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DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 760

RIN 0560-A107

Dairy Economic Loss Assistance Payment Program

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This rule implements the new Dairy Economic Loss Assistance Payment (DELAP) program. The DELAP program will assist dairy producers by providing payments to producers who produced and marketed milk in the United States at some time from February through July 2009. The payments provided by the DELAP program are intended to offset a portion of the dairy producers' losses resulting from milk prices that were far below production costs.

DATES: *Effective Date:* December 17, 2009.

FOR FURTHER INFORMATION CONTACT: Danielle Cooke, Special Programs Manager, Farm Service Agency (FSA), U.S. Department of Agriculture (USDA), STOP 0512, 1400 Independence Avenue, SW., Washington, DC 20250-0512; telephone (202) 720-1919; fax (202) 690-1536; e-mail, Danielle.Cooke@wdc.usda.gov. Persons with disabilities who require alternative means for communications (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Background

The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (2010 Agriculture Appropriations Bill, Pub. L. 111-80) provides funds for

the Secretary of Agriculture to assist dairy producers. This financial assistance is authorized by section 10104 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171, commonly known as the 2002 Farm Bill), to cover economic losses incurred by dairy producers. The statute provides that the Secretary may provide assistance for economic losses in such manner as the Secretary considers appropriate and thus provides a wide discretion in that regard, subject to appropriations. Until now, no funds have been appropriated for the program. However, the 2010 Agriculture Appropriations Bill provides \$290 million for payments to dairy producers. This, in fact, is the first time funds have been appropriated to implement section 10104 and the appropriations bill provides that the program can be implemented without regard to certain procedural requirements that might otherwise apply such as requirements dealing with comment. That is, the appropriations bill specifically exempts this rule from prior comment and thus allows the rule to become final without prior comment.

Farm commodity prices are always volatile and milk production is cyclical. In 2009, dairy producers experienced the lowest prices for milk in recent history, when prices fell from near record highs that had encouraged the expansion of the dairy herd. Dairy producers continue to experience severe economic pressure that started in late 2008 and continued into 2009 due to declining demand caused by the worldwide recession. Milk prices have declined substantially in 2009, with the national price for milk averaging \$16.80 per hundredweight (cwt.) in the fourth quarter of 2008 and averaging \$12.23 per cwt. in the first quarter of 2009, a 27 percent decline. USDA estimates current national average total production costs at \$22.32 per cwt. and average operating costs at \$13.86 per cwt. On average, the price U.S. dairy producers received for milk marketed in the summer of 2009 was about half of what it costs them to produce milk.

The Secretary of Agriculture is implementing the DELAP program to assist producers in this time of economic hardship. The DELAP program will be implemented immediately upon the effective date of this rule. In order that this assistance

might be provided as quickly and efficiently as possible to the benefit of those to whom the relief is directed, this rule will make benefits using the data already reported by dairy operations to the Farm Service Agency under the existing program. Like existing assistance programs, DELAP will provide assistance to producer on an operation by operation basis, and DELAP will use existing data, where possible, so that payments may be made in many cases immediately after the publication of this rule. Benefit limits, based on amounts of production, are by operation. Producers of milk may be eligible for benefits with respect to more than one operation. Other limits, such as a disallowance of benefits to persons with an adjusted gross income limit over a certain amount are described below and in the rule. Those parties (State and local governments and their political subdivisions and related agencies) excluded, by statute from some existing programs, will also be excluded from the DELAP program so as to provide consistency between programs and general Congressional directives with respect to dairy programs.

Eligibility and Request for Benefits

As implemented in this rule, dairy producers that both produced milk in the United States and commercially marketed it from February through July 2009 may be eligible for DELAP. For a dairy producer to be eligible for DELAP, the producer and the dairy operation in which the producer has a share must:

(1) Have produced milk in the United States and marketed milk commercially at some time from February through July 2009;

(2) Have milk production data, submitted for MILC, for the applicable months recorded at the local Farm Service Agency (FSA) county office or provide a request for DELAP benefits with such data; and

(3) Certify to all milk production produced and marketed from February through July 2009 by the dairy operation.

In addition, the dairy producer must meet the average adjusted gross income ("AGI") limitations in 7 CFR part 1400 to be eligible for DELAP. Any dairy producer who has annual average adjusted gross nonfarm income in excess of \$500,000 for calendar years 2005 through 2007 is not eligible for

DELAP. The use of AGI limits for many programs, are provided for by statute and include rules of "attribution" such that the "AGI" limits apply through multiple layers of organization. For example if Individual A is over the limit and owns 100 percent of Corporation C which had a 20 percent interest in Corporation B which had a 50 percent interest in milk producer Corporation A, the AGI of Individual A would result in a 10 percent (100 percent times 20 percent times 50 percent) loss in benefits to Corporation A. No statute as such requires the application of the AGI limits to DELAP. However, in order that existing data can be the basis for DELAP without further application and to reflect the general principles of farm programs reflected in the application of the AGI test to many other programs, it is has been decided to apply the same AGI limits that apply to existing programs. In addition, thereby helping to insure that benefits go to those with greater need. The Secretary's DELAP discretion has been utilized accordingly.

Restrictions also apply to this program including, but not limited to, those pertaining to highly erodible land and wetland conservation provisions in 7 CFR part 12. Any dairy producer that violates highly erodible land and wetland conservation provisions will be ineligible for program benefits; if it is determined after a payment is issued for the DELAP program that a violation occurred, then repayment of the benefit plus interest would be required.

FSA will use existing MILC records for production data for February through July 2009 to calculate and issue payments. The period February to July was chosen because it allows for six months of data, and February was the first month of the calendar year in which MILC payments were made, thus providing a greater likelihood of actual data in the county offices. Producers were incentivized by the payments to provide the data. Six months of data should provide a fair picture of the size of the operation. Based on current information, FSA estimates that more than 95 percent of eligible producers will have a full data set so to be able to receive benefits automatically and will not need to request benefits.

Dairy producers that do not have production records at the FSA county office, specifically for the months of February through July 2009, will need to request benefits during the DELAP application period. The application period for DELAP will be 30 days, beginning December 17, 2009.

During the application period, dairy producers may submit the request for benefits to FSA by mail, email, or fax.

There is not a specific application form that is required for this program. The request for benefits may be in the form of a letter or memo that includes the production data FSA needs to determine payment eligibility and payment amount. In addition to production data, the request for benefits must include:

- The name and location of the dairy operation;
- Contact information for the dairy operation, including telephone number; and
- Name, share percentage, and tax identification number for each entity or individual producer receiving a share of the payment.

FSA will not approve any requests for benefits received by FSA after the application period closes. A specific application period with a cutoff date is needed because FSA will need to know the total production quantity of requests to calculate the payments. A limited amount of funds will be held in reserve for new applications, appeals, and errors. In order to expedite the availability of funds, it has been determined to be in the public interest to limit the application period to 30 days.

Payments

Qualifying by operation, eligible dairy producers can receive a one-time payment based on the amount of milk both produced and commercially marketed by the dairy operation during the months of February through July 2009. FSA will use the production information from February through July 2009 to estimate a full year's production amount and use that amount of annual production to calculate the payments. In other words, the dairy operation's actual production for the whole year is not specifically relevant to the payment calculation. Rather, a dairy operation's eligible payment quantity for DELAP purposes will be two times the commercially marketed milk production from February through July 2009, up to a maximum of six million pounds per dairy operation. The six million pound limit is intended to insure, in light of the funding limit, that funding is distributed equitably in a way that does not unduly dilute the amount of assistance that would be available to smaller dairies. Such a limit has been applied in several predecessor programs. Challenges were made in some prior programs to the Secretary's use of discretion to set such limits in programs with limited funds and those limits were upheld as being valid exercises of the Secretary's authority. FSA will make payments to each dairy producer for the dairy operation based

on the dairy operation's eligible payment quantity and the dairy producer's share in the dairy operation. For each dairy producer in a dairy operation that exceeds the average adjusted gross income limit, the payment to that dairy operation will be reduced commensurately because that dairy producer will not receive a payment and therefore, no producer in the dairy operation will receive a payment for that share of the production.

Payment Rate

A national per cwt. payment rate will be determined based on the factoring of the available \$290 million, less the reserve established for new applications, appeals, and errors, divided by the total pounds of eligible milk production from all eligible dairy operations. As noted earlier, there will be an eligibility cap per operation of six million pounds of milk production. Because the funds appropriated for this program are a fixed amount set in the 2010 Agricultural Appropriations Bill, the national payment rate and individual payments can only be calculated after the total eligible quantity of milk production has been determined from eligible program participants. Payment eligibilities will be calculated on an operation by operation basis. A dairy producer may be involved in more than one eligible dairy operation and the production cap is per operation (using the same definition for "operation" as used in the MILC program), not per individual. Payments to eligible producers will be calculated by multiplying the eligible payment quantity in pounds by the national payment rate.

Based on current information, FSA estimates that 875 million cwt. of milk production will be eligible for payment. FSA will establish a reserve of \$10 million. Therefore, the expected payment rate is approximately \$0.32 per cwt. (\$280 million divided by 875 million cwt.). FSA will calculate the payment rate and begin payments shortly after publishing this rule for dairy producers where payment data is based on existing records and as soon as possible, perhaps in January or February 2010 for dairy producers that request benefits during the application period. Producers who believe that they are entitled to a payment who have not received a payment should contact their FSA county office. Persons who believe that they are entitled to a higher payment should also contact that office.

If a participant in the DELAP program succeeds through the appeal processes in 7 CFR parts 11 or 780 in obtaining a

determination that additional payments are due to that participant, the participant will be paid only to the extent that funding under the DELAP program remains available.

Verification and Penalties

Information recorded in the FSA county office or provided on requests for benefits and supporting documentation will be subject to verification by FSA. False certifications by producers will carry strict penalties and FSA will validate information provided with random spot-checks. Dairy producers determined to have made any false certifications or adopted any misrepresentation, scheme, or device that defeats the program's purpose will be required to refund any payments issued under this program with interest, and may be subject to other civil, criminal, or administrative remedies.

Notice and Comment

These regulations are exempt from the notice and comment requirements of the Administrative Procedures Act (5 U.S.C. 553), as specified in section 748 (b)(2) of the 2010 Agriculture Appropriations Bill, which requires that these regulations be promulgated and administered without regard to the notice and comment provisions of section 553 of title 5 of the United States Code or the Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking. Therefore, these regulations are issued as final.

Executive Order 12866

The Office of Management and Budget (OMB) designated this final rule as economically significant under Executive Order 12866 and, therefore, OMB reviewed this rule. A cost benefit assessment of this rule is summarized below and is available from the contact information listed above.

Summary of Economic Impacts

The DELAP program is expected to provide \$290 million in payments to dairy producers during fiscal year 2010. That is the full amount authorized to be appropriated for DELAP. These are direct payments; the cost to the government is equivalent to the total payments (benefits) to producers. All of the payments are expected to be made in FY 2010.

The DELAP program provides payment to dairy producers in FY 2010 based on production in February through July 2009. It is not expected to

result in a significant change in the price of milk for consumers, because it is not subsidizing the cost of current production or providing price support. Rather, it is providing financial assistance for economic losses in the past. The payment is estimated to be less than one-third of one cent per pound of milk (less than three cents per gallon), so it is unlikely to result in a noticeable change in consumer milk prices. In fact, the opposite is possible, the DELAP program could result in a slight decrease in milk prices by keeping more cows in milk production than would be the case without the DELAP program.

Regulatory Flexibility Act

This rule is not subject to the Regulatory Flexibility Act because FSA is not required to publish a notice of proposed rulemaking for this rule.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). While DELAP eligibility decisions involve choices, the decision to make DELAP payments in some fashion, and the amount of payments to make, is non-discretionary in nature and the actual payment to be made under this rule will be based on actions that have already occurred. That being the case, FSA has determined that no environmental assessment or environmental impact statement need be prepared.

Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not retroactive and does not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. Before any judicial action may be brought regarding provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

The policies contained in this rule do not impose substantial unreimbursed direct compliance costs on Indian tribal governments or have tribal implications that preempt tribal law.

Unfunded Mandates

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA, Pub. L. 104–4) establishes requirements for Federal agencies to assess the effects of their regulatory actions that impose “Federal Mandates” that may result in expenditures to State, local, or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or tribal governments or for the private sector. In addition, FSA was not required to publish a notice of proposed rulemaking for this rule. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

Section 748(b)(3) of the 2010 Agriculture Appropriations Bill requires that the Secretary use the authority in section 808 of title 5, United States Code, which allows an agency to forgo SBREFA's usual 60-day Congressional Review delay of the effective date of a major regulation if the agency finds that there is a good cause to do so. Accordingly and given the current economic situation in the dairy industry, it is appropriate to make this rule effective as soon as possible so that benefits may be provided. Therefore, this rule is effective upon public display by the Office of the Federal Register.

Federal Assistance Programs

This rule applies to the following Federal assistance program that is not in the Catalog of Domestic Federal Assistance: DELAP.

Paperwork Reduction Act

The regulations in this rule are exempt from requirements of the Paperwork Reduction Act (44 U.S.C.

Chapter 35), as specified in section 748(b)(2)(C) of the 2010 Agriculture Appropriations Bill, which provides that these regulations be promulgated and administered without regard to the Paperwork Reduction Act.

E-Government Act Compliance

FSA is committed to complying with the E-Government Act, to promote the use of the Internet and other Information technologies to provide increased opportunities for citizen access to Government Information and services, and for other purposes.

List of Subjects in 7 CFR Part 760

Dairy products, Indemnity payments, Pesticide and pests, Reporting and recordkeeping requirements.

■ For the reasons discussed above, this rule amends 7 CFR part 760 as follows:

PART 760—INDEMNITY PAYMENT PROGRAMS

■ 1. Revise the authority citation for part 760 to read as follows:

Authority: 7 U.S.C. 4501, 7 U.S.C. 1531, 16 U.S.C. 3801, note, and 19 U.S.C. 2497; Title III, Pub. L. 109–234, 120 Stat. 474; Title IX, Pub. L. 110–28, 121 Stat. 211; and Sec. 748, Pub. L. 111–80, 123 Stat. 2131.

■ 2. Add subpart N to read as follows:

Subpart N—Dairy Economic Loss Assistance Payment Program

Sec.	
760.1301	Administration.
760.1302	Definitions and acronyms.
760.1303	Requesting benefits.
760.1304	Eligibility.
760.1305	Proof of production.
760.1306	Availability of funds.
760.1307	Dairy operation payment quantity.
760.1308	Payment rate.
760.1309	Appeals.
760.1310	Misrepresentation and scheme or device.
760.1311	Death, incompetence, or disappearance.
760.1312	Maintaining records.
760.1313	Refunds; joint and several liability.
760.1314	Miscellaneous provisions.

Subpart N—Dairy Economic Loss Assistance Payment Program

§ 760.1301 Administration.

(a) This subpart establishes, subject to the availability of funds, the terms and conditions under which the Dairy Economic Loss Assistance Payments (DELAP) program as authorized by section 10104 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171) will be administered with respect to funds appropriated under Section 748 of the Agriculture, Rural

Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (2010 Agriculture Appropriations Bill, Pub. L. 111–80).

(b) The DELAP program will be administered under the general supervision of the Administrator, FSA, and the Deputy Administrator for Farm Programs, FSA (who is referred to as the “Deputy Administrator” in this part), and will be carried out by FSA’s Price Support Division (PSD) and Kansas City Management Office (KCMO).

(c) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this subpart, except as provided in paragraph (d) of this section.

(d) The State committee will take any action required by the provisions of this subpart that has not been taken by the county committee. The State committee will also:

(1) Correct or require the county committee to correct any action taken by the county committee that is not in compliance with the provisions of this subpart.

(2) Require a county committee to not take an action or implement a decision that is not in compliance with the provisions of this subpart.

(e) No provision or delegation of this subpart to PSD, KCMO, a State committee, or a county committee will preclude the Administrator, FSA, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by PSD, KCMO, a State committee, or a county committee.

(f) The Deputy Administrator may waive or modify non-statutory deadlines and other program requirements of this part in cases where lateness or failure to meet other requirements does not adversely affect the operation of the program. Participants have no right to seek an exception under this provision. The Deputy Administrator’s refusal to consider cases or circumstances or decision not to exercise the discretionary authority of this provision will not be considered an adverse decision and is not appealable.

§ 760.1302 Definitions and acronyms.

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they may conflict with the definitions in this section.

County office or FSA county office means the FSA offices responsible for administering FSA programs in a specific areas, sometimes encompassing more than one county, in a State.

Dairy operation means any person or group of persons who, as a single unit, as determined by FSA, produce and market milk commercially produced from cows, and whose production facilities are located in the United States. In any case, however, dairy operation may be given by the agency the same meaning as the definition of dairy operation as found in part 1430 of this title for other dairy assistance programs.

Department or USDA means the U. S. Department of Agriculture.

Deputy Administrator means the Deputy Administrator for Farm Programs (DAFP), FSA, or a designee.

Eligible production means milk from cows that was produced during February through July 2009, by a dairy producer in the United States and marketed commercially by a producer in a participating State.

Farm Service Agency or FSA means the Farm Service Agency of the USDA.

Fiscal year or FY means the year beginning October 1 and ending the following September 30. The fiscal year will be designated for this subpart by year reference to the calendar year in which it ends. For example, FY 2009 is from October 1, 2008, through September 30, 2009 (inclusive).

Marketed commercially means sold to the market to which the dairy operation normally delivers whole milk and receives a monetary amount and in any case this term will be construed to allow the use of MILC records in making DELAP payments.

Milk handler means the marketing agency to or through which the dairy operation commercially markets whole milk.

Milk marketing means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use.

Participating State means each of the 50 States in the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

Payment quantity means the pounds of milk production for which an operation is eligible to be paid under this subpart.

Producer means any individual, group of individuals, partnership, corporation, estate, trust association, cooperative, or other business enterprise or other legal entity, as defined in 7 CFR 1400.3, who is, or whose members are, a citizen of or legal resident alien in the United States, and who directly or indirectly, as determined by the Secretary, shares in the risk of producing milk, and who is entitled to a share of the commercial

production available for marketing from the dairy operation. This term, and other terms in this subpart, will in any case be applied in a way that allows MILC records to be used to make DELAP payments.

United States means the 50 States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

Verifiable production records means evidence that is used to substantiate the amount of production marketed commercially by a dairy operation and its producers and that can be verified by FSA through an independent source.

§ 760.1303 Requesting benefits.

(a) If as a dairy operation or producer, your records are currently available in the FSA county office from previous participation in a fiscal year 2009 dairy program administered by FSA, you do not need to request benefits under this subpart to receive payments. FSA will make payments as specified in this subpart to eligible dairy producers based on production data maintained by the FSA county office for the months of February through July 2009.

(b) If records are not available in the FSA county office, dairy producers may request benefits. The request for benefits may be a letter or email; no specific form is required.

(1) Submit your request for DELAP to: Deputy Administrator for Farm Programs, FSA, USDA, STOP 0512, 1400 Independence Avenue, SW., Washington, DC 20250-0512; Attention: DELAP Program. Or you may send your request for DELAP via fax to (202) 690-1536 or e-mail to Danielle.Cooke@wdc.usda.gov.

(2) The complete request as described in this subpart must be received by FSA by the close of business on January 19, 2010.

(3) The complete request for benefits must include all of the following:

(i) The name and location of the dairy operation;

(ii) Contact information for the dairy operation, including telephone number;

(iii) Name, percentage share, and tax identification number for the entity or individual producer's receiving a share of the payment; and

(iv) Proof of production (acceptable documentation as specified in § 760.1305).

(4) Requests for benefits and related documents not provided to FSA as required by this subpart, will not be approved.

(5) If not already provided and available to FSA, the dairy producer or

dairy operation must provide documentation to support:

(i) The amount (quantity in pounds) of milk produced by the dairy operation during the months of February 2009 through July 2009;

(ii) Percentage share of milk production during February through July 2009 attributed to each producer in the dairy operation; and

(iii) Average adjusted gross income for each individual or entity with a share in the operation and any additional entities or individuals as needed to apply the adjusted gross income rules of these regulations.

(6) Each dairy producer requesting benefits under this subpart is responsible for providing accurate and truthful information and any supporting documentation. If the dairy operation provides the required information, each dairy producer who shares in the risk of a dairy operation's total production is responsible for the accuracy and truthfulness of the information submitted for the request for benefits before the request will be considered complete. Providing a false statement, request, or certification to the Government may be punishable by imprisonment, fines, other penalties, or sanctions.

(c) All information provided by the dairy producer or dairy operation is subject to verification, spot check, and audit by FSA. Further verification information may be obtained from the dairy operation's milk handler or marketing cooperative if necessary for FSA to verify provided information. Refusal to allow FSA or any other USDA agency to verify any information provided or the inability of FSA to verify such information will result in a determination of ineligibility for benefits under this subpart.

(d) Data furnished by dairy producers and dairy operations, subject to verification, will be used to determine eligibility for program benefits. Although participation in the DELAP program is voluntary, program benefits will not be provided unless a producer or operation furnishes all requested data or such data is already recorded at the FSA county office.

§ 760.1304 Eligibility.

(a) Payment under DELAP will only be made to producers, but the dairy "operation" must first qualify its production within limits provided for in this subpart in order to have the individuals or entities that qualify as "producers" receive payment subject to whatever additional limits (such as the adjusted gross income provisions of these regulations) apply. As needed the

agency may construe the terms of this regulation in any manner needed to facilitate and expedite payments using existing data and records from other assistance programs. Further, those parties (State and local governments and their political subdivisions and related agencies) excluded from the MILC program will not be eligible for DELAP payments notwithstanding any other provision of these regulations. That said, to be eligible to receive payments under this subpart, a dairy producer in the United States must:

(1) Have produced milk in the United States and commercially marketed the milk produced any time during February 2009 through July 2009;

(2) Be a producer, as defined in § 760.1302;

(3) Provide FSA with proof of milk production commercially marketed by all dairy producers in the dairy operation during February 2009 through July 2009; and

(4) Submit an accurate and complete request for benefits as specified in § 760.1303, if production data is not available in the FSA county office.

(b) To be eligible to receive a payment, each producer in an eligible dairy operation must meet the average adjusted gross income eligibility requirements of 7 CFR part 1400. No person or entity will be eligible to receive any payment or direct or indirect benefit under this subpart if their annual average adjusted nonfarm income is over \$500,000 as determined under 7 CFR part 1400. In the case of indirect benefits, direct benefits to other parties will be reduced accordingly. This will mean that all of the attribution rules of part 1400 will apply. For example if Individual A is over the limit and owns 100 percent of Corporation C which had a 20 percent interest in Corporation B which had a 50 percent interest in milk producer Corporation A, the AGI of Individual A would result in a 10 percent (100 percent times 20 percent times 50 percent) loss in benefits to Corporation A. For DELAP, the relevant period for the annual average adjusted nonfarm income is 2005 through 2007.

(1) Individual dairy producers in a dairy operation that is an entity are only eligible for a payment based on their share of the dairy operation.

(2) No payment will be made to any other producer based on the share of any dairy producer who exceeds the income limit or who, because of the attribution rules, has their payment reduced.

§ 760.1305 Proof of production.

(a) Dairy producers requesting benefits must, as required by this subpart, provide adequate proof of the dairy operation's eligible production during the months of February through July 2009, if those records are not already available at the FSA county office. The dairy operation must also provide proof that the eligible production was also commercially marketed during the same period.

(b) To be eligible for payment, dairy producers marketing milk during February through July 2009 must provide any required supporting documents to assist FSA in verifying production. Supporting documentation may be provided by either the dairy producer or by the dairy operation for each of its producers. Examples of supporting documentation may include, but are not limited to: Milk marketing payment stubs, tank records, milk handler records, daily milk marketings, copies of any payments received as compensation from other sources, or any other documents available to confirm the production and production history of the dairy operation. Dairy operations and producers may also be required to allow FSA to examine the herd of cattle as production evidence. If supporting documentation requested is not presented to FSA, the request for benefits will be denied.

§ 760.1306 Availability of funds.

(a) Payments under this subpart are subject to the availability of funds. The total available program funds are \$290,000,000.

(b) FSA will prorate the available funds by a national factor to ensure payments do not exceed \$290,000,000. The payment will be made based on the national payment rate as determined by FSA. FSA will prorate the payments based on the amount of milk production eligible for payments in a fair and reasonable manner.

(c) A reserve will be created to handle new applications, appeals, and errors.

§ 760.1307 Dairy operation payment quantity.

(a) A dairy operation's payment quantity (the quantity of milk on which the "operation" can generate payments for "producers" involved in the operation) will be determined by FSA, based on the pounds of production of commercially marketed milk during the months of February 2009 through July 2009, multiplied by two.

(b) The maximum payment quantity for which a dairy operation can generate payments for its dairy producers under this subpart will be 6,000,000 pounds.

(c) The dairy operation's payment quantity will be used to determine the amount of DELAP payments made to dairy producers.

§ 760.1308 Payment rate.

(a) A national per-hundredweight payment rate will be calculated by dividing the available funding, less a reserve established by FSA, by the total pounds of eligible production approved for payment.

(b) Each eligible dairy producer's payment with respect to an operation will be calculated by multiplying the payment rate determined in paragraph (a) of this section by the dairy producer's share in the dairy operation's eligible production payment quantity as determined in accordance with section § 760.1307.

(c) In the event that approval of all eligible requests for benefits would result in expenditures in excess of the amount available, FSA will reduce the payment rate in a manner that FSA determines to be fair and reasonable.

§ 760.1309 Appeals.

The appeal regulations set forth at 7 CFR parts 11 and 780 apply to determinations made under this subpart.

§ 760.1310 Misrepresentation and scheme or device.

(a) In addition to other penalties, sanctions or remedies as may apply, a dairy producer or operation will be ineligible to receive benefits under this subpart if the producer or operation is determined by FSA to have:

(1) Adopted any scheme or device that tends to defeat the purpose of this subpart;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any payment to any person or operation engaged in a misrepresentation, scheme, or device, must be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and receiving payment under this subpart will be jointly and severally liable with other producers or operations involved in such claim for benefits for any refund due under this section and for related charges. The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

§ 760.1311 Death, incompetence, or disappearance.

(a) In the case of the death, incompetency, or disappearance of a

person or the dissolution of an entity that is eligible to receive benefits in accordance with this subpart, such alternate person or persons specified in 7 CFR part 707 may receive such benefits, as determined appropriate by FSA.

(b) Payments may be made to an otherwise eligible dairy producer who is now deceased or to a dissolved entity if a representative who currently has authority to enter into an application for the producer or the producer's estate makes the request for benefits as specified in § 760.1303. Proof of authority over the deceased producer's estate or a dissolved entity must be provided.

(c) If a dairy producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must be identified in the request for benefits.

§ 760.1312 Maintaining records.

(a) Persons requesting benefits under this subpart must maintain records and accounts to document all eligibility requirements specified in this subpart. Such records and accounts must be retained for 3 years after the date of payment to the dairy producer under this subpart.

(b) Destruction of the records after 3 years from the date of payment will be at the decision and risk of the party undertaking the destruction.

§ 760.1313 Refunds; joint and several liability.

(a) Any dairy producer that receives excess payment, payment as the result of erroneous information provided by any person, or payment resulting from a failure to comply with any requirement or condition for payment under this subpart, must refund the amount of that payment to FSA.

(b) Any refund required will be due from the date of the disbursement by the agency with interest determined in accordance with paragraph (d) of this section and late payment charges as provided in 7 CFR part 1403.

(c) Each dairy producer that has an interest in the dairy operation will be jointly and severally liable for any refund and related charges found to be due to FSA.

(d) Interest will be applicable to any refunds to FSA required in accordance with 7 CFR parts 792 and 1403. Such interest will be charged at the rate that the U.S. Department of the Treasury charges FSA for funds, and will accrue from the date FSA made the payment to the date the refund is repaid.

(e) FSA may waive the accrual of interest if it determines that the cause of the erroneous payment was not due to any action of the person or entity, or was beyond the control of the person or entity committing the violation. Any waiver is at the discretion of FSA alone.

§ 760.1314 Miscellaneous provisions.

(a) *Offset.* FSA may offset or withhold any amount due to FSA from any benefit provided under this subpart in accordance with the provisions of 7 CFR part 1403.

(b) *Claims.* Claims or debts will be settled in accordance with the provisions of 7 CFR part 1403.

(c) *Other interests.* Payments or any portion thereof due under this subpart will be made without regard to questions of title under State law and without regard to any claim or lien against the milk production, or proceeds thereof, in favor of the owner or any other creditor except agencies and instrumentalities of the U.S. Government.

(d) *Assignments.* Any dairy producer entitled to any payment under this part may assign any payments in accordance with the provisions of 7 CFR part 1404.

(e) *Violations of highly erodible land and wetland conservation provisions.* The provisions of part 12 of this title apply to this subpart. That part sets out certain conservation requirements as a general condition for farm benefits.

(f) *Violations regarding controlled substances.* The provisions of § 718.6 of this title, which generally limit program payment eligibility for persons who have engaged in certain offenses with respect to controlled substances, will apply to this subpart.

Signed in Washington, DC, on December 16, 2009.

Jonathan W. Coppess,

Administrator, Farm Service Agency.

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 567

Regulatory Capital Requirements

CFR Correction

In Title 12 of the Code of Federal Regulations, Parts 500 to 599, revised as of January 1, 2009, on page 330, in

§ 567.3, remove the second paragraph (d)(1).

[FR Doc. E9-30377 Filed 12-18-09; 8:45 am]

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FEDERAL HOUSING FINANCE BOARD

12 CFR Part 925

Members of the Banks

CFR Correction

In Title 12 of the Code of Federal Regulations, Part 900 to End, revised as of January 1, 2009, on page 88, in § 925.4, in paragraph (c)(2), revise the reference “§ 925.25(b)(4)(i)” to read “§ 925.24(b)(4)(i)”.

[FR Doc. E9-30374 Filed 12-18-09; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2009-0457; Airspace Docket No. 09-AAL-10]

Establishment of Class E Airspace; Point (Pt.) Thomson, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final Rule.

SUMMARY: This action establishes Class E airspace at Pt. Thomson, AK, to accommodate new Area Navigation (RNAV) special Instrument Approach Procedures (IAPs) at Pt. Thomson #3 Heliport. The FAA is taking this action to enhance safety and management of Instrument Flight Rules (IFR) operations at Pt. Thomson #3 Heliport.

DATES: Effective 0901 UTC, February 11, 2009. The Director of the **Federal Register** approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, AAL-538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513-7587; telephone number (907) 271-5898; fax: (907) 271-2850; e-mail: gary.ctr.rolf@faa.gov. Internet address: http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/rulemaking/.

SUPPLEMENTARY INFORMATION:

History

On Wednesday, October 7, 2009, the FAA published a notice of proposed rulemaking (NPRM) in the **Federal Register** to establish Class E airspace at Pt. Thomson, AK (74 FR 51523). Subsequent to publication, the FAA noted that the title erroneously referred to the airport name incorrectly. The correct airport name is Pt. Thomson #3 (without a P). Additionally, the airport coordinates were incorrectly listed and have been corrected in the legal description. With the exception of editorial changes, and the changes described above, this rule is the same as that proposed in the NPRM. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule with changes noted above is adopted as proposed.

The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9T, *Airspace Designations and Reporting Points*, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace at Pt. Thomson #3 Heliport, to accommodate new RNAV special IAPs at Pt. Thomson #2 Heliport. This Class E airspace will provide adequate controlled airspace upward from 700 feet above the surface, for the safety and management of IFR operations at Pt. Thomson #3 Heliport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Because this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.