

## PROCEDURES FOR DEVELOPING, ISSUING AND AMENDING A FEDERAL MILK MARKETING ORDER

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Federal milk marketing orders have been an integral part of the United States dairy industry over the last half century. In 1991 approximately 100 thousand producers delivered 103 billion pounds of milk to dealers regulated in 40 federal market orders. The marketing order areas include most of the nation's major population centers with the exception of California, which has a state order.

Federal milk orders define the terms under which fluid milk handlers in a specific market purchase milk from producers. They are legal instruments, under the authority of the Agricultural Marketing Agreement Act of 1937, as amended, designed to foster orderly marketing conditions through a uniform system of classified pricing. Orders benefit dairy-men by minimizing the price instability inherent with a highly perishable product like milk that must be moved to market daily, and by assuring producers minimum farm prices for their product. Handlers also benefit through the assurance that their competitors are paying at least the minimum class price for the milk they are purchasing; while the public interest is served by assuring consumers an adequate supply of fresh milk at reasonable prices throughout the year.

A federal milk marketing order is generally promulgated upon the initiative of producer organizations which are supplying milk for a specific fluid milk market. The terms or provisions of an order are proposed and reviewed at a public hearing at which producers, handlers, and consumers can present evidence in support of or in opposition to instituting the order.

If the Secretary of Agriculture determines that the hearing evidence demonstrates a need for an order, he is empowered to issue one. USDA's "Rules of Practice and Procedures" set forth the procedures for establishing an order.

The federal order system has undergone constant change since its inception in the late 1930s. It has been able to adapt to a constantly changing environment by virtue of a hearing format for amending orders that is prescribed and stringently

adhered to through the aforementioned USDA "Rules of Practice and Procedures."

This article reviews the process that is involved in promulgating and amending federal milk orders.

### *Pre-Hearing Procedures*

Proposals for a federal order hearing generally may come from anyone, including the Secretary of Agriculture, and they may be made at any time.

Typically, industry organizations take the lead in providing information to producers and other industry members and in organizing the preparation of proposals. Cooperative Extension may assist in providing educational programs regarding proposals and the federal order program. In cases involving broad policies, such as the 1990 national hearing, additional groups or individuals who are not normally involved in local order action are likely to play a more prominent role. This might include elected and appointed officials at the state and federal levels.

Proposals are received and sorted by the Dairy Division of the Agricultural Marketing Service (AMS). When a hearing is requested by someone other than the Secretary, the Division is responsible for investigating and recommending whether a hearing on the proposal(s) should be called or denied. Marketing specialists conduct pre-hearing investigations to determine the opinions of other handlers and producers about problems and proposals.

In general, USDA will recommend a hearing when it is satisfied that the following conditions are met:

1. Marketing conditions in the area could be improved by the proposed changes.
2. Relevant evidence will be forthcoming at the hearing.
3. Proposals have substantial support among industry groups or are considered meritorious by USDA.
4. Proposals are relevant to and fall within the bounds of the Agricultural Marketing Agreement Act (AMAA), which governs federal orders.

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### ***Issuance of Hearing Notice***

The hearing notice includes the time and place of a hearing and a list of the proposals to be considered. Proposals that are not covered by the hearing notice cannot be discussed at the hearing.

The formal Notice of Hearing is an extremely important document—because it legally defines what will and what will not be subject to discussion and possible change. In general, a formal notice must be published at least fifteen (15) days prior to a hearing but a longer period is usually granted. In the case of proposed amendments deemed by the Secretary to warrant emergency actions, only three (3) days' notice is required.

### ***The Public Hearing***

The purpose of the formal, public hearing is to receive evidence regarding economic and marketing conditions that relate to the proposals. Evidence may be presented by any person as long as it pertains to a proposal contained in the hearing notice.

The principal participants are representatives of producers, handlers, and consumers, but any interested party may participate. All testimony is taken under oath or by affirmation and is recorded verbatim. Witnesses can be questioned by the judge, USDA personnel, or any other interested party to clarify facts they presented. Witnesses may refuse to answer. This could affect the weight placed on the testimony, but it does not implicate the witness in any way. Occasionally, officials elected to federal or state offices associated with the order area in question will offer a public statement prior to the hearing. In such cases, the official is not sworn in and is not subject to cross-examination, which also means that the statement is not part of the official hearing record.

A marketing specialist(s) is assigned to each hearing by the Dairy Division. The role of the specialist(s) is:

1. Note omissions of any pertinent information,
2. Direct preparation of statistical data,
3. Make sure the record reflects adequate data to form a basis for decision, and
4. Present expert testimony if necessary.

An attorney from USDA's Office of the General Counsel generally works with the marketing specialist(s) on legal questions.

The hearing record provides the basis for a decision. It must present the facts completely and clearly. Except for official documents, the public hearing record is the sole source of information for appraising the issues. "Official notice" may be taken of legal, technical, scientific, or commercial information that is established as factual even if it is not presented at the hearing, provided that interested persons are given adequate opportunity to review and comment on the evidence.

After the hearing is concluded, a copy of the hearing record is kept on file in the office of the appointed hearing clerk and must be available for public inspection. Personal copies can be obtained by a written request and upon payment of a fee at the rate provided in the contract between the Secretary and the (commercial) reporter.

The hearing is conducted by an administrative law judge (ALJ). Judges have the power to:

1. Rule upon motions and requests,
2. Change the time and place of the hearing, and adjourn from time to time or place to place,
3. Administer oaths and affirmations and take affidavits,
4. Examine and cross-examine witnesses and receive evidence,
5. Admit or exclude evidence,
6. Hear oral argument on facts or law, and
7. Do all acts and take all measures necessary for the maintenance of order at the hearing and the efficient conduct of the hearing.

An objection to the judge's ruling may be reviewed by the Secretary and later reversed by him. The judges can be removed only for cause, their office is separate from USDA jurisdiction. Although they preside over federal order hearings, they do not issue the decision.

### ***Filing of Briefs***

At the close of the hearing, the judge sets a time during which written briefs may be filed. Briefs may include suggested interpretations of evidence or conclusions based on the testimony presented at the hearing. Evidence that is not part of the hearing record or of the type that can be recognized by official notice cannot be accepted in a written brief. Following the hearing, the judge reviews the record and certifies it as true and correct, after which it is turned over to the Dairy Division for study and preparation of a Recommended Decision.

### ***USDA Review and Evaluation***

The review of the record and preparation of the Recommended Decision is often the most time-consuming part of the order amending process. Often, hundreds or even thousands of pages of testimony and evidence must be assembled and carefully studied. Obviously, the more complex the issues or the more diverse the opinions of witnesses, the more difficult this task is.

During this time, USDA decides what it will do and writes up its recommendations. It may recommend just about any action relevant to the purpose of the hearing, ranging from no change to substantial change.

### ***The Recommended Decision***

In order to appraise the potential effect of an order decision, it is initially drafted as a Recommended Decision.

USDA's "Rules of Practice and Procedure" require issuance of a Recommended Decision and say it should contain:

1. A preliminary statement
  - a. describing the history of the proceeding
  - b. including a brief explanation of material issues of fact, law or discretion presented on the record, and
  - c. a proposed finding and conclusions relative to the issues and the basis for them.
2. A ruling on each proposed finding or conclusion.
3. An appropriate proposed market order(s) implementing the recommendations.

The Recommended Decision is drafted by marketing specialists in the Dairy Division from the available record. It is filed with the hearing clerk by the Administrator of AMS. Typically it is first reviewed and approved within the Dairy Division and the Office of General Counsel. In some cases, others within USDA, including the Secretary's Office, may play a more active role in the internal review process, but the development of the Recommended Decision is strictly internal to USDA.

The Recommended Decision is published in the Federal Register and mailed to all interested parties. The decision specifies the time within which exceptions may be filed.

Although the rules of evidence and other procedures are well defined, any recommended judgment necessarily involves the weighing of many issues, factors, and interests. USDA is obliged to be as evenhanded as possible and make decisions consistent with the objectives and criteria specified in the Agricultural Marketing Agreement Act, which is the legal basis for federal orders. Their decision should not unduly or arbitrarily favor any particular market segment, firm, region, or other group. For example, contrary to what some may believe, orders are not supposed to unduly or especially favor dairy farmer interests. In fact, as we shall see, because only dairy farmers have the ultimate vote on whether to accept the Final Decision, the Secretary is obliged to make a decision that balances dairy farmer interests against processor and consumer interests. Providing a reasonable balance across what can be divergent interests is often difficult.

### ***Filing of Exceptions***

Interested parties may file exceptions to or comments on the Recommended Decision. A specified time period is allowed for exceptions, usually in the range of 15 to 60 days.

### ***The Final Decision***

The Dairy Division re-examines the findings and conclusions contained in the Recommended Decision based on the exceptions and hearing record. A Final Decision is then drafted and sent to the Secretary for review and issuance.

In the case of a national or regional hearing, the Final Decision probably can be thought of as many decisions. Basically, the Final Decision will state what changes (or lack

of changes) should be made to the Orders being considered. Thus, if USDA decides to modify provisions in each of the federal orders, there will be a part of the Final Decision which explicitly specifies these changes. There would be, in effect, not one order change but numerous changes. This is not to say that USDA will make sweeping changes in some orders and leave others alone. In most previous system-wide or regional hearings, uniform changes were made across all orders. It would fall upon the Secretary to determine when it is appropriate to make symmetric changes in all orders, and when certain orders should be changed and others left alone. For example, the Secretary could decide that a common definition of class II milk should be used in all orders but that shipping requirements should not be identical in all orders.

Legally, the Final Decision:

1. Must be based on statutory standards for federal milk marketing orders.
2. Include a statement of USDA findings, conclusions, and the complete text of the proposed order.
3. Give reasons for accepting or denying proposals.
4. Include rulings on exceptions to the Recommended Decision.

### ***Producer Approval***

Producers whose milk would be priced under the terms of each order as it is described in the Final Decision are eligible to vote. In other words, USDA says that the producers who vote on a proposed order are those whose milk would have been priced under that proposed order, had it been in effect during a recent representative period. No one else may vote besides producers. Thus, the group of producers who vote and what they vote on depends on the terms of the Final Decision. For example, if the decision modifies an existing order in some way but does not affect which producers would be associated with the order, then the producers affiliated with the old order would be the same as the producers who get to vote on the new order. They and only they would vote on the new order. On the other hand, if, for example, a decision were to merge three neighboring orders, then all farmers from the three old orders would vote as a group on the new, combined order. Thus the rule is that only those producers whose milk would be priced under the terms of the new order would vote on their order.

Following issuance of the Final Decision, the Secretary shall designate a referendum agent for each federal order, generally the Market Administrator in the case of an amended order(s). Individual referendums will be conducted for each amended order, as they are prescribed in the Final Decision.

Producers' approval may be determined by individual referendum or by the polling of cooperatives that may vote for their entire membership (bloc voting). Determination of a cooperative's eligibility for bloc voting its membership is made by the Director of the Dairy Division based on evidence that the cooperative is controlled by its members and is engaged in marketing member milk.

Orders that provide for marketwide pools must be approved by two-thirds (2/3) of the eligible voting producers or by producers who supplied two-thirds (2/3) of the milk sold in the defined marketing area during a designated period. In the rare case of individual handler pools, three-fourths (3/4) of the producers must approve the Final Decision, unless they were amended in a way that they would no longer be individual handler pools under the terms of the Final Decision.

If enough producers vote for the Final Decision, as it would apply to their new order, then the new order will be put into effect. If there are not enough affirmative votes, then the new order is rejected. This also means that the old order is lost as well. When USDA issues its Final Decision, it is saying that the old order is no longer fulfilling the intent of the Act, thus it needs to be replaced. The only question at this point is whether producers will replace it with the new order or no order whatsoever. This up-or-out process is used to make it impossible for producers to pick only the parts of an order that favor them. Because no other market participant gets to vote, producers already have an edge. It is USDA's job to give them a choice that properly balances the interests of all parties. Thus producers are given an all-or-nothing choice.

**Issuance of the Final Order**

If it is approved by producers, the Secretary issues the Final Order(s), following a 30-day period to instruct producers and handlers relative to order changes. Handlers are then required to operate in compliance with the terms and provisions of the order. The order remains in effect until amended through the same procedure, or the order or certain terms or provisions may be suspended or terminated in an emergency situation.

**Suspension or Termination**

Actions suspending particular provisions may be taken without following the usual procedures, in the case of emergency situations. When this is done, it usually pertains to relatively minor provisions, is temporary, and has widespread support.

The Secretary may unilaterally terminate an order or its provisions if he finds it no longer accomplishes the purposes of the Agricultural Marketing Agreement Act. An order must also be terminated if a majority or the required

number of producers do not approve it. Termination of the order obviously occurs in the case of a majority no vote on a Final Decision. It can also occur when there is no hearing. For example, a cooperative or group of cooperatives representing a majority of producers can notify USDA that it no longer supports the order. In essence, the latter would be a vote of no confidence.

**Administrative and Legal Recourse**

The AMAA authorizes a handler to challenge any provision or obligation of the order and to request modification or exemption from it.

The challenge would be heard at a hearing before a USDA administrative law judge, representing the Secretary of Agriculture. The judge determines whether the order provisions or their application are in accordance with the law. The judge's decision may be reviewed by USDA's judicial officer.

A handler or producer not satisfied with USDA's administrative decision may challenge it in the appropriate Federal District Court. Legal precedent indicates that Federal Courts will not hear a case unless the plaintiff (1) has standing, i.e., is a handler or producer directly affected by the order and (2) has exhausted the administrative recourses first.

<b>12 STEPS TO AMENDING AN ORDER</b>	
1.	Secretary of Agriculture introduces and/or receives proposal for hearing.
2.	Secretary investigates its merit.
3.	Secretary issues notice of hearing or denies the petition.
4.	Interested parties present evidence at hearing.
5.	Interested parties file briefs.
6.	USDA reviews and evaluates the hearing record.
7.	USDA issues recommended decision.
8.	Interested parties file exceptions.
9.	USDA reconsiders decision in light of exceptions.
10.	USDA issues final decision.
11.	Producers approve or disapprove.
12.	Final Order is effected or Order is terminated.

SOURCE: The Federal Milk Marketing Order Program. Bulletin #27, USDA, AMS, January 1989, pp. 12–20 and 7 CFR 900, “General Regulations with Respect to Marketing Agreements and Orders.”