

PENNSYLVANIA MILK MARKETING BOARD
7 PA. CODE SEC. 143.15
TRANSACTIONS BETWEEN DEALERS AND PRODUCERS
PAYMENT

The Pennsylvania Milk Marketing Board (“Board”) amends 7 Pa. Code sec. 143 (transactions between dealers and producers) to read as set forth in Annex A.

Effective date

The amendments will be effective 120 days after publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory authority

Section 301 of the Pennsylvania Milk Marketing Law (“Law”) (31 P.S. § 700j-301) gives the Board the authority to “supervise, investigate, and regulate the entire milk industry of the Commonwealth . . . , including the purchase and sale of milk . . . in this Commonwealth, and including the establishment of reasonable trade practices” Section 307 of the Law (31 P.S. § 700j-307) gives the Board the authority to adopt and enforce regulations necessary or appropriate to carry out the provisions of the Law. Section 608 of the Law (31 P.S. § 700j-608) provides that “[m]ilk dealers buying or receiving milk from producers shall furnish to each producer . . . a written statement” and that “[s]uch statement shall set forth such information as may be required by the board” The definition of milk dealer in Section 103 of the Law (31 P.S. § 700j-103) provides, in pertinent part, “[i]f a cooperative distributes . . . milk within this Commonwealth . . . to other milk dealers . . . it shall be deemed to be a milk dealer . . . as to that part of its business, and shall be governed by the provisions of this act applicable thereto.”

Purpose and explanation

The Board mandates, by way of official general order, an over-order premium be paid to Pennsylvania producers based on milk produced, processed, and sold in Pennsylvania. The Board requires milk dealers to provide a line item on monthly statements to producers that shows the amount of over-order premium being paid. The Milk Marketing Law (“Law”) defines cooperatives as “producers,” so cooperatives are told how much over-order premium they are paid. However, there is no similar requirement that cooperatives provide a line item on monthly statements to their members that shows the amount of over-order premium the members are paid, despite cooperatives being defined in the Law as dealers when they distribute member milk to other dealers. This regulation would require cooperatives to provide a line item on monthly statements to their members disclosing the amount of over-order premium being paid.

In April and May 2019, the Board conducted a survey to determine dairy farmers’ knowledge and opinions about Pennsylvania’s milk pricing system including the over-order premium.

When asked if they receive an over-order premium, 69 percent of cooperative members stated, “No” or “I’m not sure.” Those individuals indicating, “I’m not sure,” were asked for a reason for that response; the majority of comments stated that they have no information on monthly checks from cooperatives to indicate any over-order premium is received. Respondents were also asked whether they believe the over-order premium is distributed fairly. Less than 5 percent of cooperative members agree that it is. Conversely, the majority of cooperative members believe the Board should revise its system for determining and distributing the over-order premium.

A total of 214 comments from survey respondents focused mainly on the lack of transparency by cooperatives in not providing information about the amount of over-order premium included in their monthly payment. Because they lack information, many cooperative members are skeptical and even distrustful of the state and Board, as well as the cooperatives, when discussing their income. They do not understand how the system is benefitting them in any way and believe they are not, in fact, receiving what they are entitled to receive.

Milk dealers have been required since 1997 to provide a line item on monthly statements to producers showing the amount of over-order premium being paid; the independent producers are thus able to quantify the direct benefit they receive from the Board’s mandated over-order premium. For payment purposes, cooperatives are defined as the “producer,” so cooperatives are provided information regarding how much over-order premium they are being paid, but cooperatives are not required to provide that information to their members.

As of February 2021, there were approximately 1,100 independent producers and 4,300 cooperative member producers in Pennsylvania. The independent producers are provided information on their monthly pay statements showing the direct benefit they receive from the Pennsylvania over-order premium.

The majority of the 4,300 cooperative member producers do not have a line item currently on their statements detailing the amount of over-order premium they are being paid. Those producers who do not have the line item are the intended beneficiaries of this regulation.

Description of proposed amendments

The amendment will require cooperatives to provide a line item on monthly statements to their Pennsylvania producer members that shows the amount of Board-mandated over-order premium being paid.

The regulation prescribes a formula for the cooperatives to use to calculate the over-order premium rate and total amount being paid to their Pennsylvania producer members. This will provide uniformity between and among cooperatives regarding the calculation of the amount of over-order premium. The Board also currently prescribes a formula for milk dealers to determine the line item on their monthly statements to independent producers.

The cooperative formula is identical to the formula the Board currently uses to provide information to a Pennsylvania cooperative regarding the over-order premium rate received by

that cooperative. That cooperative then provides the information to its members. Since this formula is already in use and produces a result that has effectively transmitted the over-order premium rate information, the Board decided to adopt it for this regulation. This formula calculates the average rate received by members of each cooperative.

Public comments

Pennsylvania Farm Bureau submitted a comment in favor of the Board adopting the regulation.

The Pennsylvania Association of Dairy Cooperatives (“PADC”) made several comments. First PADC (and IRRC) suggested adding “Pennsylvania” to subsection (b) to expressly specify the regulation was applicable to Pennsylvania member pounds. The Board agrees and “Pennsylvania” is added to subsection (b) in the final form regulation.

PADC proposed adding a subsection to account for those situations where cooperatives market the milk of non-members, suggesting that the non-member milk should be aggregated with member milk. Cooperatives are formed and operate with the purpose that the members work together to maximize benefits for the members. Non-members, by definition, are not parties to the agreement to work together to maximize benefits for the members; therefore, non-member milk should not be treated the same as member milk and non-member milk should receive information and payments specific to the milk the non-member markets through the cooperative. The Board currently requires cooperatives, as the dealers they are defined to be, to specify the amount of over-order premium being paid to non-members pursuant to the member/non-member dichotomy described. Therefore, this suggestion is not adopted in the final form regulation.

PADC also suggested language to treat milk marketed for other cooperatives the same as milk marketed for member farmers. This concept is not adopted for the final form regulation. The final form regulation concerns transactions between individual producers and their cooperatives. The PADC cooperatives are the only cooperatives that suggested this concept be included in the regulation. Without more input from other cooperatives, the Board does not think that this suggestion should be adopted at this time.

PADC also suggested adding language based on section 809 of the Law (31 P.S. § 700j-809) which provides in relevant part that cooperative members have the right to determine among themselves how the proceeds of their collective sales are distributed. The final form regulation contains section (e) providing that cooperatives are not required to reduce or alter any payments or information provided to their members beyond providing the over-order premium payment information required by the new regulation.

After the close of the public comment period, the Board circulated a proposed draft of the final form regulation, asking for additional input. PADC was the only party that provided additional input. Based on that additional input, the Board added a subsection to address situations where cooperatives are not paid over-order premium during a month and how that

should be reported to that cooperative's members. The additional PADC input also suggested the rounding concept adopted in subsection (c) in the final form regulation.

Comments regarding calculation of the line item

Representative John Lawrence recommended that the Board change the regulation to require that cooperatives provide a line item to each cooperative member detailing the specific amount of over-order premium that member's milk generated. Regarding the proposed regulation, Representative Lawrence commented "[t]he definition in paragraph (b) would result in a listing on each farmer's milk checks of total dollar value of over-order premiums paid to the entire cooperative for a given month. This is very different from the information provided by milk dealers to their farmer members – where a milk check shows the amount of over-order premium dollars paid to each individual farmer." (Underscores in original). Milk price regulation is a complex subject and the Board believes that Representative Lawrence was missing a key piece of information when he submitted his suggestion. The Board Chairman explained that concept to Representative Lawrence and the Board believes that if Representative Lawrence had that information his suggestion would not have been made. IRRC also commented that providing an average over-order premium paid to the entire cooperative would not alleviate the concerns of cooperative members who do not believe they are receiving what they are entitled to receive. The calculation in section (b) to determine the over order premium rate for cooperative members is essentially the same calculation, mandated by Board official general order, used by milk dealers to specify over-order premium rate paid to independent farmers. This is an important issue and is explained in detail below.

The over-order premium is calculated on an individual handler pool basis based on each dealer's Class 1 utilization. This means that the over-order premium rate paid to producers differs among Class 1 processors, based on the ratio of the Pennsylvania producer milk they receive to the total producer milk they receive and the amount of packaged milk they sell in Pennsylvania. Each producer supplying a particular Class 1 processor receives the same over-order premium rate as every other producer supplying that same particular Class 1 processor, but remember that each processor pays a different over-order premium rate to its producers.

The over-order premium rate paid by each processor and received by each producer supplying that particular processor is essentially an average of the total over-order premium generated by each producer's shipments to the processor. Class 1 processors do not account for the utilization of each supplying producer's individual milk shipments. A producer's milk may today be packaged and sold to a Pennsylvania retailer (generating an over-order premium obligation), tomorrow be packaged and sold to an out-of-state retailer (not generating an over-order premium obligation), and the next day be diverted to a cheese plant (not generating an over-order premium obligation). Regardless of the ultimate use of each shipment, every producer supplying a particular Class 1 processor is paid the same over-order premium rate per hundredweight as every other producer supplying the particular Class 1 processor. In other words, producers supplying Class 1 processors are not paid individual rates based on the over-order premium generated by their particular milk shipments, but rather are paid an average rate based on the plant's utilization.

Since each Class 1 processor has a different Pennsylvania Class 1 utilization, each Class 1 processor pays a unique over-order premium rate. Producers supplying a processor with high Pennsylvania Class 1 utilization are paid a higher over-order premium rate than producers supplying a processor with a lower Pennsylvania Class 1 utilization.

The Board's proposed regulation treats the milk marketed to a cooperative by its members analogously to how milk marketed by independent producers to Class 1 processors is treated. Class 1 processors calculate and itemize the over-order premium based on the total utilization of the plant with no regard to where each supplying producer's milk ended up on any particular day. Similarly, the proposed regulation requires cooperatives to calculate and itemize the over-order premium with no regard to where an individual member's milk was shipped on any particular day. Each Class 1 processor pays a unique average over-order premium rate based on its utilization. The proposed regulation would require cooperatives to essentially do the same.

Subsection (b) has been expanded to make clear the requirement that the over-order premium rate calculated by cooperatives be applied to the pounds of milk marketed by each member to show an amount received specific to each member based on the amount of pounds marketed to the cooperative. This mirrors the requirement that Class 1 processors show the amount received by producers in their statements by applying the processor's particular rate to the pounds of milk marketed by each individual producer.

Broadly speaking, the cooperative business model provides for pooling revenues and paying money back to members per the agreement between members and the cooperative. Cooperatives receive over-order premium payments, along with other mandated minimum payments and voluntary premiums. Those revenues are pooled and paid back to members. Part of the payment to members is, therefore, attributable to the Pennsylvania over-order premium in an amount based on the premium received by the cooperative and the pounds of member milk marketed by the cooperative. Just as the over-order premium is not paid by processors to independent producers based on the over-order premium generated by each producer's individual milk shipments throughout the month, the proposed regulation does not require cooperatives to track and account for the over-order premium generated by each member's individual milk shipments throughout the month. Therefore, for the purpose of providing information regarding the over-order premium paid, the regulation treats cooperative member milk marketed to a cooperative the same as independent dairy farmer milk marketed to a Class I processor.

Fiscal impact

The proposed amendments would have little fiscal impact on the Commonwealth, its political subdivisions, or the public.

Regulatory review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 10, 2019, the Board submitted a copy of the notice of proposed rulemaking, published at 49 Pa. Bulletin 5455 (September 21, 2019) to IRRC and to the Chairs of the House and Senate Committees on Agriculture and Rural Affairs for review and comment.

Under section 5(g) of the Regulatory Review Act, the Board is required to submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5(a)(j.2)), on _____, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved this final-form rulemaking.

Contact person

Interested persons may obtain information regarding this final-form rulemaking by contacting Doug Eberly, Chief Counsel, Pennsylvania Milk Marketing Board, 2301 North Cameron Street, Harrisburg, PA 17110, ra-pmmb@pa.gov, within 30 days after publication in the Pennsylvania Bulletin. Individuals who require this information in a different format may call the Board at 717-787-4194 or the PA Relay Service for TDD Users at 800-654-5984.

Findings

The Board finds that:

- (1) Public notice of the intention to adopt these final-form regulations was given under sections 201 and 202 of the Act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) The regulation is necessary and appropriate for the administration of the act.

Order

The Board, acting under authorizing statute, orders that:

- (a) The regulations of the Board, 7 Pa. Code Chapter 143, are amended by adding § 143.15 to read as set forth in Annex A.
- (b) The Board will submit this order and Annex A to the Office of Attorney General for review and approval as to legality and form as required by law.
- (c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The order shall take effect 120 days following publication in the Pennsylvania Bulletin.

Robert N. Barley
Chairman

Pennsylvania Milk Marketing Board Regulation 47-20

No commentator expressly asked for information regarding the Final Form submission. Regardless, the Board emailed the Final Form submission packet to

Representative John Lawrence jlawrence@pahousegop.com
Pennsylvania Association of Dairy Cooperatives mbeshore@johnsonduffie.com
Pennsylvania Farm Bureau Jdmontenegro@pfb.com
Pennsylvania Association of Milk Dealers wyoviene@bakerdonelson.com
Pennsylvania Food Merchants Association allen.warshaw@gmail.com
Pennsylvania Department of Agriculture johoward@pa.gov
Nelson Troutman jt3@evenlink.com

The Board also posted the Final Form submission packet at
<https://www.mmb.pa.gov/Consumer/PublishingImages/Pages/default/Cooperative%20over-order%20premium%20line%20item%207%20Pa%20Code%20143.15.pdf>.

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§ 143.15. Cooperative communication of over-order premium.

(a) Cooperatives shall show by line item on their monthly statements to dairy farmers marketing milk through the cooperative the specific amount of the Pennsylvania Milk Marketing Board over-order premium being paid.

(b) For the purpose of this section, "the specific amount of the Pennsylvania Milk Marketing Board over-order premium being paid" shall be calculated monthly by each cooperative by

(1) deriving an over-order premium rate by dividing the total Pennsylvania over-order premium paid to the cooperative by the total cooperative Pennsylvania member pounds marketed,

(2) multiplying the rate derived in (b)(1) by the Pennsylvania member pounds marketed.

(c) The amount calculated in subsection (b) shall be expressed on dairy farmer monthly statements in cents/hundredweight. When the result of the calculation in (b)(1) falls between cents, the rate reported to dairy farmers shall be rounded down to the lower cent.

(d) If a cooperative is not paid over-order premium during a month, such cooperative shall disclose on its monthly statement that no over-order premium was received.

(e) Other than setting forth the calculation of value in subsection (b), nothing in this section shall require reduction or alteration of amounts, content, or format of information about cooperative premium programs on the monthly statements to dairy farmers.