



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Sheila E. Harsdorf, Secretary

DATE: May 9, 2018

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Sheila Harsdorf, Secretary *Sheila Harsdorf*
Sean M. Brown, JD, Administrator, Division of Trade and Consumer Protection *SB*

SUBJECT: Grain Dealers, Grain Warehouse Keepers, and Milk Contractors, Wis. Admin. Code chs. ATCP 99 and 100 (Statement of Scope)

TO BE PRESENTED BY: Jeremy McPherson

REQUESTED ACTION:

At the May 24, 2018 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve a statement of scope for proposed amendments to current DATCP rules related to grain dealers, grain warehouse keepers, and milk contractors.

SUMMARY

The proposed rulemaking will align Wis. Admin. Code chs. ATCP 99 and 100 with changes mandated by 2017 Wisconsin Act 155. The proposed changes pertain to the Agricultural Producer Security Fund (Fund), which is a public trust administered by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP). A variety of agricultural contractors, including grain dealers, grain warehouse keepers, and milk contractors, are required to contribute to the Fund annually. Monies in the Fund are used to settle claims by producers should a contractor default on payment to a producer. Assessment contributions from each industry are accounted for separately but then deposited into the overall Fund. Wis. Stat. § 126.88 (1) sets minimum and maximum balances for each industry, as well as a minimum and maximum balance requirement for the overall Fund.

Act 155, signed by the Governor on March 28, 2018, introduced two important changes affecting the Fund. First, the Act amended Wis. Stat. § 126.88 by establishing minimum and maximum balance requirements for grain dealers and grain warehouse keepers collectively, where those industries formerly were subject to separate fund balance requirements. Under prior law, individual minimums were set at \$1 million and \$200,000 while maximums were set at \$6 million and \$1 million for grain dealers and grain warehouse keepers, respectively. The new combined minimum is \$1.2 million, and the new combined maximum is \$7 million. DATCP is already required to modify fund assessments to keep balances within the statutory minimums and maximums attributable to each industry. The newly combined grain-related fund balance requirements call for an evaluation of whether existing assessment formulas applicable to grain dealers and grain warehouse keepers are adequate to maintain fund balances within the new statutory thresholds applicable to grain-related contributions.

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Additionally, 2017 Wisconsin Act 155 allows milk contractors to contract with producers so as to defer payments for up to 120 days. An increased default risk arises from allowing milk contractors to take title to producer milk up to four months before the contractors actually pay the producers. The Fund is designed to cover payment defaults, and accordingly, Act 155 creates milk contractor deferred payment assessments that are to be paid into the Fund. DATCP is required to establish a deferred payment assessment rate. In proposing a deferred payment assessment rate, DATCP plans to consider the increased exposure to the Fund associated with potential future defaults by milk contractors who owe producers for milk procured under deferred payment contracts. This rulemaking is associated with an emergency rule designed to set deferred payment assessment rates in the interim period until this proposed permanent rule is promulgated.

The Agricultural Producer Security Council, which includes a balance of representative producers and processors for the grain, milk, and vegetable industries, unanimously supported 2017 Wisconsin Act 155 at the time of its passage. DATCP shared a draft statement of scope for the present proposed rule with the Council at the latter's April 9, 2018 meeting. At that meeting, the Council approved the statement of scope.

The Governor approved the statement of scope for permanent rule changes on May 1, 2018.

Next Steps

If the DATCP Board approves the scope statement, the Department will begin work to draft the permanent rule. Approval of a scope statement is just the first, preliminary step in a lengthy process for enacting permanent rules. The DATCP Board will have at least two further opportunities to review the proposed rule. The DATCP Board must approve a hearing draft rule before the Department may hold public hearings on the rule proposal. The DATCP Board must also approve the final draft rule before the Department may adopt the rule. The permanent rule will be effective when the final draft has been approved by the DATCP Board, approved by the Governor, completed the legislative review process, and adopted by the Secretary.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection (DATCP)

Rule No.: Ch. ATCP 99 and 100, Wis. Admin. Code (Existing)

Relating to: Grain dealers and grain warehouse keepers; milk contractors

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

N/A

2. Description of the objective of the rule:

The objective of the proposed rule would be to bring DATCP rules into alignment with two legislative changes affecting the Agricultural Producer Security Fund (Fund), a public trust designed to secure payments to producers in the event of defaults.

ATCP 99 – Grain Dealers

2017 Wisconsin Act 155 amended Wis. Stat. § 126.88 (1) (b) and repealed Wis. Stat. § 126.88 (1) (c). These changes combined minimum and maximum fund balances for grain dealers and grain warehouse keepers contributing to the Fund. The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) plans to consider whether modifications to grain dealer and grain warehouse keeper assessment formulas are necessary to maintain fund balances between the new statutory thresholds applicable to grain-related contributions, as required by Wis. Stat. § 126.88 (1).

ATCP 100 – Milk Contractors

2017 Wisconsin Act 155 amended Wis. Stat. § 126.46 (1) to require DATCP to establish a deferred payment assessment rate for milk contractors who contribute to the Agricultural Producer Security Fund (Fund) and enter into deferred payment contracts with producers to procure milk. In proposing a deferred payment assessment rate, DATCP plans to consider the increased exposure to the Fund associated with potential future defaults by milk contractors who owe producers for milk procured under deferred payment contracts.

3. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and background.

The Fund, established by Wis. Stat. § 25.463, is a public trust administered by DATCP. Most milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors (collectively known as contractors) who are licensed by DATCP to obtain milk, grain, or vegetables from producers are required to pay assessments into the Fund annually. Assessment contributions from each industry are accounted for separately but then deposited into one overall Fund. Monies in the Fund are used to settle claims by producers in the event that a contractor defaults on a payment.

Wis. Stat. § 126.88 (1) sets minimum and maximum balances for each industry, as well as a minimum and maximum balance requirement for the overall Fund. In order to achieve these balances, Wis. Stat. ch. 126 establishes detailed assessment requirements for each type of contractor, except that Ch. 126 requires DATCP to establish milk contractor assessments by rule.

Justification for proposed rule.

ATCP 99 – Grain

2017 Wisconsin Act 155 amended Wis. Stat. § 126.88 (1) (b) and repealed Wis. Stat. § 126.88 (1) (c). These changes combined individual minimum and maximum Fund balance requirements for grain dealers and grain warehouse keepers. The new combined minimum is \$1.2 million and the new combined maximum is \$7 million. Under prior law, individual minimums were set at \$1 million and \$200,000 and maximums were set at \$6 million and \$1 million for grain dealers and grain warehouse keepers respectively. Under an existing provision that was unchanged by Act 155, DATCP is required to adjust assessment rates by rule to maintain Fund balances between the statutory thresholds, per Wis. Stat. § 126.88 (1).

ATCP 100 – Milk

Act 155 amended Wis. Stat. § 126.46 (1) to allow milk contractors to enter into contracts with milk producers so as to defer payment for up to 120 days. As amended, the statute requires the provision of financial statements, and, in some instances, individual security, to cover the additional risk arising under such deferred payment contracts. As the Fund could ultimately be responsible for defaults under this type of contract, the Act also creates milk contractor deferred payment assessments and directs DATCP to establish the rates of those assessments by rule.

The legislation creating Act 155 was supported by the Agricultural Producer Security Council, an advisory group of industry members established by Wis. Stat. § 15.137 (1).

Proposed new policies.

ATCP 99 – Grain

Under a recently promulgated emergency rule (EmR 1803) and a proposed permanent rule (CR 17-047), grain dealer assessments were structured to be reduced at any time at which the portion of the Fund attributable to grain dealers exceeds \$6 million, which was the former maximum for those dealers. DATCP proposes to evaluate whether additional modifications are necessary to optimize Fund balances between the new statutory thresholds (\$1.2 million and \$7 million) and to ensure that each industry segment (grain dealers and grain warehouse keepers) contributes assessments commensurate with its default exposure.

ATCP 100 – Milk

DATCP proposes to set a deferred payment assessment rate that is appropriate to the degree of risk of defaults by milk contractors who owe producers of milk procured under deferred payment contracts. Act 155, with its provisions concerning deferred payments contracts, becomes effective on April 28, 2018. To cover the interim period until a permanent rule is promulgated, the Act requires DATCP to promulgate an emergency rule establishing a milk contractor deferred payment assessment rate to remain in effect for up to 24 months. Accordingly, DATCP is preparing a statement of scope for an emergency rule addressed to this issue.

Policy alternatives.

ATCP 99 - Grain

Without action, current assessment rates may result in grain dealers or grain warehouse keepers paying assessments that are disproportionate to their respective exposure, and grain warehouse keepers could qualify for an assessment reduction when they would otherwise be ineligible.

ATCP 100

DATCP must act or be out of compliance with Wis. Stat. ch. 126. DATCP must implement a rule so milk contractors and milk producers know what assessment rate applies when entering into contracts to defer payment for milk up to 120 days.

4. Statutory authority for the rule (including the statutory citation and language):

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 the department.

Wis. Stat. § 126.46 (1) directs DATCP to establish by rule annual fund assessments for milk contractors, including assessments for deferred payment contracts entered into under s. 126.485.

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

Wis. Stat. § 126.81 (2m) requires DATCP to promulgate rules that specify fund assessments under Wis. Stat. §. 126.46 (1).

Wis. Stat. § 126.88 (2) (a) directs DATCP to promulgate a rule modifying assessments when the Fund balance or a portion of the Fund balance falls below the minimum amounts or rises above the maximum amounts required under Wis. Stats. § 126.88 (1) (a) through (e).

5. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

DATCP estimates that it will use approximately 0.25 FTE staff to develop this rule. That includes time required for investigation and analysis, rule drafting, preparing related documents, coordinating council meetings with the Agricultural Producer Security Council, holding public hearings, and communicating with other affected persons and groups. DATCP will use existing staff to develop this rule.

6. Description of all entities that may be impacted by the rule:

Milk contractors, milk producers, grain dealers, and grain warehouse keepers could be impacted as a result of changes made to assessment formulas.

Milk, grain, and vegetable producers are all protected against financial defaults by contractors who contribute to the overall Fund. All could potentially benefit by a higher agricultural producer security fund balance as a result of the additional deferred payment assessment.

7. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

ATCP 99 – Grain

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

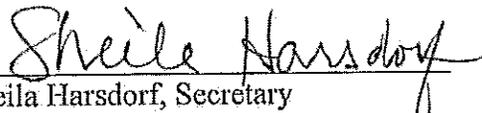
ATCP 100 – Milk

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

8. Anticipated economic impact

DATCP expects the proposed rule to have minimal to no economic impact statewide or locally to the general public. However, the three industries (grain, milk, and vegetable) will benefit from greater coverage offered by the Fund if a future default should occur.

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Sheila Harsdorf, Secretary
Department of Agriculture, Trade and Consumer Protection

4.18.18
Date signed