

Report From Agency

DATCP Docket No. 18-R-03
Rules Clearinghouse No. CR 18-061

Final Draft Rule
September 18, 2019

PROPOSED ORDER OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION ADOPTING RULES

The Wisconsin department of agriculture, trade and consumer protection proposes the following rule *to amend* ch. ATCP 99.235 (2) and (4) and ATCP 100.135 (10); and *to repeal and recreate* ch. ATCP 100.135 (1); and *to create* ch. ATCP 100.135 (1e) and (1m); *relating to* grain warehouse keepers and milk contractors.

Analysis Prepared by the Department of Agriculture, Trade and Consumer Protection

This proposed rule modifies Wis. Admin. Code ch. ATCP 99 to align grain warehouse keeper assessment reduction and exemption thresholds with the statutory changes enacted under 2017 Wisconsin Act 155 (Act 155). Act 155 amended Wis. Stat. § 126.88 (1) (b) and repealed Wis. Stat. § 126.88 (1) (c), which resulted in combining Agricultural Producer Security Fund (Fund) balances for grain dealers and grain warehouse keepers and creating a new minimum and maximum.

This proposed rule also modifies Wis. Admin. Code ch. ATCP 100 to establish an annual assessment rate for milk contractors that both contribute to the Fund and enter into deferred payment contracts with producers to procure milk. Among other things, Act 155 allows milk contractors to enter into contracts with producers to defer payment for up to 120 days and requires these milk contractors to pay a deferred payment assessment into the Fund. Act 155 requires the Department of Agriculture, Trade and Consumer Protection (DATCP) to establish a deferred payment assessment rate by administrative rule.

Statutes Interpreted

Statutes Interpreted: Wis. Stat. §§ 25.463, 126.30 (1), and 126.88 (1) (b)

Statutory Authority

Statutory Authority: Wis. Stat. §§ 25.463, 93.07 (1), 126.46 (1), 126.81 (1) (a), and 126.88 (1)

Explanation of Statutory Authority

Wis. Stat. § 25.463 creates the Wisconsin Agricultural Producer Security Trust Fund.

Wis. Stat. § 93.07 (1) directs DATCP to make such regulations as are necessary for the discharge of all the powers and duties of DATCP.

Wis. Stat. § 126.46 (1) directs DATCP to specify by rule annual fund assessments for milk contractors, including an assessment for deferred payment contracts under Wis. Stat. § 126.485.

Wis. Stat. § 126.81 (1) (a) allows DATCP to promulgate rules to interpret and implement Wis. Stat. ch. 126.

Wis. Stat. § 126.88 (1) allows DATCP to promulgate rules modifying assessments provided under Wis. Stat. § 126.30 (1).

Wis. Stat. § 126.88 (1) (b) directs DATCP to promulgate a rule modifying assessments to maintain a combined Fund balance attributable to grain dealers and grain warehouse keepers of at least \$1,200,000, but not more than \$7,000,000.

Related Statutes and Rules

Wis. Stat. § 15.137 (1) defines the membership of the Agricultural Producer Security Council (Council), which advises DATCP on the Fund and other producer security matters.

Plain Language Analysis

Background

ATCP 99

The Fund is a public trust administered by DATCP. Milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors (collectively known as contractors) must purchase a license to obtain milk, grain, or vegetables from producers, and most contractors are required to contribute to the Fund annually. The Fund is used to settle claims by producers in the event that a contractor defaults on payment. Assessment contributions from each industry are accounted for separately and deposited into the overall Fund. Wis. Stat. ch. 126, establishes detailed assessment requirements, except that it requires DATCP to establish milk contractor assessments by rule. Wis. Stat. ch. 126 sets minimum and maximum Fund balances for each industry, as well as a minimum and maximum balance requirement for the overall Fund.

In March 2018, the Governor signed Act 155. This Act combined individual minimum and maximum Fund balance requirements for grain dealers and grain warehouse keepers. Prior to Act 155, individual minimums for grain dealers and grain warehouse keepers were set at \$1 million and \$200,000, respectively, and maximums were set at \$6 million and \$1 million, respectively. These balances were combined specifically to increase the overall stability of the Fund and guard against a modest grain warehouse keeper default having a catastrophic effect on that portion of the Fund. The new combined minimum is \$1.2 million and the new combined maximum is \$7 million. Current law requires DATCP to adjust assessment rates by rule to maintain Fund balances between the statutory thresholds.

A 2008 drafting error set the assessment exemption threshold at \$3 million for both grain dealers and warehouse keepers. Notes from the rulemaking docket indicate that the warehouse keeper threshold should have been set at \$500,000. Since the previous warehouse keeper Fund balance maximum was \$1 million, an assessment exemption threshold of \$3 million would never be realized.

ATCP 100 – Milk

Act 155 permits milk contractors and producers to enter into contracts to defer payments for up to 120 days. Act 155 further requires DATCP to promulgate rules, including emergency rules, to establish a deferred payment Fund assessment rate for these types of transactions.

Prior to Act 155, milk producers were required to be paid on the 4th and the 19th of every month. Allowing producer payments to be deferred for up to 120 days exposes the Fund to larger default payouts in the event a contractor fails to pay the producer. The deferred payment assessment is intended to cover this additional risk.

Proposed Policies.

DATCP proposes to make modifications to ATCP 99 that are necessary to align administrative code with Act 155 grain dealer and warehouse keeper thresholds and to ensure that assessments continue to be equitable between both grain dealers and warehouse keepers. DATCP also took the opportunity to address the drafting error relating to the assessment exemption for grain warehouse keepers. This rule will not result in a change to assessment amounts currently being paid by either grain dealers or warehouse keepers.

Act 155 combined Fund balance minimum and maximum thresholds in the grain dealer and grain warehouse keeper programs. Prior to Act 155, the statute specified separate limits for grain dealers and warehouse keepers. Under Wis. Stat. § 126.88, DATCP is required to modify assessments to maintain Fund balances within statutory thresholds. When combined, the two exceeded the new statutory maximum of \$7 million, and it required DATCP to modify assessments to bring that portion of the Fund back below the statutory maximum. DATCP previously took action addressing grain dealer assessments specifically in a current emergency rule (EmR 1803) and a proposed permanent rule (CR 17-047). This rule updates the current emergency rule and proposed permanent rule to include grain warehouse keepers.

As required by Act 155, DATCP proposes to establish a Fund assessment rate in ATCP 100 for contributing milk contractors that procure milk under a deferred payment contract. The law now allows milk producer payments to be deferred for up to 120 days, which exposes the Fund to potentially larger default payouts in the event a contractor fails to pay the producer. The deferred payment assessment is intended to cover this additional risk.

Policy Alternatives.

DATCP is required by Wis. Stat. § 126.88 (1) to modify assessments to maintain Fund balances between statutory thresholds. If DATCP does nothing, ATCP 99 will not comply with statute.

DATCP is also required by a newly amended statutory provision under Wis. Stat. § 126.46 (1) to specify a deferred payment assessment rate by rule. If DATCP does not set a rate, it will not comply with statute.

Rule Content

This proposed rule does all of the following:

- Reduces Fund assessments paid by all grain warehouse keepers to the minimum amounts of either \$100 or \$250 when the grain warehouse keeper portion of the Fund exceeds \$1 million.
- Corrects the drafting error, changing the grain warehouse keeper assessment exemption from \$3 million to \$500,000.
- Establishes the milk contractor deferred payment assessment rate of 0.0035.

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

ATCP 99 - Grain

The United States Warehouse Act is a voluntary regulatory program administered by the Farm Service Agency (FSA), a unit within USDA. Under this 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 security to milk producers in the event of payment defaults.

Comparison with Rules in Adjacent States

ATCP 99 - Grain

Like all states with a significant grain industry, Minnesota, Michigan, Illinois, Indiana, and Iowa 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 the warehouses must maintain 100% of depositor-owned grain in inventory at all times.

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) employs 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 are no exceptions to this requirement. Dealers are not prohibited from entering into contracts with milk producers that have extended payment terms.

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 a bond, letter of credit, certificate of deposit, or pre-payment. There are no exceptions to this requirement. Dairy plants are not prohibited from entering into contracts with milk producers that have extended payment terms.

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

Summary of Factual Data and Analytical Methodologies

The proposed rule changes, along with statutory changes reflected in Act 155, were prompted by recommendations made by the Agricultural Producer Security Council. DATCP consulted with the Council during the development of this proposed rule. The Council approved the content of the hearing draft rule at its June 25, 2018 meeting and the final draft rule at its November 29, 2018 meeting.

ATCP 99 – Grain

As of March 31, 2018, the Fund balance attributable to grain dealers is approximately \$6,789,000, which exceeded the previous maximum threshold by \$789,000. The Fund balance attributable to

grain warehouse keepers is approximately \$284,000, which is just above the previous minimum. The combined balance of approximately \$7,073,000 is over the new statutory maximum of \$7 million and almost entirely a result of the grain dealer portion of the Fund.

Pre-Act 155 Balances

	Minimum Statutory Balance	Actual Balance as of 3/31/18	Maximum Statutory Balance
Grain Dealers	\$ 1,000,000	\$ 6,788,914.73	\$ 6,000,000
Grain Warehouse Keepers	\$ 200,000	\$ 283,878.32	\$ 1,000,000
Milk Contractors	\$ 3,000,000	\$ 6,579,940.89	\$ 12,000,000
Vegetable Contractors	\$ 800,000	(\$ 4,296,714.61)	\$ 3,000,000
Entire Fund	\$ 5,000,000	\$ 9,356,019.33	\$ 22,000,000

Act 155 Implementation Balances

	Minimum Statutory Balance	Actual Balance as of 3/31/18	Maximum Statutory Balance
Grain Dealers and Grain Warehouse Keepers	\$ 1,200,000	\$ 7,072,793.05	\$ 7,000,000
Milk Contractors	\$ 3,000,000	\$ 6,579,940.89	\$ 12,000,000
Vegetable Contractors	\$ 800,000	(\$ 4,296,714.61)	\$ 3,000,000
Entire Fund	\$ 5,000,000	\$ 9,356,019.33	\$ 22,000,000

By the time Act 155 became law, the grain dealer portion of the Fund had already exceeded its individual statutory maximum of \$6 million. As a result, DATCP enacted an emergency rule and a proposed permanent rule to lower assessments until that portion of the fund fell back below \$6 million.

Based on the current Fund balance and projected annual growth attributable to grain warehouse keepers, that portion of the fund is not projected to reach assessment reduction thresholds for a number of years. To ensure that the grain warehouse keeper program assessments are equitable and proportionate to their respective exposure, this rule proposes that a reduction in assessments will not be implemented for grain warehouse keepers until the Fund balance attributable to grain warehouse keepers exceeds \$1 million.

ATCP 100 – Milk

Act 155 allows a portion of producers' milk checks to be deferred beyond the current statutory requirement. Previously, milk contractors were required to pay producers by the 4th and 19th of each month for the prior month's milk. The Act requires DATCP to establish a milk contractor deferred payment assessment rate to be applied to deferred payment contracts to cover the additional risk they pose to producers and the Fund. Similar provisions are already in place for the grain industry and were considered while developing the milk deferred payment assessment rate.

Like the new deferred payment contract provisions for milk contractors, the grain dealer program permits grain dealers to enter in to contracts with grain producers to defer payments for up to 120 days. The deferred payment assessment rate applied to these contracts in the grain program is

0.0035. Deferred payments in the milk program pose a similar risk; therefore, DATCP proposes to use the same deferred payment assessment rate of 0.0035 for milk contractors. That is to say, \$100,000 of deferred milk payments would equal a \$350 deferred payment assessment.

The amount of increased revenue is unknown and will depend on the amount of milk paid for under deferred payment contracts.

Analysis and Supporting Documents used to Determine Effect on Small Business

Members of the Agricultural Producer Security Council, an advisory council as defined in Wis. Stat. § 15.137 (1), worked with the Department to craft Act 155 and these changes to Wisconsin Administrative Code. 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., 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 not have an immediate impact on grain warehouse keepers. Prior to Act 155, warehouse keepers were not projected to receive an assessment reductions for a number of years. This proposed rule does not change those projections. Nonetheless, these changes are necessary to harmonize ATCP 99 with statute.

ATCP 100- Milk

This rule will establish a deferred payment assessment rate that will cover the additional risk posed to milk producers and the Fund associated with milk contractors deferring payments to milk producers for up to 120 days, as permitted by Act 155. Milk contractors entering into deferred payment contracts with producers will pay higher assessments; however, statute allows these assessments to be passed on to the producers who requested their payments be deferred. Therefore, there will be no effect to milk contractors.

Because Act 155 permits, but does not require, milk contractors to offer deferred payment contracts, any effects will be the result of decisions between contractors and producers.

Milk, grain, and vegetable producers are all protected against financial defaults by contractors who contribute to the overall Fund. All producers could potentially benefit from a higher Fund balance.

DATCP Contact

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Where and When Comments May Be Submitted

Questions and comments related to this rule may be directed to:

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Rule comments were accepted for two weeks after the public hearing.

- 1 **SECTION 1.** ATCP 99.235 (2) is amended to read:
- 2 **(2)** ASSESSMENT AMOUNT.
- 3 **(a)** A contributing grain warehouse keeper who operates grain warehouses with a combined
4 capacity of less than 500,000 bushels shall pay an annual fund assessment equal to the greater of
5 the following amounts:
- 6 **1.** \$100.
- 7 **2.** ~~The~~ If the fund balance attributable to grain warehouse keepers is less than \$1 million on
8 May 31 of the last preceding license year, then the sum of the amounts calculated under s.
9 126.30 (1) (a) and (b), Stats., multiplied by 1.5.
- 10 **(b)** A contributing grain warehouse keeper who reports at least 500,000 bushels shall pay an
11 annual fund assessment equal to the greater of the following amounts:
- 12 **1.** \$250.

1 **2.** ~~The~~ If the fund balance attributable to grain warehouse keepers is less than \$1 million on
2 May 31 of the last preceding license year, then the sum of the amounts calculated under s.
3 126.30 (1) (a) and ~~(1)-(b)~~, Stats.

4 **SECTION 2.** ATCP 99.235 (4) (b) is amended to read:

5 **(b)** The fund balance attributable to grain warehouse keepers was at least ~~\$3 million~~
6 \$500,000 on May 31 of the last preceding license year.

7 **SECTION 3.** ATCP 100.135 (1) is repealed and recreated to read:

8 **(1) GENERAL.** A contributing milk contractor shall pay an annual fund assessment for
9 each license year. The annual fund assessment shall be calculated under this section, rather than
10 under s. 126.46, Stats. Except as provided in sub. (6) or (10), or s. ATCP 100.13, the annual
11 fund assessment amount shall equal the sum of the assessments in subs. (1e) and (1m).

12 **SECTION 4.** ATCP 100.135 (1e) is created to read:

13 **(1e) BASIC ASSESSMENT.** A contributing milk contractor shall pay a basic assessment
14 equal to the minimum assessment amount listed in sub. (9) or the sum of the following
15 multiplied by 0.8, whichever is greater:

16 a. The milk contractor's current ratio assessment. The current ratio assessment for a
17 license year equals the milk contractor's current ratio assessment rate under sub. (2) multiplied
18 by the annual milk payroll obligations reported under s. 126.41 (6) (a), Stats., in the milk
19 contractor's license application for that license year.

20 b. The milk contractor's debt to equity ratio assessment. The debt to equity ratio
21 assessment for a license year equals the milk contractor's debt to equity ratio assessment rate
22 under sub. (4) multiplied by the annual milk payroll obligations reported under s. 126.41 (6) (a),
23 Stats., in the milk contractor's license application for that license year.

1 **SECTION 5.** ATCP 100.135 (1m) is created to read:

2 **(1m) DEFERRED PAYMENT ASSESSMENT.** A contributing milk contractor shall pay a
3 deferred payment assessment under s. 126.485 (5), Stats., equal to the amount the milk
4 contractor reports under s. 126.41 (6) (ag), Stats., in the milk contractor’s license application for
5 that license year multiplied by 0.0035.

6 **SECTION 6.** ATCP 100.135 (10) (intro.) is amended to read:

7 (10) EXEMPTION. A contributing milk contractor is not required to pay any fund
8 assessment under this section for a license year, other than a deferred payment assessment
9 required under sub. (1m), if all of the following apply:

10 **SECTION 7. EFFECTIVE DATE:** This rule takes effect on the first day of the month
11 following publication in the Wisconsin administrative register, as provided in s. 227.22 (2)
12 (intro.), Stats.

13

Dated this ____ day of _____, 2019.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Bradley M. Pfaff
Secretary