DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1170

RIN 0581–AD12

[Doc. AMS–DA–10–0089; DA–11–01]

Dairy Product Mandatory Reporting

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule with request for comments.

SUMMARY: The Mandatory Price Reporting Act of 2010 amended section 273(d) of the Agricultural Marketing Act of 1946 (the Act), requiring the Secretary of Agriculture (Secretary) to establish an electronic reporting system for certain manufacturers of dairy products to report sales information for a mandatory dairy product reporting program. The amendment further stated that the Secretary shall publish the information obtained for the preceding week not later than 3 p.m. Eastern Time on Wednesday of each week.

This proposed rule offers procedures for the Agricultural Marketing Service (AMS) to implement the amendment to section 273(d) the Act and announces the intention of AMS to request approval by the Office of Management and Budget (OMB) of associated information collection requirements. This proposed rule requests comments concerning changes proposed in this rule.

DATES: Comments must be received by August 9, 2011.

ADDRESSES: Interested persons are invited to submit written comments via the Federal eRulemaking portal at *http://www.regulations.gov* or to John R. Mengel, Chief Economist, USDA/AMS/Dairy Programs, Office of the Chief Economist, STOP 0229–Room 2753, 1400 Independence Ave, SW., Washington, DC 20250–0229, *fax:* (202) 720–2454. All comments should reference the docket number as well as the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the above office during regular business hours or can be viewed at *http://www.regulations.gov*. All comments received will be posted without change, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: John R. Mengel, Chief Economist, USDA/AMS/Dairy Programs, Office of the Chief Economist, STOP 0229–Room 2753, 1400 Independence Ave, SW., Washington, DC 20250–0229, *john.mengel@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This proposed rule is issued pursuant to the Agricultural Marketing Act of 1946 [7 U.S.C. 1621 *et seq.*], as amended November 22, 2000, by Public Law 106–532, 114 Stat. 2541; May 13, 2002, by Public Law 107–171, 116 Stat. 207; and September 27, 2010, by Public Law 111–239, 124 Stat. 2502.

Background: The Dairy Product Mandatory Reporting Program was established on August 2, 2007, on an interim final basis (72 FR 36341). A final rule (73 FR 34175) became effective June 22, 2008. The National Agricultural Statistics Service (NASS) currently collects information for the program, and AMS provides verification and enforcement functions for the program. NASS publishes sales information for cheddar cheese, butter, dry whey, and nonfat dry milk (NFDM) on a weekly basis. NASS began publishing cheddar cheese sales information in 1997 and began publishing butter, NFDM, and dry whey sales information in 1998. Information was collected on a voluntary basis before the Dairy Product Mandatory Reporting Program became effective. Any manufacturer that processes and markets less than 1 million pounds of the applicable dairy products per calendar year is exempt from these reporting requirements.

AMS is responsible for verifying the sales information submitted by reporting entities to NASS. AMS currently visits larger entities that account for 80 percent of the yearly reported product volume of each specified dairy product at least once annually. AMS visits one-half of entities that account for the remaining 20 percent each year, visiting each such entity at least once every other year. During each visit, AMS reviews applicable sales transactions records for at least the 4 most recent weeks. In some cases, AMS may review sales records for periods of up to 2 years. AMS verifies that sales transactions match the information reported to NASS and that there are no applicable sales transactions not reported to NASS. Noncompliance, appeals, and enforcement procedures are administered by AMS.

The Mandatory Price Reporting Act of 2010 (Pub. L. 111–239, Sept. 27, 2010) amended section 273(d) of the Act (7 U.S.C. 1637b) to require that the Secretary establish an electronic reporting system for manufacturers of dairy products to report certain market information for the mandatory dairy product reporting program. The amendment further stated that the Secretary shall publish the information obtained under this section for the preceding week not later than 3 p.m. Eastern Time on Wednesday of each week. This proposed rule includes regulatory changes for implementing these provisions and transferring applicable data collection responsibilities to AMS. This proposed rule announces the intention of AMS to request approval of associated information collection requirements by the Office of Management and Budget (OMB). Comments are requested concerning changes proposed in this rule.

Executive Orders 12866

This proposed rule has been determined to not be significant for purposes of Executive Orders 12866 and therefore has not been reviewed by the Office of Management and Budget with respect to this Executive Order.

Executive Order 12988 Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. The amendments contained in this proposed rule are not intended to have a retroactive effect.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this proposed rule on small entities and has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Small businesses in the dairy product manufacturing[1] industry have been defined by the Small Business Administration (SBA) as those processors employing not more than 500 employees. For purposes of determining a processor's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees. According to U.S. Census Bureau Statistics of U.S. Businesses, there were 1,583 dairy manufacturing establishments in the United States in 2008. Of these businesses, 1,039

[1] North American Industry Classification System (NAICS) code 3115.

establishments had fewer than 500 employees, and 544 establishments had greater than 500 employees (*http://www.census.gov/econ/susb/*, U.S. Census Bureau, 2008 County Business Patterns).

The dairy manufacturing establishments included in U.S. Census Bureau statistics include manufacturers of all types of dairy products. The number of plants that produce butter, cheese, NFDM, and dry whey with the precise specifications included in the mandatory reporting requirements is much lower than this. Furthermore, those manufacturers that process and market less than 1 million pounds of the applicable dairy products annually are exempt from reporting sales data. Currently, NASS conducts an annual validation survey that serves to determine which plants are required to report. In 2010, this survey included 182 plants. Based upon the survey, there were 88 dairy product plants that were subject to mandatory reporting of sales data. There were 52 reporting entities that reported data for one or more plants. The annual cost for plants to complete this survey is estimated at approximately $9 per plant. AMS intends to continue to conduct the survey. Based upon company profile information available on the Internet, AMS estimates that almost half of the reporting entities are considered small businesses under the criteria established by the SBA.

AMS estimates that the annual cost per plant for reporting sales information for products included in the surveys is approximately $511. The majority of reporting entities report data to NASS through a secure web-based application. Less than three plants regularly fax their information, and it is believed that these plants do have Internet access. Therefore, there would be no significant start-up costs anticipated for the reporting entities as a result of implementing this rule as proposed.

Under the current Dairy Product Mandatory Reporting Program, dairy manufacturers are required to maintain records for verification purposes for a 2-year period. This proposed rule makes no changes to this requirement. These records are maintained as part of the normal course of business. Thus, there is no additional burden or cost associated with the maintenance of these records. Therefore, in total, this proposed rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Act requires persons engaged in manufacturing dairy products to provide to USDA certain information including the price, quantity, and moisture content, where applicable, of dairy products sold by the manufacturer. In accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35), AMS announces its intention to request an approval of information collection and recordkeeping pursuant to these requirements.

Title: Dairy Products Mandatory Sales Reporting Program.

OMB Number: 0581–NEW.

Expiration Date of Approval: 3 years from date of OMB approval.

Type of Request: New information collection.

Abstract: The information collection requirements in the request are essential to carry out the intent of the Agricultural Marketing Act of 1946 as amended (the Act).

The Act requires each manufacturer to report to the Secretary information concerning the price, quantity, and moisture content (where applicable) of dairy products sold by the manufacturer. Dairy products reported include cheddar cheese, butter, dry whey, and NFDM. Dairy manufacturers report information for these products if the products meet certain product specifications.

The collection and reporting of sales information, as required by the Act, have been the responsibility of NASS. NASS currently collects the information as part of the information collection package OMB 0535–0020. NASS allows manufacturers to submit information through a secure web-based application, by e-mail, or by fax. Manufacturers are required to submit information to NASS by 12 noon on Wednesday on all applicable products during the 7 days ending 12 midnight of the previous Saturday, local time of the plant or storage facility where the sales are made. NASS compiles and aggregates the information reported by the reporting entities and publishes the information each Friday morning. If a Federal holiday falls on a Tuesday or Wednesday, NASS contacts manufacturers via e-mail or phone concerning the applicable report deadline.

Manufacturers that process and market less than 1 million pounds of applicable dairy products annually are exempt from reporting requirements. Each year, dairy manufacturers complete an Annual Validation Worksheet for NASS to determine which dairy manufacturers are exempt and to ascertain if valid information is being supplied. NASS currently collects the information as part of the information collection package OMB 0535–0020.

The Mandatory Price Reporting Act of 2010 amended subsection 273(d) of the Act, requiring the Secretary to establish an electronic reporting system to collect the required information and to publish, not later than 3 p.m. Eastern Time on Wednesday of each week, a report containing the preceding week's information. The information collection and reporting requirements have been the responsibility of NASS. Under this proposed rule AMS would assume this responsibility. NASS would no longer collect price, quantity, or moisture content (where applicable) information for cheddar cheese, butter, NFDM, or dry whey, and NASS would no longer collect the associated annual validation information. The forms associated with this data collection would be removed from OMB 0535–0020 and would be included in an AMS collection package, OMB 0581–NEW.

The proposed provisions have been reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements. The proposed electronic submission forms would require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. It is expected that no outside technical expertise will be needed. The forms are simple, easy to understand, and place as small a burden as possible on respondents.

To assist the industry in achieving compliance, educational and outreach sessions will be held prior to implementation. AMS will assist reporting entities in understanding requirements for submitting data through electronic means specified by AMS. In addition, AMS plans to beta test the electronic-submission technology before implementation, and all entities required to report will be encouraged to participate in the beta-testing program. Any feedback received during this outreach and testing period will be used to correct technical problems.

Collecting the information will coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the program while minimizing the amount of work necessary to submit the required reports. The information to be collected by AMS, as proposed in this rule, is identical to the information currently collected by NASS. NASS currently allows manufacturers to submit information through a secure web-based

application, by e-mail, or by fax. This proposed rule will require manufacturers to submit information only by electronic means specified by AMS. AMS would specify that each manufacturer submit the information using a secure Internet connection that includes a user name and password. The requirement that reporting entities submit information electronically is in accordance with the Act.

The frequency of data collection will not change. Reporting entities are now required to report information to NASS by 12 noon on Wednesday. This proposed rule would require reporting entities to report the same information to AMS by 12 noon local time of the reporting entities on Tuesday. This change is necessary to allow AMS personnel time to review and compile data and to publish the information by 3 p.m. Eastern Time on Wednesday as required by the Act. If a Federal holiday falls on Monday through Wednesday of a particular week, the due date for report submission may be adjusted. Prior to the beginning of each calendar year, this rule proposes that AMS shall inform reporting entities of the times and dates that reports are due.

Information collection requirements that are included in this proposal include:

(1) Dairy Products Sales, Cheddar Cheese

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per week for each report submitted.

Respondents: Cheddar cheese manufacturers. Each reporting entity may report for a single cheddar cheese plant or it may report for more than one cheddar cheese plant, depending upon how the business is structured.

Estimated Number of Respondents: 28.

Estimated Total Annual Burden on Respondents: 485 hours.

(2) Dairy Products Sales, Butter

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per week for each report submitted.

Respondents: Butter manufacturers. Each reporting entity may report for a single butter plant or it may report for more than one butter plant, depending upon how the business is structured.

Estimated Number of Respondents: 20.

Estimated Total Annual Burden on Respondents: 347 hours.

(3) Dairy Products Sales, Nonfat Dry Milk

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per week for each report submitted.

Respondents: NFDM manufacturers. Each reporting entity may report for a single NFDM plant or it may report for more than one NFDM plant, depending upon how the business is structured.

Estimated Number of Respondents: 26.

Estimated Total Annual Burden on Respondents: 451 hours.

(4) Dairy Products Sales, Dry Whey

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per week for each report submitted.

Respondents: Dry whey manufacturers. Each reporting entity may report for a single dry whey plant or it may report for more than one dry whey plant, depending upon how the business is structured.

Estimated Number of Respondents: 21.

Estimated Total Annual Burden on Respondents: 364 hours.

(5) Annual Validation Survey

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per year for each report submitted.

Respondents: Dairy manufacturers. Each reporting entity may report for a single plant or it may report for more than one plant, depending upon how the business is structured.

Estimated Number of Respondents: 180.

*Estimated Total Annual Burden on Res*pondents: 60 hours.

(6) Survey Follow-Up, Verification

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes for each contact from AMS.

Respondents: Dairy manufacturers. Each reporting entity may report for a single plant or it may report for more than one plant, depending upon how the business is structured.

Estimated Number of Respondents: 7 per week.

Estimated Total Annual Burden on Respondents: 30 hours.

Copies of this information collection and related instructions can be obtained without charge from John Mengel, Chief Economist, *john.mengel@ams.usda.gov.*

Request for Public Comment Under the Paperwork Reduction Act

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;

(c) ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) ways to minimize the burden of the collection of information on those who are to respond.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Except as otherwise directed by the Secretary of Agriculture or the U.S. Attorney General for enforcement purposes, no officer, employee, or agent of the United States shall provide the public any information, statistics, or documents obtained from or submitted by any person under the Act that does not ensure preservation of confidentiality regarding the identity of persons, including parties to contracts and proprietary business information. All report forms include a statement that individual reports are kept confidential.

With respect to the application of the Privacy Act of 1974 (5 U.S.C. 552a) to the maintenance of records required by the Act, the Dairy Products Sales survey population consists of dairy product manufacturers. Data collected by this survey relates to manufacturers' operations and transactions and not to those of individuals. Records maintained at business sites for verification of information that would be reported to AMS include contracts, agreements, receipts and other materials related to sales of specific dairy products. No records about individuals would be maintained by AMS for this survey, and AMS believes that none would be part of these maintained business papers.

Request for Public Comment on Proposals To Change to 7 CFR Part 1170

This rule proposes that AMS be responsible for collection of sales data and reporting; that reporting entities be required to submit, by an electronic means specified by AMS, a report to AMS by Tuesday, 12 noon local time of reporting entities (unless adjusted because of a Federal holiday and communicated to dairy product manufacturers by AMS before the beginning of the calendar year), of all

products sold as specified in § 1170.8 during the 7 days ending 12 midnight of the previous Saturday, local time of the plant or storage facility where the sales are made; and that not later than 3 p.m. Eastern Time on Wednesday of each week (unless adjusted because of a Federal holiday and publicly announced by AMS before the beginning of the calendar year), AMS shall publish aggregated information obtained from manufacturers or other persons of all products sold as specified in § 1170.8. Conforming changes are proposed where necessary since data collection and publication responsibilities would be transferred from NASS to AMS. AMS specifically requests comments concerning changes proposed in this rule.

AMS will review all timely comments received and will consider these comments in developing a final rule.

List of Subjects in 7 CFR Part 1170

Dairy products, Reporting and recordkeeping requirements, Cheese, Butter, Whey, Nonfat dry milk.

For the reasons set forth in the preamble, it is proposed that 7 CFR part 1170 be amended as follows:

PART 1170—DAIRY PRODUCT MANDATORY REPORTING

1. The authority citation for 7 CFR part 1170 is amended to read as follows:

Authority: 7 U.S.C. 1637–1637b, as amended by Public Law 106–532, 114 Stat. 2541; Public Law 107–171, 116 Stat. 207; and Public Law. 111–239, 124 Stat. 2501.

2. Revise § 1170.2 to read as follows:

§ 1170.2 Act.

Act means the Agricultural Marketing Act of 1946, 7 U.S.C. 1621 *et seq.*, as amended by the Dairy Market Enhancement Act of 2000, Public Law 106–532, 114 Stat. 2541; the Farm Security and Rural Investment Act of 2002, Public Law 107–171, 116 Stat. 207; and the Mandatory Price Reporting Act of 2010, Public Law 111–239, 124 Stat. 2501.

3. Revise § 1170.7 to read as follows:

§ 1170.7 Reporting requirements.

(a) All dairy product manufacturers, with the exception of those who are exempt as described in § 1170.9, shall submit a report weekly to the Agricultural Marketing Service (AMS) by Tuesday, 12 noon local time of reporting entities, on all products sold as specified in § 1170.8 during the 7 days ending 12 midnight of the previous Saturday, local time of the plant or storage facility where the sales are made. If a Federal holiday falls on Monday through Wednesday of a particular week, the due date for report submission may be adjusted. Prior to the beginning of each calendar year, AMS shall release, to manufacturers that are required to report, the times and dates that reports are due. The report is to be submitted by electronic means specified by AMS and shall indicate the name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the applicable products, and the moisture content where applicable. Each sale shall be reported for the time period when the transaction is completed, i.e. the product is "shipped out" and title transfer occurs. Each sale shall be reported either f.o.b. plant if the product is "shipped out" from the plant or f.o.b. storage facility location if the product is "shipped out" from a storage facility. In calculating the total dollars received or dollars per pound, the reporting entity shall neither add transportation charges incurred at the time the product is "shipped out" or after the product is "shipped out" nor deduct transportation charges incurred before the product is "shipped out." In calculating the total dollars received or dollars per pound, the reporting entity shall not deduct brokerage fees or clearing charges paid by the manufacturer.

(b) Manufacturers or other persons storing dairy products are required to report, on a monthly basis, stocks of dairy products (as defined in § 1170.4) on hand, on the appropriate forms supplied by the National Agricultural Statistic Service. The report shall indicate the name, address, and stocks on hand at the end of the month for each storage location.

4. Revise § 1170.8 (a)(3)(ii) to read as follows:

§ 1170.8 Price reporting specifications.

* * * * *

(a) * * *

(3) * * *

(ii) *500-pound barrels:* Report weighted average moisture content of cheese sold. AMS will adjust price to a benchmark of 38.0 percent based on standard moisture adjustment formulas. Exclude cheese with moisture content exceeding 37.7 percent.

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5. Add § 1170.17 to read as follows:

§ 1170.17 Publication of statistical information.

Not later than 3 p.m. Eastern Time on the Wednesday of each week, AMS shall publish aggregated information obtained by manufacturers or other persons of all products sold as specified in § 1170.8. If a Federal holiday falls on Monday through Wednesday of a particular week, the due date for report publication may be adjusted. The public shall be notified of report times prior to the beginning of the calendar year.

Dated: June 7, 2011.

Ellen King,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–14481 Filed 6–9–11; 8:45 am]

BILLING CODE 3410–02–P