parties are given 20 minutes. There is no cross-examination of those testifying except by the hearing panel. This eliminates the sometimes lengthy and contentious cross examination by lawyers in federal order hearings. Submission of a post hearing brief may be requested at the time of the hearing by those who testify. The purpose of the brief is to provide further information requested by the hearing panel or to amplify or clarify one's own testimony.

Final Decision

CDFA is mandated by law to make its determination on the merits of the original and alternative proposals and implement Marketing and Stabilization (pricing) plan regulations within 62 days. This mandated timeline is the single most effective method for ensuring timely decisions. Decisions are primarily based on the hearing record, although the Department's own evidence and proposals outside of the hearing may be considered. After review by the agency, a recommendation is presented to the Secretary for his/her review. The final decision must be announced at least 10 days before the order goes into effect.

Producer Referendum

Unlike the federal system, changes in pricing provisions of the Stabilization and Marketing Plans are

not subject to approval by producers. While it is technically possible to amend an order faster, in practice, it takes four to six months from the time of petition to the time of implementation. The amendments to the Milk Pooling Plan may require producer approval, but this depends on whether the changes are considered substantive (impacting pay prices) which requires a vote, or are more technical in nature which do not. A vote to reject pooling plan amendments does not lead to elimination of the entire order or pooling plan.

Conclusion

The process of policymaking is important to determining the quality of its results. If federal orders are to be flexible enough to keep up with changes in the dairy industry, the process of rulemaking will need to allow for timely and innovative regulation. Changes that are currently being tested or should be considered include:

- 1) Increased use of informal rulemaking.
- 2) Develop joint agency-industry committees to build consensus prior to issuing a proposed rule.
- 3) Call hearings to bring issues into public focus with a format that is informational rather than quasi-judicial and contentious.
- 4) Set strict timelines for decision-making (may require legislative mandates) to ensure timely changes.

Some of the alternative rulemaking procedures discussed here, or other new ideas, may well be vital to moving federal orders into the next century.

Sources:

- [1] The Federal Milk Marketing Order Program, Bulletin #27, USDA, AMS, January 1989, pp.12-20.
- [2] Ross, Heather L., "How Will Congress Review Rulemaking," Resources for the Future, Winter 1997, Issue 126, pp. 5-7.
- [3] Rubic, Mark Joseph, "Rulemaking Procedure and Federal Milk Marketing Orders," Chicago Market Administrator, Unpublished Bulletin.

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