Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–NOP–11–0009; NOP–11–04PR]

RIN 0581–AD08

National Organic Program; Origin of Livestock

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The U.S. Department of Agriculture's Agricultural Marketing Service (USDA AMS) proposes to amend the origin of livestock requirements for dairy animals under the USDA organic regulations. This proposed action would specify that a producer can transition dairy animals into organic production once. This proposed action would clarify that, after completion of this one-time transition, any new dairy animals that a producer adds to a dairy farm would need to be managed organically from the last third of gestation or sourced from dairy animals that already completed their transition into organic production. This proposed action would also clarify how breeder stock should be managed on organic livestock farms.

DATES: Comments must be received by July 27, 2015.

ADDRESSES: Interested parties may submit written comments on this proposed rule using one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Scott Updike, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, Room 2646—So., Ag Stop 0268, 1400 Independence Ave. SW., Washington, DC 20250–0268.

Instructions: All submissions received must include the docket number AMS–NOP–11–0009; NOP–11–04PR, and/or Regulatory Information Number (RIN) 0581–AD08 for this rulemaking. Commenters should identify the topic and section of the proposed rule to which their comment refers. All commenters should refer to the GENERAL INFORMATION section for more information on preparing your comments. All comments received will be posted without change to *http://www.regulations.gov.*

Docket: For access to the docket, including background documents and comments received, go to *http://www.regulations.gov.* Comments submitted in response to this proposed rule will also be available for viewing in person at USDA–AMS, National Organic Program, Room 2646—South Building, 1400 Independence Ave. SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720–3252.

FOR FURTHER INFORMATION CONTACT: Andrew Perry, Director, Standards Division, Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

Executive Summary

A. Purpose of Proposed Rule

This proposed rule would create greater consistency in the implementation of a standard for the transition of dairy animals into organic production and for the management of breeder stock. AMS has determined that the current regulations regarding the transition of dairy animals and the management of breeder stock on organic operations need additional specificity and clarity to improve AMS' ability to efficiently administer the National Organic Program (NOP). A stated purpose of the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) is to assure consumers that organically produced products meet a consistent and uniform standard (7 U.S.C. 6501). This action would facilitate and improve compliance with and enforcement of the USDA organic regulations (7 CFR part 205) and maintain consumer trust in the consistency of the Organic seal.

B. Summary of Provisions

This proposed rule would update the regulation by explicitly requiring that milk or milk products labeled, sold or represented as organic be from dairy animals organically managed since at least the last third of gestation, with a one-time exception for transition. This exception would allow a producer, as defined by the regulations, to transition nonorganic dairy animals to organic milk production one time, under specific conditions.

This proposal would specify that a producer (*e.g.,* an individual or corporation starting or operating a dairy farm) could transition nonorganic dairy animals to organic milk production one time over a single twelve-month period. The proposal would require that all transitioning animals end the transition process at the same time. This twelve-month period is consistent with OFPA's requirement that there be a minimum period of one year of organic management before milk from dairy animals can be sold as organic (7 U.S.C. 6509(e)(2)).

This proposal would specify that, once the transition into organic production is complete, that a producer would not be allowed to conduct any additional transitions. After the transition, the producer would only be able to expand the number of dairy animals or replace culled dairy animals on any dairy farm in two ways: (1) Add dairy animals that had been under continuous organic management since the last third of gestation, or (2) add transitioned dairy animals that had already completed the transition on another dairy farm during that producer's one-time transition.

The proposal would define a dairy farm as a specific premises with a milking parlor where at least one lactating animal is milked. For the purpose of this definition, a milking parlor should be considered a physical structure (*e.g.,* barn, parlor) in which dairy animals are milked. Because the dairy farm definition, in part, drives the eligibility for a producer to transition animals to organic production, this action would mean that producers that only raise heifers for organic dairy farms would not be eligible to transition conventional animals to organic. Such producers do not milk animals and, therefore, would not be considered eligible for the one-time transition

exception. However, such producers could continue raising heifers for organic dairy farms as long as the animals were under continuous organic management from the last third of gestation.

This proposed rule reiterates that breeder stock may be brought from a nonorganic operation onto an organic operation at any time. While the regulations prohibit organic livestock from being removed and managed on a nonorganic operation and subsequently returned to an organic operation (*i.e.,* cycling in and out of organic production), this provision does not extend to nonorganic breeder stock that are themselves not certified or eligible for slaughter, sale, and labeling as organic. Further, OFPA specifically allows breeder stock to be purchased from any source if the stock is not in its last third of gestation. Consistent with OFPA and USDA organic regulations, a producer has flexibility in its sourcing and its management of nonorganic breeder stock after its organic calf is weaned and before it begins the last third of gestation for the next offspring. However, a producer must continue to prevent commingling of organic and nonorganic products and prevent contact of any organic production or products with prohibited substances (7 CFR 205.201(a)(5)). AMS is proposing additional provisions for organic management of breeder stock during the time when the breeder stock is directly contributing to the nourishment of organic offspring, from the last third of gestation through the end of the nursing period.

C. Costs and Benefits

AMS estimates the following costs and benefits of this proposed rule.

Costs (range)	Benefits
$288,000–$935,000 This range indicates the estimated costs for dairy producers to purchase organic replacement heifers instead of transitioned heifers. (AMS had no data to estimate costs for dairy sheep and goat farms) AMS believes the lower bound is a conservative estimate of the costs and actual costs could be less. The upper limit accounts for an assumed organic premium for organic heifers. The difference between the lower bound and upper limit is believed to be an intra-industry transfer of costs and benefits, not a net cost.	Will create a consistent, level playing field for all existing organic dairy producers, regardless of how they transitioned into organic production. Facilitates more consistent enforcement of organic dairy standards. Maintains consumer confidence in the USDA organic seal.

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I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are engaged in the dairy industry. Potentially affected entities may include, but are not limited to:

- Individuals or business entities that are considering starting a new dairy farm and that plan to seek organic certification for that farm.
- Existing dairy farms that are currently certified organic under the USDA organic regulations.
- Existing conventional dairy farms that are considering converting their farm to certified organic production.
- Businesses engaged in raising heifers for sale to certified organic operations.
- Certifying agents accredited under the USDA organic regulations to certify organic livestock operations.
- Certifying agents accredited under the USDA organic regulations who may seek to certify transitioned dairy animals or transitional crops.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this section could also be affected. To determine whether you or your business may be affected by this action, you should carefully examine the proposed regulatory text. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for AMS?

Your comments should clearly indicate whether or not they support the action being proposed for any or all of the items in this proposed rule. You should clearly indicate the reason(s) for the stated position. Your comments should also offer any recommended language changes that would be appropriate for your position. Please include relevant information and data to further support your position (*e.g.* scientific, environmental, industry impact information, *etc.*).

Specifically, AMS is requesting comments on the following topics:

1. The cost and benefit analysis presented, including assumptions and estimates, of limiting dairy transition to a one-time exception for a given producer;

2. Procedures that certifying agents would use under this proposal to determine whether a producer is eligible for the one-time transition; and

3. The proposed implementation approach for this rule.

II. Background

A. Dairy Transition

AMS' National Organic Program (NOP) is authorized by OFPA. Through the NOP, AMS oversees national standards for the production and handling of organically produced agricultural products. This action is being taken by AMS to create greater consistency in the implementation of the origin of livestock requirements for organic dairy animals, and to facilitate and improve compliance with and enforcement of the USDA organic regulations. This action is also being taken to satisfy consumer expectations

that organic livestock meet a consistent and uniform standard.

Section 6509 of OFPA authorizes the USDA to implement regulations regarding standards for organic livestock products, including the transition of dairy animals into organic production. OFPA establishes that in general, organic livestock will be managed organically since the last third of gestation (7 U.S.C. 6509(b)). As an exception for dairy animals, OFPA requires a minimum period of one year of organic management before milk from non-organic dairy animals can be sold as organic (7 U.S.C. 6509(e)(2)). OFPA also addresses the use of breeder stock on livestock farms (7 U.S.C. 6509(b)). Furthermore, OFPA authorizes the creation of the National Organic Standards Board (NOSB) to advise USDA about the implementation of standards and practices for organic production (7 U.S.C. 6518).

The USDA organic regulations regarding the origin of livestock (7 CFR 205.236(a)) require that all livestock products (*e.g.,* meat, fiber) sold, labeled, or represented as being organic must be from livestock under continuous organic management from the last third of gestation onward. For dairy animals, the USDA organic regulations provide an exception at section 205.236(a)(2) that allows for the transition of a dairy herd into organic production as long as they are under continuous organic management for the one-year period prior to production of organic milk or milk products. During this one-year period, dairy animals may consume crops and forage from land which is in the third year of organic management and included in the organic system plan, but has not yet been certified organic (7 CFR 205.236(a)(2)(i)). Section 205.236(a)(2)(iii) requires that once an entire distinct herd has transitioned to organic production, all dairy animals shall be managed organically from the last third of gestation.

While the regulations allow for the transition of a conventional herd to organic milk production after one year of organic management, the regulations do not define a herd. As such, stakeholders have interpreted the term ''herd'' in a variety of ways. For example, some operations and certifying agents consider a herd to include all of the animals on the farm, whereas others consider a herd to be a group of animals on a farm that are managed together over time.

Additionally, organic operations and certifying agents have interpreted the USDA organic regulations differently regarding when the transition of a herd into organic production should be considered complete. Some dairy operations continuously transition conventional dairy animals as new ''distinct'' herds into organic production. This can be a cost savings to a farmer because he or she does not have to purchase organic dairy animals to either expand their herd or replace their cull animals. Other dairy operations have only used the transition exception once when they initially converted a ''herd'' to organic production. Current practice also does not always align with the intent of the May 2003 NOSB recommendation and the regulations that dairy herd transition be used only one time, when a producer with a farm initially transitions from conventional to organic production. AMS is updating the transition exception through this proposed rulemaking.

In July 2013, the USDA Office of Inspector General (OIG) published an audit report on organic milk operations stating that certifying agents were interpreting the origin of livestock requirements differently.[1] According to the OIG report, three of the six certifiers interviewed by OIG allowed producers to continuously transition additional herds to organic milk production, while the other three certifiers did not permit this practice. OIG recommended that a proposed rule be issued to clarify the standard and ensure that all certifiers consistently apply and enforce the origin of livestock requirements. This proposed rule responds to the OIG finding on this issue.

B. Breeder Stock

OFPA states that breeder stock may be purchased from any source if such stock is not in the last third of gestation (7 U.S.C. 6509(b)). The USDA organic regulations define breeder stock as female livestock whose offspring may be incorporated into an organic operation at the time of their birth (7 CFR 205.2). OFPA and the regulations limit breeder stock to nonorganic females who may produce organic offspring if certain conditions are met. The regulations specify that such breeder stock may be brought from a nonorganic operation onto an organic operation at any time (7 CFR 205.236(a)(3)). If breeder stock is gestating and its offspring are to be raised as organic, the regulations require that the breeder stock be brought onto the facility no later than the last third of gestation and be under continuous organic management until the offspring are weaned from the breeder stock (7 CFR 205.236(a)).

Stakeholders, through public comment to the NOSB and comments to NOP have expressed concern that some operations may bring breeder stock onto an organic operation, manage them organically for the last third of gestation so that the breeder stock can produce organic offspring, and then return that breeder stock to nonorganic management. Some stakeholders, including the NOSB, have suggested that such a practice does not align with a regulatory provision that prohibits livestock removed from an organic operation and subsequently managed on a nonorganic operation to be sold, labeled, or represented as organically produced (section 205.236(b)).[2]

C. Development of Existing Standards

Between 1994 and 2006, the NOSB made six recommendations regarding origin of dairy animals; several of which included recommendations on the management of breeder stock.[3] Between 1997 and 2000, AMS issued two proposed rules and a final rule regarding national standards for production and handling of organic products, including livestock and their products. [4] [5] AMS also issued a proposed rule and final rule implementing congressional amendments to the OFPA regarding feed for transitioning dairy animals.[6] The NOSB as well as the public commented on these rulemakings with regard to the origin of livestock and exception for transition. Key points from these actions that led to the development of the existing standards on origin of livestock are summarized below.

(1) In June 1994, the NOSB recommended a series of provisions to address the source of livestock on organic farms. Within this recommendation, the NOSB stated that dairy stock be fed certified organic feeds and raised under organic management practices for not less than 12 months prior to the sale of their milk as organic.[7]

(2) On December 16, 1997, AMS responded to the June 1994 NOSB

[1] The July 2013 Office of Inspector General (OIG) audit report on organic milk operations may be accessed at the following Web site: *http://www.usda.gov/oig/webdocs/01601-0002-32.pdf.*

[2] National Organic Standards Board April 2003 Recommendation on Breeder Stock: Clarification of Rule. Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3104547.*

[3] A complete listing of related documents and NOSB recommendations is found in Section III below.

[4] 62 FR 65850; 65 FR 13512.

[5] 65 FR 80548.

[6] 71 FR 32803.

[7] NOSB Final Recommendation, 2 June 1994. Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=stelprdc5058940.*

recommendation through publication of a proposed rule.[8] The language contained within that proposed rule echoed the NOSB's recommendation. The proposal would have required that dairy animals must be on a certified organic facility beginning no later than 12 months prior to the production of milk or milk products sold, labeled, or represented as organic. The 1997 proposed rule also proposed that all feed provided to organic dairy livestock consist of organically produced and handled agricultural products, including pasture and forage. However, the proposed rule included a provision to allow nonorganic feed up to a maximum of 20 percent of the animal's diet. The 20 percent level was roughly representative of the nutrients provided from supplemental grain feeding, in addition to nutrients provided by pasture and forage. The proposed language also contained a provision that, if necessary, a herd of dairy livestock converting to organic management for the first time could be provided with nonorganic feed until 90 days prior to the production of organic milk or milk products. This proposed rule was never finalized.[9]

(3) In March 1998, the NOSB provided a second recommendation reaffirming its 1994 recommendation on the source of livestock.[10] The March 1998 NOSB recommendation also recommended that livestock comprising part of a mixed crop/livestock operation should qualify to be certified organic at the end of the transition period.

(4) On March 13, 2000, AMS published a proposed rule that would establish the USDA organic regulations.[11] Within this proposed rule, AMS responded to the NOSB's March 1998 recommendation on the source of livestock. AMS proposed to require that livestock be under continuous organic management beginning no later than one year prior to the production of organic milk or milk products. Unlike AMS' 1997 proposal, the 2000 proposed rule did not include a provision for the allowance of nonorganic feed during the 12-month transition period.

(5) On June 12, 2000, the NOSB commented on the second proposed rule with respect to the origin of dairy livestock. The NOSB stated that livestock should be under organic management for one full year prior to the sale of organic milk with an exception for conversion of an entire, distinct herd into organic production. The NOSB laid out the following three conditions for conversion of a herd into organic production:

- For the first nine months of the final twelve-month dairy herd transition period, animals must be fed at least 80 percent feed that is either organic or self-raised transitional feed. The remaining 20 percent could be nonorganic during those nine months.
- For the final three months, animals must be fed 100 percent organic feed.
- Once a dairy operation has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation, except that transitional feed raised on the farm may be fed to young stock up to 12 months prior to milk production.

(6) On December 21, 2000, AMS published a final rule establishing the USDA organic regulations.[12] Through this action, AMS finalized the origin of livestock provision, including a requirement that organic milk be produced from animals under organic management beginning no later than one year prior to the production of milk or milk products sold, labeled, or represented as organic. The rule further incorporated the exceptions recommended by the NOSB by allowing 80 percent organic feed and 20 percent nonorganic feed (*i.e.,* the ''80/20'' rule) for transitioned animals. AMS did not include NOSB's recommendation allowing young stock to be fed transitional feeds. In the preamble to the final rule, AMS explained that such a provision would allow animals to transition at different times, rather than as a herd, thereby making it incompatible with the notion that the whole herd transition was a distinct one-time event.[13] AMS further described that the exception to transition is a one-time opportunity for producers to implement a conversion strategy for an established discrete dairy herd in conjunction with the land resources that sustain it. This rule went into effect on February 20, 2001, and was fully implemented on October 21, 2002.

(7) In October 2002, the NOSB recommended that all replacement and expansion dairy animals be raised as organic from the last third of gestation onward. The NOSB believed that this would ensure consistency with the current regulations at section 205.236(a)(2)(iii). Their recommendation also included a provision for breeder stock (7 CFR 205.236(a)(3)) requiring that breeder stock remain under organic management indefinitely after their introduction onto an organic farm; that is to say, the recommendation was to prohibit breeder stock from rotating in and out of organic management.

(8) In May 2003, the NOSB recommended that following a transition, all dairy livestock, including replacement stock, remain under organic management from the last third of gestation onward.[14] Concurrently, the NOSB made a separate recommendation regarding breeder stock.[15] They recommended a requirement for operations to continuously manage all breeder stock as organic if they were brought onto an organic farm to produce organic offspring. The NOSB further advocated that the NOP issue guidance in the form of questions and answers to clarify the management of breeder stock to the industry.

(9) In October 2003, a legal challenge was filed against USDA stating that, among other things, the OFPA required organic dairy animals be fed 100 percent organic feeds, and thus, the 80/20 rule for the transition of dairy animals was in violation of the statute.[16]

(10) On January 26, 2005, the U.S. Court of Appeals for the First Circuit issued a decision in the case.[17] The court upheld the USDA organic regulations in general, but remanded the case to the lower court, for, among other things, the entry of a declaratory judgment with respect to the 80/20 dairy transition allowance, then codified in section 205.236(a)(2)(i) of the regulations. The lower court found the 80/20 dairy transition provisions at section 205.236(a)(2)(i) to be contrary to the OFPA and in excess of the Secretary's rulemaking authority.[18]

[8] 62 FR 65850.

[9] Due to the volume and content of public comments submitted in response to the 1997 proposed rule, AMS withdrew the proposal and issued a second proposed rule prior to the final rule that established the National Organic Program (NOP) (published December 21, 2000).

[10] NOSB Committee Report and Adopted Recommendations, 16 March 1998. Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=stelprdc5058929.*

[11] 65 FR 13512.

[12] 65 FR 80548.

[13] 65 FR 80570.

[14] National Organic Standards Board May 2003 Recommendation on Origin of Livestock: Recommendation for Rule Change (document dated April 2003). Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3104546.*

[15] National Organic Standards Board May 2003 Recommendation on Breeder Stock: Clarification of Rule (document dated April 2003). Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3104547.*

[16] *Harvey* v. *Veneman,* 297 F.Supp. 2d 334 (D. Maine 2004).

[17] *Harvey* v. *Veneman,* 396 F.3d 28 (1st Cir. 2005).

[18] *Harvey* v. *Johanns.* Civil No. 02–216–P–H. Consent Final Judgment and Order, 9 June 2005. Available online at: *http://www.ams.usda.gov/*

(11) On November 10, 2005, Congress amended the OFPA to allow a special provision for transitioning dairy livestock to organic production (7 U.S.C. 6509(e)(2)(B)). This amendment provided a new provision to allow crops and forage from land included in the organic system plan of a farm that was in the third year of organic management to be consumed by the dairy animals on the farm during the 12 month period immediately prior to the sale of organic milk and milk products.

(12) On April 27, 2006, AMS published a proposed rule entitled ''Revisions to Livestock Standards Based on Court Order'' to address the November 2005 amendments to OFPA.[19] AMS received nearly 12,400 comments on the issue of dairy animal replacement during the comment period for this proposed rule. Additionally, in response to the April 13, 2006, advanced notice of proposed rulemaking on access to pasture, AMS received over 325 comments on the issue of dairy animal replacement.[20] Neither of these actions intended to address the dairy replacement or transition issue as an objective. Accordingly, the comments were not a part of subsequent rulemaking for either action as they were beyond the scope of these rules. They are, however, acknowledged and discussed in this proposed rule.

(13) On May 12, 2006, the NOSB commented on the ''Revisions to Livestock Standards Based on Court Order (Harvey v. Johanns) and 2005 Amendment to the Organic Foods Production Act of 1990'' proposed rule published April 27, 2006.[21] The NOSB amended its May 2003 dairy replacement recommendation to read: ''Once a dairy operation has been converted to organic production, all dairy animals, including all young stock whether born on or brought onto the operation, shall be under organic management from the last third of the mother's gestation.''

(14) On June 7, 2006, AMS published a final rule entitled ''Revisions to Livestock Standards Based on Court Order'' to implement the November 2005 statutory change.[22] The amendments reflected the new OFPA allowance permitting transitioning dairy animals to be fed feedstuffs from transitioning lands in their last of the three-year period (7 CFR 205.236(a)(2)(i)), as well as setting a termination date of June 9, 2007, for the existing 80/20 feed conversion rule (7 CFR 205.236(a)(2)(ii)). In the preamble to the 2006 final rule, AMS noted that additional clarity could be provided regarding the transition of dairy animals into organic production.

D. Discussion of Past Comments Received

The approximately 12,725 combined comments received on the April 2006 proposed rule addressing the court order and the April 2006 advanced notice of proposed rulemaking on access to pasture provided AMS with information needed to develop this proposed action. In general, comments requested greater clarity on the parameters for transitioning dairy animals into organic production, and called for elimination of the ''two-track'' system. The ''two-track'' system refers to an April 2003 NOP statement that once an entire, distinct herd transitioned using the 80/20 provision (20% nonorganic feed in the 12 months before milking), all offspring then had to be managed organically and no transitioned replacements could be purchased.[23] The NOP also stated that, for those that did not use the 80/20 provision, the dairy animals only needed to be under continuous organic management starting no later than 12 months prior to production (*i.e.,* producers could continue to transition animals into organic over time).

The majority of commenters stated that the ''two-track'' system could be addressed by conveying that, once a dairy operation is certified organic, regardless of how that operation transitioned into organic, all new dairy animals added to that operation should be managed organically from the last third of gestation. Commenters stated that this principle should apply to those animals born on the farm and those purchased as replacement and expansion animals to increase herd size.

Commenters stated that only allowing organic dairy operations to add animals who have been managed organically since the last third of gestation supports consumer confidence in the organic milk sector. They reiterated that consumers expect that organic milk is produced without the use of excluded methods and substances prohibited under the regulations (*i.e.,* hormones, antibiotics, and certain animal medications), and believe that greater clarity on how animals can transition into organic production is needed. Some commenters stressed that organic dairy products were keystone products for consumer confidence and a major stepping-stone to additional purchases in other organic categories.

Commenters stated that continued transition of conventional animals increases the supply of animals able to produce organic milk, depresses the value of organic heifers and limits the incentives to produce organic replacement animals. They also stated that the allowance to transition a large number of animals, rather than purchasing or raising animals as organic from last third of gestation, results in surplus organic heifer calves being sold into the conventional market. Some commenters stated that the practice of allowing some operations to transition conventional animals on a regular basis encouraged development of heifer development farms. They based this belief on the position that it is easier and cheaper to purchase transitioned animals from heifer development farms than it is to raise animals that are organic from birth. Commenters claimed that raising organic dairy animals is twice as expensive as raising conventional dairy animals during their first year of life. They contended that producers who sell organic calves and replace them with transitioned conventionally raised heifers, have an economic advantage over those who raise animals organically from birth, due to lower cost of conventional feed and ability to shorten the interval before milk production by purchasing older animals. Commenters believed that for the organic heifer market to develop, and for there to be more organic stock available at an appropriate market value, greater clarity is needed in the regulations to convey that organic heifers are required in every case, except for the one-time initial transition of a dairy operation.

At the time of the 2006 proposed rule, commenters stated that at least nine U.S.-based certifying agents were requiring the dairy operations they certified (approximately 1,100 certified and 150 transitioning operations) to manage all replacement dairy animals organically from the last third of gestation. This accounted for roughly 50% of the organic dairy operations at that time. Other certifying agents were allowing the other approximately 50% of dairy operations to transition conventional animals to organic on a continual basis. Commenters stressed that a main purpose of the OFPA was consumer assurance that organically produced products met a consistent

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[19] 71 FR 24820.

[20] 71 FR 19131.

[21] 71 FR 24820.

[22] 71 FR 32803.

[23] National Organic Program, Origin of Livestock Statement. April 11, 2003. Available online at *www.regulations.gov* under ''Related Documents'' for docket number AMS–NOP–11–0009.

standard and that the current origin of livestock standard needs further specificity to meet that purpose.

Since receiving these comments in response to the 2006 proposed rule, diverse stakeholders including trade associations, organic dairy producer groups, consumer organizations, and certifying agents continue to submit letters to NOP requesting greater clarity on the origin of livestock provisions of the regulations. In response to those requests, NOP engaged stakeholders in ongoing discussions over the last two years related to potential changes and any associated costs and benefits of these changes. AMS developed this proposed rule in response to the public comments and feedback we have received regarding the origin of livestock provisions.

III. Overview of Proposed Amendments

A. Dairy Transition

AMS is proposing to add five new terms: Organic management, dairy farm, transitioned animal, transitional crop, and third-year transitional crop to those defined at section 205.2. Organic management would be defined as management of an organic production or handling operation in compliance with all applicable production and handling provisions under the regulations. Stakeholders have questioned whether the term ''organic management'' in the regulations is related to compliance with the regulations or to some other generic use or understanding of the term. Providing a definition for this term would confirm that its use is directly tied to the regulations. For example, the regulations allow crops and forage in their third year of organic management to be fed to livestock transitioning to organic production. In the case of crops and forage in their third year of organic management, this means that the land they are grown on must meet certain requirements of the regulations as it transitions into certified organic production (*e.g.,* per section 205.202(b), no prohibited substances applied to land). Further, during the transition period for dairy animals, they must be under organic management in compliance with the regulations. This means producers need to meet all of the livestock requirements during that transition period (*e.g.,* per section 205.237, provide animals with a specified amount of dry matter from pasture during the farm's grazing season).

Under this proposal, AMS would define a dairy farm as a premises, which must have a milking parlor, where one or more lactating animals raised on that premises are milked. This definition is similar to the definitions of a dairy farm used by the AMS Dairy Grading Program.[24]

This proposal would define a transitioned animal to clarify which animals are eligible to produce organic milk, but are not eligible for certification as organic slaughter stock or eligible for certification for purpose of organic fiber production. This definition supports the current requirement that meat or fiber come from animals under continuous organic management since the last third of gestation (7 CFR 205.236(a)). The transitioned animal definition and its relevance to this action are discussed in more detail below.

This proposal would define a transitional crop as any agricultural crop or forage from land, included in the organic system plan of a producer's operation, that has had no application of prohibited substances within one year prior to harvest of the crop or forage. Based upon this definition, AMS would add a related definition for third-year transitional crop. A third-year transitional crop would be defined as crops and forage from land, included in the organic system plan of a producer's operation, that has had no application of prohibited substances within 2 years prior to harvest of the crop or forage. Third-year transitional crops need to meet all other requirements of the regulations (*e.g.,* soil fertility and crop nutrient management practice standard (section 205.203); use of organic seed if commercially available (section 205.204)). OFPA and the regulations currently allow producers to feed these third year transitional crops to dairy animals in transition (7 U.S.C. 6509(e)(2)(b); existing section 205.236(a)(2)(i)).

AMS is proposing to amend the introductory text at section 205.236(a)(2) to reflect that the one-time exception to transition to organic dairy production would be limited to a given producer. A producer is defined under the regulations as ''a person who engages in the business of growing or producing food, fiber, feed, and other agricultural-based consumer products'' (section 205.2). The regulations also define a person as an ''individual, partnership, corporation, association, cooperative or other entity'' (section 205.2). This definition is based on the definition of person under OFPA (7 U.S.C 6502(15)). A producer must be a person as described in section 205.2 to be eligible for a one-time transition. Because the one-time transition is tied to the producer (*i.e.,* a farm or business), employees of that producer are not themselves considered a producer utilizing a one-time transition. Under the proposal, such employees would retain their ability to establish a new business entity as a producer that may be eligible for its own one-time transition.

In addition, while the definition of person includes cooperatives, cooperatives would not themselves seek a one-time exception to transition animals into organic production. There are business entities, including cooperatives, within the organic dairy sector that are typically certified as organic handlers, not as organic producers, and who would not meet the definition of a dairy farm. Instead, these entities contract with multiple organic producers for their milk supply. Under this proposal, the eligibility for a one-time transition is tied to a producer, as specified on an organic certificate, and they would need to meet the definition of a dairy farm and other proposed requirements.

Dairy producers with multiple farms would need to make a decision about how to transition to organic production. Producers with multiple farms have a single twelve month period in which they may transition conventional dairy animals to organic milk production. During this transition period, these producers may transition all animals on all the farms, some of the animals on some of the farms, all the animals on one of the farms, or some of the animals on one of the farms. The producer would initiate the transition to organic milk production at least 12 months prior to completing the transition and obtaining organic certification. However, once the transition period ends, the producers may not themselves transition any additional animals into organic production. Instead, they would need to source animals as organically managed since the last third of gestation or those already transitioned to organic production on a different producer's dairy farm.

The proposed amendments would replace the current text at section 205.236(a)(2) to specify that each producer would be able to conduct one transition. To be eligible for a transition, the proposal language specifies that the producer must start a new organic dairy farm or transition an existing conventional dairy farm to organic certification. This transition would need to occur over a single, continuous 12-month period prior to production of milk or milk products that are to be sold, labeled, or represented as organic.

[24] USDA AMS. July 2011. Milk for Manufacturing Purposes and its Production and Processing. Recommended Requirements. Dairy Programs.

After completing a transition, that producer would not be able to transition any new animals into organic production.

For example, if producer A already completed a transition on dairy farm A, then producer A would not be eligible to transition animals into organic production on dairy farm B. Under this proposal, once a producer completes its transition of dairy animals into organic production, a producer would have two options for bringing any new dairy animals onto a producer's organic dairy farm(s) (whether for expansion or replacement purposes): (1) Add animals that are under continuous organic management from the last third of gestation; or (2) add transitioned animals sourced from a certified organic dairy producer.

Because the dairy farm definition, in part, would drive the eligibility for a producer to transition animals to organic production, producers that only raise heifers for organic dairy farms would not be eligible to transition conventional animals to organic. Such producers do not milk animals and, therefore, would not be eligible for a transition. Such producers could continue raising heifers for organic dairy farms as long as the animals were under continuous organic management from the last third of gestation.

AMS considered alternatives to our proposal that would link the transitioned exception to a producer. These alternatives included linking the one-time transition exception to a dairy farm, an operation, persons responsibly connected, and the current unit of regulation, a herd. We did not choose the dairy farm by itself as the criterion for eligibility to transition because it would allow a given producer to transition dairy animals on multiple dairy farms over time. This proposal was drafted to create greater consistency in the implementation of the transition mechanism so that it is not used as a continual means of producing organic milk without purchasing organic stock once a producer has converted to organic production. Furthermore, AMS could not identify how a producer and a certifying agent could verify that a transition had not already occurred on a given dairy farm. This would be especially difficult as time went on and a dairy farm may have changed ownership multiple times. By linking the transition to a given producer, a producer (*e.g.,* an individual or a corporation) can attest to a certifying agent as part of their application for certification that they have not already completed a dairy transition and certifying agents could verify such attestations by checking past certification records associated with that producer.

AMS also considered linking the transition exception to the operation. Based on stakeholder feedback and past NOSB recommendations, the term ''operation'' is used at times, as is the term ''producer'', to describe how a one-time exception to transition into organic dairy production could be structured. Upon review, AMS is proposing to link the transition to a given producer rather than an operation because both producer and person are already defined under OFPA and the implementing regulations.

Other stakeholders suggested limiting the transition such that after an operation completed its one-time transition, any persons responsibly connected to that operation could not transition additional animals into organic production. ''Responsibly connected'' is defined under the current regulations as ''any person who is a partner, officer, director, holder, manager, or owner of 10 percent or more of the voting stock of an applicant or a recipient of certification or accreditation'' (7 CFR 205.2). This approach would require a person with an operation to list all persons responsibly connected to that operation to document the relationship various individuals had to the dairy farm. This approach would be difficult to document and difficult for a certifier to verify for the purpose of certification. This approach also would be overly prescriptive. For example, under this approach, new managers on a farm, who had never been part of a transition, would be restricted from starting a new dairy farm on a different location and completing their own transition of dairy animals into organic production. This approach could also restrict the ability for children of organic dairy producers to transition animals into organic production. Children could be ''responsibly connected'' to their parents' farm if they served as managers or partners. If their parents had already completed a transition, then these children, who were managers or partners, could not transition any additional animals if they bought that farm because they would be considered ''responsibly connected'' to the parents' operation. For these reasons, AMS is not proposing this approach. Rather, under the proposed language that a one-time exception is tied to a given ''producer'', employees, such as managers or partners, including children, could start up a new business entity with a dairy farm and be eligible for their own one-time transition.

AMS also did not choose the current herd standard because a given operation can have a new herd every year, or even multiple per year, allowing farmers to transition new animals annually, if not more often. The intent of our proposal is to provide a clear, consistent standard that when implemented will reflect the NOSB recommendation to allow for a producer to use a one-time transition of animals into organic milk production. Providing a producer with a one-time exception to transition dairy animals to organic milk production best captures the intent of the NOSB's recommendation. It also supports the concept discussed in the 2000 final rule establishing the USDA organic regulations that transition to organic dairy should be a distinct, one-time event for a producer.[25]

Under the proposed amendments, any transition would need to meet certain conditions. Proposed section 205.236(a)(2)(i) would specify that dairy animals must be under continuous organic management during the 12-month transition period. This aligns with the provision in OFPA which requires that dairy animals be managed as organic for at least 12 months prior to the production of organic milk.[26] During the 12-month period, proposed section 205.236(a)(2)(ii) would specify that the producer should describe its transition approach as part of the organic system plan already required at section 205.200. Under existing section 205.401, the producer must submit this organic system plan as part of an application for certification to a certifying agent. We are proposing this provision to ensure that applicants for organic certification can demonstrate their ability to comply early on in the certification process. The intent is to support communication between the applicant and the certifying agent about the transition approach and to minimize situations in which a producer approaches a certifying agent after 12 months of transitioning animals only to realize that they did not complete the transition as specified in the regulations.

This proposal would make minor revisions to a provision under the current regulations that allows dairy animals undergoing transition to consume ''third-year'' crops. The proposed provision would appear at section 205.236(a)(2)(iii) and would specify that, during the 12-month transition, dairy animals may consume third-year transitional crops which this proposal would define at section 205.2.

[25] 65 FR 80569–80570.

[26] 7 U.S.C. 6509(e)(2)(A).

During the development of this proposed rule, the exception for transitioning dairy animals raised the question about the eligibility of those animals and their offspring for certification as organic slaughter stock or for the purpose of organic fiber. Third-year crops and forages are allowed by OFPA as feed for transitioned animals that will produce organic milk.[27] However, these crops are *not* yet certified organic and should be treated as nonorganic feeds when determining if an animal has been raised organically since the last third of gestation.

Therefore, to clarify the status of offspring born during and just after the transition period and whether they would be eligible for certification as organic slaughter stock or for organic fiber, AMS is proposing to add a definition for a transitioned animal at section 205.2. Transitioned animal would be defined as: (1) Any dairy animal that transitioned during the one-time transition exception to organic milk production after 12 months of continuous organic management; (2) any offspring born during or after the 12-month transition period to a transitioned animal that, during its last third of gestation, consumes crops and forages in the third year of organic management; or (3) any offspring born during the one-time transition exception that themselves consume crops and forages in the third year of organic management. The proposed definition specifies that such animals must not be sold, labeled, or represented as organic slaughter stock or for the purpose of organic fiber.[28] The current regulations already require that slaughter stock and livestock, with the exception of poultry and certain dairy animals, be under continuous organic management since the last third of gestation (7 CFR 205.236(a)). This proposed rule does not change, but rather reiterates how that requirement applies to animals that were part of a dairy transition. This term is used in proposed section 205.236(a)(2)(iv) which specifies that offspring must be considered transitioned animals if they were born during or after the 12-month dairy herd transition period and not fed certified organic feed from the last third of gestation onward.

For a producer and certifying agent to determine whether offspring is eligible for organic dairy, meat and/or fiber, the length of gestation for different dairy animals (*e.g.,* cows, goats, sheep) and feed source must be considered. For offspring to be certified organic for meat and fiber, it must be under continuous organic management, including receiving certified organic feed, from the last third of gestation (7 CFR 205.236(a)). This requirement is reiterated through proposed section 205.236(a)(2)(v). A practical summary of how certifying agents and producers would apply the proposed amendments about the status of offspring at sections 205.236(a)(2)(iv)–(v) is shown in Table 1.

TABLE 1—STATUS OF OFFSPRING PART OF A DAIRY TRANSITION

Type of feed consumed by offspring during transition or during its last third of gestation	Is it considered a transitioned animal?	Could it be certified to produce organic milk?	Could it be certified to produce organic meat or fiber?
Third year transitional crops	Yes	Yes	No.
Certified organic crops	No	Yes	Yes.

Proposed section 205.236(a)(2)(vi) would require that all dairy animals for a given producer end the transition at the same time. AMS considered allowing dairy animals to have staggered transition periods, but chose not to allow that option as it could complicate the transition process. As a practical matter, a staggered transition would create more difficulty in animal management for the producer since animal transitions would start and end at different times. Furthermore, it would require more advanced records management creating a greater burden on the producer, more difficulty in overseeing the process, and increased room for error or potential violation. If a producer wants to bring in additional animals after the producer completes its transition, then the producer may use breeder stock or source organic dairy animals (either last third gestation animals or transitioned animals from a certified organic dairy farm that already completed its transition). If a producer decides to increase the number of animals undergoing transition during a one-time transition period, then the producer could (1) source organic dairy animals, or (2) source nonorganic animals and extend the transition period for all animals undergoing transition such that they end their transition together after 12-months of organic management.

Proposed section 205.236(a)(2)(vii) would specify that dairy animals that completed the 12-month transition are transitioned animals as defined under section 205.2. In practical terms, this would mean that these dairy animals can produce organic milk, but are not eligible for certification as organic slaughter stock or for the purpose of organic fiber. This is consistent with the existing requirement at section 205.236(a) that, with the exception of poultry and dairy, livestock products must be from animals that are under continuous organic management since the last third of gestation.

Proposed section 205.236(a)(2)(viii) would specify that, after the 12 month transition period, transitioned animals may produce organic milk on any organic dairy farm as long as the animal is under continuous organic management at all times on a certified organic dairy farm. Movement of transitioned animals to other certified organic dairies would not affect the status of the animals to produce organic milk. Based on some stakeholder comments, AMS considered limiting transitioned animals to produce organic milk only on the dairy farm upon which they were transitioned. However, AMS believes that some movement or inter-farm sales of transitioned animals is reasonable and expected. For example, if an existing organic dairy producer purchased an adjoining organic farm, it may be necessary for that farmer's transitioned animals to leave their original premises of transition to take advantage of the new adjoining pastureland. Similarly, if an organic dairy producer wanted to move his/her operation to an updated organic facility on another property, it would create an excessive burden if transitioned animals were not permitted to move to the new facility. This provision will also allow

[27] 7 U.S.C. 6509(e)(2)(B).

[28] Organic slaughter stock is defined in the regulations as any animal intended to be slaughtered for consumption by humans or other animals (7 CFR 205.2).

the transitioned dairy animals to continue producing organic milk if there is a change in ownership to a different producer, provided the dairy animals are under continuous organic management throughout this time.

AMS is also proposing new section 205.236(ix) to specify that, after the 12-month period ends, any new dairy animal brought onto a producer's dairy farm(s) must be an animal under continuous organic management from the last third of gestation or a transitioned animal sourced from a certified organic dairy farm. This provision would ensure that, after a producer completes one transition on a dairy farm, that producer would not be allowed to themselves transition additional dairy animals into organic production on any dairy farm. This requirement supports the NOSB's intent that transition should be a one-time event for producers to transition to organic dairy and is intended to create one standard that would be equally applied to all dairy operations once they have transitioned to certified organic production.

Implementation Considerations

Certifying agents would have certain responsibilities under this proposed rule. Certifying agents would need to:

- Establish and maintain procedures for determining whether or not a producer (*e.g.* a new applicant for certification) is eligible to transition dairy animals into organic production and for determining whether offspring that are part of a transition are eligible to produce organic milk, meat or fiber;
- Ensure that certified organic dairy producers maintain sufficient records (7 CFR 205.103) to identify all organically managed animals, including whether they are transitioned animals and, thus, not eligible for certification as organic slaughter stock (7 CFR 205.236(b)(2) and 205.236(c));
- Hire and/or train sufficient, qualified staff (7 CFR 205.501(a)(4)) to examine production and certification history of certified organic dairy producers or applicants for certification which involve the transition of dairy animals from conventional to organic production; and
- Maintain records of applications for certification or certified operations, including records pertaining to the origin of all livestock, for at least 10 years from the date of their creation, pursuant to section 205.510(b)(2).

Certifying agents already address many of these responsibilities through the current regulations. For example, certifying agents should have procedures in place to ensure that operations identify whether dairy animals are organically managed from the last third of gestation and, thus, potentially eligible for certification as organic slaughter stock, or transitioned into organic production, and, thus, not eligible as organic slaughter stock (section 205.236(b)(2) and (c)). The primary new responsibility for certifying agents will be establishing and implementing a procedure for determining whether a producer is eligible for a one-time transition. AMS is seeking comments from certifying agents on how these responsibilities are best implemented given the proposed action.

In addition, organic livestock producers are already required to maintain records that fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited (7 CFR 205.103(b)(2)). Under existing regulation, section 205.236(c), organic producers must already maintain records sufficient to preserve the identity of all organically managed animals. Examples of records to verify compliance with the origin of livestock requirements include livestock purchase records, organic certificates for livestock purchased as organic, animal reproduction: breeding, birth and/or hatch records, and herd conversion/organic management records.[29] Under this proposed rule, organic dairy producers would need to maintain the same records. There are no new records that would be required under this proposal. In accordance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) that implement the Paperwork Reduction Act (44 U.S.C. 3501–3520) (PRA), the information collection requirements associated with the NOP, including the recordkeeping and reporting requirements related to origin of livestock, have been previously approved by OMB and assigned OMB control number 0581–0191.

AMS also recognizes that some producers and certifying agents will need time to implement any regulatory changes. Over the last several years, the NOSB and stakeholders have been engaged in extensive discussion about how organic dairies would need to change their practices as a result of any modification to the current USDA organic regulations. AMS is considering and seeking public comment on the following implementation proposal:

Producers who are certified as of the effective date for any final action would be allowed to complete any transition that was already approved under their organic system plan by a certifying agent. However, as of the effective date, producers who are certified would be required to source or raise any new animals from last third of gestation or source animals already transitioned under another producer's one-time exception. As of the effective date, producers who are new applicants for organic certification (*i.e.,* startup organic dairies or nonorganic dairies transitioning to organic production) would be allowed to use the transition exception once when first applying for organic certification.

Under the current regulations at section 205.672, organic dairy animals can return to organic milk production if a Federal or state emergency pest or disease treatment program requires use of a prohibited substance. This allowance for re-transition is independent of the transition exception being proposed here. A dairy farm, that had not used its one-time exception to transition based on section 205.236, would retain that one-time exception to transition even if the farm used the section 205.672 allowance to re-transition after an emergency pest or disease treatment.

Under the current regulations at section 205.290, organic producers, through their certifying agent, can request a temporary variance from the livestock practice standards for reasons such as natural disasters, severe weather and other business interruptions. The NOP Instruction on Processing Requests for Temporary Variances (NOP 2606)[30] clarifies the policy that variances will not be granted for feeding non-organic feed to livestock.

B. Breeder Stock

Under this proposal, AMS would restructure section 205.236(a)(3) to reiterate that breeder stock may be brought from a nonorganic operation onto an organic operation at any time and to further clarify how breeder stock should be managed for the purpose of producing organic offspring.

Consistent with an April 2003 NOSB recommendation on breeder stock, AMS considered amending the regulations at existing section 205.236(a)(3) to require that breeder stock that was brought onto an organic farm, but subsequently was removed from organic management, be prohibited from returning as breeder

[29] National Organic Program. March 2011. Organic Livestock Plan Template, Origin of Livestock: L2-page 1. Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5091032.*

[30] NOP 2606. July 22, 2011. Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5087115.*

stock for the purpose of organic production. The NOSB recommendation suggests that allowing breeder stock to return to organic management after a period of nonorganic management does not align with a regulatory provision that prohibits livestock removed from an organic operation and subsequently managed on a nonorganic operation to be sold, labeled, or represented as organically produced (7 CFR 205.236(b)).[31]

However, OFPA states that breeder stock may be purchased from any source (7 U.S.C. 6509(b)); there is no requirement in OFPA that the source be organic. Further, while the current regulations at section 205.236(b)(1) prohibit livestock from being removed and subsequently managed on a nonorganic operation (*i.e.,* cycling in and out of organic production), this provision does not extend to nonorganic breeder stock that are themselves not certified organic or eligible for slaughter, sale, and labeling as organic (7 CFR 205.236(b)(2)). Therefore, AMS does not believe that restrictions on how nonorganic breeder stock are managed outside of the last third of gestation through weaning of organic offspring are warranted.

At proposed sections 205.236(a)(3) and 205.236(a)(3)(i), AMS is reiterating that breeder stock may be brought from a nonorganic operation onto an organic operation at any time as long as such breeder stock are on the organic operation no later than the last third of gestation. In practical terms, this means that between the end of nursing its organic offspring and the beginning of the last third of gestation for the next organic offspring, nonorganic breeder stock may be managed as the producer chooses. If a producer is managing nonorganic breeder stock on its organic operation, the current regulations already require that they implement practices to prevent contact of organic animals with prohibited substances (*e.g.,* from certain fly tags that might be used with nonorganic breeder stock) (7 CFR 205.201(a)(5)).

AMS is proposing a provision related to organic management of breeder stock only when the breeder stock is directly contributing to the nourishment of organic offspring, from the last third of gestation through the end of the nursing period. Under proposed section 205.236(a)(3)(ii), such breeder stock would need to be managed organically throughout the last third of gestation and the lactation period during which time they may nurse their own offspring. Allowing organic calves to nurse on nonorganic breeder stock as long as they are all under organic management supports the natural behavior of the animals (7 CFR 205.239(a)). Breeder stock may not be used as nurse cows on dairy farms to be a source of milk for other organic calves, though inadvertent suckling by non-offspring would not cause loss of organic status to the calves.

C. Additional Clarifications

In conjunction with the proposed amendments discussed above, AMS is proposing additional amendments to provide greater clarity on the restrictions at sections 205.236(b)(1) and 205.236(b)(2). Section 205.236(b)(1) states that livestock or edible livestock products that are removed from an organic operation and subsequently managed on a nonorganic operation may not be sold, labeled, or represented as organically produced. We are proposing the addition of ''non-edible'' to this provision to specify that non-edible animal products, such as animal fiber, are also subject to this provision. Section 205.236(b)(2) is proposed to be amended to specify that transitioned animals must not be sold, labeled, or represented as organic slaughter stock. This change is needed for consistency with the proposed definition for transitioned animal and the proposed provisions for dairy transition.

We are also proposing a change to section 205.236(c) to reiterate that producers are responsible for maintaining records that show whether a dairy animal is a transitioned animal and, therefore, not eligible for certification as organic slaughter stock or for the purpose of organic fiber. Producers should already be tracking whether an animal is eligible for organic slaughter or fiber given the last third of gestation requirement. Table 2 provides an overview of all the proposed amendments.

D. Other Amendments Considered

AMS recently received requests from stakeholders to consider providing an exception to transition fiber producing animals to organic fiber production, just as dairy animals can be transitioned to organic milk production. OFPA authorizes a transition for dairy animals entering organic milk production. As such, AMS is not proposing a transition for fiber under this proposed rule. In practical terms, this means that producers can transition sheep from conventional milk production to organic milk production, but would need to source animals organically managed since the last third of gestation in order to produce organic wool.

TABLE 2—PROPOSED ACTION—ORIGIN OF LIVESTOCK

Section title	Current wording	Type of action	Proposed action
205.2	N/A	New terms added	Dairy Farm, Organic Management, Third-Year Transitional Crop, Transitional Crop, Transitioned animal.
205.236(a)	Livestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching: Except, That:	No Change	N/A—Included for Completeness.
205.236(a)(1)	Poultry. Poultry or edible poultry products must be from poultry that has been under continuous organic management beginning no later than the second day of life;	No Change	N/A—Included for Completeness.

[31] National Organic Standards Board Recommendation May 2003 on Breeder Stock: Clarification of Rule. Available online at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3104547.*

TABLE 2—PROPOSED ACTION—ORIGIN OF LIVESTOCK—Continued

Section title	Current wording	Type of action	Proposed action
205.236(a)(2)	Dairy animals. Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic, Except,	Revision	Dairy animals. A producer as defined in § 205.2 may transition dairy animals into organic production only once. A producer is eligible for this transition only if the producer starts a new organic dairy farm or converts an existing nonorganic dairy farm to organic production. A producer must not transition any new animals into organic production after completion of this one-time transition. This transition must occur over a continuous 12-month period prior to production of milk or milk products that are to be sold, labeled, or represented as organic, and meet the following conditions:
205.236(a)(2)(i)	That, crops and forage from land, included in the organic system plan of a dairy farm, that is in the third year of organic management may be consumed by the dairy animals of the farm during the 12-month period immediately prior to the sale of organic milk and milk products; and	Revision	During the 12-month period, dairy animals must be under continuous organic management;
205.236(a)(2)(ii)	That, when an entire, distinct herd is converted to organic production, the producer may, provided no milk produced under this subparagraph enters the stream of commerce labeled as organic after June 9, 2007: (a) For the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from the land included in the organic system plan and managed in compliance with organic crop requirements; and (b) Provide feed in compliance with § 205.237 for the final 3 months.	Revision	During the 12-month period, the producer should describe the transition as part of its organic system plan and submit this as part of an application for certification to a certifying agent, as required in § 205.401;
205.236(a)(2)(iii)	Once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation.	Revision	During the 12-month period, dairy animals and their offspring may consume third year transitional crops;
205.236(a)(2)(iv)	N/A	New section added	Offspring born during or after the 12-month period are transitioned animals if they consume third-year transitional crops during the transition or if the mother consumes third year transitional crops during the offspring's last third of gestation;
205.236(a)(2)(v)	N/A	New section added	Offspring born from transitioning dairy animals are organic if they are under continuous organic management and if only certified organic crops and forages are used from their last third of gestation;
205.236(a)(2)(vi)	N/A	New section added	All dairy animals must end the transition at the same time;

TABLE 2—PROPOSED ACTION—ORIGIN OF LIVESTOCK—Continued

Section title	Current wording	Type of action	Proposed action
205.236(a)(2)(vii)	N/A	New section added	Dairy animals that complete the transition are transitioned animals and must not be used for organic livestock products other than organic milk;
205.236(a)(2)(viii)	N/A	New section added	After the 12-month period ends, transitioned animals may produce organic milk on any organic dairy farm as long as the animal is under continuous organic management at all times on a certified organic operation; and
205.236(a)(2)(ix)	N/A	New section added	After the 12-month period ends, any new dairy animal brought onto a producer's dairy farm(s) for organic milk production must be an animal under continuous organic management from the last third of gestation or a transitioned animal sourced from another certified organic dairy farm.
205.236(a)(3)	Breeder stock. Livestock used as breeder stock may be brought from a nonorganic operations onto an organic operation at any time: Provided, that, if such livestock are gestating and the offspring are to be raised as organic livestock, the breeder stock must be brought onto the facility no later than the last third of gestation.	Revision	Breeder stock. Livestock used as breeder stock may be brought from a nonorganic operation onto an organic operation at any time, Provided, That the following conditions are met:
205.236(a)(3)(i)	N/A	New section added	Such breeder stock must be brought onto the operation no later than the last third of gestation if its offspring are to be raised as organic livestock; and
205.236(a)(3)(ii)	N/A	New section added	Such breeder stock must be managed organically throughout the last third of gestation and the lactation period during which time they may nurse their own offspring.
205.236(b)	The following are prohibited:	No Change	N/A—Included for Completeness.
205.236(b)(1)	Livestock or edible livestock products that are removed from an organic operation and subsequently managed on a nonorganic operation may not be sold, labeled or represented as organically produced.	Revision	Livestock, edible livestock products, or nonedible livestock products such as animal fiber that are removed from an organic operation and subsequently managed on a nonorganic operation may not be sold, labeled, or represented as organically produced.
205.236(b)(2)	Breeder or dairy stock that has not been under continuous organic management since the last third of gestation may not be sold, labeled, or represented as organic slaughter stock.	Revision	Breeder stock, dairy stock, or transitioned animals that have not been under continuous organic management since the last third of gestation may not be sold, labeled, or represented as organic slaughter stock.
205.236(c)	The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed animals and edible and nonedible animal products produced on the operation.	Revision	The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed animals, including whether they are transitioned animals, and edible and nonedible animal products produced on the operation.

IV. Related Documents

Documents related to this proposed rule include the Organic Foods Production Act of 1990, as amended, (7 U.S.C. 6501–6522) and its implementing regulations (7 CFR part 205). The NOSB deliberated and made the recommendations described in this proposal at public meetings announced in the following **Federal Register** Notices: (1) 67 FR 19375, (May 7, 2002); (2) 67 FR 54784, (September 17, 2002); (3) 67 FR 62949, (October 19, 2002); and (4) 68 FR 23277, (May 13, 2003). AMS also considered NOSB recommendations from June 2, 1994, and March 20, 1998, in the development of this proposed rule. NOSB meetings are open to the public and allow for public participation.

AMS published a series of proposed rules that addressed, in part, the origin of livestock provisions at: (1) 62 FR 65850, (December 16, 1997); (2) 65 FR 13512, (March 13, 2000); and (3) 71 FR 24820, (April 27, 2006). Past final rules relevant to this topic were published at: (1) 65 FR 80548, (December 21, 2000); and 71 FR 32803, (June 7, 2006).

V. Statutory and Regulatory Authority

The Organic Foods Production Act of 1990, as amended, authorizes AMS to administer the NOP (7 U.S.C. 6501–6502). Under the NOP, AMS oversees national standards for the production and handling of organically produced agricultural products. One of the purposes of OFPA is to assure consumers that organically produced products meet a consistent standard (7 U.S.C. 6501(2)). Section 6509 of the OFPA also requires that livestock to be slaughtered, sold or labeled as organic be managed in accordance with the Act, allows for the use of breeder stock, and provides for an exception to transition dairy stock to organic milk production.

A. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a ''significant regulatory action'' under section 3(f) of Executive Order 12866, and, therefore, has been reviewed by the Office of Management and Budget (OMB).

Need for the Rule

This action is necessary to create greater consistency in the implementation of a standard for the transition of dairy animals into organic production and for the management of breeder stock. AMS has determined that the current regulations regarding the transition of dairy animals and the management of breeder stock on organic operations need additional specificity and clarity to improve AMS' ability to efficiently administer the NOP. A stated purpose of the OFPA is to assure consumers that organically produced products meet a consistent and uniform standard (7 U.S.C. 6501). This action is being taken to facilitate and improve compliance and enforcement and to satisfy consumer expectations that organic livestock meet a consistent and uniform standard, regardless of how a producer transitioned into organic production.

In a 2006 final rule related to this issue, AMS acknowledged that the regulations provide different allowances for replacing organic dairy animals dependent on how a producer transitioned to organic production.[32] AMS further stated that, given the almost 13,000 comments on the 2006 proposed rule, the issue remained a significant concern of the organic community, including organic dairy producers, certifying agents, trade organizations, and consumers. AMS developed this proposal in response to this stakeholder feedback.

Further, as cited in the July 2013 OIG audit of organic milk operations,[33] implementation of the origin of livestock requirements continues to differ across producers and certifying agents. As part of this audit, some certifying agents conveyed that the current regulations create challenges in implementation such that some organic dairy producers may have a competitive advantage over others. Similarly, certifying agents and organic operations have recommended more detail in the regulations on the management of breeder stock to support implementation across the organic sector.

This action is also necessary to address the persistent requests to AMS for further developed origin of livestock standards that meet the expectations of the NOSB and the majority of stakeholders. Setting an enforceable practice standard would ensure consistency across the industry. Because organic products cannot be distinguished from nonorganic products based on sight inspection, consumers rely on process verification methods such as certification to a uniform standard to ensure that organic claims are true. For this reason, organic products have been described as ''credence goods'' in the economics literature.[34] [35] Credence goods have properties that are difficult to verify, both before and after purchase. Organic dairy products are an example of a ''credence good'' for which consistent implementation of a common production standard across the sector supports continued consumer confidence. This action would help maintain consumer trust in the organic seal. ''Customers'' includes both consumers purchasing organic milk, yogurt, butter, ice-cream, and cheese at retail markets and organic livestock producers purchasing organic dairy animals for their own operations.

While a dairy transition is permitted by the OFPA, this proposed rule would limit dairy animal transition. As discussed, AMS received extensive comments in 2006 on the issue of dairy transition. Commenters stated that consumers expect that organic milk is produced without the use of excluded methods and substances prohibited under the regulations such as hormones, antibiotics, and certain pesticides. Market research suggests that these comments are indicative of a customer base who expects ''organic'' to be produced without the use of such substances. In 2013, a report assessing trends in the organic market stated that consumers identified ''absence of pesticides'', ''absence of growth hormones'', and ''absence of antibiotics'' as properties they associate with the term ''organic'' in 64%, 59%, and 55% of the responses respectively.[36] Over

[32] 71 FR 32804.

[33] The July 2013 Office of Inspector General (OIG) audit report on organic milk operations may be accessed at the following Web site: *http://www.usda.gov/oig/webdocs/01601-0002-32.pdf.*

[34] Caswell, Julie A. and Eliza M. Mojduszka. 1996. ''Using Informational Labeling to Influence the Market for Quality in Food Products.'' American Journal of Agricultural Economics. Vol. 78, No. 5: 1248–1253.

[35] Zorn, Alexander, Christian Lippert, and Stephan Dabbert. 2009. ''Economic Concepts of Organic Certification.'' Deliverable 5 for Project CERTCOST: Economic Analysis of Certification Systems in Organic Food and Farming. *http://www.certcost.org/Lib/CERTCOST/Deliverable/D11_D5.pdf.*

[36] The Hartman Group, Inc., The Organic and Natural Consumer 2013: Traits and Trends. The Cultural Context Around Behavior. Of 1,569 respondents responding in 2012 to the question, ''From the following list, what properties do you think are implied or suggested by the term ''organic''?

thirty percent of those surveyed for this report indicated that avoidance of prohibited substances motivated them to buy organic products.[37] Based on past comments, stakeholders argue that sourcing or raising animals as organic from last third of gestation is better aligned with the expectation that animals producing organic milk have never received prohibited substances such as antibiotics or growth hormones.

Baseline

This baseline focuses on the current market and production of heifers and cows as the predominant portion of the industry that would be affected and for which data is available. The baseline and subsequent calculations do not include quantitative estimates for dairy production related to sheep or goats. AMS used multiple data sources to describe the baseline and build quantitative estimates for this proposed rule. The first source is the NOP list of all certified operations. In January of each calendar year, every certifying agent is required to submit an annual list of their certified operations to the NOP (7 CFR 205.501(a)(15)(ii)). The NOP consolidates this information once per year into a public, searchable database.[38] Another source of data is the Organic Trade Association's (OTA) 2014 Organic Industry Survey. The Nutrition Business Journal conducts this survey on behalf of OTA to summarize market information and trends within the organic industry across food and non-food sectors.[39] AMS also utilized information from the National Agricultural Statistics Service (NASS) 2011 Organic Production Survey.[40] The NASS data includes acreage, production and sales data for organic crops and livestock. USDA's Economic Research Service (ERS) also conducts the Agricultural Resource Management Survey (ARMS), which includes questions about organic production practices.[41] In 2010, ERS conducted a supplemental ARMS that focused on organic dairy operations. AMS worked with ERS to analyze recent ARMS data and develop an estimation of organic dairy production practices and costs for this proposed rule. Finally, AMS used summary information from a 2013 ERS report on organic production.[42] The ERS report was based on data from state and private certifying agents.

The Organic Dairy Market

According to the 2013 Organic Trade Association (OTA) Industry Survey, U.S. organic food, fiber, and agricultural product sales were over $32 billion in 2013, up 11.4 percent from 2012.[43] Organic dairy is the second largest sector in organic retail sales (15.2%), after fruits and vegetables (36%). Sales of organic dairy products, including milk, cream, yogurt, cheese, butter, cottage cheese, sour cream, and ice-cream, reached almost $4.2 billion in 2012. Table 3 shows the organic dairy market characteristics by subcategory.

TABLE 3—ORGANIC DAIRY MARKET—RETAIL SALES BY SUBCATEGORY

Subcategory	2013 Sales	2013 Growth (percent)	Percentage of organic dairy sales [a]
Milk/Cream	2,813	7.3	62.7
Yogurt	1,021	−0.2	22.8
Cheese	331	18.9	7.4
Butter/Cottage Cheese/Sour Cream	261	17.9	5.8
Ice-Cream	60	19.1	1.3

[a] While Organic Trade Association's 2014 Organic Industry Survey included eggs as a subcategory for its summary on organic dairy sales, we have excluded the data on eggs from this table.

While the majority of organic dairy products are marketed under regional or national brands, sales of products under private label arrangements accounted for between 30–40% of the organic dairy market in 2013.[44] Both OTA's 2013 and 2014 Organic Industry Surveys cite drought and feed costs as the key constraints on market growth. However, constraints to market growth vary regionally and across different size operations. According to a 2009 ERS report that analyzed 2005 ARMS data, 55% of farms in the West reported sourcing inputs as the most difficult aspect of organic milk production versus only 24% of farms in the Upper Midwest region and 19% of farms in the Northeast.[45] This is likely correlated with size of operation since organic dairies in the West tend to be larger in size and, therefore, have increased feed demand. Certification and compliance were cited as the most difficult aspect of organic milk production for farms in the Upper Midwest and Northeast (51% and 32% respectively).

Overview of Organic Dairy Production

Current dairy production and husbandry practices provide important context for the baseline and cost analysis. This section describes nonorganic and organic heifer development and highlights how they differ. Principles of management for other species would be similar, but the timing will be different. For example, a goat begins its first lactation at 1 year of age while a cow begins its first lactation at 2 years of age.

[37] Ibid. Of 1,036 respondents responding in 2012 to the question about the reasons why they continue to purchase organic products, 38% stated to avoid products that rely on pesticides or other chemicals, 34% stated to avoid genetically modified products, 34% stated to avoid products that rely on growth hormones, and 29% stated to avoid products that rely on antibiotics.

[38] The most recent list of certified operations may be found at the following link: *http://apps.ams.usda.gov/nop/.*

[39] Organic Trade Association (OTA)/Nutrition Business Journal, 2014 Organic Industry Survey. Nutrition Business Journal conducted a survey between Jan 27, 2014 and April 5, 2014 to obtain information for their estimates. Over 200 organic firms responded to the survey. NBJ used secondary data from SPINS, Nielsen, and IRI to supplement the survey and build market statistics.

[40] The NASS survey may be found at the following link: *http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1859.*

[41] The ERS ARMS survey information may be found at the following link: *http://www.ers.usda.gov/data-products/arms-farm-financial-and-crop-production-practices.aspx.*

[42] The ERS 2013 Summary of Organic Production may be found at the following link: *http://www.ers.usda.gov/data-products/organic-production.aspx.*

[43] OTA 2014 Organic Industry Survey.

[44] Organic Trade Association (OTA)/Nutrition Business Journal, 2013 Organic Industry Survey. Private label arrangements allow businesses to offer or sell their products under another company's brand name, often a store brand.

[45] Economic Research Service. 2009. Characteristics, Costs, and Issues for Organic Dairy Farming (pg. 33). Report by William McBride and Catherine Greene. Statistics based on 2005 ARMS data. Report available online at: *http://www.ers.usda.gov/publications/err-economic-research-report/err82.aspx.*

When a heifer calf is born on a dairy farm, the producer ensures that the calf receives colostrum, either from a bottle or nursing her dam. The heifer calf is then separated from the dam and placed in group, pair, or single housing. Some larger dairy producers contract with heifer development farms to raise replacement heifers. These heifer development farms pick up the heifer calves and raise them at another location until they are within a month or two of their first lactation. Heifer calves are raised on a diet of milk replacer or liquid milk with free choice roughages and grains. Once the calves have learned how to eat grains and roughages, the calves are weaned from the milk.

After weaning, the heifers are developed to grow at a moderate pace until they are ready to be bred. During this time, the heifers may be raised on pasture, fed a complete ration or a mixture of both. Once the heifers are about 14 or 15 months of age, they are bred, gestate for about 9 months, and calve around 2 years of age. Usually once the heifers are bred or ''settled,'' they will be fed a diet which allows them to slowly grow in terms of frame size and body weight. As the heifer approaches her due date, she is termed a ''springer'' or is described as ''freshening.'' After she calves, she begins lactating, is moved to the milking herd and called a ''first calf heifer.''

Organic producers follow similar timelines, but use some different practices. Organic producers must provide a feed ration comprised of certified organic agricultural feedstuffs. At this point in time, AMS is not aware of any certified organic milk replacer produced in the US. As a result, organically raised dairy calves must be fed organic milk. This makes the practice of sending young calves to heifer development farms less feasible for organic producers as these heifer development farms may not have access to certified organic milk. In addition, organic regulations require that all organically managed ruminants receive 30% of their dry matter intake from pasture during the grazing season, though dairy calves under 6 months of age are excluded from this provision. By the age of 6 months, dairy calves must be on pasture during the grazing season. Nonorganic calves do not have a pasture requirement.

Organic producers must also follow certain health care practices. For example, organic producers may not use antibiotics to prevent disease. Instead, organic producers must prevent the animals from getting sick using other management practices such as vaccinations. However, if an animal does get sick, organic producers are required to use medication to restore the animal to health even if the animal loses organic status. Once the animal loses organic status, the animal could return to organic milk production only as part of a one-time transition with another producer.

Organic producers also may not use hormonal methods to synchronize estrus. Nonorganic producers may use hormonal products to both initiate estrus and synchronize estrus among the heifers to aid in conception. Certain synchronization protocols allow for a timed breeding method that does not require observation of a standing heat to identify estrus.

Dairy farms and heifer development farms which produce transitioned dairy animals are able to raise the heifer calves nonorganically until 12 months before organic milk production begins. The pre-weaning phase of life is the time in which heifer calf mortality is the highest and the diet is the most expensive on a per calorie basis. Nonorganic practices to reduce mortality and expense during this pre-weaning phase include the use of milk replacer and, at times, antibiotics. By the time the dairy heifer reaches one year of age, most health threats are past and the animal is consuming a less expensive diet.

AMS is not aware of any national survey that compares the culling rate of organic dairy animals with nonorganic dairy animals. In 2007, the USDA Animal and Plant Health Inspection Service (APHIS) conducted the National Animal Health Monitoring System (NAHMS) survey for dairy animals; a follow-up is planned for 2014.[46] In this survey of dairy animals, the national rate of permanently removing a dairy animal from a farm was 23.6 percent. However, this included animals that were sold as replacement females to other dairies. This also excluded the percentage of animals which died. The percentage of cows culled did not vary depending upon the size of the producer nor did it vary depending upon the region of the U.S. in which the dairy was located. Most dairy cows were removed for udder problems or reproductive problems, followed by lameness or poor milking ability. Overall, mortality rates were 7.8% for un-weaned heifers, 1.8% for weaned heifers, and 5.7% for cows.

From this information, an average dairy farm would sell 23.6% of its milking cattle and would lose 5.7% of its milking cattle to death. This would require that the average dairy farm in the U.S. be able to raise or purchase females that represent about 30% of the farm's herd size just to maintain current size. Based on this average national need for replacements, the overall U.S. dairy herd (both nonorganic and organic) would have excess replacement females available for development. At this rate, the organic milking herd should be able to be maintained by last third gestation replacement females. In addition, the organic milking herd should also provide a sufficient quantity of females if market conditions lead to an expansion of the number of organic dairy animals.

Specific to organic production, the U.S. had approximately 1,850 organic dairy farms that milked 200,000 cows in 2011.[47] Of these farms, 1,823 farms were producing organic milk from dairy cows and 19 farms were producing organic milk from goats. The number of certified organic sheep, buffalo, and bison dairy operations for that period is not known. This proposed action would apply to any animals (*e.g.,* heifers/cows, goats, sheep) that produce milk for an organic operation. The baseline discussion and the following cost analysis focus on heifers and cows as the predominant portion of the industry affected by this proposed action and due to the limited data available on other types of dairy animals.

Based on the NASS survey, Table 4 shows that the highest concentration of organic dairy farms is in the Northeast and Upper Midwest.

[46] USDA APHIS. NAHMS Dairy 2007 Part I: Reference of Dairy Cattle Health and Management Practices in the United States, 2007. This survey included both nonorganic and organic dairy animals. Available online at: *http://www.aphis.usda.gov/wps/portal/banner/help?1dmy&urile=wcm%3apath%3a%2Faphis_content_library%2Fsa_our_focus%2Fsa_animal_health%2Fsa_monitoring_and_surveillance%2Fsa_nahms%2Fct_nahms_dairy_studies#dairy2014.*

[47] USDA NASS. 2011. Census of Agriculture—Organic Production Survey. Available online at: *http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1859.*

TABLE 4—TOP STATES WITH ORGANIC DAIRY FARMS COMPARED TO PRODUCTION

	Number of organic dairy farms	Percent of U.S. of organic dairy farms	Milk production (pounds)	Percent of U.S. milk production
United States	1,823	.....	2,797,845,926	.....
Wisconsin	397	21.7	313,991,661	11.2
Pennsylvania	236	12.9	148,704,869	5.3
New York	235	12.9	218,597,110	7.8
Vermont	180	9.9	149,649,913	5.3
Texas	8	0.4	423,558,952	15.1
California	72	3.9	469,148,296	16.8

The four states with the largest number of certified organic dairy farms (Wisconsin, Pennsylvania, New York, and Vermont) account for 57 percent of the total farms. However, those states represent less than 30 percent of national organic milk production. By contrast, the West and Southwest account for the highest milk production per farm. The two highest-producing states (California and Texas) represented only 4.3 percent of total certified organic dairy farms, while producing 31.9 percent of the total organic milk nationally. According to 2010 ARMS data, the mean size of an organic dairy farm nationally was 77 cows. In the Northeast and the Upper Midwest, the mean number of organic cows per farm was 64. In the West, the mean number of organic cows per farm was 288. Both ARMS and NASS surveys demonstrate similar distributions of both farms and milk production. The 2010 ARMS data also shows that organic dairies averaged about 13,900 pounds of milk annually per cow, or a daily average of 46 pounds of milk per cow (assuming a 300-day lactation period).

According to 2010 ARMS data, nearly 99 percent of the dairies responding to the organic dairy survey reported using replacement heifers that were born on the farm, with 96.5 percent reporting that the heifers were both born and raised on their operation. For the only 3.5 percent of dairies that did not raise their replacement heifers on their operation, they presumably hired heifer development farms to raise the heifers prior to rejoining the herd. Of the farms reporting using replacement heifers born on the farm, the average number of replacement heifers sourced by this method was 31 head per farm. These heifers, born in 2010, would have been added to the milking herd in 2012.

Some dairy operations also bought replacement heifers. It is unknown whether these replacement heifers were certified organic when purchased or were nonorganic animals then transitioned into organic production. We would expect a mixture of certified organic heifers and transitioning heifers entering organic production that is dependent on the producer's current transition approach. Of the farms responding to the ARMS, 7.3 percent reported purchasing dairy cows and 5.3 percent reported buying replacement heifers. Farms that purchased milk cows purchased an average of 8 cows per farm and those that purchased heifers bought an average of 15 head.

Overall, in 2010, organic dairy farms added 58,500 cows and heifers to their operations, with 95.7 percent of those born on the operation. The remainder of animals came from off farm sources and included milk cows, 1,100 head (1.8 percent), and heifers, 1,425 head (2.5 percent).

Most organic dairies (91 percent) reported selling cull cows. Some dairy farms also reported selling milk cows and replacement heifers. Of the farms responding to the ARMS, 17.0 percent reported selling milk cows and 17.0 percent reported selling replacement heifers. Farms that sold milk cows sold an average of 14 cows per farm and those that sold replacement heifers sold an average of 11 head. Overall, dairies sold 4,400 milk cows and 3,500 replacement heifers. Farms could have sold these animals into the nonorganic or organic market.

Information on how many of replacement heifers bought were transitioned heifers and how many were managed organically from the last third of gestation is not available, and, therefore, AMS is not able to quantify the baseline. Certifying agents do not maintain aggregated data on what transition approach producers are currently implementing. Therefore, we do not have data on how many producers are bringing heifers into organic production as nonorganic animals and transitioning them into organic versus sourcing and managing animals as organic from the last third of gestation. However, the two largest producers of branded organic fluid milk both require their supplying dairies to supply milk from organic cows, as opposed to transitioning new nonorganic animals into organic production. Based on discussions with the industry, AMS assumes that, qualitatively, the vast majority of replacement heifers purchased is managed organically from the last third of gestation and, therefore, would not need to change practices due to this proposed action. We seek comment on this assumption and data on current industry practice to help refine our estimates.

As discussed in the BACKGROUND section, under the current baseline, we know that producers differ in their transition strategies dependent on how the term ''herd'' in the regulations is interpreted and applied. The difference in transition approach across producers is, as previously discussed, due to both a lack of definition for what a ''herd'' is and different interpretations of when the transition of a herd into organic production should be considered completed. Within the existing industry, there are some organic producers who transitioned a single ''herd'' of animals into organic production, consider their transition complete, and only source animals that are managed organically from the last third of gestation. There are other organic producers who transitioned their operation to organic, but continue to expand their operation by bringing nonorganic animals into organic production as additional ''herds''. In some cases, these operations have multiple fields on a given location or multiple locations under their business and, therefore, consider the herd in a given field or location as distinct for the purpose of their transition approach. For producers using this kind of multi-herd approach for their operation, the proposed action would require them to source organic animals or previously transitioned animals across all of their herds, regardless of location or multi-herd management strategy. This will, in turn, increase their costs as discussed in the cost analysis that follows.

Alternatives Considered

As required by E.O. 12866, various alternatives were considered to achieve the objectives of this rule. The alternatives considered include: (Option A) revising the standard to allow producers to transition dairy animals into organic production over a 12-month period on a continuous basis; and (Option B) revising the standard to clearly convey that a producer with a dairy farm has a one-time exception over a 12-month period to transition dairy animals into organic production. These options are shown in Table 5 below.

TABLE 5—ALTERNATIVES CONSIDERED

Alternative	Description
Option A—Continuous Transition	Revise standard to allow a producer to transition dairy animals into organic production over a 12-month period on a continuous basis.
Option B—Use ''Dairy Farm'' as Unit of Regulation.	Revise standard to tie the one-time transition exception to a given dairy farm (premises) over a 12-month period.
Option C—Proposed Rule	Revise standard to tie the one-time transition exception to a given producer with a dairy farm over a 12-month period.

As discussed, maintaining the status quo (*i.e.,* the baseline unit of regulation as a ''herd'') does not further our objective to provide additional guidance to the organic dairy industry and, therefore, was not considered as a viable alternative. Since 2006, vast stakeholder comments have requested that AMS engage in rulemaking to support greater consistency in the application of the origin of livestock requirements across certifying agents and operations. In addition to stakeholder comments, the OIG identified this issue in its July 2013 audit of organic milk operations and recommended that AMS undertaking rulemaking.

Option A

The first alternative considered (Option A) would amend the regulations to specify that a producer could transition dairy animals into organic production over a 12-month period on a continuous basis. Under OFPA, a dairy animal from which milk or milk products will be sold or labeled as organically produced must be raised in accordance with OFPA for not less than the 12-month period immediately prior to the sale of such milk and milk products (7 U.S.C. 6509(e)(2)(A)). AMS could allow transition of any dairy animal into organic production, without further limitation, as long as it is organically managed for a 12-month period prior to the sale of organic milk or milk products. In effect, this would mean that a producer could continuously transition conventional dairy animals into organic production on an ongoing basis, as opposed to allowing a producer to transition animals into organic production once.

While this alternative could achieve the regulatory objective by setting a consistent and uniform standard across the organic dairy industry, numerous NOSB recommendations and stakeholder comments have not suggested this approach. Further, in assessing the baseline, this approach would increase the number of nonorganic animals transitioned into organic production. If the demand shifts to nonorganic animals for transition into organic production, this would reduce the current demand, and, thus, value of organic heifers. Further, because consumers expect milk to be produced without the use of certain inputs that can be used in nonorganic animals (*e.g.,* antibiotics), this approach could have unknown, but likely negative, impacts on consumer confidence in the growing organic dairy sector.

Option B

The second alternative considered (Option B) would amend the regulations to specify that a dairy farm, as defined by the regulation, could transition dairy animals into organic production one-time over a 12-month period. This would mean that a transition could occur only once on a given premises. Under this alternative, a producer could transition dairy animals on multiple dairy farms over time as long as animals had not been previously transitioned on a given premises. For example, if dairy farm location X, Y, and Z had never had animals transitioned to organic on their respective premises, then producer A could conduct transition on each location (X, Y, and Z) once. If producer B then purchased these dairy farms from producer A, producer B could not complete a transition on these premises because the location had already experienced a one-time transition to organic.

We did not choose this alternative because it would only meet the intent of this regulatory action in a limited way. While it would reduce the number of transitions over time, it would allow a given producer, with a single organic certificate, to transition dairy animals on multiple dairy farms. As discussed in the BACKGROUND section, this proposal was drafted to create greater consistency in the implementation of the transition mechanism so that it is not used as a continual means of producing organic milk without purchasing organic stock once a producer has converted to organic production. Furthermore, AMS could not identify how a producer and a certifying agent could verify that a transition had not already occurred on a given dairy farm. This would be especially difficult as time went on and a dairy farm may have changed ownership multiple times.

Option C

The third alternative considered, and selected for this proposed action, would provide a limited exception (*i.e.,* a one-time opportunity for producers) to transition dairy animals into organic production that aligns with both OFPA and the NOSB recommendations. While the NOSB recommendations do not provide the level of specificity needed to implement this approach, the intent of the NOSB is to require that, once an operation is certified organic, any new animals added to that operation should be organically managed since last third of gestation. This proposed rule would address the NOSB recommendation, adding specificity to ensure successful implementation of a uniform and consistent standard. AMS considered many options for how to best operationalize a one-time exception to transition dairy animals into organic production. These options include linking the one-time exception to a dairy farm, an operation, persons responsibly connected, and the current unit of regulation, a herd. For the reasons previously discussed in the OVERVIEW OF PROPOSED AMENDMENTS section, AMS is proposing to link the transition exception to a producer.

Based on NOSB recommendations and almost 13,000 stakeholder comments, this approach would retain the opportunity for new producers to transition into organic dairy production and ensure that organic products meet a consistent standard to support consumer confidence. This approach would require a small number of dairy farms to change their current practices for sourcing dairy animals and, as a result, would impose some limited costs. This approach is also the more pragmatic to implement through the certification and verification process as compared to linking the one-time transition to a dairy farm (Option B). By linking the transition to a given producer (Option C), a producer (*e.g.,* an individual or a corporation) can attest to a certifying agent as part of their application for certification that they have not already completed a dairy transition and certifying agents could verify such attestations by checking past certification records associated with that producer.

The costs and benefits of this approach are discussed in more detail below.

Costs of Proposed Rule

The proposed rule has the potential to increase production costs on dairy producers who currently purchase transitioned dairy animals as replacements, assuming that transitioned animals are currently being sold at a discount to organic replacement animals. Organic dairy farmers who regularly purchase transitioned dairy animals as replacements and organic operations in the process of expansion are likely to face higher costs of production if this rule were finalized as proposed. The cost of implementing the proposed rule will fall primarily on organic dairies that currently purchase transitioned heifers, although dairies currently purchasing organic heifers would be expected to pay higher prices in the short-term due to increased competition for these animals. Farms that sell their excess organic replacement heifers may see an increase in demand for their heifers while farms that exclusively raise their own organic replacement heifers would not be affected by the proposed rule.

Overall, this cost analysis uses existing data on the number of replacement animals purchased on organic operations to estimate costs. Using data by organic operation differs from the proposed unit of regulation, which is by producer (*i.e.,* a business entity). We do not have data explicitly available by producer. However, we believe that this analysis using data by organic operation would be similar to any analysis by producer because, in many cases, the operation and producer are functionally one in the same. Further, while we do not have data on multi-herd producers, this analysis assumes that costs will be equivalent on a per cow basis. We are seeking comment on these assumptions and any data relevant to sheep and goat dairy production.

Estimated Costs for Dairies

The ARMS included the total amount spent on replacement heifers, but the survey did not distinguish between organic and transitioned heifers. For purposes of this analysis, we will assume that 25% to 50 percent of all purchased heifers are transitioned heifers, or between 360 and 720 head. This is a broad estimate though we believe that the proportion is likely smaller than 50% based on discussions with organic dairy producers. The survey results indicated that the average replacement heifer cost approximately $898. The University of Minnesota Farm Financial Database (FINBIN) includes the average replacement cost for organic heifers; between 2006 and 2012 the cost per head ranged between $1,200 and $1,900. Extension officials at the University of Vermont estimated that organic replacement heifers typically cost between $1,600 and $2,000.[48] Data on the cost of transitioned heifers is not available. Using the upper end of these ranges ($2,000), the cost of purchasing organic replacement heifers of all weights would be $7.6 million per year. This is the total cost, not the additional cost of purchasing organic heifers instead of transitioned heifers, so the incremental costs will be considerably less. These costs only reflect dairy cattle. Costs for purchasing dairy sheep and goats are not included in this analysis.

AMS previously contacted several state extension dairy experts who explained that supplies of organic replacement heifers and milk cows were in excess supply creating a soft demand.[49] In addition, the ARMS shows that organic dairy farms retained 56,000 replacement heifers while selling 32,000 head as cull cattle, milk cows, or replacement heifers, indicating that there are ample supplies of replacement heifers available. Therefore, the additional demand for organic replacement heifers is not expected to lead to an increase in the price of replacement heifers. However, to be conservative in estimating the additional costs of the proposed rule, the analysis will assume that the increased demand will increase the cost of an organic replacement heifer by 25 percent, or $500.

Because the price of transitioned heifers is not available, the analysis will use the cost of conventional springers[50] as a substitute. Since the cost of a transitioned heifer is likely to be more than the cost of a conventional heifer, using the conventional springer price will generally overstate the cost of compliance with the proposed rule and so provide an upper bound of costs incurred.

AMS Livestock, Poultry, and Grain Market News reports on five dairy auction markets[51] in the U.S. Using the reports from the period May 6, 2013 to June 5, 2013, the average auction price for Approved[52] springers was $1,200 per head. The difference in cost between organic heifers and conventional heifers is $800 per head. As discussed, we assume that the cost of transitioned heifer is, at a minimum, equivalent to a conventional heifer. With the assumed $500 increase in cost of organic heifers, the total difference will be $1,300. The difference in cost between a transitioned heifer and an organic heifer is summarized in Table 6.

[48] Conversation with Dr. Bob Parsons, Extension Associate Professor at University of Vermont, June 4, 2013.

[49] Conversations with Dr. Bob Parsons, Extension Associate Professor at University of Vermont, June 4, 2013; Bradley J. Heins, Assistant Professor of Organic Dairy Production at University of Minnesota, June 5, 2013; and A. Fay Benson, Small Dairy Support, Cornell University SCNY Regional Team, June 6, 2013.

[50] A springer is a heifer that is 7–9 months pregnant and will begin producing milk within 2 months.

[51] The markets are the Mammoth Cave Dairy Auction, Smiths Grove, KY; Springfield Livestock Marketing Center, Springfield, MO; Producers Auction Yards, Norwood, MO; New Holland Sales Stables, New Holland, PA; and Toppenish Monthly Dairy Replacement Sale, Toppenish, WA.

[52] Dairy cattle are classified into four categories: Supreme, Approved, Medium, and Common. The most common category of springers sold is Approved.

TABLE 6—DIFFERENCE IN COST BETWEEN A TRANSITIONED HEIFER AND AN ORGANIC HEIFER

	Low end of range	High end of range	Value used
Cost of organic replacement heifer	$1,200	$2,000	$2,000
Increased premium for organic heifer due to increased demand (assumed)	.....	.....	500
Total cost of organic replacement heifer	.....	.....	2,500
Cost of conventional heifer (used as lower bound for cost of transitioned heifer)	1,000	1,435	1,200
Cost difference per heifer	.....	.....	1,300

According to the NASS 2011 Certified Organic Production Survey, the U.S. had approximately 1,850 organic dairy farms that milked 200,000 cows. Based on the NASS survey results for the total number of organic dairy operations and ARMS data on the number of replacement heifers purchased, we estimate the total increase in cost of purchasing organic heifers instead of transitioned heifers at a maximum of $935,000 per year with the assumption that 50% of replacement animals purchased are transitioned dairy animals and $468,000 per year with the assumption that 25% of replacement animals purchased are transitioned dairy animals. If the cost of organic replacement heifers does not increase due to current market conditions, the estimate of the total increase in cost is significantly less at $576,000 for the 50% assumption and $288,000 for the 25% assumption. The additional cost of purchasing organic heifers for replacement purposes is summarized in Table 7.

TABLE 7—ADDITIONAL COST INCURRED TO PURCHASE ORGANIC HEIFERS

	Price difference used	Total additional cost for dairy producers	
		25% Assumption	50% Assumption
Low Estimate	Uses $800 difference between conventional and organic heifers.	$288,000	$576,000.
High Estimate	Uses $1,300 difference ($800 above plus $500 in assumed organic premium).	$468,000 ($180,000 of which is an intra-industry transfer).	$935,000 ($359,000 of which is an intra-industry transfer.

The cost difference between the low and high estimate ($359,000 or $180,000) should not be considered a net cost, but rather an intra-industry transfer. While some producers who need to purchase organic heifers will have additional costs if there is a $500 premium for these animals, this premium will stay within the organic dairy sector as a benefit to those producers supplying organic heifers. Any intra-industry transfer is expected to benefit small operations as such operations tend to have more flexibility in capacity (*e.g.,* available pasture) to accommodate raising organic replacement heifers for the organic market. This flexibility is less apparent for large operations. Furthermore, the actual costs of this action may be considerably less than the low estimate. This analysis is based on a conservative assumption that 50 percent of all purchased heifers are transitioned heifers. Based on discussions with organic dairy producers, we believe that this proportion is likely smaller which would decrease the low cost estimate.[53] The costs of the proposed action will vary by size of operation because the proportion of dairies that source at least some of their replacement heifers from their own calves also varies by size of operation. Of the largest operations in the ARMS data, those with 200 or more cows, 96 percent reported that at least some of their replacement heifers were born on their operations. All operations with between 100 and 199 cows reported that at least some of their replacement heifers were born on their operations, and 99 percent of operations with fewer than 50 cows and those with between 50 and 99 cows reported that at least some of their replacement heifers were born on their operations.

Purchases of milk cows and replacement heifers also vary by size. Ten percent of operations with fewer than 50 cows reported purchasing milk cows, and the average number purchased was 6 head. Five percent of operations with between 50 and 99 cows reported purchasing milk cows, and the average number purchased was 14 head. Three percent of operations with between 100 and 199 cows reported purchasing milk cows, and the average number purchased was 10 head. No operations with 200 or more cows reported purchasing milk cows.

The pattern is different for purchasing heifers. Four percent of operations with fewer than 50 cows reported purchasing heifers, and the average number purchased was 10 head. Seven percent of operations with between 50 and 99 cows reported purchasing heifers, and the average number purchased was 10 head. Three percent of operations with between 100 and 199 cows reported purchasing heifers, and the average number purchased was 5 head. Eight percent of operations with 200 or more cows reported purchasing heifers, and the average number purchased was 76 head. Based on a cost difference of $1,300 per head between transitioned replacement heifers and organic replacement heifers, and assuming that half of replacement heifers currently purchased are transitioned, dairies with fewer than 50 cows would pay an additional $270,000, dairies with between 50 and 99 cows would pay an additional $280,000, dairies with between 100 and 199 cows would pay an additional $30,000 and dairies with 200 or more cows would pay an additional $355,000. The costs by size of operation are summarized in Table 8.

[53] Between April 2012 and December 2013, AMS staff contacted 8 organic dairy producers of various sizes to determine the extent to which heifers are raised or purchased on their farms.

TABLE 8—COSTS BY SIZE OF OPERATION FOR PURCHASING ORGANIC HEIFERS

	Fewer than 50 cows	50–99 cows	100–199 cows	200 or more cows
Size of Operation				
Percent of operations that purchased replacement heifers	4%	7%	3%	8%.
Average number of replacement heifers purchased	10 head	10 head	5 head	76 head.
Total cost for purchase of replacement heifers across size class.	$270,000	$280,000	$30,000	$355,000.
Cost per operation (25% to 50% transitioned heifers)	$3,250–$6,500	$3,250–$6,500	$1,600–$3,250	$29,700–$49,400.

Effects on Heifer Development Operations

Heifer development operations raise heifers either from wet calves or weaned calves and generally sell them as springers at about 24 months of age. To raise organic or transitioned heifers, these operations must have organic pasture available for the heifers to graze. Operations that raise transitioned heifers may have to increase their ownership or leasing of organic pasture to continue to operate at their current capacity since organic heifer calves will need access to organic pasture for a longer period than transitioned heifers will need access to pasture.

Since the locations, numbers, and sizes of heifer development operations are not known, it is not possible to estimate the increased costs this will entail. However, it is possible that, to the extent that organic heifers sell at a premium to transitioned heifers, the increased costs may be at least partially offset by increases in revenues from selling organic replacement heifers. We are seeking data related to the likely impacts on heifer development operations and those for sheep and goats.

Effects on Consumers

Nearly 99 percent of all dairies report that they source at least some of their replacement cows from their own calves, and only 4.3 percent of all dairies purchase replacement heifers. The 95.7 percent of producers that do not purchase replacement heifers would not see an increase in costs. To replace purchased transitioned heifers, dairies would have to either raise their own replacements or buy them from an operation that sells organic replacement heifers. Since the current market for replacement heifers is soft and there are ample supplies, as detailed above, it is unlikely that the proposed rule would significantly increase producer, and therefore, milk costs to the consumer.

Benefits of the Proposed Rule

This proposed rule would bring specificity and clarity to the regulations relating to the origin of dairy livestock and the management of breeder stock. Greater clarity and specificity will create uniform application of the practice standards applied in organic production and in turn will help maintain consumer confidence in purchasing organic products.

The Organic Trade Association's (OTA) 2013 U.S. Families' Organic Attitudes and Beliefs tracking study identified that 13 percent of organic buyers surveyed who saw or heard a negative news story about organic chose to buy less organic foods. Further, nearly half of non-buyers of organic products surveyed displayed a decrease in their average level of trust in organic products' authenticity from 5.3 on a 10-point scale in 2012 to 4.4 in 2013.[54]

Conclusions

A clear and consistent standard for transition of dairy animals into organic production is needed and anticipated by dairy producers, consumers, trade associations, certifying agents, and the OIG. This proposed rule would provide a foundation for compliance and enforcement in support of fair competition among dairy producers through a single, well-defined standard. AMS is pursing the regulatory option that retains the opportunity for new producers to transition into organic dairy production once. In the event of emergencies, producers, through their certifiers could apply for a temporary variance provided for in section 205.290(a).

AMS is seeking comments on the actual economic impacts, both costs and benefits, of this action on the industry. We are specifically interested in validating the accuracy of the number of farms impacted, validating the accuracy of the estimated number of replacement animals, and understanding the number and size of heifer development operations that may be affected by this action. The costs and benefits are summarized in the Executive Summary and were described in detail in this section.

In addition, and in support of our validation efforts, we also are requesting comments on or submissions of applicable farm or industry data, data sources, reports, research and other relevant information that would help us better understand the full range of impacts of the rule on farm income and profitability.

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This proposed rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under the OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in section 6514(b) of the OFPA. States are also preempted under sections 6503 and 6507 of the OFPA from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to section 6507(b)(2) of the OFPA, a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to section 6519(f) of the OFPA, this proposed rule would not

[54] Organic Trade Association. 2013. U.S. Families' Organic Attitudes and Beliefs: 2013 Tracking Study. *www.ota.com.*

alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601–624), the Poultry Products Inspection Act (21 U.S.C. 451–471), or the Egg Products Inspection Act (21 U.S.C. 1031–1056), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301–399), nor the authority of the Administrator of the EPA under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136–136(y)).

Section 6520 of the OFPA provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action.

The RFA permits agencies to prepare the initial RFA in conjunction with other analyses required by law, such as the Regulatory Impact Analysis (RIA). AMS notes that several requirements to complete the RFA overlap with the RIA. For example, the RFA requires a description of the reasons why action by the agency is being considered and an analysis of the proposed rule's costs to small entities. The RIA describes the need for this proposed rule, the alternatives considered and the potential costs and benefits of this proposed rule. In order to avoid duplication, we combine some analyses as allowed in section 605(b) of the RFA. As explained below, AMS expects that the entities that could be impacted by this proposed rule would qualify as small businesses. In the RIA, the discussion of alternatives and the potential costs and benefits pertain to impacts upon all entities, including small entities. Therefore, the scope of those analyses is applicable to the RFA. The RIA should be referred to for more detail.

AMS has considered the economic impact of this proposed action on small entities. Small entities include producers transitioning into organic dairy production, existing organic dairy producers, and producers that raise replacement animals for organic dairies. AMS believes that the cost of implementing the proposed rule will fall primarily on organic dairies that currently purchase transitioned heifers, although dairies currently purchasing organic heifers would be expected to pay higher prices in the short-term due to increased competition for these animals. Farms that sell their excess organic replacement heifers may see an increase in demand for their heifers while farms that raise their own organic replacement heifers would not be affected by the proposed rule. AMS believes there may be a limited number of heifer development operations who could be impacted by this action. However, since the locations, numbers, and sizes of heifer development operations are not known, it is not possible to estimate the number of such entities and any increased costs for those entities.

This proposed rule would also affect certifying agents that certify organic dairy operations. The Small Business Administration (SBA) defines small agricultural service firms, which includes certifying agents, as those having annual receipts of less than $7,000,000 (North American Industry Classification System Subsector 115—Support Activities for Agriculture and Forestry). There are currently 84 USDA-accredited certifying agents; based on a query of the NOP certified organic operations database, there are approximately 53 certifying agents who are currently involved in the certification of organic dairies. AMS believes that these certifying agents would meet the criterion for a small business. While certifying agents are small entities that will be affected by this proposed rule, we do not expect these certifying agents to incur significant costs as a result of this action. Certifying agents already must comply with the current regulations, *e.g.,* maintaining certification records for organic dairy operations. Their primary new responsibility under this proposal will be to determine, through the existing application process for organic certification, a producer's eligibility for a one-time transition into organic production.

For the RFA analysis, AMS focused on estimating how different size organic dairy operations (small versus large) would be impacted as a result of purchasing all organic dairy replacement animals. As discussed above, we do not have data on heifer development operations that raise dairy replacement heifers and are unable to estimate the impacts on these entities. As defined by the SBA (13 CFR 121.201), small agricultural producers are defined as those having annual receipts of less than $750,000. AMS used this SBA criterion to identify large organic dairy operations, those with cash receipts of more than $750,000, and small operations, those with cash receipts of $750,000 or less. The ARMS dataset estimates that 95 percent had cash receipts below $750,000 and 5 percent had cash receipts above $750,000. Using the NASS estimate for the total number of organic dairy operations, AMS estimates that, in 2011, there were 91 large operations and 1,756 operations that would be considered small under the SBA criterion.

AMS notes that there is little variation in the proportion of organic dairies that source at least some of their replacement heifers from their own calves. Of the large operations, 96 percent reported that at least some of their replacement heifers were born on their operations. About 99 percent of small operations reported sourcing at least some of their replacement heifers from calves born on their operations.

While the frequency of purchases of replacement heifers varied little by size, our analysis shows that the mean number of replacement heifers purchased was significantly different across size categories. Small operations were slightly less likely to buy replacement heifers (5.3 percent versus 5.5 percent). Of the small operations that purchased replacement heifers, the average number purchased was 10 head, compared with an average purchase of 107 head for large operations. For this cost analysis, we assumed a cost difference of $1,300 per head between transitioned replacement heifers and organic replacement heifers and assumed that half of replacement heifers currently purchased are transitioned.[55] Based on our analysis, AMS estimates that, under the proposed rule, small operations would collectively spend an additional $588,000 for heifers. Large operations would collectively pay an additional $347,000 for heifers. Of the operations that purchased heifers, the average additional cost per operation would be $6,300 for small operations

[55] The determination of a cost difference of $1,300 per head and the assumption about the proportion of replacement heifers that are transitioned is discussed in the RIA. See section on EO 12866 and 13563.

and $70,000 for large operations. AMS notes that this analysis assumed that there is no difference in the cost per head paid by large and small operations for purchases of replacement heifers. Table 9 summarizes the cost analysis using the SBA criterion for small businesses (*i.e.,* producers with less than $750,000 in cash receipts).

TABLE 9—COST OF ORGANIC REPLACEMENT HEIFERS BY SBA CRITERION FOR SMALL BUSINESSES

	Small operations (<$750,000)	Large operations (>=$750,000)
Total cost (all operations)	$588,000	$347,000
Per operation purchasing replacement heifers (25% to 50% transitioned replacements)	3,150–6,300	35,000–70,000

To understand the potential costs in context, we used the higher average cost estimate per operation from Table 9 for the purchase of organic replacement heifers (*i.e.,* $6,300 for small; $70,000 for large) and compared it to the average gross cash farm income for each size category. In 2011, the average gross farm cash income for small operations was $211,375, and $2,348,345 for large operations. For both small and large operations, the average additional costs imposed by the requirement to purchase organic replacement heifers accounts for approximately 2.9 percent of an operation's average gross cash farm income. AMS believes that any costs incurred by producers in complying with this proposed action would be offset by a stronger marketplace for organic dairy products. If implemented, this action would, as discussed in the benefits portion of the RIA, ensure that consumer expectations are met and support the growing market for these organic products. AMS believes that, over the long run, the economic impact on producers of not implementing this proposed rule would be greater than the economic impact of this proposed rule due to the need for greater consistency in applying the origin of livestock standard across the organic dairy sector.

In addition, AMS has not identified any relevant Federal rules that are currently in effect that duplicate, overlap, or conflict with this proposed rule. This action provides additional clarity on the origin of livestock requirements that are specific and limited to the USDA organic regulations.

D. Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

AMS has assessed the impact of this rule on Indian tribes and determined that this rule may have tribal implications that require tribal consultation under EO 13175. If a Tribe requests consultation, AMS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

E. Paperwork Reduction Act

No additional collection or recordkeeping requirements are imposed on the public by this proposed rule. Accordingly, OMB clearance is not required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, Chapter 35.

F. Civil Rights Impact Analysis

AMS has reviewed this proposed rule in accordance with the Department Regulation 4300–4, Civil Rights Impact Analysis (CRIA), to address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, AMS has determined that this rule would only impact the organic practices of organic producers and that this rule has no potential for affecting producers in protected groups differently than the general population of producers. This rulemaking was initiated to clarify a regulatory requirement and enable consistent implementation and enforcement.

Protected individuals have the same opportunity to participate in the NOP as non-protected individuals. The USDA organic regulations prohibit discrimination by certifying agents. Specifically, section 205.501(d) of the current regulations for accreditation of certifying agents provides that ''No private or governmental entity accredited as a certifying agent under this subpart shall exclude from participation in or deny the benefits of the NOP to any person due to discrimination because of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status.'' Paragraph 205.501(a)(2) requires ''certifying agents to demonstrate the ability to fully comply with the requirements for accreditation set forth in this subpart'' including the prohibition on discrimination. The granting of accreditation to certifying agents under section 205.506 requires the review of information submitted by the certifying agent and an on-site review of the certifying agent's operation. Further, if certification is denied, section 205.405(d) requires that the certifying agent notify the applicant of their right to file an appeal to the AMS Administrator in accordance with section 205.681. These regulations provide protections against discrimination, thereby permitting all producers, regardless of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status, who voluntarily choose to adhere to the rule and qualify, to be certified as meeting NOP requirements by an accredited certifying agent. This proposed rule in no way changes any of these protections against discrimination.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

For the reasons set forth in the preamble, 7 CFR part 205 is proposed to be amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

■ 1. The authority citation for 7 CFR part 205 continues to read:

Authority: 7 U.S.C. 6501–6522.

■ 2. Section 205.2 is amended by adding in alphabetical order definitions for

''dairy farm,'' ''organic management,'' third-year transitional crop,'' ''transitional crop,'' and ''transitioned animal'' to read as follows:

§ 205.2 Terms defined.

* * * * *

Dairy farm. A premises with a milking parlor where at least one lactating animal is milked.

* * * * *

Organic management. Management of a production or handling operation in compliance with all applicable production and handling provisions under this part.

* * * * *

Third-year transitional crop. Crops and forage from land, included in the organic system plan of a producer's operation, that has had no application of prohibited substances within 2 years prior to harvest of the crop or forage.

* * * * *

Transitional crop. Any agricultural crop or forage from land, included in the organic system plan of a producer's operation, that has had no application of prohibited substances within one year prior to harvest of the crop or forage.

Transitioned animal. A dairy animal that was converted to organic milk production in accordance with § 205.236(a)(2); offspring borne to a transitioned animal that, during its last third of gestation, consumes third year transitional crops; or offspring borne during the one-time transition exception that themselves consume third year transitional crops. Such animals must not be sold, labeled, or represented as organic slaughter stock or for the purpose of organic fiber.

* * * * *

■ 3. Section 205.236 is revised to read as follows:

§ 205.236 Origin of livestock.

(a) Livestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching: *Except,* That:

(1) *Poultry.* Poultry or edible poultry products must be from poultry that has been under continuous organic management beginning no later than the second day of life;

(2) *Dairy animals.* A producer as defined in § 205.2 may transition dairy animals into organic production only once. A producer is eligible for this transition only if the producer starts a new organic dairy farm or converts an existing nonorganic dairy farm to organic production. A producer must not transition any new animals into organic production after completion of this one-time transition. This transition must occur over a continuous 12-month period prior to production of milk or milk products that are to be sold, labeled, or represented as organic, and meet the following conditions:

(i) During the 12-month period, dairy animals must be under continuous organic management;

(ii) During the 12-month period, the producer should describe the transition as part of its organic system plan and submit this as part of an application for certification to a certifying agent, as required in § 205.401;

(iii) During the 12-month period, dairy animals and their offspring may consume third-year transitional crops;

(iv) Offspring born during or after the 12-month period are transitioned animals if they consume third-year transitional crops during the transition or if the mother consumes third year transitional crops during the offspring's last third of gestation;

(v) Offspring born from transitioning dairy animals are organic if they are under continuous organic management and if only certified organic crops and forages are used from their last third of gestation;

(vi) All dairy animals must end the transition at the same time;

(vii) Dairy animals that complete the transition are transitioned animals and must not be used for organic livestock products other than organic milk;

(viii) After the 12-month period ends, transitioned animals may produce organic milk on any organic dairy farm as long as the animal is under continuous organic management at all times on a certified organic operation; and

(ix) After the 12-month period ends, any new dairy animal brought onto a producer's dairy farm(s) for organic milk production must be an animal under continuous organic management from the last third of gestation or a transitioned animal sourced from another certified organic dairy farm.

(3) *Breeder stock.* Livestock used as breeder stock may be brought from a nonorganic operation onto an organic operation at any time, *Provided,* That the following conditions are met:

(i) Such breeder stock must be brought onto the operation no later than the last third of gestation if its offspring are to be raised as organic livestock; and

(ii) Such breeder stock must be managed organically throughout the last third of gestation and the lactation period during which time they may nurse their own offspring.

(b) The following are prohibited:

(1) Livestock, edible livestock products, or nonedible livestock products such as animal fiber that are removed from an organic operation and subsequently managed on a nonorganic operation may not be sold, labeled, or represented as organically produced.

(2) Breeder stock, dairy stock, or transitioned animals that have not been under continuous organic management since the last third of gestation may not be sold, labeled, or represented as organic slaughter stock.

(c) The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed animals, including whether they are transitioned animals, and edible and nonedible animal products produced on the operation.

■ 4. Section 205.237 is amended by revising paragraph (a) to read as follows:

§ 205.237 Livestock feed.

(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced and handled by operations certified to the NOP, except as provided in § 205.236(a)(2)(iii), except, that, synthetic substances allowed under § 205.603 and nonsynthetic substances not prohibited under § 205.604 may be used as feed additives and feed supplements, *Provided,* That, all agricultural ingredients included in the ingredients list, for such additives and supplements, shall have been produced and handled organically.

* * * * *

■ 5. Section 205.239 is amended by revising paragraph (a)(3) to read as follows:

§ 205.239 Livestock living conditions.

(a) * * *

(3) Appropriate clean, dry bedding. When roughages are used as bedding, they shall have been organically produced in accordance with this part by an operation certified under this part, except as provided in § 205.236(a)(2)(iii), and, if applicable, organically handled by operations certified to the NOP.

* * * * *

Dated: April 23, 2015.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

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