

## Report From Agency

DATCP Docket No. 16-R-06  
Rules Clearinghouse No. 17-047

Final Draft Rule  
September 21, 2017

### 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 99.126 (2), ATCP 100.135 (1), and ATCP 101.245; and *to repeal and recreate* ch. ATCP 99.126 (3); *relating to* grain dealers and grain warehouse keepers; milk contractors; and vegetable contractors.

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

This proposed rule would modify Wis. Admin. Code ch. ATCP 101 to increase vegetable contractor assessments, as required by statute, to address the portion of the Agricultural Producer Security Fund (Fund) that is currently below its minimum threshold. This proposed rule will also amend portions of ch. ATCP 99, Wis. Admin. Code, and ch. ATCP 100, Wis. Admin. Code based on findings from a recent actuarial study of the Fund and discussions with the Agricultural Producer Security Council (Council).

#### *Statutes Interpreted*

Statutes Interpreted: ss. 25.463, 126.15 (1) and (6), 126.46 (1), and 126.88 (2) (a), Wis. Stats.

#### *Statutory Authority*

Statutory Authority: ss. 25.463 and 126.81 (1) (a) Wis. Stats.

#### *Explanation of Statutory Authority*

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

Wis. Stat. § 126.46 (1) directs Department to specify by rule annual fund assessments for milk contractors.

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

Wis. Stat. § 126.88 (2) (a) directs the Department 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).

### *Related Statutes and Rules*

Wis. Stat. § 15.137 (1) defines the membership of the Council, who advise the Department on the Fund and other producer security matters.

### *Plain Language Analysis*

#### **Background**

The Fund, established by Wis. Stat. § 25.463, is a public trust administered by the Department. Milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors (collectively known as contractors) must purchase a license to obtain milk, grain, and vegetables, respectively, from producers, and most contractors are required to contribute to the Fund annually. Funds are used to settle claims by producers in the event that a contractor defaults on a payment. Funds from each industry are accounted for separately and then deposited into the overall fund. Wis. Stat. Chapter 126 establishes detailed fund assessment requirements, except that it requires the Department to establish milk contractor fund assessments by rule. Wis. Stat. ch. 126.88 (1) sets minimum and maximum fund balances for each industry, as well as a minimum and maximum balance requirement for the overall fund.

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

Under current law, license fees must be paid to obtain a license. Whereas assessment rates are partially based on the amount of risk a given licensee poses, license fees are based simply on the overall purchases (or storage capacity) of the licensee.

In 2014, a default by Allens Inc. caused the Fund to pay vegetable producers more than \$6 million. The resultant impact of this default is that the Fund balance attributed to vegetable contractors fell well below the minimum statutory threshold of \$800,000. The following year, a \$1 million default in the milk industry further drew down the Fund balance. As a result, the Department and the Council identified the need to evaluate the entire agricultural producer

security program. An actuarial study was conducted to, in part, examine the overall sustainability of the Fund and analyze the equitability of assessments contributed by each industry relative to anticipated losses. The Department adopted a number of interim emergency rules as stopgap measures while it awaited the results of an actuarial study to consider possible permanent rule changes. In December 2015, the Department received the study and began working with the Council to develop recommendations for permanent changes to the agricultural producer security program.

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

Wis. Stat. Chapter 126 establishes a maximum balance for grain dealers. As of May 31, 2017, the grain dealer balance has reached the statutory maximum balance of \$6 million and the Department is required to initiate rulemaking to reduce grain dealer assessments.<sup>1</sup> Additionally, the actuarial study indicated that, while the overall Fund was sustainable long-term, adjustments may be needed to assessments or individual Fund balance thresholds to provide more equity across all industry segments.

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

While awaiting the results of the actuarial study, the Department issued emergency rules for all three affected industries. The final one will lapse in February 2018. Due to the length of an administrative rule process, the Department may yet seek emergency rules in the interim.<sup>2</sup>

## **Rule Content**

### **General**

This proposed rule does all of the following:

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

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

<sup>2</sup> After the final draft of this rule was approved, the Department adopted an emergency rule that mirrors this permanent rule. That rule expires in January 2020.

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

### *ATCP 100 - Milk*

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

### *ATCP 101 - Vegetable*

The Perishable Agricultural Commodities Act (PACA) is a federal program that provides some protections for vegetables. This program consists of a priority lien against vegetable-related assets and is applicable to fresh vegetables based on a complex set of variables and circumstances. Wisconsin's vegetable security program applies only to processing vegetables. Wisconsin's program uses an indemnity fund, rather than a priority lien-type program. There may be some limited overlap between the Wisconsin and federal programs, but that overlap is justified because the scope of federal coverage is not entirely clear. Overlap was reduced by Wisconsin legislation, which permits certain potato buyers covered under the federal program to opt out of most of the state program.

## **Comparison with Rules in Adjacent States**

### *ATCP 99 - Grain*

Like all states with a significant grain industry, Minnesota, Michigan, Illinois, Indiana, and Iowa all require persons who buy grain from producers to obtain a grain dealer license, and all persons who store grain for others are required to obtain either a state or federal grain warehouse license. Licensees must file financial statements with the state, and 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) has a combination of bonds and indemnity fund contributions.

#### *ATCP 100 - Milk*

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

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

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

#### *ATCP 101 - Vegetable*

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

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

### ***Summary of Factual Data and Analytical Methodologies***

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

*Producer Security Fund; Assessment Revenues*

The following table shows *projected* assessment revenues for FY 2019-20 (*with* and *without* this rule):

<b>Total Projected Fund Assessment Revenues</b>			
	<b>FY 2018-19* Without this rule</b>	<b>FY 2018-19* With this rule</b>	<b>Difference</b>
Grain Dealers	\$ 974,000	\$ 256,000	\$ (718,000)
Grain Warehouse Keepers	38,000	38,000	0
Milk Contractors	771,000	621,000	(150,000)
Vegetable Contractors	95,000	327,000	232,000
<b>TOTAL</b>	<b>\$ 1,878,000</b>	<b>\$ 1,242,000</b>	<b>\$ ( 636,000)</b>

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

Under this rule, the fund balance amount attributable to vegetable contractor will build over several years toward the required statutory minimum (it currently falls short of the required minimum).

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

***Analysis and Supporting Documents used to Determine Effect on Small Business***

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

<sup>3</sup> After the final draft of this rule was approved by the DATCP Board, 2017 Wisconsin Act 155 combined the Fund statutory thresholds for grain dealers and grain warehouse keepers to a \$1.2 million minimum and a \$7 million maximum. The Department intends to preserve the individual grain dealer threshold of \$6 million to qualify for an assessment reduction.

Bureau Federation; Cooperative Network; and the Wisconsin Potato and Vegetable Growers Association, Inc.

### *Effect on Small Business*

This rule will have a positive impact on grain dealers by automatically reducing assessments whenever the grain dealer portion of the Fund balance exceeds its statutory maximum. The rule also reduces deferred payment contract assessments whenever the grain dealer portion of the Fund balance exceeds its statutory maximum.

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

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

### *DATCP Contact*

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1           **SECTION 1.** ATCP 99.126 (2) is amended to read:  
2           **(2) BASIC ASSESSMENT.**  
3           **(a)** A contributing grain dealer who reports less than \$500,000 in grain payments under s.  
4   126.11 (9) (a), Stats., shall pay a basic assessment equal to the greater of the following amounts:  
5           **1.** \$100.  
6           **2.** If the fund balance attributable to grain dealers is less than \$6 million on May 31 of the  
7   last preceding license year, then ~~The~~ the sum of the amounts calculated under s. 126.15 (1) (a)  
8   and **(b)**, Stats.

1 (b) A contributing grain dealer who reports at least \$500,000 but less than \$3 million in grain  
2 payments under s. 126.11 (9) (a), Stats., shall pay a basic assessment equal to the greater of the  
3 following amounts:

4 1. \$200.

5 2. If the fund balance attributable to grain dealers is less than \$6 million on May 31 of the  
6 last preceding license year, then ~~The~~ the sum of the amounts calculated under s. 126.15 (1) (a)  
7 and (b), Stats.

8 (c) A contributing grain dealer who reports at least \$3 million in grain payments under s.  
9 126.11 (9) (a), Stats., shall pay a basic assessment equal to the greater of the following amounts:

10 1. \$500.

11 2. If the fund balance attributable to grain dealers is less than \$6 million on May 31 of the  
12 last preceding license year, then the ~~The~~ the sum of the amounts calculated under s. 126.15 (1) (a)  
13 and (b), Stats.

14 **SECTION 2.** ATCP 99.126 (3) is repealed and recreated:

15 (3) DEFERRED PAYMENT ASSESSMENT. A contributing grain dealer shall pay a deferred  
16 payment assessment equal to the amount the grain dealer reports under s.126.11 (9) (b), Stats., in  
17 the grain dealer's license application for that license year multiplied by rates determined as  
18 follows:

19 (a) If the fund balance attributable to grain dealers is greater than \$6 million on May 31,  
20 the rate is 0.000875 for deferred payment contracts entered into anytime during the following  
21 license year.

1 (b) If the fund balance attributable to grain dealers is not more than \$6 million on May  
2 31, the rate is 0.0035 for deferred payment contracts entered into anytime during the following  
3 license year.

4 **SECTION 3.** ATCP 100.135 (1) is amended to read:

5  
6 ATCP 100.135 **Contributing milk contractors; fund assessments.** (1) General. A  
7 contributing milk contractor shall pay an annual fund assessment for each license year. The  
8 annual fund assessment shall be calculated under this section, rather than under s. 126.46, Stats.  
9 Except as provided in sub. (6) or (10), or s. ATCP 100.13, the annual fund assessment amount is  
10 the minimum assessment amount listed in sub. (9) or the sum of the following multiplied by 0.8,  
11 whichever is greater:

12 **SECTION 4.** ATCP 101.245 (2) is amended to read:

13  
14 **(2) ASSESSMENT AMOUNT.**

15 **(a)** A contributing vegetable contractor that reports less than \$500,000 in contract obligations  
16 under s. 126.56 (9) (am), Stats., shall pay a fund assessment equal to the greater of the following  
17 amounts:

18 1. \$100.

19 2. The sum of the amounts calculated under s. 126.60 (1) (a) and (b), Stats. If all of the  
20 contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats.,  
21 were made under written contracts where payments were required no more than 30 days  
22 after taking custody or control of the vegetables, then further divide this amount by 2.

23 **(b)** A contributing vegetable contractor that reports at least \$500,000 but less than \$4 million in  
24 contract obligations under s. 126.56 (9) (am), Stats., shall pay a fund assessment equal to the  
25 greater of the following amounts:

26 1. \$200.

1           2. The sum of the amounts calculated under s. 126.60 (1) (a) and (b), Stats. If all of the  
2 contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats., were  
3 made under written contracts where payments were required no more than 30 days after taking  
4 custody or control of the vegetables, then further divide this amount by 2.

5 (c) A contributing vegetable contractor who reports \$4 million or more in contract obligations  
6 under s. 126.56 (9) (am), Stats., shall pay an fund assessment equal to the greater of following  
7 amounts:

8           1. \$500.

9           2. The sum of the amounts calculated under s. 126.60 (1) (a) and (b), Stats. If all of the  
10 contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats.,  
11 were made under written contracts where payments were required no more than 30 days after  
12 taking custody or control of the vegetables, then further divide this amount by 2.

13 (d) If the fund balance attributable to vegetable contractors is less than \$800,000 on November  
14 30 of the preceding license year, a contributing vegetable contractor shall pay the sum of the  
15 amount calculated under either (a), (b), or (c) and the lesser of:

16           1. \$50,000. If all of the contract obligations reported by the vegetable contractor under s.  
17 126.56 (9) (am), Stats., were made under written contracts where payments were  
18 required no more than 30 days after taking custody or control of the vegetables, then  
19 this amount is \$25,000.

20           2. The amount of contract obligations under s. 126.56 (9) (am), Stats., multiplied by  
21 0.002. If all of the contract obligations reported by the vegetable contractor under s.  
22 126.56 (9) (am), Stats., were made under written contracts where payments were

1           required no more than 30 days after taking custody or control of the vegetables, then  
2           divide this amount by 2.

3  
4           **SECTION 5. EFFECTIVE DATE:** This rule takes effect on the first day of the month  
5 following publication in the Wisconsin administrative register, as provided in s. 227.22 (2)  
6 (intro.), Stats.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

WISCONSIN DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By: \_\_\_\_\_

Jeff Lyon  
Interim Secretary

7