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Fast-Track Regulation Agency Background Document

Agency name	Milk Commission
Virginia Administrative Code (VAC) citation(s)	2 VAC 15-20
Regulation title(s)	Regulations for the Control and Supervision of Virginia's Milk Industry
Action title	Amendment to a certain wholesale category
Date this document prepared	December 11, 2018

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

This amendment will change the number of cases of milk per delivery for two of the three wholesale and retail categories on the Milk Commission's Presumed Cost Schedule that establishes the minimum cost to produce individual fluid milk products.

Currently, the established categories are "Less than 14 cases per delivery," "14 to 99 cases per delivery," and "More than 99 cases per delivery." The adjustment would change the categories to "Less than 7 cases per delivery," "7 to 99 cases per delivery," and "More than 99 cases per delivery."

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

N/A

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

The Milk Commission adopted amendments to 2 VAC 15-20, *Regulations for the Control and Supervision of Virginia's Milk Industry*, on February 16, 2018.

Mandate and Impetus

Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, board decision, etc.). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, please also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

During the 2018 Session of the General Assembly, Delegate McGuire introduced House Bill 738, which would have amended the Code of Virginia to require that the Milk Commission adopt a regulation "to establish fewer than seven cases as the number of cases in the highest delivery percentage for Class I fluid milk delivered to wholesale accounts." As an amendment of this nature to the Code of Virginia would have prevented the Milk Commission from making future amendments to this specific provision of the regulation, the Milk Commission and Delegate McGuire agreed that a regulatory action with the proposed amendment was the preferred method of reaching Delegate McGuire's desired outcome of reducing the minimum number of cases of milk required per delivery to qualify for a lower wholesale cost.

The Milk Commission consulted industry stakeholders, including dairy cooperatives that serve Virginia dairy farmers and dairy processors that shop and sell high volumes of milk into the Commonwealth, and they voiced no opinion on the proposed amendment. As this amendment does not require wholesalers to change their business practices, the effect of the change is minimal, and the agency expects the amendment will be noncontroversial.

Legal Basis

Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity's overall regulatory authority.

Section 3.2-3204 of the Code of Virginia authorizes the Milk Commission to confer and cooperate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this chapter and to enter into a compact or compacts for such uniform system of milk control. This section also authorizes the Milk

Commission to make, adopt, and enforce all regulations or orders necessary to carry out the purposes of Chapter 32 of Title 3.2 of the Code of Virginia regarding the Milk Commission.

Purpose

Please explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

During the 2018 Session of the General Assembly, Delegate McGuire introduced House Bill 738, which would have amended the Code of Virginia to require that the Milk Commission adopt a regulation “to establish fewer than seven cases as the number of cases in the highest delivery percentage for Class I fluid milk delivered to wholesale accounts.” As an amendment of this nature to the Code of Virginia would have prevented the Milk Commission from making future amendments to this specific provision of the regulation, the Milk Commission and Delegate McGuire agreed that a regulatory action with the proposed amendment was the preferred method of reaching Delegate McGuire’s desired outcome of reducing the minimum number of cases of milk required per delivery to qualify for a lower wholesale cost.

The Milk Commission establishes minimum prices at all transaction levels to ensure that milk is not used as a loss leader in retail grocery sales, a practice that has a detrimental impact on the dairy industry. Ultimately, that detrimental impact could result in milk travelling longer distances to reach retail locations, which increases the cost and results in milk that has a shorter shelf life, all of which can impact the economic welfare of consumers.

The proposed amendment will reduce the minimum number of cases of milk required per delivery to qualify for a potentially lower wholesale cost. The Milk Commission establishes a minimum wholesale price; however, most wholesalers set their prices based on the actual cost of delivering goods, which tends to be higher than the required prices established by regulation. As such, the overall impact of the proposed amendment on all parties will likely be limited. This regulatory action would not affect larger grocery retailers that purchase milk in significantly higher volumes than the delivery category amended by this regulatory action.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of Changes” section below.

2 VAC 15-20 includes a provision that establishes a formula for determining the presumed cost for milk delivered to wholesale accounts. In this formula, the percentage by which the platform cost is multiplied differs depending upon the number of cases of milk in the delivery to the wholesale account, as noted below.

- More than 99 cases per delivery—Platform Cost x 1.0675 (6.75%)
- From 14 to 99 cases per delivery—Platform Cost x 1.125 (12.5%)
- Less than 14 cases per delivery—Platform Cost x 1.250 (25%)

The proposed amendment will reduce the number of cases required per delivery to qualify for a potentially lower wholesale cost. With the proposed amendments, the formula that determines the presumed cost for milk delivered to wholesale accounts would be as noted below.

- More than 99 cases per delivery—Platform Cost x 1.0675 (6.75%)

From 7 to 99 cases per delivery—Platform Cost x 1.125 (12.5%)
Less than 7 cases per delivery—Platform Cost x 1.250 (25%)

Issues

Please identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The intended benefit from the proposed amendment is to enable more retailers to potentially qualify for a lower wholesale cost by reducing the minimum number of cases of milk required per delivery to qualify for said lower wholesale cost. The proposed amendments to regulation pose no known disadvantages to the public or the Commonwealth.

Requirements More Restrictive than Federal

Please identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

No agency, locality, or entity will be particularly affected by the amendments to this regulation.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, please identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources 	<p>There is no projected additional cost to this agency to implement the amended regulation.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There are no projected costs to the state as a result of these amendments.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>This amendment will enable more retailers to potentially qualify for a lower wholesale milk cost by reducing the minimum number of cases of milk required per delivery to qualify for said lower wholesale cost.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There are no projected costs to localities as a result of these amendments</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>This amendment will enable more retailers to potentially qualify for a lower wholesale milk cost by reducing the minimum number of cases of milk required per delivery to qualify for said lower wholesale cost.</p>

Impact on Other Entities

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>The regulation could potentially affect any person or business that wholesales milk or retails milk and typically purchases between 7 and 13 cases of milk at a time.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million. 	<p>The agency does not maintain data from which it is able to estimate the number of potentially impacted entities; however, all of the potentially impacted entities are small businesses.</p> <p>It is unlikely that the majority of small businesses will be impacted because this regulation establishes a minimum price and most wholesale distributors price milk at the actual cost to deliver goods to the store, which exceeds such the minimum price.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; 	<p>Affected individuals or businesses will incur no additional costs as a result of the proposed amendments because the amendments do not require wholesalers to change their business practices and the proposed amendments prescribe no additional requirements.</p>

b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	
Benefits the regulatory change is designed to produce.	This amendment will enable more retailers to potentially qualify for a lower wholesale milk cost by reducing the minimum number of cases of milk required per delivery to qualify for said lower wholesale cost.

Alternatives

Please describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

The only alternative would be to not amend the regulation. This alternative was rejected because the request for change came from Delegate McGuire through the introduction of House Bill 738, which would have amended the Code of Virginia to require that the Milk Commission adopt a regulation “to establish fewer than seven cases as the number of cases in the highest delivery percentage for Class I fluid milk delivered to wholesale accounts.” An amendment of this nature to the Code of Virginia would have prevented the Milk Commission from making future amendments to this specific provision of the regulation. The Milk Commission and Delegate McGuire agreed that a regulatory action with the proposed amendment was the preferred method of reaching Delegate McGuire’s desired outcome. If the agency does not amend the regulation at this time, Delegate McGuire may reintroduce the legislation during the 2019 Session of the General Assembly.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

The proposed amendments will benefit small businesses by allowing small retail businesses that typically purchase between 7 and 13 cases of milk at a time to potentially qualify for lower wholesale costs when purchasing milk. The agency considered alternative regulatory methods and determined that there were no options that would result in less stringent requirements while still protecting dairy farmers, processors, wholesalers, and retailers, many of whom are small business owners, from artificially low milk prices. The Milk Commission sets mandatory minimum milk prices based on the actual cost to produce the milk in order to protect dairy farmers from pressure to sell product below cost.

The current proposal does not create any additional requirements and will not mandate any changes to existing business practices.

Public Participation

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Detail of Changes

Please list all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation.

If the regulatory change will be a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory change. Delete inapplicable tables.

If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.

For changes to existing regulation(s), please use the following chart:

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
100(3)(g)(2)	N/A	<p>(2) The presumed cost for Class I items delivered to wholesale accounts shall be the product of the total platform cost as set forth in subdivision 3 g (1) of this section, multiplied by the following percentages:</p> <p>More than 99 cases per delivery—Platform Cost x 1.0675 (6.75%)</p> <p>From 14 to 99 cases per delivery—Platform Cost x 1.125 (12.5%)</p> <p>Less than 14 cases per delivery—Platform Cost x 1.250 (25%)</p>	<p>The proposed change will replace the existing categories for cases of milk utilized in the formula to determine the presumed cost for milk delivered to wholesale accounts with the following categories:</p> <p>More than 99 cases per delivery—Platform Cost x 1.0675 (6.75%)</p> <p>From 7 to 99 cases per delivery—Platform Cost x 1.125 (12.5%)</p> <p>Less than 7 cases per delivery—Platform Cost x 1.250 (25%)</p> <p>This amendment will enable more retailers to potentially qualify for a lower wholesale milk cost by reducing the minimum number of cases of milk</p>

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