

ARKANSAS REGISTER

Proposed Rule Cover Sheet



Secretary of State
John Thurston
500 Woodlane Street, Suite 026
Little Rock, Arkansas 72201-1094
(501) 682-5070
www.sos.arkansas.gov



Name of Department _____

Agency or Division Name _____

Other Subdivision or Department, If Applicable _____

Previous Agency Name, If Applicable _____

Contact Person _____

Contact E-mail _____

Contact Phone _____

Name of Rule _____

Newspaper Name _____

Date of Publishing _____

Final Date for Public Comment _____

Location and Time of Public Meeting _____

Mark Up
MILK STABILIZATION RULES

I. Purpose

1. The purpose of these rules is to:

- a. Implement Act 521 of 2021, codified at Ark. Code Ann. § 2-10-104; and
- b. Ensure that Arkansas milk producers receive Class 1 prices for milk utilized or sold as fluid milk in this state.

2. It is the understanding of the Arkansas Milk Stabilization Board that:

- a. Prices for milk produced and sold in Arkansas are currently only regulated at the Federal level, pursuant to the state of Arkansas's inclusion in Federal Milk Marketing Order Number 7;
- b. The Federal regulations set the minimum prices of milk paid to producers based on the average utilization of milk within the entire marketing order region, which includes several southeastern states;
- c. Traditionally, the utilization of milk produced and sold in the state of Arkansas as fluid milk is much higher than the average utilization of milk as fluid milk in the Federal Milk Marketing Order Number 7;
- d. As a result, Arkansas milk producers are often underpaid for the milk they produce, making it necessary for the state to require a premium to fairly compensate milk producers;
- e. The overwhelming majority of milk producers in Arkansas are members of cooperative associations;
- f. Due to various economic reasons, the cooperative associations often negotiate with milk dealers to reach agreements for price premiums that exceed the Federal Marketing Order's established monthly minimum milk price;
- g. However, milk producers remain underpaid for the milk they produce as the premiums paid to cooperatives are not sufficiently passed on to producers;
- h. It is therefore necessary to establish clear circumstances that cause Arkansas milk producers to be underpaid for milk, and to require that premium payments are fairly passed through to producers in those circumstances.

II. DEFINITIONS AND CONTEXT

The following terms shall be construed in this rule to have the following meanings, except in those instances where the context clearly indicates otherwise:

"BOARD" means the Arkansas Milk Stabilization Board.

"BOOKS AND RECORDS" or "BOOKS OR RECORDS" shall include all pertinent books, ledgers, journals, records, papers, memoranda, correspondence, vouchers, bills, receipts, cancelled checks, accounts, exhibits, photographs and other documents.

"CONSUMER" means any person other than a milk dealer who purchases milk for consumption or use by him or herself or others.

"COOPERATIVE" means a cooperative agricultural association or corporation of producers organized under the laws of this State or of any other state and engaged in making collective sales or in the marketing of milk for producers under contract with it.

"DEALER" means any person, who purchases or receives or handles on consignment or otherwise milk within the State, for processing or manufacture and further sale, within or without the State, whether on behalf of himself or others, or both. A producer who delivers milk to a milk dealer only shall not be deemed a milk dealer.

"DEPARTMENT" means the Arkansas Department of Agriculture.

"HANDLE" to handle means the doing of any one or several or all of the following acts, to buy, sell, barter, acquire, store, process, consign, receive, transport, control as owner, buyer, seller, consignee, consignor, bailee, bailor, broker, or factor.

"MARKET" includes any county, city, borough, incorporated town, or township in the State, or any two or more such counties, cities, boroughs, incorporated towns, or townships, or any portions thereof, or any other land within the territorial limits of the State designated by the Board as a marketing area.

"MILK" includes fluid milk and cream, fresh, sour or storage, skimmed milk, low-fat milk, flavored milk or milk drink, buttermilk, ice cream mix, and condensed or concentrated whole or skimmed milk except when contained in hermetically sealed cans.

"OVER-MARKET PREMIUM" means the payment required to be paid to producers pursuant to Act 521 of 2021, and further provided for in this rule.

"PERSON" includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned or conducted by or on behalf of two or more individuals or other persons.

"PRICE" includes the amount paid or to be paid and the proceeds returned or to be returned, whether the transaction be one of purchase, sale, consignment, sale or return, accounting, or otherwise.

"PRODUCER" means a person producing milk in Arkansas.

"STORE" includes a grocery store, hotel, restaurant, soda fountain, dairy products store, or any similar mercantile establishment which sells or distributes milk.

Any reference in this rule to quantity of milk shall be construed to include its whole milk equivalent.

III. PRICES OF MILK

A. Calculations of Milk Prices

Milk class prices shall be calculated using the regulations set in 7 C.F.R. Part 1000. By the 17th of every month, a dealer shall determine the utilization of its milk that was both produced in and sold as fluid milk within Arkansas for the preceding month. If the dealer's percentage of utilization of milk that was produced in and sold as fluid milk within Arkansas exceeds the percentage of utilization of milk as Class I milk in Federal Milk Marketing Order (FMMO) Number 7, the producer shall be paid an Over-Market Premium, as calculated in Section III, Paragraph B.

B. Over-Market Premium

When an Over-Market Premium is owed to a producer, the premium shall be paid to the producer, or to the producer's cooperative, by the dealer pursuant to the rules for payments to producers set forth below.

If the Dealer pays the premium to the cooperative, the cooperative shall make the calculations. The premium shall be calculated as follows:

1. Calculate the Dealer's Class I Utilization Price by multiplying the percentage of its milk produced in and sold in Arkansas as fluid milk by the Class I Price as determined under the FMMO 7 (Dealer's Class I Utilization % x Class I Price);
2. Calculate the FMMO Class I Utilization Price by multiplying the percentage of milk utilized as Class I milk within the FMMO 7 by the Class I Price as determined under the FMMO 7 (FMMO 7 Utilization % x Class I Price); and
3. Subtract the FMMO 7 Class I Utilization Price from the Dealer's Class I Utilization Price (Dealer's Class I Utilization Price – FMMO Class I Utilization Price).

The figure that results from the calculation above is the Over-Market Premium that is owed to producers for every hundredweight of milk produced in and sold as fluid milk within Arkansas.

C. Terms of Payment

1. Producers shall be paid as follows:

(a) Payment to producers, cooperatives and producer settlement funds shall be made under the Federal milk marketing order.

(b) A final settlement payment for all milk and cream purchased shall be made not later than the 17th day of the following month. The final settlement shall include any balances due to the producer, including any Over-Market Premium owed, if applicable, and shall be accompanied by a statement to each producer setting forth the information required under Section II, paragraph D.

(c) If a date required for payment falls on a Saturday, Sunday or State or National Holiday, the payment is due on the following business day.

2. This section may not be interpreted as prohibiting a dealer from paying its producers on a weekly basis; however, when a dealer pays on this basis, it shall also provide its producers with a monthly statement as prescribed by Section II, paragraph D. All advance payments on the weekly basis shall be at least at the lowest announced class price for the previous month for the number of pounds purchased or received during the week in question. The final settlement shall include any balances due for the initial weeks during the month and shall be accompanied by a statement to each producer setting forth the information required under Section II, paragraph D.

D. Monthly Statement to Producers

Dealers purchasing milk or cream from producers shall furnish producers, in addition to any reports to producers that may be required by the FMMO, with statements containing each of the following items at the time of the monthly final settlement payment. Producers receiving their statements through electronic media shall have an agreement to do so on file with the purchasing dealer.

1. The name and address of the dealer issuing statement.
2. The date of statement.
3. The period for which statement is rendered.
4. The name and either the address or the producer number of the producer for whom the statement is intended.
5. The total pounds of milk purchased from the producer.
6. The gross amount paid for milk.
7. The dealer's utilization percentage for milk produced in and sold as fluid milk in Arkansas.

8. The utilization percentage for class I milk in FMMO 7.
7. Itemization of the pounds of milk subject to Over-Market Premiums and additional amounts paid as premiums, bonuses, or similar payments.
8. The gross amount due after addition of premiums, bonuses, or similar payment.
9. Itemization of advance payments and authorized deductions.
10. The total deductions.
11. The net amount due and paid.
12. A listing of the amount of milk picked up each day.

IV. RECORDS, REPORTS, AND INFORMATION

A. Records

Milk dealers shall keep within the State the following records:

1. All records as may be required to be kept or produced under the FMMO.
2. Any records used to determine the dealer's liabilities for Over-Market Premiums under these rules.
3. All reports filed with the Board as required under these rules.
4. Such other records and information as the Board may deem necessary.

The records herein required shall be kept in the possession of the milk dealer for a period not less than two years unless the Board otherwise provides.

B. Reports

By the 20th of every month, each milk dealer shall submit to the Board a report for the preceding month stating whether the percentage of its milk produced in and sold as fluid milk within Arkansas is greater or less than the percentage of milk utilized as Class I milk in FMMO 7. The report shall list in detail the total amount of the dealer's milk produced in and sold within Arkansas and the total amount of the dealer's milk produced in and sold as fluid milk within Arkansas. If an Over-Market Premium is owed for the preceding month, the following additional information shall be included in the monthly report:

1. The Over-Market Premium price per hundredweight, as calculated under Section II Paragraph B.
2. An accounting of how much milk was subject to the Over-Market Premium.
3. Identification of producers owed an Over-Market Premium, including the names and addresses of the producers.
4. A copy of the statement provided to each producer upon final settlement payment, as required under Section II, Paragraph D.

V. COOPERATIVES

A. No provision of this rule shall prevent or interfere with, and no provision contained herein shall be deemed or construed to prevent or interfere with, any agreement between producers and milk cooperative agricultural association or corporation organized under the laws of this State, or a similar association or corporation organized under the laws of this or any other state.

B. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such cooperative agricultural association or corporation.

C. Dealer payments of Over-Market Premiums made to cooperatives shall be passed through, in whole, to producers for the premium owed to the producer under this rule.

VI. VIOLATIONS

A. It shall be a violation of these rules for a milk dealer to fail to pay an Over-Market Premium as required under these rules.

B. It shall be a violation of these rules for a cooperative to fail to pass through Over-Market Premium payments in whole as required in Section VI(C).

C. A producer who is not paid an Over-Market Premium as required under these rules may file an action in a circuit court with proper jurisdiction to recover the Over-Market Premium and any other applicable damages under Arkansas law or rule.

Clean Copy
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B. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such cooperative agricultural association or corporation.

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B. It shall be a violation of these rules for a cooperative to fail to pass through Over-Market Premium payments in whole as required in Section VI(C).

C. A producer who is not paid an Over-Market Premium as required under these rules may file an action in a circuit court with proper jurisdiction to recover the Over-Market Premium and any other applicable damages under Arkansas law or rule.

QUESTIONNAIRE FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY Arkansas Department of Agriculture
DIVISION Milk Stabilization Board
DIVISION DIRECTOR _____
CONTACT PERSON Wade Hodge
ADDRESS #1 Natural Resources Drive, Little Rock AR 72205
PHONE NO. 501-219-6361 FAX NO. _____
E-MAIL wade.hodge@agriculture.arkansas.gov
NAME OF PRESENTER AT COMMITTEE MEETING Wade Hodge
PRESENTER E-MAIL wade.hodge@agriculture.arkansas.gov

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question **completely** using layman terms. You may use additional sheets, if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Rebecca Miller-Rice
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

- 1. What is the short title of this rule? Milk Stabilization Rules
- 2. What is the subject of the proposed rule? To implement the provisions of Act 521 of 2021, which requires the Milk Stabilization Board to ensure that Arkansas milk producers receive Class 1 prices for milk produced and sold as fluid milk within Arkansas.
- 3. Is this rule required to comply with a federal statute, rule, or regulation? Yes _____ No x _____
If yes, please provide the federal rule, regulation, and/or statute citation.
- 4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes _____ No x _____
If yes, what is the effective date of the emergency rule? _____
When does the emergency rule expire? _____

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes _____ No _____

5. Is this a new rule? Yes ☒ No ☐ If yes, please provide a brief summary explaining the rule. The rule implements the provisions of Act 521 of 2021, which requires the Milk Stabilization Board to ensure that Arkansas milk producers receive Class 1 prices for milk produced and sold as fluid milk within Arkansas.

Does this repeal an existing rule? Yes ☐ No ☒ If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes ☐ No ☒ If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does.**

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Ark. Code Ann. § 2-10-101 et seq; specifically § 2-10-104(d).
7. What is the purpose of this proposed rule? Why is it necessary? See attached summary
8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). www.agriculture.arkansas.gov
9. Will a public hearing be held on this proposed rule? Yes ☒ No ☐
If yes, please complete the following:
Date: March 2, 2022
Time: 9:30 a.m.
Place: 1 Natural Resources Drive, Little Rock, AR
10. When does the public comment period expire for permanent promulgation? (Must provide a date.)
March 7, 2022
11. What is the proposed effective date of this proposed rule? (Must provide a date.)
May 1, 2022
12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice.
13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark.

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Arkansas Department of Agriculture
DIVISION Milk Stabilization Board
PERSON COMPLETING THIS STATEMENT Wade Hodge
TELEPHONE NO. 501-219-6361 **FAX NO.** _____
EMAIL: wade.hodge@agriculture.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Milk Stabilization Rules

1. Does this proposed, amended, or repealed rule have a financial impact?
Yes _____ No X _____
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes x _____ No _____
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes x _____ No _____

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;
- (b) The reason for adoption of the more costly rule;
- (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
- (d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.
4. If the purpose of this rule is to implement a federal rule or regulation, please state the following: N/A
- (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

(b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____ N/A _____

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____ N/A _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected. N/A

Current Fiscal Year

\$ _____ N/A _____

Next Fiscal Year

\$ _____ N/A _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

\$ _____ N/A _____

Next Fiscal Year

\$ _____ N/A _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private

individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes _____ No ☒ _____

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously

with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.



Asa Hutchinson
Governor

ARKANSAS DEPARTMENT OF AGRICULTURE

1 Natural Resources Drive, Little Rock, AR 72205
agriculture.arkansas.gov
(501) 225-1598



Wes Ward
Secretary of Agriculture

February 4, 2022

Proposed Rule to Implement Milk Pricing Requirements of Act 521 of 2021

Purpose:

The purpose of this memorandum is to explain the Arkansas Milk Stabilization Board's proposed rules to ensure that Arkansas milk producers receive Class I prices for milk produced in and sold as fluid milk within Arkansas pursuant to Act 521 of 2021.

Background:

In the 2021 General Assembly, the Arkansas Legislature passed House Bill 1729 which amended the law regarding the powers and duties of the Board, giving the Board significantly more responsibility. Act 521 became effective July 28, 2021 and requires the Board to ensure that Arkansas milk producers receive Class I prices for milk utilized or sold as fluid milk within Arkansas.

Prior to the enactment of Act 521, Arkansas milk transactions were only governed by the Federal Milk Marketing Order 7 ("FMMO" and "FMMO 7") for the Southeast Region which covers all of Arkansas and parts or all of eight other states. 7 C.F.R. § 1000 *et al.* The FMMO is a complex pricing regulatory system that sets the minimum prices to be paid for milk products based on the end use ("utilization") of the milk (i.e., skim milk, cheese, cream, etc.). Under that system, the FMMO sets the price based on the utilization of milk in the region as a whole. Class I milk, which includes fluid milk, is worth the most money. Classes II-IV include various other uses of milk, including but not limited to ice cream, soft and hard cheeses, butter, yogurt, and condensed milk, and Classes II-IV are worth less money than Class I milk.

The FMMO considers the overall use of the milk and assigns the price to be paid to producers based on the percentage of utilization as a whole within the regional market. So, if 75% of milk for the month was used as Class I fluid milk, 75% of all milk in the region would be worth the Class I price, and the remaining 25% of the milk produced would be paid at the rate for the utilization of that milk as Class II, III, or IV. All producers in the region would be paid as if 75% of the milk they produced was used as Class I milk, and 25% was used as Class II, III, or IV milk.

From discussion held at Board meetings, it has been determined that the percentage of producers' milk in Arkansas used as Class I is approximately 94%, while the regional market average use is approximately 65%. Therefore, Arkansas producers receive substantially less compensation than they would for the actual utilization of their milk. In Arkansas, nearly all milk producers are members of cooperatives, the most prevalent being Dairy Farmers of America (DFA), a national cooperative association. The proposed rule will require the cooperative to pay Class I prices to its Arkansas members for milk utilized and sold as fluid milk in Arkansas.

From May 2021 through January 2022, the Board met six times to discuss the Act and various versions of the proposed rule. The Board voted to move forward with adoption of the proposed rule on January 27, 2022.

Key Points: The proposed rule:

- Requires a determination of whether the local Arkansas utilization for Class I milk exceeds the FMMO 7 utilization for Class I milk

- Requires the cooperative to pay an over-market premium to producers in Arkansas if the local utilization exceeds the FMMO 7 utilization
- Provides that processors may pay the premium to the cooperative instead of the producers
- Requires the cooperatives to pass the premium through to producers in an amount sufficient to ensure that producers receive Class I prices

Discussion:

The FMMO sets the base price for milk, but there are other economic factors that determine what prices are ultimately paid to producers. Cooperatives have greater bargaining power than individual farmers because they consist of all the producers together as opposed to each one advocating on their own. The cooperatives also do tasks that are traditionally handled by the milk processor, like picking up and delivering the milk to the processor, which reduce the processor's costs but also gives the cooperative power because the cooperative then controls where the milk is delivered, and it has the power to choose to whom it sells milk. Because of these things, and various other factors, the cooperatives have the bargaining power to then negotiate with the processor a price that is above what the FMMO dictates as the base price. That negotiated price is referred to as an over-order premium, which is negotiated between the cooperative and the processor monthly.

The proposed rule provides that the premium to be paid to the producers is the premium that is already negotiated between the processor and the cooperative, and the cooperative is required to pass that money through to the producers in an amount that would ensure that the producers receive Class I prices.