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Department of Agriculture, Trade and Consumer Protection
Bradley M. Pfaff, Secretary

DATE: May 7, 2019

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FROM: Bradley M. Pfaff, Secretary
Department of Agriculture, Trade and Consumer Protection

SUBJECT: Grain Dealers; Milk Contractors; Vegetable Contractors, chs. ATCP 99, 100, and 101; Final Draft Rule (Clearinghouse Rule #17-047)

Introduction

The Department of Agriculture, Trade and Consumer Protection (“DATCP”) is transmitting this rule for legislative committee review, as provided in Wis. Stat. § 227.19 (2) and (3). DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in Wis. Stat. § 227.19 (2). This rule makes certain changes to the Agricultural Producer Security Fund (Fund).

Background

The Fund, established by Wis. Stat. § 25.463 and administered by the Department as a public trust, has been reduced by about 50% due to recent defaults, and the balance attributed to vegetable contractors is currently well below its minimum statutory threshold.

Milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors (collectively known as contractors) must purchase a license to obtain milk, grain, and vegetables, respectively, from producers, and most contractors are required to contribute to the Fund annually. Funds are used to settle claims by producers in the event that a contractor defaults on a payment. Funds from each industry are accounted for separately and then deposited into the overall Fund. Wis. Stat. Chapter 126 establishes detailed fund assessment requirements, except that it requires the Department to establish milk contractor fund assessments by rule. Wis. Stat. § 126.88

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May 7, 2019
The Honorable Roger Roth
The Honorable Robin Vos

(1) sets minimum and maximum fund balances for each industry as well as a minimum and maximum balance requirement for the overall Fund.

Generally, assessment rates are calculated using a complex formula that is based on the contractor's current ratio and debt-to-equity ratio. The assessment rate is higher for contractors with weaker financial positions. The assessment rate for contractors that are not required to file a financial statement is a fixed rate based on the number of years the contractor contributed to the Fund. The Department calculates the annual assessment at the beginning of each license year.

Due to a 2014 default, the Fund balance attributed to vegetable contractors fell well below the minimum statutory threshold of \$800,000. The following year, a \$1 million default in the milk industry further drew down the Fund balance. As a result, the Department and the Agricultural Producer Security Council (Council), as defined in Wis. Stat. § 15.137 (1), identified the need to evaluate the entire program. An actuarial study was conducted in part to examine the overall sustainability of the Fund and to analyze the equitability of assessments contributed by each industry relative to anticipated losses. In December 2015, the Department received the study and began working with the Council to develop recommendations for permanent changes to the Agricultural Producer Security program.

The Department is statutorily required to initiate rulemaking to modify vegetable contractor assessments as a result of its portion of the Fund balance being below its statutory threshold. Conversely, without a significant increase, the vegetable contractor portion of the Fund balance will remain negative for the foreseeable future.

Wis. Stat. Chapter 126 establishes a maximum balance for grain dealers. Without this change in policy, the Department anticipates the grain dealer balance will exceed that maximum balance for the foreseeable future.

The Department must take some action to meet its statutory obligation with regard to the Fund balance attributable to vegetable contractors and grain dealers. A permanent solution must be reached or the Fund will not be able to meet its statutory obligation as dictated by Wis. Stat. Chapter 126.

Rule Content

This proposed rule does all of the following:

- Creates an automatic reduction in the assessments paid by grain dealers when the grain dealer portion of the Fund exceeds the statutory maximum.
- Reduces assessments paid by milk contractors by 20 percent by adding a multiplier.
- Increases the assessment paid by vegetable contractors.
- Restores the Fund to meet its statutory obligation.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

May 7, 2019
The Honorable Roger Roth
The Honorable Robin Vos

ATCP 99 - Grain

The United States Warehouse Act is a voluntary regulatory program administered by Farm Service Agency (FSA), a unit within USDA. Under the Act, warehouse keepers who obtain a warehouse license must comply with several FSA regulations. Generally, the warehouse keeper must maintain enough grain in inventory to cover 100% of depositor obligations at all times. Further, FSA licensed warehouse keepers must submit financial statements, submit to inspections by USDA auditors, and post surety bonds. In the event a warehouse defaults, FSA can convert the bonds to cash and disperse the proceeds to depositors. The federal grain warehouse license is officially a voluntary program; in practice, it is not completely voluntary. Every state that has significant grain production (including Wisconsin) has some type of state grain warehousing law. These laws require grain warehouse keepers to obtain a license but allow them to choose either a state license or a federal license. Those that choose a federal license are exempt from the state licensing program.

ATCP 100 - Milk

No federal programs currently exist that offer milk producer security from contractor payment defaults.

ATCP 101 - Vegetable

The Perishable Agricultural Commodities Act (PACA) is a federal program that provides some protections for vegetables. This program consists of a priority lien against vegetable-related assets and is applicable to fresh vegetables based on a complex set of variables and circumstances. Wisconsin's vegetable security program applies only to processing vegetables. Wisconsin's program uses an indemnity fund, rather than a priority lien-type program.

There may be some limited overlap between the Wisconsin and federal programs, but that overlap is justified because the scope of federal coverage is not entirely clear. Overlap was reduced by Wisconsin legislation, which permits certain potato buyers covered under the federal program to opt out of most of the state program.

Comparison with Rules in Adjacent States

ATCP 99 - Grain

Like all states with a significant grain industry, Minnesota, Michigan, Illinois, Indiana, and Iowa all require persons who buy grain from producers to obtain a grain dealer license and all persons who store grain for others are required to obtain either a state or federal grain warehouse license. Licensees must file financial statements with the state, and warehouses must maintain 100% of depositor-owned grain in inventory at all times.

May 7, 2019
The Honorable Roger Roth
The Honorable Robin Vos

Minnesota requires grain dealers and grain warehouse keepers to post bonds with the state. Indiana, Illinois, and Iowa all have a state indemnity fund that is made up of grain dealer and warehouse assessments. Michigan (like Wisconsin) has a combination of bonds and indemnity fund contributions.

ATCP 100 - Milk

Minnesota requires any wholesale dealer or food processor who contracts with other Minnesota dealers or farmers of milk, cream, or products made from milk or cream, to be licensed as a Wholesale Produce Dealer. Dealers are required to obtain a surety bond and required to maintain trust assets so that assets are freely available to satisfy outstanding obligations. There is no exemption to this requirement.

Michigan requires producer security for all manufacturing and Grade A dairy plants that are a first receiving point for raw milk that will be processed at that facility. Security can be in one or more of several forms including bond, letter of credit, certificate of deposit, or pre-payment. There is no exemption to this requirement.

Illinois, Indiana, and Iowa do not require dairy producer security.

ATCP 101 - Vegetable

Minnesota requires any wholesale dealer or food processor who contracts with other Minnesota dealers for fresh fruits or vegetables to be licensed as a Wholesale Produce Dealer. Dealers are required to obtain a surety bond and required to maintain trust assets so that assets are freely available to satisfy outstanding obligations. dealer defaults.

Illinois, Iowa, Michigan, and Indiana lack similar programs.

Summary of Factual Data and Analytical Methodologies

As a result of a large default, the Department and the Council identified the need to evaluate the entire agricultural producer security program. An actuarial study was conducted in part to examine the overall sustainability of the Fund and to analyze the equitability of assessments contributed by each industry relative to anticipated losses. The Department adopted a number of interim emergency rules as a stopgap measure while it awaited the results of an actuarial study to consider possible permanent rule changes. In December 2015, the Department received the study of the Fund and began working with the Council to develop recommendations for permanent changes in the agricultural producer security program. These proposed rule changes reflect that joint effort. The DATCP Board approved the proposal at its September 21, 2017 Board meeting.

Producer Security Fund; Assessment Revenues

The following table shows *projected* assessment revenues:

Total Projected Fund Assessment Revenues			
	<i>Without this rule</i>	<i>With this rule</i>	Difference
Grain Dealers	\$ 974,000	\$ 256,000	\$ (718,000)
Grain Warehouse Keepers	38,000	38,000	0
Milk Contractors	771,000	621,000	(150,000)
Vegetable Contractors	95,000	327,000	232,000
TOTAL	\$ 1,878,000	\$ 1,242,000	\$ (636,000)

* Projection assumes constant procurement volumes, commodity price levels and contractor financial strength.

Under this rule, the fund balance amount attributable to vegetable contractors will begin to build towards the required statutory minimum of \$800,000.

	Minimum Statutory Balance	Actual Balance as of June 30, 2017	Maximum Statutory Balance
Grain Dealers ¹	\$ 1,000,000	\$ 6,140,594.71	\$ 6,000,000
Grain Warehouse Keepers	\$ 200,000	\$ 134,966.89	\$ 1,000,000
Milk Contractors	\$ 3,000,000	\$ 6,176,076.50	\$ 12,000,000
Vegetable Contractors	\$ 800,000	(\$ 4,501,749.98)	\$ 3,000,000
Entire Fund	\$ 5,000,000	\$ 7,949,888.12	\$ 22,000,000

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

Members of the Agricultural Producer Security Council, as defined in Wis. Stat. § 15.137 (1), have worked with the Department in crafting certain rule changes following the 2015 actuarial study. Members represent the following: the Farmers' Educational and Cooperative Union of America, Wisconsin Division; the Midwest Food Processors Association, Inc.; the National Farmers' Organization, Inc.; the Wisconsin Agri-Business Association, Inc.; the Wisconsin Cheese Makers Association; the Wisconsin Corn Growers Association, Inc.,

¹ After the final draft of this rule was approved by the DATCP Board, 2017 Wisconsin Act 155 combined the Fund statutory thresholds for grain dealers and grain warehouse keepers to a \$1.2 million minimum and a \$7 million maximum. The Department intends to preserve the individual grain dealer threshold of \$6 million to qualify for an assessment reduction.

May 7, 2019
The Honorable Roger Roth
The Honorable Robin Vos

the Wisconsin Soybean Association, Inc.; the Wisconsin Dairy Products Association, Inc.; the Wisconsin Farm Bureau Federation; Cooperative Network; and the Wisconsin Potato and Vegetable Growers Association, Inc.

Effect on Small Business

ATCP 99 - Grain

This rule will have a positive impact on grain dealers by reducing fund assessments whenever the grain dealer portion of the producer security fund balance exceeds \$6,000,000.

ATCP 100 - Milk

This rule will have a positive impact on milk contractors by reducing their assessments by 20 percent. The Fund will continue to grow, but at a slower pace, thus ensuring that they pay a fairer share of the cost of the program.

ATCP 101 - Vegetable

This rule will increase vegetable contractor fund assessments by 0.2% of their contract obligations to producers. By spreading the increase to achieve the statutory minimum over 18 years, this should have a minimal impact on the vegetable contractors.

Small Business Regulatory Review Report

The Small Business Regulatory Review Board did not issue a report on this rule.

Hearings

DATCP held two public hearings on this rule on July 14, 2017 in Stevens Point and on July 19, 2017 in Madison. There were two attendees at the Stevens Point hearing and three at the Madison hearing.

DATCP received oral testimony from the Midwest Food Products Association, the Wisconsin Cheese Makers Association, and the Cooperative Network.

DATCP received written testimony from the Wisconsin Potato and Vegetable Growers Association, Seneca Foods, the Cooperative Network, Birdseye Foods, the Wisconsin Cheese Makers Association, and the Midwest Food Products Association.

May 7, 2019
The Honorable Roger Roth
The Honorable Robin Vos

Comments about ATCP 99 and ATCP 100 were positive although some organizations advocated for legislative changes to the program that were outside the scope of this rule change. Recommended changes to ATCP 101 faced some opposition due to the fee increase requested for that portion of the Fund. However, no specific alternative was proposed that fell within the scope of DATCP's rulemaking authority.

Changes from Hearing Draft

DATCP made technical corrections based on Rules Clearinghouse suggestions. The Clearinghouse noted a lack of clarity in two locations: ATCP 99.126 (3), dealing with deferred payment assessments, and ATCP 101.245, dealing with vegetable contractor assessments. In both cases, DATCP rewrote the rule language to make it clearer. Other Clearinghouse changes affected rule formatting.

Since some changes advocated at the public hearings would affect statute rather than rule, DATCP did not consider those changes. DATCP kept the proposed fee changes to ATCP 101, affecting the vegetable contractors. The agency, after discussion, decided that 18 years continued to be a reasonable timeframe to restore the Fund to the level required by state statute. Further, DATCP decided the change continued to be necessary to protect the health of the Fund for all three industries.