



State of Wisconsin  
Governor Tony Evers

**Department of Agriculture, Trade and Consumer Protection**  
Bradley M. Pfaff, Secretary

**DATE:** September 18, 2019

**TO:** The Honorable Roger Roth  
President, Wisconsin State Senate  
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The Honorable Robin Vos  
Speaker, Wisconsin State Assembly  
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**FROM:** Bradley M. Pfaff, Secretary  
Department of Agriculture, Trade and Consumer Protection

**SUBJECT: Grain Dealers; Milk Contractors; chs. ATCP 99 and 100; Final Draft Rule (Clearinghouse Rule #18-061)**

### *Introduction*

The Department of Agriculture, Trade and Consumer Protection (DATCP) transmits this rule for legislative committee review, as provided in Wis. Stat. §§ 227.19 (2) and (3). DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in Wis. Stat. § 227.19 (2). This rule makes certain changes to the Agricultural Producer Security Fund (Fund).

### *Background*

#### *ATCP 99*

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 § 126.88 (1) (b) and repealed Wis.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

The Fund is a public trust administered by DATCP. Milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors (collectively known as contractors) must purchase a license to obtain milk, grain, or vegetables from producers, and most contractors are required to contribute to the Fund annually. The Fund is used to settle claims by producers in the event that a contractor defaults on payment. Assessment contributions from each industry are accounted for separately and deposited into the overall Fund. Wis. Stat. ch. 126,

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establishes detailed assessment requirements. Wis. Stat. ch. 126 sets minimum and maximum Fund balances for each industry, as well as a minimum and maximum balance requirement for the overall Fund.

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

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

#### *ATCP 100 – Milk*

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

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

#### Proposed Policies

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

Act 155 combined Fund balance minimum and maximum thresholds in the grain dealer and grain warehouse keeper programs. Prior to Act 155, the statute specified separate limits for grain dealers and warehouse keepers. Under Wis. Stat. § 126.88, DATCP is required to modify assessments to maintain Fund balances within statutory thresholds. When combined, the two exceeded the new statutory maximum of \$7 million, and it required DATCP to modify assessments to bring that portion of the Fund back below the statutory maximum.

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

### Policy Alternatives

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

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

### ***Rule Content***

This proposed rule does all of the following:

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

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

#### *ATCP 99 - Grain*

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

#### *ATCP 100 - Milk*

No federal programs currently exist that offer security to milk producers in the event of payment defaults.

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

#### ***ATCP 99 - Grain***

Like all states with a significant grain industry, Minnesota, Michigan, Illinois, Indiana, and Iowa require persons who buy grain from producers to obtain a grain dealer license, and all persons who store grain for others are required to obtain either a state or federal grain warehouse license. Licensees must file financial statements with the state, and the warehouses must maintain 100% of depositor-owned grain in inventory at all times.

Minnesota requires grain dealers and grain warehouse keepers to post bonds with the state. Indiana, Illinois, and Iowa all have a state indemnity fund that is made up of grain dealer and warehouse assessments. Michigan (like Wisconsin) employs a combination of bonds and indemnity fund contributions.

#### ***ATCP 100 - Milk***

Minnesota requires any wholesale dealer or food processor who contracts with other Minnesota dealers or farmers of milk, cream, or products made from milk or cream, to be licensed as a Wholesale Produce Dealer. Dealers are required to obtain a surety bond and required to maintain trust assets so that assets are freely available to satisfy outstanding obligations. There are no exceptions to this requirement. Dealers are not prohibited from entering into contracts with milk producers that have extended payment terms.

Michigan requires producer security for all manufacturing and Grade A dairy plants that are a first receiving point for raw milk that will be processed at that facility. Security can be in one or more of several forms including a bond, letter of credit, certificate of deposit, or pre-payment. There are no exceptions to this requirement. Dairy plants are not prohibited from entering into contracts with milk producers that have extended payment terms.

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

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

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

#### ***ATCP 99 – Grain***

As of March 31, 2018, the Fund balance attributable to grain dealers is approximately \$6,789,000, which exceeded the previous maximum threshold by \$789,000. The Fund balance attributable to grain warehouse keepers is approximately \$284,000, which is just above the previous minimum. The combined balance of approximately \$7,073,000 is over the new statutory maximum of \$7 million and almost entirely a result of the grain dealer portion of the Fund.

### Pre-Act 155 Balances

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

### Act 155 Implementation Balances

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

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

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

#### *ATCP 100 – Milk*

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

Like the new deferred payment contract provisions for milk contractors, the grain dealer program permits grain dealers to enter in to contracts with grain producers to defer payments for up to 120 days. The deferred payment assessment rate applied to these contracts in the grain program is 0.0035. Deferred payments in the milk program pose a similar risk; therefore, DATCP proposes to use the same deferred payment assessment rate of 0.0035 for

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milk contractors. That is to say, \$100,000 of deferred milk payments would equal a \$350 deferred payment assessment.

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

***Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis***

Members of the Agricultural Producer Security Council, an advisory council as defined in Wis. Stat. § 15.137 (1), worked with the Department to craft Act 155 and these changes to Wisconsin Administrative Code. Members represent the following: the Farmers' Educational and Cooperative Union of America, Wisconsin Division; the Midwest Food Processors Association, Inc.; the National Farmers' Organization, Inc.; the Wisconsin Agri-Business Association, Inc.; the Wisconsin Cheese Makers Association; the Wisconsin Corn Growers Association, Inc., the Wisconsin Soybean Association, Inc.; the Wisconsin Dairy Products Association, Inc.; the Wisconsin Farm Bureau Federation; Cooperative Network; and the Wisconsin Potato and Vegetable Growers Association, Inc.

***Effect on Small Business***

***ATCP 99- Grain***

This rule will not have an immediate impact on grain warehouse keepers. Prior to Act 155, warehouse keepers were not projected to receive an assessment reductions for a number of years. This proposed rule does not change those projections. Nonetheless, these changes are necessary to harmonize ATCP 99 with statute.

***ATCP 100- Milk***

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

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

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

***Small Business Regulatory Review Report***

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The Small Business Regulatory Review Board did not issue a report on this rule.

### *Hearings*

DATCP held a public hearing on the hearing draft rule on September 10, 2018, at the Prairie Oaks State Office Building in Madison and received two letters of support from Cooperative Network and Wisconsin Agri-Business Association.

### *Changes from Hearing Draft*

DATCP made technical corrections based on Rules Clearinghouse suggestions as to form, style, and placement. None of the public comments recommended changes to the hearing draft.