Please focus on the following words: Transitioned; source/d; operation. Ask your certifier (AQ/BG). There are changes that affect all organic (NOP) dairy operations. Bill Quinn, OrganicAg.

National Organic Program; Origin of Livestock

A Rule by the Agricultural Marketing Service on 04/05/2022

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Start Printed Page 19740

AGENCY:

Agricultural Marketing Service, USDA.

ACTION:

Final rule.

SUMMARY:

The U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) amends the origin of livestock requirements for dairy animals under the USDA organic regulations with this final rule. AMS is taking this action to increase uniformity in origin of livestock production practice for organic dairy animals, and reduce variance between the approaches taken by certifying agents. The policy choices in this rule align with practices that many certifiers and most organic operations already follow, and align with the public comments on the rule. This rule specifies that organic milk and milk products must be from animals that have been under continuous organic management from the last third of gestation onward, with an exception for newly certified organic livestock operations.

DATES:

Effective date: This rule is effective June 6, 2022.

Compliance date: Certified organic operations must comply with all provisions of this final rule by April 5, 2023. For more information, see the Compliance Date for These Regulations section of this document.

Please focus on the following words: Transitioned; source/d; operation. Ask your certifier (AQ/BG). There are changes that affect all organic (NOP) dairy operations. Bill Quinn, OrganicAg.

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SUPPLEMENTARY INFORMATION:

Executive Summary

A. Purpose of Final Rule

This final rule clarifies requirements related to organic dairy production under the USDA organic regulations, which dictate how and when nonorganic dairy animals may be transitioned, or converted, to organic production (7 CFR part 205). This action specifies that a nonorganic dairy may transition to organic production on a one-time basis, and once the transition is complete, the operation must not transition additional nonorganic animals to organic production or source transitioned animals. This action is intended to facilitate and improve compliance with and enforcement of the USDA organic regulations.

The rule takes into account current practices and stakeholder input to ensure a policy option that minimizes disruptions, while protecting the value of the organic label. This final rule will improve AMS's ability to effectively administer the National Organic Program (NOP) and improve AMS's oversight of the USDA-accredited certifying agents that inspect and certify organic dairy operations. The final rule is also intended to maintain consumer trust in the organic seal by assuring consumers that organically produced products meet a consistent and uniform standard—a stated purpose of the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501 *et seq.*).

AMS is making these changes, following consultation with the National Organic Standards Board (NOSB) and following notice and public comment, to provide additional details for the USDA organic regulations governing the production of organic livestock products, and at the direction of Congress (Further Consolidated Appropriations Act, 2020; Pub. L. 116-94), and as authorized under OFPA (Sections 6509(e)(2) and 6509(g)).

B. Summary of Provisions

This final rule updates the origin of livestock regulations, first published in December 2000 in the **Federal Register** (65 FR 80547), by explicitly requiring that milk or milk

products labeled, sold, or represented as organic be from dairy animals organically managed from the last third of gestation onward, with a one-time exception for newly certified organic livestock operations to convert (or "transition") nonorganic dairy animals to organic milk production. This exception allows an eligible operation to transition nonorganic dairy animals to organic milk production one time by managing animals organically for 12-months rather than from the last third of gestation. The transition must occur over a single 12-month period and all transitioning animals must end the transition at the same time.

After the transition to organic production is complete, an operation is not allowed to transition additional nonorganic animals to organic milk production, and the certified operation may not source animals transitioned by other operations. After the transition, an operation replacing culled dairy animals and/or expanding its number of dairy animals must add dairy animals that have been under continuous organic management from the last third of gestation.

In this final rule, AMS clarifies that breeder stock must be managed organically during the period that breeder stock are nursing their organic offspring, from the last third of gestation through the end of the nursing period. Breeder stock that are not certified organic may not be sold, labeled, or represented as organic. The final rule reiterates that nonorganic breeder stock may be brought from a nonorganic operation onto an organic operation at any time, but they must be brought onto the organic operation no later than the last third of gestation if their offspring are to be raised as organic livestock.

C. Regulatory Analysis (Costs and Impacts)

AMS is taking this action to set origin of livestock production practice standards for organic dairy animals, and reduce variance between the approaches taken by certifying agents. AMS updated the analysis from the proposed rule (84 FR 52041) using the most recent information about the dairy market, including the number of certified organic operations and the number of organic dairy animals. Updating the information with NASS 2019 data revises the estimated costs of the final rule to $615,000-$1,845,000.

D. Compliance Date for These Regulations

AMS is establishing a compliance date for this final rule of April 5, 2023, or ten months after the effective date of this final rule. This means that a certified operation may only

add transitioned animals to their operation up to the compliance date of April 5, 2023. Any certified operation may source or sell transitioned animals in the period prior to the compliance date, but certified operations may not start new transitions that would not be completed by April 5, 2023. Starting on the compliance date of April 5, 2023, all certified operations (*i.e.,* operations certified as of the compliance date) must fully comply with the provisions of this final rule.

I. General Information

Does this action apply to me?

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

• Individuals or business entities that are considering owning or operating a new dairy farm and that plan to seek organic certification for that farm; Start Printed Page 19741

- Dairy farms that are currently certified organic under the USDA organic regulations;
- Organic farms engaged in raising heifers for sale to certified organic operations;
- Nonorganic dairy farms that are considering converting their dairy farm to certified organic production; and/or
- Certifying agents accredited under the USDA organic regulations to certify organic livestock operations.

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 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** .

II. Background

AMS's National Organic Program (NOP) is authorized by the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6524). Through the NOP, AMS establishes and oversees the implementation of national standards for the production and handling of organically produced agricultural products. Below, background is provided on the topics

of dairy transition and breeder stock, describe general dairy production practices, and summarize the history of this rulemaking.

A. Dairy Transition

OFPA establishes that, in general, organic livestock must be organically managed from the last third of gestation onward (7 U.S.C. 6509(b)). For dairy animals, OFPA requires 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)). During the transition period, OFPA also allows dairy farms to feed dairy animals crops and forage from land on the dairy farm that is in its third year of organic management (*Id.*).

The USDA organic regulations regarding the origin of livestock (7 CFR 205.236) have required that all livestock products sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation onward. For dairy animals, the USDA organic regulations have also provided an exception (§ 205.236(a)(2)) that allows for the transition of a dairy herd into organic production if animals 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 certified organic feeds and/or crops and forage from land that is in the third year of organic management and included in the organic system plan but has not yet been certified organic (§ 205.236(a)(2)(i)). Section 205.236(a)(2)(iii) has required that once an "entire distinct herd" has transitioned to organic production, all dairy animals in that herd shall be organically managed from the last third of gestation.

As USDA noted when promulgating the regulations that first implemented the NOP, "[t]he conversion provision . . . rewards producers for raising their own replacement animals while still allowing for the introduction of animals from off the farm that were organically raised from the last third of gestation." 65 FR 80570 (Dec. 21, 2000). USDA explained that "the conversion provision cannot be used routinely to bring nonorganically raised animals into an organic operation. It is a one-time opportunity for producers working with a certifying agent to implement a conversion strategy for an established, discrete dairy herd . . . ." *Id.*

These provisions have established two different classes of organic animals that operations and their certifiers track, because there are implications in terms of the fate of the animal: Last third organic animals may be eligible for organic slaughter (if also not treated with synthetic parasiticides that appear on the National List [1]), while

transitioned animals (as well as last third animals that have received parasiticides) are ineligible for organic slaughter.

The USDA organic regulations related to transition of dairy animals have been inconsistently applied, however, in part because while they have allowed for the transition of a nonorganic herd to organic milk production after one year of organic management, the regulations did not define an "entire distinct herd." This has led to significant inconsistencies in the regulatory interpretation by certifying agents and farms. For example, some operations and certifying agents consider an entire distinct herd to include all the animals on the farm. In contrast, others have applied the rules differently, allowing smaller groups to be considered multiple distinct herds. Some certifying agents have allowed dairy farms to continually transition nonorganic dairy animals into organic production as new "distinct" herds, while other dairy operations have been allowed to use the transition exception only once (*i.e.,* when they initially converted their farm's entire nonorganic "herd" to organic production). The inconsistent interpretation has led to unevenness in the marketplace. This final rule adopts the latter interpretation, and amends the regulations regarding dairy animals to clarify their requirements. As USDA first said more than twenty years ago, organic dairy operations may "rais[e] their own replacement animals" or "introduce[e] . . . animals from off the farm that were organically raised from the last third of gestation." 65 FR 80570. But they may not "routinely . . . bring nonorganically raised animals into an organic operation." *Id.* When Congress amended 7 U.S.C. 6509(e)(2) in 2005, it did not disturb this understanding.

In a 2006 rulemaking, USDA noted that some "commenters wanted the last third of gestation clause to apply to all dairy operations once the operation is certified as organic, regardless of the number of animals converted, or whether an entire, distinct herd is converted." 71 FR 32804. USDA responded that those comments were beyond the scope of the present rulemaking, but recognized that its regulations left "two methods of replacement of dairy animals for organic dairy operations and that this is a matter of concern in the organic community." *Id.* USDA suggested that it would undertake further rulemaking "[t]o address the issue of dairy replacement animals for all certified organic dairy operations." *Id.*

Differences in how certifying agents have interpreted the regulations were detailed in a July 2013 audit report published by the USDA Office of Inspector General (OIG).[2] According to the OIG report, three of the six certifying agents interviewed by OIG

allowed producers to continuously transition additional herds to organic milk production, while the other three certifying agents did not permit this practice. OIG recommended that a proposed rule be issued to clarify the standard and ensure that all certifying agents consistently apply and enforce the origin of livestock requirements. The National Organic Standards Board (NOSB) has also issued several recommendations that AMS revise the transition exception to clarify that each operation is entitled to a one-time Start Printed Page 19742 transition per operation (see Development of Existing Standards below). This final rule responds to the OIG's findings and the NOSB's recommendations on this issue. It was also directed by Congress (Further Consolidated Appropriations Act, 2020).

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). Nonorganic breeder stock may be used to raise 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 are gestating and their offspring are to be raised as organic, the regulations require that the breeder stock be brought onto the facility and organically managed no later than the last third of gestation (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 and nurse the 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 organic livestock removed from organic operations and subsequently managed on nonorganic operations to be sold, labeled, or represented as organically produced (7 CFR 205.236(b)).[3] To clarify these potentially conflicting regulations, this final rule addresses the use and management of breeder stock on organic operations.

C. Overview of Organic Dairy Production

This section provides a high-level overview of heifer (*i.e.,* young female cows) raising practices. It also highlights the differences between organic and nonorganic practices for raising replacement dairy heifers (*i.e.,* the animals brought onto a farm to replace the animals that die or that are removed from the farm for other reasons).

Current dairy production and husbandry practices provide important context for this rulemaking. The practices described below are specific to raising dairy heifers but may be applied similarly to other species. However, the timing of events may differ depending on the animal. (*e.g.,* a dairy goat may begin its first lactation at one year of age while a cow begins its first lactation at nearly two years of age).

NONORGANIC HEIFER DEVELOPMENT

When a heifer calf (*i.e.,* a young female cow) is born on a dairy farm, the producer ensures that the calf receives colostrum, either from a bottle or by nursing her female parent ("dam" or "mother"). The heifer calf will often be separated from the dam and placed in single, pair, or group housing. Some dairy producers raise their own heifers from birth; others may contract with heifer growers to raise replacement heifers during different stages of their lives until they produce milk. Newborn calves are raised on a diet of milk or milk replacer, grains, and roughages. Once the calves reach a certain weight, they are weaned from milk to water and continue to eat grains and roughages.

After weaning, the heifers are developed to grow at a moderate pace until they are ready to be bred. During this time, heifers may be fed pasture only; graze and be fed a supplemental feed ration; or be fed only a feed ration (depending on the operation's grazing season). Once the heifers weigh about 800 pounds (12-15 months old), they are bred, gestate for 9 months, and calve around 2 years of age. After calving, they begin producing milk (and are then referred to as cows).

ORGANIC HEIFER DEVELOPMENT

Organic producers follow similar timelines as nonorganic producers but may use different practices in the feeding, health care, and breeding of heifers. These differing practices may affect production costs in each stage of organic heifer development.

Organic producers must provide a feed ration comprised of certified organic feeds. Currently, there is very little certified organic milk replacer produced in the United States. As a result, organically raised dairy calves primarily rely on feeding certified

organic milk. This makes the practice of sending newborn calves to heifer growers less feasible for organic producers, as heifer growers may not have access to certified organic milk. Certified organic animals (and animals undergoing a one-time transition to organic) must be fed an organic feed ration. Additionally, organic regulations require that all ruminants greater than 6 months of age receive 30 percent of their dry matter intake from pasture during the grazing season. Nonorganic dairy heifers 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 organically approved methods such as supportive therapy and vaccination programs. In the event an animal becomes sick, organic producers are required to use medication to restore the animal to health, even if the treatment will cause the animal to lose its organic status. Once an animal loses its organic status, the animal (and its products) cannot be represented as organic. This final rule clarifies that nonorganic animals—including animals that have lost organic status due to a veterinary treatment—may only be transitioned to organic by eligible operations as part of that operation's one-time transition.

Nonorganic breeding practices are less expensive than organic breeding practices. Nonorganic producers may use hormonal products to both initiate estrus and synchronize estrus among heifers to aid in conception, essentially promoting an earlier lactation. Organic producers may not use hormonal methods to synchronize estrus.

These differences in production practices cause many certifying agents to prohibit continual transition, and as such, many operations already comply with the final rule. The 2013 OIG audit of the National Organic Program and organic milk operations (Audit Report 01601-0002-32) found that half of the six certifiers interviewed allowed continuous transition at the time, while the other three did not. Prior to this final rule, dairy farms and heifer raising operations that *were* permitted by their certifying agent to continually transition dairy animals could reduce production costs by not managing their heifer calves under the USDA organic regulations for the first year of life. Alternatively, they could source less expensive year-old nonorganic heifers on a continual basis. 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 reduce mortality and expenses during this pre-weaning phase by feeding heifers milk replacer and nonorganic feeds, and by using antibiotics to maintain health. By the time the dairy heifer reaches one year of Start Printed Page 19743 age, most health threats have passed and the animal is consuming a less expensive diet.

D. Development of Existing Standards

OFPA required the USDA to establish the NOSB to advise the USDA on the implementation of OFPA (7 U.S.C. 6518). The NOSB held its first formal meetings in 1992. Between 1994 and 2006, the NOSB made six recommendations regarding origin of dairy animals, including several recommendations on the management of breeder stock.[4] Between 1997 and 2000, AMS issued two proposed rules (62 FR 65850; 65 FR 13511) and a final rule (65 FR 80547) regarding national standards for production and handling of organic products, including livestock and their products. AMS also issued a proposed rule and final rule in 2006 implementing congressional amendments to OFPA regarding feed for transitioning dairy animals (71 FR 24820; 71 FR 32803). The NOSB, as well as the public, commented on these rulemakings with regard to the origin of livestock and the 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 should be fed certified organic feeds and raised under organic management practices for no less than 12 months prior to the sale of their milk as organic.[5]

(2) On December 16, 1997, AMS responded to the June 1994 NOSB recommendation through publication of a proposed rule (62 FR 65850). The language contained in that proposed rule echoed the NOSB's 1994 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.[6]

(3) In March 1998, the NOSB provided a second recommendation reaffirming its 1994 recommendation on the source of livestock.[7] 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 (65 FR 13511) that would establish the USDA organic regulations. 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's 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 9 months of the final 12-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 9 months.
- For the final 3 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 (65 FR 80547). 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. 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 § 205.236(a)(2)(iii). Its recommendation also included a provision 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.[8] Concurrently, the NOSB made a separate recommendation regarding breeder stock.[9] It recommended a requirement that operations continuously manage all breeder stock as organic if they were brought onto an organic farm to produce organic offspring. The NOSB further Start Printed Page 19744 advocated that the NOP issue guidance in the form of questions and answers to clarify the management of breeder stock to the industry. The NOSB reiterated its recommendations in October 2004.[10]

(9) In October 2003, a legal challenge was filed against USDA stating that, among other things, OFPA required organic dairy animals be fed 100 percent organic feeds during the 12-month transition, and thus, the 80/20 rule for the transition of dairy animals was in violation of the statute.[11]

(10) On January 26, 2005, the U.S. Court of Appeals for the First Circuit issued a decision in the case.[12] 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 § 205.236(a)(2)(i) of the regulations. The lower court found the 80/20 dairy transition provisions at § 205.236(a)(2)(i) to be contrary to OFPA and in excess of the Secretary's rulemaking authority.[13]

(11) On November 10, 2005, Congress amended 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 (71 FR 24820) entitled "Revisions to Livestock Standards Based on Court Order" to address the November 2005 amendments to OFPA. 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 (71 FR 19131), AMS received over 325 comments on the issue of dairy animal replacement. 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 final rule.

(13) On May 12, 2006, the NOSB provided a comment on the April 2006 proposed rule (71 FR 24820).[14] In its comment, the NOSB offered modifications to its May 2003 dairy replacement recommendation [15] for the regulatory text 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." The modification was intended to clarify that any animal brought onto an organic operation, after conversion, should be under organic management from the last third of gestation (*i.e.,* purchase of animals transitioned by other operations should not be permitted). The revised text also intended to clarify that an *operation* (as opposed to *herd*) is entitled to the one-time opportunity to convert to organic production.

(14) On June 7, 2006, AMS published a final rule entitled "Revisions to Livestock Standards Based on Court Order" (71 FR 32803) to implement the November 2005 statutory change. The amendments reflected the new OFPA allowance permitting transitioning dairy animals to be fed feedstuffs from transitioning lands in the last year of the 3-year transition 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.

(15) In October 2006, NOP published guidelines meant to clarify the existing origin of livestock rule.[16] The guidelines allowed organic milk operations that were certified organic prior to October 21, 2002, or that transitioned their cattle by feeding them 100 percent organic feed during conversion, to acquire additional conventional (or "nonorganic") cattle and transition them to an organic status. The guidelines prohibited organic milk operations that transitioned their cattle using the 80/20 exemption from transitioning additional cattle. This guidance document was archived by AMS on January 31, 2011, in anticipation of rulemaking to clarify the origin of livestock rule.

(16) On April 28, 2015, AMS published a proposed rule titled "Origin of Livestock" (80 FR 23455) to propose changes to the exception allowing nonorganic dairy animals to transition to organic milk production after one year of organic management. This action proposed that each producer (*e.g.,* individual or business entity) would be allowed to transition nonorganic dairy animals to organic milk production only one time. After the transition is completed, a producer could transition dairy animals in the future only if the producer, through its certifying agent, requests an exemption due to a natural disaster or damage caused by drought, wind, flood, excessive moisture, hail, tornado, earthquake, fire, or other business interruption, in accordance with 7 CFR 205.290. The comment period for the proposed rule was opened on April 28, 2015, for 60 days, during which time AMS received 1,371 public comments.

(17) On October 1, 2019, AMS reopened the comment period on the April 28, 2015, proposed rule (84 FR 52041). The comment period was reopened for 60 days during which time AMS received 746 public comments.

(18) On December 20, 2019, Congress instructed AMS to finalize rulemaking within 180 days in the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94, div. B, title VII, section 756, Dec. 20, 2019, 133 Stat. 2654), stating "the Secretary of Agriculture shall issue a final rule based on the proposed rule entitled 'National Organic Program; Origin of Livestock,' . . . Provided, That the final rule shall incorporate public comments submitted in response to the proposed rule."

(19) On May 12, 2021, AMS reopened the comment period (86 FR 25961) on the 2015 proposed rule. AMS requested comments on specific topics, including whether AMS should prohibit the movement of transitioned cows, and whether AMS should use the term "operation" or "producer" to describe the regulated entity. The 2021 comment period was reopened for 60 days, during which time AMS received 486 public comments.

III. Overview of Comments

This section provides a summary of the comments AMS received on issues related to this final rule. First, comments received on this topic prior to Start Printed Page 19745 2015 are discussed, as they informed the development of the 2015 proposed rule and this final rule. AMS then summarizes comments received since the publication of the 2015 proposed rule over the course of three comment periods in 2015, 2019, and 2021. Finally, AMS responds to specific comments in the description of this rule and in the Regulatory Impact Analysis.

A. Discussion of Comments Received Prior to 2015

In general, 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 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 percent nonorganic feed in the 12 months before milking), all offspring then had to be managed organically and no transitioned replacements could be purchased.[17] The NOP also stated that, for those producers 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 allowing organic dairy operations to add only 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 organic purchases. Commenters stated that continued transition of nonorganic 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 nonorganic animals on a regular basis encouraged transitional heifer development farms (an operation that raises heifers before they reach production age). They stated that it is easier and less expensive to purchase transitioned animals from heifer development farms than it is to raise animals that are organic from birth.

Commenters estimated that raising organic dairy animals is twice as expensive as raising nonorganic dairy animals during their first year of life. They contended that producers who sell organic calves and replace them with transitioned nonorganically raised heifers have an economic advantage over those who raise animals organically from birth, due to the lower cost of nonorganic feed and nonorganic management. 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.

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 percent of the organic dairy operations at that time. Other certifying agents were allowing the other approximately 50 percent of dairy operations to transition nonorganic animals to organic on a continual basis. Commenters stressed that a main purpose of OFPA is consumer assurance that organically produced products meet a consistent standard and that the current origin of livestock standard needs further specificity to meet that purpose.

B. Discussion of Comments Received on 2015 Proposed Rule

AMS received 1,371 comments during the first comment period for the 2015 proposed rule on Origin of Livestock (April 28, 2015, to July 27, 2015). Commenters included private citizens and consumers, producers, consumer groups, organic certifying agents, producer groups, trade organizations, milk handlers, and foreign and state governments. The majority of comments (1,305 comments) were submitted by private citizens and consumers. AMS identified approximately 1,110 form letter submissions out of the 1,371 submissions. During the second comment period (October 1, 2019 to December 2, 2019), AMS received 746 comments, which included 198 comments identified as form letters. During the third comment period (May 12, 2021 to July 12, 2021), AMS received 486 comments, which included 374 comments identified as form letters.

A general summary of comments follows. Detailed discussion of specific comments follows in the description of the final rule. All comments on the 2015 proposed rule can be accessed at *https://www.regulations.gov* via Docket ID AMS-NOP-11-0009.
Of the comments received in 2015, most commenters supported the proposed rule because they felt the proposed regulatory text was intended to close loopholes that allowed operations to continuously bring nonorganic animals into organic milk production. Comments that expressed general support for the rule included private citizens and consumers; dairy farmers; certifying agents; producer groups; consumer groups; a trade organization; handlers and academics/specialists.

Other comments received in 2015 expressed general opposition to the proposed rule. These commenters were mostly concerned that the proposed rule would, for example: Weaken organic standards by creating loopholes, make organic milk or food less healthy, or favor large corporations and "factory" farms over small farms and consumers. Some commenters were not aware USDA regulations allow for transitioning nonorganic animals to organic production and were opposed to this practice altogether. A commenter who supported continuous transition questioned whether AMS had the authority to restrict the origin of livestock as proposed. AMS responds to these comments below. Start Printed Page 19746
In 2019, AMS received comments in support of the rule, as well as a few comments in opposition to the proposed rule. These commenters outlined arguments similar to those submitted in 2015, and specifically emphasized that changing the rule to allow only one

transition to organic *per producer* would be restrictive and beyond the scope of AMS's legal authority, among other concerns.

In 2021, AMS reopened the proposed rule's comment period to seek comment on several specific topics, including whether AMS should prohibit the movement of transitioned dairy animals in organic dairy production as part of the final rule, and whether AMS should regulate "producers" or "operations." Commenters urged AMS to finalize the rule without further delay, believing it would ensure dairy farms operate on a level playing field and that animals are consistently raised using organic practices. Commenters also responded to AMS's specific requests, and those are discussed by topic below. A comment asserted that USDA did not have the statutory authority to prohibit certified operations that have completed their one-time transition from acquiring transitioned animals for organic production.

IV. Overview of Amendments and Responses to Comments

The requirements of the final rule are discussed below. For each section of the final rule, we describe comments that AMS received and revisions from the proposed to final rule. AMS then discusses the comments we received but did not incorporate into the final rule. Comments received on the costs and benefits of the rule are discussed in the Regulatory Impact Analysis. The final regulatory text is available, in its entirety, at the bottom of this document.

This final rule clarifies a regulation that has been in effect for twenty years. AMS considers the requirements for organic livestock in 7 U.S.C. 6509(b), (c), and (d) to be applicable to all organic livestock. Section 6509(e)(2) requires organic management of dairy animals "for not less than the 12-month period immediately prior" to the sale of organic milk or milk products. AMS has interpreted this provision to be the minimum 12-month period of organic management and that the Secretary may establish a longer period for dairy operations. AMS had determined that the appropriate period under which dairy animals must be under organic management is from last third of gestation except during the one-time transition when a new organic dairy operation is being certified or when a nonorganic dairy operation is transitioning to organic production. This final rule elaborates on the original 7 CFR 205.236(a)(2)(iii), under which organic dairy operations may "rais[e] their own replacement animals" or "introduce[e] . . . animals from off the farm that were organically raised from the last third of gestation,"

but may not "routinely . . . bring nonorganically raised animals into an organic operation." 65 FR 80570. AMS allowed the minimum period of 12 months for new operation or transitioning operations to assist new entrants into the organic market as a one-time event.

In 2005, Congress amended section 6509(e)(2) to add subsection (B). It left undisturbed subsection (A), which USDA had implemented in 7 CFR 205.236(a)(2)(iii). Additionally, in the further Consolidated Appropriations Act of 2020, Congress instructed the Secretary to "issue a final rule based on the proposed rule entitled `National Organic Program; Origin of Livestock,' published in the **Federal Register** on April 28, 2015 (80 FR 23455): Provided, That the final rule shall incorporate public comments submitted in response to the proposed rule." 7 U.S.C. 6509 note. Having incorporated the public comments on the proposed rule and considered the need for consistency between certifying agents, the need to consider the expectations of consumers and organic producers, the need to be able to implement and enforce the rule effectively, and the statutory provisions included in OFPA, the Secretary now issues that final rule.

The proposed rule in 2015 stated that it would not prohibit the movement of transitioned animals, a practice in which some operations are currently engaged. In 2021, AMS reopened the comment period to seek comment on whether the final rule should do so. With this final rule, AMS is limiting the movement of transitioned animals. AMS views the different parts of this final rule as working together: The one-time transition allowance at the operation level will more effectively work in the real world if we also limit the movement of transitioned animals. The second part of the rule will facilitate the first part of the rule.

A. Definitions (§ 205.2)

This section of the final rule defines terms that appear in the final rule and/or existing USDA organic regulations. The final rule adds three terms to organic regulations. "Organic management" is defined as: "management of a production or handling operation in compliance with all applicable provisions under this part." The term "third-year transitional crop," is defined as, "crops and forage from land included in the organic system plan of a producer's operation that is not certified organic but is in the third year of organic management and is eligible for organic certification in one year or less." Finally, the term "**transitioned animal**" is defined as, "A dairy animal converted to organic milk production in accordance with § 205.236(a)(2) that has not been under

continuous organic management from the last third of gestation; offspring born to a transitioned animal that, during its last third of gestation, consumes third-year transitional crops; and offspring born during the one-time transition exception that themselves consume third-year transitional crops." Below we describe the final rule and respond to comments received on the proposed definitions.

I. DEFINITIONS—COMMENTS AND REVISIONS

This section (§ 205.2) differs from the 2015 proposed rule as follows:

" *Dairy farm* ": AMS received many comments on AMS's proposed definition of a dairy farm. That proposal would have defined a dairy farm as, "A premises with a milking parlor where at least one lactating animal is milked." Commenters were concerned that the proposed definition of "dairy farm" required an operation to milk only one animal to meet the definition of a dairy farm. Since any new dairy farm could transition animals on a one-time basis, some commenters were concerned that a producer would continuously create new dairy farms for the purpose of producing transitioned animals, defeating the purpose of the rule. Public comments argued this interpretation would be relatively easy to make, because the dairy farm definition requires that only one animal be milked. These transitioned animals would then presumably be sold to other organic dairies, thereby allowing operations to continuously add transitioned animals to their operations and failing to establish consistency across operations.

These commenters suggested that AMS modify the definition of a "dairy farm" to close the potential loophole by requiring that a dairy farm be a functioning `commercial dairy' that is inspected and permitted by the state in which it operates, has a relationship with a licensed milk handler, and has operated for no less than 180 days. Other comments were concerned that legitimate dairies would be excluded by our proposed definition, as AMS defined a dairy farm as a premise with a milking parlor. They noted that dairy farms do not always have a milking Start Printed Page 19747 parlor, for example, when dairies are starting transition with non-milking animals (*e.g.,* heifers). Another commenter pointed out that some dairies use portable or mobile equipment for collecting milk and that it was unclear if these operations would be considered dairy farms under the rule. Another commenter stated that a "dairy farm" definition was not necessary and recommended that AMS delete the definition in the final rule.

AMS has not included a definition for "dairy farm" in the final rule. AMS concluded that the proposed term would not have included certain legitimate dairy operations (*i.e.,* dairy operations that do not have a milking parlor) and would have included operations that should not be considered dairy operations for the purposes of the rule (*i.e.,* non-commercial dairy operations).

The final regulatory text does not include this term, as AMS determined it is not necessary and is an ordinary term that does not require definition. The proposed rule articulated the definition of "dairy farm" as a way to establish the eligibility requirements to transition animals. AMS concluded an alternative approach was preferred in the final rule to limit continual transition by organic operations, as suggested by commenters. This decision was a logical outgrowth of the proposed rule, based on the rule's articulated purpose. In the final rule, the definition of a dairy farm is not necessary to implement the final rule or achieve our regulatory objective. For additional discussion, see the section on Dairy Transition (§ 205.236(a)(2)) below.

" *Organic management* ": In the proposed rule, AMS defined organic management as, "Management of a production or handling operation in compliance with all applicable production and handling provisions under this part." AMS is revising the proposed definition of "organic management" in this final rule to simplify the wording and improve readability. The change is not intended to alter the meaning of the term. The final rule defines organic management more simply as, "Management of a production or handling operation in compliance with all applicable provisions under this part." This does not broaden, nor does it intend to broaden the rule, as the only applicable provisions are the production and handling provisions.

" *Third-year transitional crop* ": AMS received a comment that AMS's proposed definition for "third-year transitional crop" referred only to prohibited materials as the determining factor for evaluating whether crops produced on the land could be considered transitional. The commenter noted "there is more to land transition than not applying prohibited materials."

AMS agrees that organic land management includes a range of practices and requirements, only one of which is the absence of prohibited materials. AMS has revised the definition to clarify that third-year transitional crops are crops and forage harvested from land that is in its third year of organic management and thus is eligible for organic certification in one year or less.

" *Transitional crop* ": AMS received comments that the definition of "transitional crop" was unnecessary, as neither the current regulations nor the proposed rule refer to "transitional crop" and this term would not be needed to enforce the regulations. The commenter argued that land is transitioning for three years and that it could be considered "transitional" at any time during the three-year period, including the time during the first year of transition.

AMS agrees that a definition for "transitional crop" is unnecessary, and we have removed the definition from the final rule. The term is not used in the regulations outside of the term "third-year transitional crop," and that term is separately defined in the final rule. Furthermore, AMS does not establish requirements for certification of transitional crops and does not intend to do so through this rulemaking.

" *Transitioned animal* ": AMS received a comment on the definition of a transitioned animal. This comment recommended removing the language "sold, labeled, or represented as organic slaughter stock or for the purpose of organic fiber" from the definition of a transitioned animal and incorporating it into § 205.236(a)(2)(vii).

AMS revised this definition to remove language that transitioned animals cannot be sold, labeled, or represented as organic slaughter stock or for the purpose of organic fiber. AMS is removing this language, which was a requirement within the definition. The final rule clearly states transitioned animals must not be used for organic livestock products other than organic milk and milk products (§ 205.236(a)(2)(vii)). Additionally, AMS added language to the definition to reiterate that transitioned animals are animals that have not been under continuous organic management from the last third of gestation, and we revised the spelling of "borne" to "born".

II. DEFINITIONS—CHANGES REQUESTED BUT NOT MADE

" *Transitioned animal* ": A commenter was opposed to AMS's inclusion of "offspring" in this definition. It argued that the OFPA provision that allows transitioning animals to be fed third-year transitional crops "applies to the animals of the farm that are being transitioned. It does not apply to offspring born to the transitioning animals." AMS disagrees that OFPA limits use of third-year transitional crops to any specific class, or age, of livestock during the transition.

AMS also received comments requesting we include fiber-bearing animals in the definition of a transitioned animal to allow nonorganic fiber animals to transition to

organic. AMS has not adopted this suggestion, as OFPA does not include an allowance for fiber animals to transition. For a discussion of this topic, please see the section below titled "J. Other Amendments Considered."

" *Person* " and " *Producer* ": AMS did not propose to change the definition of "person" or "producer" in the proposed rule, but these two terms are defined in the current regulations at § 205.2, and AMS received comments about how those definitions could affect the implementation of our rule. Comments primarily expressed concern that a producer could continuously transition by repeatedly creating new or separate legal entities or that eligibility requirements would be difficult to verify. Another comment stated that an operation may have numerous individuals conducting business on the premises, and the proposed rule language does not explicitly define which of these individuals should be considered the producer for purposes of the one-time transition allowance.

AMS has not revised the definitions for either term, as the final rule does not rely on these terms to establish who may transition animals. For a discussion of changes made by AMS to address comments about who is eligible to transition, see the discussion below on Dairy Transition.

B. Dairy Transition (§ 205.236(a)(2))

This section of the final rule specifies who is eligible to transition nonorganic animals to organic production and the requirements and conditions of the transition period. The section also prohibits organic livestock operations from sourcing transitioned animals, except in specific and limited cases where the Administrator may grant a variance. Table 1 outlines the restrictions by dairy animal type. Start Printed Page 19748

Expand Table

Last third organic animals	Transitioned animals
May move between organic operations	May not move between organic operations, except in case of Administrator-approved variance at 205.236(d).
May be eligible for organic slaughter (if also not treated with synthetic parasiticides that appear on the National List)	Not eligible for organic slaughter.

Table 1—Restrictions for Transitioned and Last Third Organic Dairy Animals

Below we describe the final rule, including the variance request procedures and criteria, and respond to comments received on the proposed rule.

I. DAIRY TRANSITION—COMMENTS AND REVISIONS

SECTION 205.236(A)(2)—

AMS made two important revisions to this section in response to comments. First, AMS revised the regulated entity from "producer" to "operation," to be consistent with the current regulations. **Second, AMS prohibited certified organic operations from sourcing transitioned animals from other organic operations**. These two changes work in tandem to result in a rule that meets AMS policy goals, best responds to public comment, and can be clearly implemented and enforced by certifying agents and AMS. Based on public comments, AMS is confident that the policy choices in this rule align with practices that many certifiers and most organic operations already follow, and align with public comments on the rule.

The revisions and final requirements are discussed in more detail below.

Operation as regulated entity (§ 205.236(a)(2)): AMS received many comments on the appropriate regulated entity (*e.g.,* producer, operation, owner, etc.) that should be eligible for the one-time transition. In 2021, AMS specifically requested comments on this topic. Comments were received from producers, certifying agents, consumers/citizens, producer groups, consumer groups, trade associations, handlers, and a foreign government.

The regulated entity establishes who is eligible to transition dairy animals to organic production. The USDA organic regulations consider the certified operation to be the regulatory unit. In the proposed rule, however, AMS selected "producer" as the regulatory unit. Few commenters supported that option. Most comments recommended changing the regulatory unit to "operation" or a variation such as "certified operation" or "dairy operation."

Others recommended AMS prohibit "persons responsibly connected" to a transitioned dairy from ever transitioning animals in the future. The term "responsibly connected" is currently defined in the regulations (§ 205.2) 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." A subset of the comments that recommended the aforementioned prohibition on "persons responsibly connected" also recommended revising the definition of that term to include persons with at least a 20 percent ownership share in the operation, rather than 10 percent. Finally, several commenters wanted a less stringent regulatory unit to allow organic operations to continually transition dairy animals, as needed, into organic production.

AMS revised the language for this final rule in response to comments and to clarify the existing USDA organic regulations. The final rule specifies that an *operation* (rather than a *producer* in the proposed rule) has one opportunity to transition animals. This definition of "operation" best captures the more expansive understanding of an "entire, distinct herd" in the current regulations, under which dairy operations have been allowed to use the transition exception only once (*i.e.,* when they initially converted their farm's entire nonorganic "herd" to organic production). AMS adopted "operation" as the regulated unit for the following additional reasons:

1. As noted, the term "operation" is consistent with how the organic regulations are currently administered by AMS and certifying agents. For example, certifying agents issue adverse actions (notices of noncompliance, etc.) to certified operations. The term "operation" aligns with the term used in NOSB's most recent 2006 recommendation and it reflects common usage by industry.

2. Comments received indicate that the term "producer" can be interpreted in different ways. For example, the definition of "producer" in § 205.2 includes the word "person." Commenters took this to mean different things, with some understanding it to mean an individual human (*i.e.,* a natural person) while others understood it to mean a "person" as separately defined at § 205.2. The definition of "person" at § 205.2 is not limited to individuals and includes various types of business entities. AMS determined that different interpretations of the term "producer" would lead to differences in how certifying agents enforce the requirements, and this would be an unacceptable outcome of the rulemaking.

3. Certifying agents argued that it would be simpler to verify an operation's eligibility (as opposed to a producer's eligibility) to transition animals. Certifying agents are responsible for verifying eligibility during the application process. AMS has revised the

regulated entity to ensure the certification process remains straightforward and that the requirements are enforceable.

4. Many comments noted that regulating "producers," as proposed, could restrict people associated with a dairy from starting their own dairies. This could include business partners, managers, and family members. AMS determined that "operation" as the regulated entity most simply allows people who might be associated with a certified dairy to go out and start their own organic dairy operation by allowing them to transition nonorganic animals to organic production.

5. AMS recognizes there are multiple scenarios where producers that previously operated an organic dairy may wish to start a new dairy operation. For example, dairies may go out of business or be sold entirely, and the same people may later wish to start new operations. The final rule permits only operations that are both (1) not certified for livestock production and (2) have never transitioned animals to use the one-time exception for transitioning animals.

6. AMS did not select a stricter regulatory unit, such as "persons responsibly connected," that is stricter than an organic dairy that has transitioned, for several reasons. AMS was concerned the requirement could not be easily verified by certifying agents and/or that it could create delays and/or unnecessary obstacles in the certification process. AMS was also concerned that it could prevent people Start Printed Page 19749 from using the exception in cases where it would be reasonable.
Another overarching reason for selecting "operation" as the regulated entity is that this final rule prohibits the movement of transitioned animals between organic operations. This revision supports our intent to prohibit any certified organic operation from continually sourcing transitioned animals. For implementation and oversight purposes, this aligns well with the policy choice to select a simpler regulatory unit ("operation") that aligns with the rest of the USDA organic regulations and the existing framework for certification and oversight. New operations may transition animals into organic management; existing organic operations may not. These revisions are discussed further below.

Prohibition on sourcing transitioned animals (§ 205.236(a)(2)): AMS specifies in this section that organic operations may not source transitioned animals, except in the case of variances granted by the Administrator. Prohibiting the sourcing of transitioned animals is intended to prevent new heifer replacement operations from being repeatedly established to provide an ongoing source of transitioned animals. Otherwise, the movement of transitioned animals could allow operations to use just transitioned dairy animals to bypass the restrictions and purpose of the one-time transition period. This policy choice is consistent with public comments on this rule. The demand induced by allowing certified farms to continually source transitioned animals would produce a corresponding incentive for other businesses to continually open new organic operations to provide transitioned cows into the market. This is not the original intent of our regulations, nor the desired policy outcome. As such, AMS is making the policy choice to achieve the policy goal of having more organic animals under organic management for their full lives.

Without preventing the sourcing of transitioned animals, AMS would expect an influx of transitioned animals, as some organic dairies would pursue the practice of purchasing transitioned animals from newly created heifer replacement operations. Given the policy choice to limit transitions in the market to new operations only, with a limited variance process, AMS believes that limiting the transition between operations to better manage supply and demand dynamics, and removing incentives for continuous transition practices to continue would better support that policy.

AMS received many comments on this topic over the three comment periods, starting in 2015. In 2021, AMS specifically requested comments on whether the final rule should prohibit organic dairy operations from acquiring transitioned animals. AMS received many comments supporting this choice, as well as comments opposing it. Ultimately, AMS agrees with comments that a prohibition on the movement of transitioned animals between organic operations facilitates achieving our regulatory objective to increase the number of livestock that are managed as organic throughout their lives. In the final rule, AMS included this provision in § 205.236(a)(2) and removed the two proposed sections 205.236(viii) and (ix) that would have allowed transitioned animals to move between organic operations. Certified operations may request a variance from the prohibition on

the movement of transitioned animals for specific circumstances, as described in § 205.236(d).

The rule is not intended to restrict entry of legitimate new participants into the organic market, and transitions continue to be allowed for new operations after not less than a 12-month period of organic management. Transitions would also be allowed if a variance is granted (explained further below). These transition allowances reduce the costs of converting to organic production, and will continue to be an important incentive for eligible nonorganic dairy farms to convert to organic. However, once established, the certified organic farm would then need to use organic dairy animals that have been organically managed from the last third of gestation.

Examples of Rule Implementation. Several examples are provided below to clarify the final rule's requirements at § 205.236(a)(2), and to explain how cows may be transferred between operations:

- Organic dairy animals (organically managed from the last third of gestation) may be transferred between new and existing organic operations at any time. A certified dairy operation that cannot raise enough organic animals (organically managed from the last third of gestation) on-farm to maintain its herd may source animals managed organically from the last third of gestation from other organic operations.
- A new farmer or conventional operation may apply for both crops and livestock certification and use the transition allowance to start a dairy. Further, a certified crop operation that has never transitioned animals may add a dairy to its certification and use the transition allowance to start the dairy.
- For example, if a certified dairy farmer wants to pass transitioned animals to a family member, that family member could apply for organic certification as a new certified operation, and bring the transitioned animals into that operation under the one-time transition allowance.
- Another option for facilitating intergenerational transfers of transitioned animals would be for a family member to join an existing certified organic dairy with transitioned animals. The establishment of the regulatory unit as the "operation" allows family members to join in the ownership and operation of an existing organic operation, allowing the receiving generation to receive the cows that were transitioned by the giving generation, because they are part of the operation that transitioned the animals.

• **Two (or more) operations will not generally produce organic milk on the same premises (*i.e.,* use the same land and milking parlor). More than one operation owned by the same person(s) and producing milk at the same location (with each transitioning a group of animals) goes against the intent of this final rule**. However, multiple people (like parent/child family members) can be responsible parties for a single operation and new responsible parties to an operation can be added over time.

- Nothing in the rule prevents transitioned animals from being sold to other farms as conventional animals; a transitioned animal started life as a conventional animal and can return to conventional production if an organic farm with transitioned animals wishes to sell its herd. Organic dairy animals (organically managed from the last third of gestation) may be transferred as organic to other organic farms (new or established). This reflects the difference in economic investment in the transitioned animal compared with the "organic for life" animal.

• The term "**source**" at § 205.236(a)(2) is intended to have a meaning that is broader than "purchase." For example, the term "source" would include acquisition of animals when the transaction does do not include a financial exchange (*e.g.,* transfers).

• Additionally, an organic livestock operation could not source transitioned animals under a scheme where transitioned animals are milked but not owned by that organic operation, as a means of continually bringing transitioned animals into milk production. For example, Operation A could not source transitioned animals from Operation B, Operation C, Operation D (etc.), even if Operation A does not own the transitioned animals Start Printed Page 19750 from Operation B, Operation C, (etc.). Certifying agents must review an applicant's organic system plan (and annually thereafter) to ensure that no operation, once certified, sources transitioned animals.

• A heifer-raising operation, like a dairy, may not continually transition nonorganic animals. Once an eligible (*e.g.,* nonorganic) heifer-raising operation transitions animals under the one-time exception, it may source only organic animals (organically managed from the last third of gestation). Heifer-raising operations may not provide transitioned animals to an already certified organic operation that has completed its one-time transition.

ADMINISTRATOR VARIANCES FOR MOVEMENT OF TRANSITIONED ANIMALS (§ 205.236(D))

In the final rule, AMS is providing for a variance request process that is specific to the prohibition on the movement of transitioned animals. In the proposed rule, AMS asked whether any exceptions or variances should be granted. Many comments noted existing

sections of the organic regulations that already provide for temporary variances in the case of extreme weather events or disease, for example (§§ 205.290 and 205.672).

However, a few commenters noted some movement of transitioned animals between farms would be appropriate and could happen without undermining the intent of the rule to limit operations from continually transitioning animals. These comments either noted that a transitioned animal producing organic milk on one farm should be allowed to produce on any organic farm, or noted that there were "common sense" situations where movement of transitioned animals would not run counter to the intent of the rule.

One comment noted that prohibiting sale of transitioned animals could hurt family farmers, and as noted above, another argued that while there should be strict requirements on herd conversions, there should also be flexibility for "reasonable" or "common sense" movement of transitioned animals to allow an operation to capture the value of the animal and/or to allow an organic (transitioned) animal to continue to produce organic milk on a different organic farm.

AMS believes that a prohibition on the movement of transitioned animals is necessary to prevent ongoing creation of organic operations (*e.g.,* heifer replacement operations) that would supply organic dairies with transitioned animals in an ongoing manner. AMS has discussed the reasons for this prohibition throughout this final rule. However, AMS also recognizes that there are certain limited, legitimate, and reasonable situations where movement of transitioned animals between operations is warranted. Sections 205.290 and 205.672 of the existing regulations allow all operations to use variances in extreme or unexpected conditions. Section 205.272 allows for the re-transitioning of dairy animals (over 12 months) in cases of Federal or State emergency disease treatments. Section 205.290 allows variances from portions of the regulations (but would not permit the use of prohibited substances or nonorganic feed) in the case of natural disasters, damage from weather, fires, or other business interruptions.
However, these sections do not sufficiently meet the needs of the situations pointed out in public comments, like bankruptcy, insolvency, and intergenerational transfer. Small dairy farmers who are more vulnerable to financial stress may need relief in these situations.[18] The Organic Integrity Database listings that include data at the dairy animal level indicate that, since 2016, operations that have surrendered their organic dairy

certification have been small organic dairies as defined by the Small Business Administration (SBA) in 13 CFR part 121.[19] AMS seeks to ensure operations are not unduly impacted by the prohibition on the movement of transitioned animals, especially in times of financial hardship or intergenerational transfer.

In the final rule, AMS has included provisions that allow the Administrator [20] to issue a variance and allow the movement of transitioned animals between operations. This variance request process is specific to the Origin of Livestock provisions, but mirrors the existing temporary variance provisions in the regulations at § 205.290. Under the process described in the NOP Program Handbook,[21] the operation must submit their request for a temporary variance in writing to their certifying agent and include supporting documentation justifying the need for the temporary variance. The certifying agent reviews the request to determine whether the request comports with the reasons listed at § 205.290(a), and whether the documentation provided by the operation justifies the need for the temporary variance. The certifying agent submits the request to AMS, including the original request and supporting documentation, and recommends either granting or denying the temporary variance along with the reasons for their recommendation, and includes any additional documentation that supports their recommendation. A list of temporary variances that are in effect and that were denied are available to the public at *https://www.ams.usda.gov/rules-regulations/organic*. Temporary variance denial decisions are not appealable; however, an operation can appeal a proposed adverse action if they are not able to meet the regulatory requirements because a temporary variance has been denied.

AMS considered allowing certifying agents to decide variance requests but decided to retain those decisions at the Administrator level similar to the existing temporary variance process at § 205.290. By requiring operations to seek approval from the Administrator rather than individual certifying agents, AMS believes that the process will result in more consistent decision-making. AMS is best positioned to make these decisions (vs. certifiers) because it can most easily request information from any accredited certifier. AMS anticipates that it may need to obtain or verify information from more than one certifier to assess the variance request. AMS is also best positioned to track whether any one operation is making multiple variance requests as a means to continually source transitioned animals.

The new Origin of Livestock paragraph describing this type of variance identifies the scenarios for which a variance could be granted and describes the process for requesting a variance. The limited circumstances in which a variance may be granted will prevent this process from being used as a mechanism for an operation to continually source transitioned animals. The variance must be submitted to NOP through a certifier and will be considered by the Administrator against the limited circumstances listed in the regulation in § 205.236(d)(1).

Variances will be made only for businesses that are "small," as determined by the Small Business Administration (SBA) in the small business size regulations (13 CFR part 121). Those regulations currently establish that a dairy cattle operation is Start Printed Page 19751 a small business if it takes in less than one million dollars in annual receipts. AMS is limiting variances to small businesses only to minimize adverse economic impact on small entities, as directed by the Regulatory Flexibility Act.
The variance requestor must provide documentation to support the request (*e.g.,* contracts, evidence of forced/sale closure, family records, wills or trusts, bankruptcy filings, tax documentation, records to support size standard). This variance is specifically crafted to address concerns about intergenerational transfers, forced sale or bankruptcy proceedings, and liquidity needs of dairy operations ceasing operations that may be hampered by the restriction on the sourcing of transitioned animals. AMS does not intend for these variances to become an avenue for operations to use out of convenience or to create a market for transitioned animals.

SECTION 205.236(A)(2)(I)—

In the final rule, this paragraph specifies that the transition period must be continuous and must last at least 12 months. AMS moved a portion of the language included at § 205.236(a)(2) and combined it with similar text in § 205.236(a)(2)(i) to reduce regulatory language and increase clarity. AMS also added language to clarify that an operation using the one-time transition must be certified before it may represent or sell products as organic.

SECTION 205.236(A)(2)(II)—

In this section of the final rule, AMS added requirements for an operation to describe its transition plan in its organic system plan, including the actual or anticipated start date of

the 12-month transition period and the identity (*e.g.,* ear tag numbers) of animals to transition. The means of identifying animals may vary by operation but must be reviewed and approved by the certifying agent. AMS believes this information is necessary for certifying agents to determine compliance and to provide for traceability of transitioned animals. Certifying agents may also require any additional information about the transition that they deem necessary to determine compliance.

AMS also revised this paragraph to reflect the timing for when an operation must apply for certification. An operation must submit an application to begin the certification process, and an operation must be certified before it can legally sell, label, or represent product as organic. This means that the transition period may exceed 12 months if the operation has applied for certification but is not yet certified after 12 months has passed. In this case, the animals would continue to be transitioning under continuous organic management until certification is complete. See below for further discussion of changes requested but not made by AMS ("Applying for Certification—Timeline").

SECTION 205.236(A)(2)(III)—

Some commenters requested that AMS clarify that third-year transitional crops may be consumed by dairy animals during their transition only if those third-year transitional crops are produced by the operation transitioning to organic.

AMS agrees that the OFPA transition requirements (7 U.S.C. 6509(e)(2)(B)) limit transitioning operations' use of third-year transitional crops to their own operation. AMS has revised the final rule, § 205.236(a)(2)(iii), to more clearly align with OFPA by clarifying transitioning dairy animals may consume third-year transitional crops grown by the operation only. Allowed third-year transitional crops include those grown by the operation on land that is leased or rented and included in the organic system plan of the transitioning operation. AMS has also clarified that certified organic feed is to be fed during the 12-month transition, in addition to third-year transitional crops.

SECTION 205.236(A)(2)(IV)

AMS made a minor change to this section between the proposed regulations and the final rule to clarify our meaning. See discussion below of Dairy Transition—Changes Requested but Not Made.

SECTION 205.236(A)(2)(V)—

In the final rule, AMS made minor revisions to this paragraph in response to a comment that transitioned animals are a class of "organic" animal. In the proposed rule, AMS had used the term "organic" to mean animals that are under organic management from the last third of gestation. The final rule revises the language to clarify that these animals are the same as any animal managed organically from the last third of gestation.

SECTION 205.236(A)(2)(VI)—

This paragraph sets the requirement that all dairy animals must end the transition at the same time. This reiterates that the transition exception is a distinct opportunity with a definitive end. Once the transition is complete, an operation may not add additional transitioned animals to its operation. The requirement that all animals end the transition at the same time prevents operations from sourcing additional nonorganic animals after they have begun their one-time 12-month transition period (unless they wish to restart the 12-month transition period for the entire group).

This requirement is not intended to limit animals born during the transition period to transitioning animals (dams) from joining the organic herd. In some scenarios (*e.g.,* operations that transition animals using third-year transitional feeds), animals born during the 12-month transition period may not complete 12 months of organic management by the end of the transition period. For example, transitioning animals bred after the start of the transition may birth animals toward the end of the 12-month transition period. These animals still may be added to the operation's herd. Animals born during the transition must be under continuous organic management from birth and for no less than 12 months immediately prior to the production of organic milk to qualify for organic certification.

Certifying agents will need to ensure that operations correctly classify animals as transitioned animals (as opposed to organically managed from the last third of gestation), as these animals do not meet the requirements for organic slaughter stock and may not be sourced by organic dairies (§ 205.236(a)(2)). An example is provided below to clarify how to classify animals born to transitioning animals during the transition period.

For example (this example assumes the operation does *not* feed third-year transitional crops during transition but, rather, feeds certified organic feed and pasture): The

offspring of a pregnant cow that calves within the first three months of the transition cannot be considered organic from the last third of gestation (assume a gestation time of 9 months for this discussion). In this case, the heifer calf is considered a transitioned animal. Its transition will be completed after 12-months, at the same time its mother completes transition (*i.e.,* the organic management of the pregnant mother during the last third of gestation also counts toward the 12-month transition of the offspring). In contrast, offspring born after the first three months of the transition period will be considered organically managed from the last third of gestation (*i.e.,* the mother is under organic management during the entire last third of gestation). This aligns with the requirement for nonorganic breeder stock (*i.e.,* the requirements are no stricter). Start Printed Page 19752

SECTION 205.236(A)(VII)—

One commenter suggested that AMS include "milk products" in addition to "milk" in § 205.236(a)(2)(vii) to clarify that products other than milk can be produced by transitioned animals. AMS agrees and we have revised this section in the final rule to refer to both milk and milk products and to clarify our meaning.

SECTIONS 205.236(A)(2)(VIII) AND (IX)—

The final rule prohibits certified operations from sourcing transitioned animals after completing the one-time transition (§ 205.236(a)(2)), except in the case of variances granted by the Administrator (§ 205.236(d)).

The proposed rule would have allowed transitioned animals to produce organic milk on any organic farm. In effect, this would have allowed certified operations to purchase transitioned animals for organic milk production. In 2015, AMS received 989 comments in support of changing the final rule to ban the sale of transitioned animals between organic operations. Commenters included consumers, producers, certifying agents, producer groups, consumer groups, and trade associations. In 2019, AMS received additional comments that transitioned animals should not be sold to organic operations for organic milk production. AMS specifically sought comments on this topic in 2021, with most commenters in support of transitioned animals losing organic status if sold, transferred, given, or otherwise moved to another operation, or if included as part of a merger of organic operations in which ownership remains with the original certified

operation but there is common management. A few commenters were opposed to limiting the movement or sale of transitioned animals under the one-time allowance, citing a potential burden on family farms, a lack of rationale for the prohibition, and a lack of oversight necessary to enforce this prohibition.

Other commenters were concerned that by allowing sales of transitioned animals between operations, AMS's rule would not effectively stop operations from continually acquiring transitioned animals. If organic operations could find loopholes to continue to produce transitioned animals, there would be a market for those transitioned animals. To prevent this activity, many commenters suggested that AMS prohibit the sale of transitioned animals between operations altogether.

AMS considered different options to ensure the final rule is clear and enforceable. AMS determined that prohibiting certified operations from sourcing transitioned animals (with limited exceptions at § 205.236(d)) best supports the policy goal. This policy choice is consistent with public comments advocating for this rule.

For example, based on public comments, academic literature, and the existing regulations, AMS believes that consumers expect that organic animals have not been treated with antibiotics; however, a transitioned cow producing organic milk may have been treated with antibiotics early in life, before the transition began.[22 23] Beef labeled as organic must have been produced from an animal that had been organic for its whole life. It is reasonable to conclude that a consumer would prefer milk from cows (or goats, etc.) that had never been treated with antibiotics given that prohibition with other forms of livestock; while still allowing for the one-time transition allowed under OFPA. Another example is outdoor access; AMS believes that consumers generally prefer that organic animals have access to outdoors throughout their lives, as per the existing regulations; however, transitioned animals do not manifest a full life of these benefits.[24] Constraining the movement of transitioned cows between operations is expected to decrease the overall number of transitioned animals industry-wide over time
AMS removed § 205.236(a)(2)(viii) and (ix) and included the revised requirement at § 205.236(a)(2). Section 205.236(a)(2) of this final rule specifies that once an eligible, newly-certified organic livestock operation completes the one-time minimum 12-month transition to organic, it may not source any transitioned animals. For additional

discussion about sourcing animals, see OPERATION AS REGULATED ENTITY (§ 205.236(a)(2)).

Certified organic dairy operations that purchase animals, individually or as an entire herd, may not purchase any transitioned animals for organic milk production beginning on the compliance date. Livestock must be under continuous organic management from the last third of gestation (§§ 205.236(a) and 205.236(a)(2)). The final rule does not limit certified organic dairy operations from purchasing animals that have been organically managed from the last third of gestation. Nor does the final rule prohibit operations from raising and selling organic replacement animals to certified dairy operations. Such animals must be organically managed from the last third of gestation to be sourced by organic operations (§§ 205.236(a) and 205.236(a)(2)).

AMS received a comment that some nonorganic dairies convert to organic production by purchasing certified organic dairy cows while transitioning nonorganic animals. A dairy may wish to do this to keep some of its own nonorganic animals (to transition) while generating income from the organic cows. The final rule requires that all transitioning animals complete the transition at the same time (*i.e.,* at the end of a single 12-month period) at § 205.236(a)(2)(vi). It also prohibits the sourcing of transitioned animals after the one-time transition is complete (§ 205.236(a)(2)), but it does not explicitly discuss sourcing of organic animals during the transition. AMS will allow certifiers to determine if a transitioning operation may source organic animals during the transition, as site-specific and other conditions will need to be evaluated to determine if an operation could comply with all requirements. For example, if an operation purchases lactating organic dairy animals during the transition period but also manages lactating transitioning animals, very specific practices would be required to keep nonorganic milk (from transitioning animals) segregated from organic milk until the transition period is complete.

II. DAIRY TRANSITION—CHANGES REQUESTED BUT NOT MADE

(1) PROHIBIT TRANSITION ENTIRELY (§ 205.236)

AMS received many comments opposed to allowing any transition of nonorganic animals to organic production. Generally, the commenters thought any products labeled as

organic should be organically managed from birth or from the last third of gestation and that any allowance for transitioning nonorganic animals is unwarranted.

AMS has not prohibited transition altogether in the final rule. AMS believes that the one-time transition allowance provides an important and reasonable incentive for new dairies and existing nonorganic dairies to seek organic certification. Many currently Start Printed Page 19753 certified organic dairy operations transitioned their operations to enter the organic market, and this final rule preserves the same opportunity for new and nonorganic operations pursuing organic certification. For additional analysis of alternatives, see the Regulatory Impact Analysis (RIA) below.

(2) ALLOW CONTINUOUS TRANSITION—DO NOT RESTRICT TO ONE-TIME EVENT (§ 205.236)

For additional discussion of this alternative regulatory approach, see the ALTERNATIVES CONSIDERED section of the Regulatory Impact Analysis (RIA) below.

Several commenters felt that limiting producers to one transition was unnecessarily restrictive and would create undue hardship for organic dairy farmers. The commenters preferred that operations be allowed to transition animals into organic production without limit and thought 12 months of organic management was sufficient for sale of milk as "organic" under OFPA. They argued that allowing producers to transition animals without limit allows producers to respond quickly to consumer demand and to rebuild herds in the case of disease or illness. They also argued that the current demand for organic milk was evidence that consumers are satisfied by the current requirements.

AMS is not allowing organic operations to continually transition nonorganic animals into organic production in the final rule. While an allowance to continually transition nonorganic animals would allow producers to adjust their herd size quickly by permitting the purchase of nonorganic animals to transition, such an allowance would also be likely to decrease the organic management of calves. This is because during the period of nonorganic management, producers would not be required to adhere to the feed, healthcare, or living condition requirements stipulated by the USDA organic regulations. Even if AMS were not to limit transition to a one-time event, as suggested by some comments, AMS would not expect all organic dairies to stop managing calves and young dairy stock organically. Some producers would likely continue to use the organic

milk produced by their animals as feed for their offspring, while others might source nonorganic milk to reduce feed costs. AMS does not believe that all producers would adopt a consistent practice in response to the policy, and AMS could not assure consumers that organic dairy products are using common production standards which are consistent a key purpose of OFPA (7 U.S.C. 6501(2)).

Furthermore, many organic stakeholders commented that the practice of taking animals out of organic production upon birth and restarting organic management one year prior to milk production (which is currently allowed by some certifying agents) is inconsistent with consumer expectations, and has led to inconsistencies in the implementation and oversight of the organic livestock rules. As discussed above, AMS explicitly made the policy choice to implement provisions that increase the number of animals managed as organic from the last third of gestation. Establishing national standards to govern the marketing of organically produced products is a key purpose of OFPA (7 U.S.C. 6501(1)). Further, based on public comments, AMS believes the policy choices in this rule align with practices that many certifiers and most organic operations already follow.[25 26]

(3) PROHIBIT THIRD-YEAR TRANSITIONAL FEED DURING TRANSITION (§ 205.236(A)(2)(VII))

Another comment received by AMS requested that third-year transitional crops not be allowed as feed during the transition period. The commenter pointed out that these crops cannot be fed to organic slaughter stock or fiber-bearing animals and argued that the allowance for transitioning dairy stock to consume these feeds does not advance a consistent organic standard, as intended by OFPA.

AMS recognizes that there are differences between the requirements for transitioning dairy animals and livestock used to produce organic meat and fiber products. AMS has not prohibited third-year transitional crops as feed during transition in the final rule, as the allowance to use third-year transitional crops eases the burden of transitioning for new dairy operations and is permitted by OFPA.

(4) PROHIBIT THIRD-YEAR TRANSITIONAL FEED FOR OFFSPRING (§ 205.236(A)(2)(III) AND (IV) AND (V) AND (VI))

A commenter argued that AMS was expanding the allowance for third-year transitional crops by allowing offspring to consume this type of feed during the transition. They

commented that OFPA does not allow offspring born to transitioning animals to be fed crops and forage in the third year of organic management.

AMS disagrees that OFPA limits use of third-year transitional crops to any specific class or age of livestock during the transition. OFPA allows third-year transitional crops to be fed to dairy animals up to the end of the 12-month transition period. Dairy animals, regardless of the stage of production, are equally subject to these requirements. Restricting the use of third-year transitional crops for offspring would impose stricter requirements for offspring born during transition, even though these animals are managed organically for a longer period of time prior to production of organic milk.

The final rule allows any transitioning animal to consume third-year transitional crops during the 12-month transition, including offspring born during the transition and young stock. Animals that consume third-year transitional crops during the transition period are transitioned animals, and animals born to transitioned animals that consumed third-year transitional crops during the last third of gestation are transitioned animals. Transitioned animals are not eligible to produce organic meat or fiber. In addition, transitioned dairy animals may not be sourced by certified organic dairies.

(5) REQUIRE MILK FOR OFFSPRING THAT IS ELIGIBLE FOR SALE AS ORGANIC (§ 205.236(A))

Some commenters pointed out that both the current organic regulations and the proposed rule allow milk to be fed to offspring in certain circumstances when the milk would not meet the requirements for sale as organic. They referred to § 205.237, which requires organically produced agricultural products in livestock feed rations and questioned how milk that does not qualify for sale as organic can be provided to offspring. For example, the organic regulations only require that breeder stock be managed organically starting no later than the last third of gestation. If nonorganic breeder stock are managed as organic only during the last third of gestation, the milk suckled by offspring at the time of birth would not qualify for sale as organic. Additionally, commenters also requested that AMS clarify if milk from nonorganic animals that has been managed organically during the last third of gestation can be provided to animals other than their own offspring.

In the final rule, offspring born to animals that have been managed organically starting no later than the last third of gestation can be considered organic animals instead of transitioned animals. AMS has not imposed stricter requirements for dairy animals than Start Printed Page 19754 those that currently exist for slaughter stock or changed the requirements for slaughter stock, and organic slaughter stock may receive milk that could not itself be sold as organic. AMS recognizes that the allowance for feeding offspring milk that cannot itself be certified and sold as organic (for human consumption) may appear inconsistent. However, current organic regulations clearly allow animals to be certified organic if managed organically managed starting no later than the last third of gestation, without any prohibition on milk nursed from the nonorganic mothers by the offspring. The final rule does not change these requirements. In response to comments about whether milk from nonorganic breeder stock or transitioning animals may be provided to animals that are not an animal's own offspring, if offspring are separated from their mothers after birth, as is common practice on dairy farms, milk that is pooled from a group of animals but is not comprised entirely of organic milk may not be provided to offspring. Milk from transitioning animals that is collected by the dairy farm and not consumed directly by the offspring may not be sold as organic.

The final rule establishes limitations on offspring that have consumed milk from a transitioning mother that consume(d) third-year transitional crops during or after the last third of gestation. Calves are considered transitioned themselves when they or their mothers consume(d) third-year transitional crops during or after the last third of gestation. As transitioned animals, these offspring are not eligible for sale as organic slaughter stock and may not be sourced by organic dairies per § 205.236(a)(2).

Conversely, mothers that have been organically managed starting no later than the last third of gestation and which are fed only organic feed during the last third of gestation (no third-year transitional crops) give birth to organic offspring (organically managed from the last third of gestation) with a status similar to that of organic slaughter stock born to nonorganic breeder stock. Organic animals organically managed from the last third of gestation may be sold between organic dairy farms and produce organic milk on any organic dairy farm.

(6) APPLYING FOR CERTIFICATION—TIMELINE (§ 205.236(A)(2)(II))

AMS received comments about the proposed requirement for producers to submit an application for certification during the 12-month transition period, including a description of the transition. Several commenters requested that AMS revise the requirement so producers would be required to submit their application and describe the transition prior to starting the 12-month transition rather than during the 12-month transition. These commenters thought this would allow a certifying agent to oversee the entire transition, prevent potential infractions, and help ensure adequate recordkeeping and tracking of transitioning animals.

Another commenter suggested that AMS require producers to apply for certification within 90 days before or after feeding dairy animals third-year transitional crops. Another commenter stated it was unclear if the proposed rule changed the existing rule in regard to the obligations and responsibilities of transitioning operations and certifying agents. Yet another commenter pointed out that the language in the proposed rule made it unclear if a producer could submit an application before the transition started.

In the final rule, AMS has not required that producers submit an application prior to starting the 12-month transition. Operations that sell livestock or livestock products as organic, including milk, must be certified, with the exception of those operations described in § 205.101. While there are likely benefits to both producers and certifying agents when an application is submitted early in the transition to organic, the timing of the submission of an application does not dictate whether an operation meets the requirements for certification. Certifying agents are required to verify that producers comply with all provisions of the USDA organic regulations. Producers who choose to submit an application late in their transition may experience delays in obtaining certification until the certifying agent verifies that all provisions are compliant. The transitioning animals will continue to transition through this pre-certification period; product may not be sold or represented as organic without certification.

Applications submitted prior to, or at any time during, the 12-month period are all subject to the same review criteria described in §§ 205.400-205.406 of the current regulations. Certifying agents who are unable to verify an applicant is in compliance with the requirements must not grant certification.

(7) PROVIDE 18 MONTHS FOR TRANSITION (§ 205.236(A)(2)(VI))

Several commenters requested that producers be given more than a 12-month period to transition to organic. Extending the period of time from 12 months to 18 months would allow a producer to add additional nonorganic animals to its operation for six months after the beginning of its transition, while still requiring each animal to be managed organically for no less than 12 months immediately prior to production of milk to be sold, labeled, or represented as organic. Commenters stated that a longer period would help reduce the stress associated with starting a new dairy by allowing flexibility. Commenters stated that by allowing additional time, new producers would be able to use the additional time to source animals and stagger when animals start to transition to reduce the financial burden of transition.

AMS understands that transitioning a dairy to organic can be financially and logistically challenging. However, AMS is maintaining, as proposed, the 12-month transition requirement. While AMS recognizes that a longer period for the transition would likely ease some of the challenges of transition, AMS finds a 12-month total allowance is still appropriate. AMS did not find broad support for this option in comments, and verification of compliance is simpler when animals are transitioned as one group. Under the final rule, producers are not prevented from sourcing animals for the transition over a period of time, but the group must transition together. For example, a farm could gradually acquire nonorganic animals for six months prior to starting the 12-month transition, begin the transition once all animals arrive on the farm, and then end the transition for all animals at the same time. Additionally, the regulations allow new operations and certified operations to purchase dairy animals at any time, provided they have been managed organically from the last third of gestation.

(8) DO NOT LIMIT TRANSITION FOR GOAT OPERATIONS (§ 205.236(A)(2))

AMS received a few comments regarding non-bovine animals (*e.g.,* sheep or goats). Several commenters stated that the proposed rule would have a greater impact on goat operations than cattle operations, as there are fewer non-bovine dairy operations and sourcing organic replacements may be difficult. One commenter requested that AMS allow goat operations to continuously transition animals on existing operations. The commenter stated that goat producers are continually striving to improve their genetics and that, if limited to purchasing organic goats, the producers could not efficiently

improve the genetics of the herd. The commenter Start Printed Page 19755 stated that under the rule, new genetics would need to be introduced by obtaining nonorganic bucks alone, rather than nonorganic does and bucks.

AMS recognizes that the availability of organic (last third of gestation) non-bovine animals for sale is limited; however, AMS is not making an exception to the one-time transition for non-bovine operations in the final rule. AMS does not believe there is a difference in consumer expectations for these milks compared to organic cow milk. Given the policy choice, based an agency analysis and public comments, to increase the number of animals managed as organic from the last third of gestation, it is appropriate to require goats to meet the same requirements as cows. Additionally, as described below, producers may purchase nonorganic male breeder stock and nonorganic female breeder stock, at any time, for the production of organic offspring. Breeder stock that are not transitioned as part of the initial herd may not produce milk to be sold, labeled, or represented as organic.

C. Breeder Stock (§ 205.236(a)(3))

This section of the final rule describes the provisions for bringing on breeder stock from a non-organic operation to an organic operation. The provision stipulates that breeder stock must be brought onto an operation by the last third of gestation and must be organically managed from the last third of gestation through the period in which the breeder stock is nursing its offspring. No changes were made to this section between the proposed regulations and the final rule. Below we describe the final rule and respond to comments received on the proposed rule.

I. BREEDER STOCK—CHANGES REQUESTED BUT NOT MADE

(1) REQUIRE ORGANIC MANAGEMENT OF BREEDER STOCK (§ 205.236(A)(3))

In 2015, AMS received many comments that expressed opposition to allowing breeder stock to rotate in and out of organic management. Commenters generally requested that the final rule require uninterrupted organic management of breeder stock starting from the time they are brought onto an organic operation. Commenters requested that if the organic management of nonorganic breeder stock is interrupted, the breeder stock can no longer produce organic offspring.

In 2019, AMS received additional comments that discussed this issue. As in 2015, comments predominantly supported modifying the current language in the proposed rule to stipulate that breeder stock can be transitioned only once to organic management. These commenters cited organic herd health and consistency with the language in OFPA as their principal factors. One commenter further referenced the OFPA provision related to breeder stock and argued that the proposed rule language allowing breeder stock to be transitioned from nonorganic to organic at any time is inconsistent with the intent of OFPA. One commenter noted that modifying the current language in the proposed rule stipulating breeder stock may be transitioned to organic management only once would be inconsistent with language in OFPA that states "any source." This commenter recommended that these advocates work with Congress rather than the USDA to achieve these changes.

AMS has not revised the requirements for breeder stock in the final rule. OFPA states that breeder stock may be purchased from any source (7 U.S.C. 6509(b)); there is no requirement that the source be certified organic. Further, while the current regulations at § 205.236(b)(1) clarify that organic livestock removed from organic operations lose their organic status, this provision does not extend to nonorganic breeder stock that are themselves not certified organic or eligible for slaughter, sale, or labeling as organic (§ 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 and after the weaning of organic offspring are warranted.

However, AMS is establishing requirements for the management of nonorganic breeder stock during the last third of gestation and while an organic offspring is consuming milk from the nonorganic breeder stock after birth. Additionally, 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)).

(2) CHANGE REGULATORY TEXT FROM "BROUGHT" TO "PURCHASE" (§ 205.236(A)(3))

Several comments requested that AMS change the language at § 205.236(a)(3) to only allow organic operations to "purchase" nonorganic breeder stock rather than allow breeder stock to be "brought" onto organic operations, as currently allowed. Commenters pointed out that OFPA language allows for organic operations to *purchase* nonorganic breeder stock and that this implies the breeder stock are to be

managed organically following purchase. By changing the language to align with OFPA, the commenters argue breeder stock would no longer go in and out of organic management while managed at the operation.

AMS is not convinced that changing the regulations to allow purchase of nonorganic breeder stock at any time would be significantly different than the current regulation. Furthermore, as nonorganic animals, breeder stock are not regulated under USDA organic regulations, except during the last third of gestation when producing organic offspring and/or nursing their organic offspring.

(3) REQUIRE ONE YEAR OF ORGANIC MANAGEMENT PRIOR TO ALLOWING CALVES TO CONSUME MILK (§ 205.236)

See discussion above in Dairy Transition—Changes Requested but Not Made, titled "Require Milk for Offspring that is Eligible for Sale as Organic".

(4) ALLOW MILK SUCKLED BY ANIMALS OTHER THAN OWN CALF (§ 205.236)

See discussion above in Dairy Transition—Changes Requested but Not Made, titled "Require Milk for Offspring that is Eligible for Sale as Organic."

(5) CLARIFY THE STATUS OF MALE ANIMALS FOR BREEDING (§ 205.236(A)(2)(IX))

Some commenters noted that the wording of proposed § 205.236(a)(2)(ix) implies that male animals cannot be brought onto an organic operation for breeding purposes. They proposed including language affirming that male breeder stock may be used at any time and won't be required to be managed organically.

AMS has not made any changes and points out that this section describes requirements for dairy animals used "for organic milk production," which do not include male animals. Breeder stock are defined at § 205.2 as female livestock. The use of nonorganic male animals for breeding purposes is not restricted by this section or by other sections of the organic regulations.

D. Prohibitions (§ 205.236(b))

This section of the final rule stipulates that product from animals from removed from organic management to a nonorganic operation cannot be sold as organic and breeder stock and transitioned animals not under continuous management since the last third of

gestation may not be sold, labeled, or represented as organic slaughter stock. Below we describe the final rule and respond to comments received on the proposed rule. Start Printed Page 19756

I. PROHIBITIONS—COMMENTS AND REVISIONS

Section 205.236(b)(1)—A commenter thought AMS should specify in this section that handling organic livestock products at a nonorganic operation affects the organic status of products, as the term AMS used ("managed") does not apply well to edible and nonedible products. The commenter suggested that "managed" be changed to "managed or handled".

AMS agrees that the term "managed" is better used to describe activities related to livestock production than it is suited to describe activities (*e.g.,* processing) related to livestock products. In the final rule, AMS has removed the reference to livestock products from this section after concluding that it is not necessary to discuss livestock products in this section. Requirements related to the handling, processing, and labeling of organic products are covered at length and in detail under other sections of the USDA organic regulations. Other sections of the regulations also address the types of operations that must be certified organic, and AMS is preparing a separate final rule to clarify requirements for operations that handle organic products and to clarify which operations are exempt from the requirements of certification (see proposed rule at 85 FR 47536).

Section 205.236(b)(2)—AMS revised the proposed term "dairy stock" to "dairy animals" in the final rule to be consistent with language used throughout § 205.236(a).

E. Records (§ 205.236(c))

Section 205.236(c) amends the current regulations to specifically require that an operation's records identify whether dairy animals were transitioned to organic. These records are required for certifiers to verify compliance, as organic operations may not source transitioned animals after their one-time transition is complete (§ 205.236(a)(2)). Additionally, transitioned animals may not be represented as organic slaughter stock. These requirements support the livestock recordkeeping requirements described in OFPA (7 U.S.C. 6509(f)) and the USDA organic regulations at 7 CFR 205.103. No changes were made to this section between the proposed rule and the final rule.

F. Administrator Variances for Movement of Transitioned Animals (§ 205.236(d))

This added section of the final rule includes provisions to allow for movement of transitioned animals in certain situations. See discussion above in "DAIRY TRANSITION (§ 205.236(a)(2))."

G. Livestock Feed (§ 205.237(a))

This section of the final rule includes a revision to the livestock feed requirements. Below we describe the final rule and changes from the proposed rule.

I. LIVESTOCK FEED—REVISIONS

In the final rule, § 205.237(a) was revised to include a reference to § 205.236(a)(3), which allows offspring to consume milk from nonorganic breeder stock. The reference to these requirements is made here to recognize that milk from breeder stock is not necessarily certified organic. Section 205.236(a)(3) requires operations to provide breeder stock with organic feed throughout the last third of gestation and during the lactation period, during which time they may nurse their own offspring. The reference to these requirements in § 205.237(a) is intended to provide a more complete description of the livestock feed requirements. The update to this section does not permit the feeding of milk from breeder stock to organic animals other than the breeder stock's offspring.

H. Other Amendments Considered

I. OTHER AMENDMENTS CONSIDERED—CHANGES REQUESTED BUT NOT MADE

(1) FIBER PRODUCING ANIMALS (§ 205.236(B)(2))

AMS received several comments about the sections of the proposed rule that include information about fiber-producing animals. Some commenters argued that the rule should be revised to allow a one-time transition for fiber-bearing animals. One comment noted that recent changes to organic regulations align dairy and fiber animals in other areas, such as parasiticide use, and so the rule for transitioning of dairy animals should be the same for fiber-bearing animals. They also stated that this revision would be consistent with other organic livestock fiber standards around the world and excluding it would put United States producers at a global economic disadvantage.

AMS did not propose an allowance for transition of fiber animals in the proposed rule, so AMS is not creating an allowance for the transition of fiber animals in the final rule. An allowance to transition fiber animals could require amendment of OFPA, which authorizes a transition for dairy animals only. This means that producers can transition sheep, for example, from nonorganic milk production to organic milk production, but would need to source animals organically managed beginning at the last third of gestation in order to produce organic wool.

V. Related Documents

Documents related to this final rule include the Organic Foods Production Act of 1990, as amended, (7 U.S.C. 6501-6524) and its implementing regulations (7 CFR part 205). 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 13511, 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 (2) 71 FR 32803, June 7, 2006.
The NOSB deliberated and made the recommendations described in this final rule at public meetings announced in the following **Federal Register** notices: 67 FR 19375, May 7, 2002; 67 FR 54784, September 17, 2002; 67 FR 62949, October 19, 2002; and 68 FR 23277, May 13, 2003. AMS also considered NOSB recommendations from June 2, 1994, and March 20, 1998, in the development of this final rule. NOSB meetings are open to the public and allow for public participation. NOSB recommendations are available on the AMS website.

Paperwork Reduction Act

This final rule is clarifying current requirements pertaining to documenting, reporting, and recordkeeping for organic dairies and no additional collection or recordkeeping requirements are being imposed. In addition, AMS is prohibiting the sourcing of transitioned animals in § 205.236(a)(2) that would have allowed transitioned animals to move between organic operations in response to public comment on the proposed rule. However, certified operations may request a temporary variance from the prohibition on the movement of transitioned animals for specific circumstances, now described in § 205.236(d). The paperwork burden in the currently-approved OMB ICR# 0581-0191 [27] includes the time and costs to comply with existing organic system plan requirements and recordkeeping requirements, and more than accounts for any burden

associated with requesting temporary variances even with the expanded criteria at § 205.236(d).

Currently, temporary variances as described at § 205.290 are calculated at 10% or 4,628 of 46,277 total Start Printed Page 19757 operations [28] at one hour for each variance for a total of 4,628 hours annually. Yet, there were only 10 actual temporary variances requested in 2021 [29] although 2 requests covered certified organic ruminant operations in counties impacted by extreme drought that were declared disaster areas.[30] If we calculated 2021 as impacting 25 operations, this would amount to a total of 25 hours of impact. This still leaves a very large annual margin of 4,603 hours under the current information collection for all types of temporary variances. Actual previous 10 years of requests for temporary variances averaged about 2-7 requests per year. If all 3,134 currently certified organic dairy producers request a temporary variance under the expanded criteria described in § 205.236(d), there would still be very large margin of 1,469 burden hours.

AMS recognizes that the burden for temporary variances will need to be restructured. AMS will prepare an information collection package for this additional burden and will ultimately merge impacts from this final rule into OMB ICR# 0581-0191. The process for updating the NOP's overall program ICR will begin in January 2023, and will allow an opportunity to merge the burden from any other final rules with optimal efficiency.

Civil Rights Review

AMS has reviewed this final rule in accordance with the Department Regulation 4300-4, Civil Rights Impact Analysis, to address any major civil rights impacts the final rule might have on minorities, women, and persons with disabilities. AMS has determined that there is evidence of an adverse impact to males, females, Hispanics, Whites, Black/African Americans, Asian Americans, and Native Hawaiians based on an 80 percent analysis for farms reporting 50 percent or more from organic sales; the impact rate for American Indians/Alaskan Native does not meet the condition for adverse impact. There are no data for a baseline comparison for all organic dairy producers.

AMS is not aware of any data indicating organic dairy operations owned by members of protected groups are more likely to continually source transitioned animals. While AMS does not have specific race, ethnicity, or gender data regarding organic livestock producers, the rule would not alter the ability for producers of any race, color, national

origin, gender, religion, age, disability political beliefs, sexual orientation, or marital or family status to participate in the National Organic Program or change their protections from discrimination.

The Agency has concluded that the final rule will impact organic dairy producers by potentially increasing production costs for: (1) Organic livestock and dairies that currently continually transition nonorganic animals for use on their operation or sale; (2) organic dairies that currently source transitioned dairy animals as replacements; and (3) organic dairies that purchase organic replacement animals (as increased demand could increase prices). To mitigate these impacts, AMS is providing organic producers one year from publication of the final rule to complete any ongoing transitions. Additionally, any organic operations selling organic replacement heifers may benefit from higher prices.

Executive Order 13175

This final 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 would not, to our knowledge, have tribal implications that require consultation under E.O. 13175. In a December 2019 AMS Quarterly Tribal Listening Session, AMS provided an overview of this final rule and invited any requests for concerns or consultation. AMS received no questions or comments during the listening session. AMS has also researched its database of certified organic dairies operating under Tribal Government and found no such operations.

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, reducing costs, harmonizing rules, and promoting flexibility. AMS has prepared the RIA with the purpose of accomplishing these objectives.

The Regulatory Flexibility Act (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.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

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 final rule is not intended to have a retroactive effect.

To prevent duplicative regulation, states and local jurisdictions are preempted under 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 OFPA. States are also preempted under sections 6503 and 6507 of 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 OFPA.

Pursuant to section 6507 of 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 Start Printed Page 19758 State under

certain circumstances. Such additional requirements must: (a) Further the purposes of OFPA, (b) not be inconsistent with OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

In addition, pursuant to section 6519(c)(6) of OFPA, this final rule does not supersede or alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), 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 *et seq.*), nor the authority of the Administrator of the EPA under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Regulatory Impact Analysis and Regulatory Flexibility Analysis

AMS is taking this action to set origin of livestock production practice standards for organic dairy animals, reduce variance between the approaches taken by certifying agents, and increase the share of organic dairy animals that are under organic management for their entire lives. AMS updated the analysis from the proposed rule (84 FR 52041) using the most recent information about the dairy market, including the number of certified organic operations and the number of organic dairy animals. Updating information with NASS Organic Survey data from 2019 revises the estimated costs of the final rule to $615,000-$1,845,000. Below public comments on previously published regulatory analyses are also discussed.

Need for the Rule

AMS determined that the USDA organic regulations for sourcing dairy animals and managing breeder stock require additional specificity to ensure organic dairy operations meet a consistent standard. AMS's revisions of the requirements support two purposes of OFPA (7 U.S.C. 6501): To establish a national standard for organically produced products and to assure consumers that organically produced products meet a consistent standard. Interpretations of the "origin of livestock" organic regulations have differed between certifying agents, and the different interpretations have led to divergent practices by organic dairy operations for sourcing replacement dairy animals. These inconsistencies have contributed to confusion among organic dairy producers about

what the regulations require. The inconsistencies have produced an unequal situation in which production costs are influenced by any given certifier's interpretation of the organic livestock regulations. However, a certifier is not likely to publish its interpretation of the existing regulations, and a certifier may not even apply its interpretation consistently among the operations it certifies (some may be allowed to continually transition animals while others are not).

AMS is revising the regulations to ensure the USDA organic regulations are administered and enforced in a clear and uniform manner, and to address inconsistencies determined in the 2013 USDA Office of Inspector General (OIG) Audit.[31] The OIG audit of organic milk operations found that the interpretation and implementation of the origin of livestock requirements differed across producers and certifying agents. As a result, organic milk producers may have faced materially different organic production requirements based on their particular certifier's interpretation of the NOP's origin of livestock requirements. This rulemaking will help ensure that producers face consistent application of the organic standards. Furthermore, AMS expects that increased clarity will help assure consumers that organic dairy products meet a consistent standard, a stated purpose of the Organic Foods Production Act (OFPA) of 1990 (7 U.S.C. 6501).

NOP's experience is that because organic products cannot be readily distinguished from nonorganic products based on sight inspection, buyers rely on process verification methods to ensure that organic claims are true. Within the economics literature, organic food products are “credence goods,” or goods with characteristics that are valuable but are difficult to verify, both before and after purchase.[32 33 34] Foods certified under USDA's NOP, including milk, have a common standard that specifies production practices, such as dairy herd pasture requirements, permitted feeds, and permitted use of antibiotics and hormones, that cannot be independently verified by consumers.

When producing goods with credence characteristics, producers face a moral hazard problem stemming from their incentive to forego taking costly actions or investments associated with the label claim if handlers or consumers have no way of verifying the production process (*i.e.,* asymmetric information). In providing guidance to Federal agencies undertaking rulemaking, OMB Circular A-4 cites asymmetric information as a source of market failure and as a potential justification for regulation. However, the social benefit of addressing an information asymmetry can be no higher than the willingness to pay for the additional information by the party with less information.

Lassoued and Hobbs (2015) further emphasize the role of trust in the institutions and

brands that verify credence good attributes as being essential for developing the consumer confidence that drives brand loyalty.[35]

AMS developed the final rule in the context of maintaining consistency and trust in the USDA organic label as directed by OFPA, as it pertains specifically to organic dairy farms and to organic farms and organic handlers/processors generally. AMS anticipates this final rule will support both producer and consumer confidence in the organic label by reducing major inconsistencies in production practices across organic dairies, and resulting in more organic animals that are managed organically throughout their productive lives.

Baseline

This rule specifies the conditions under which operations can transition non-organic animals to organic for the purpose of milk production. Current dairy production and husbandry practices provide important context for the baseline and cost analysis. For a general description of replacement animal production, see "Overview of Organic Dairy Production" in section II. Background above.

The baseline presented below focuses on production practices of bovine dairy farms maintaining cows and heifers and does not include quantitative estimates for non-bovine dairy farms that maintain sheep and goats. AMS does not expect this rule will have a substantial economic impact on those specific sub-sectors for the following reasons: Goat does and sheep ewes are Start Printed Page 19759 able to produce milk earlier than cows, so the potential cost-savings for non-bovine dairy farms to continually source transitioned animals (vs. animals under organic management from the last third of gestation) is small compared to that for bovine dairy farms. For this reason, the practice of continually adding transitioned animals to organic non-bovine herds is likely less prevalent than with organic bovine herds. While a commenter asked for an exemption for goats during the comment period citing limited availability of organic genetics, there are avenues to bring in additional genetics through breeding stock. These operations also make up a relatively small portion of the organic dairy industry. The Organic Integrity Database [36] of certified organic operations includes approximately 56 dairy goat operations and 2 dairy sheep operations.

AMS used multiple data sources to describe the baseline and build quantitative estimates. The first source is the Agricultural Resource Management Survey (ARMS),

which is maintained by USDA's Economic Research Service (ERS) and includes questions about dairy farm cattle purchases, restocking rates, and organic status.[37] In 2016, ERS conducted a supplemental ARMS that focused on organic dairy operations; this was the most recent such survey. AMS worked with ERS to analyze the ARMS data and develop an estimation of organic dairy production practices and costs for this rule.

Other sources of data are the National Agricultural Statistics Service's (NASS) 2019 Certified Organic Production Survey and 2017 Census of Agriculture,[38] which include State-level data on production, herd sizes, output, and sales for organic and non-organic crops and livestock. Additionally, the Organic Trade Association's (OTA) 2021 Organic Industry Survey is used to summarize market information and trends within the organic industry.[39] Also, AMS requested an organic dairy farm special tabulation from the National Animal Health Monitoring System (NAHMS) Dairy 2014 report collected by USDA's Animal and Plant Health Inspection Service.[40]

A final source of data is the AMS list of all certified operations included in the Organic Integrity Database (OID). The organic regulations require USDA-accredited certifying agents to keep track of the number of operations they certify in OID (7 CFR 205.501(a)(15)(ii)). AMS consolidates this information into a public, searchable online database.[41] AMS used information from this database to cross-check NASS data on the number of organic dairy operations.

THE ORGANIC DAIRY MARKET—SALES AND NUMBER OF OPERATIONS

According to the OTA Industry Survey, U.S. organic food, fiber, and agricultural product sales were over $61.9 billion in 2020.[42] Organic dairy and eggs is the third largest sector in organic retail food sales (13 percent), after fruits and vegetables (36 percent) and beverages (14 percent). Sales of organic dairy products, including milk, cream, yogurt, cheese, butter, cottage cheese, sour cream, and ice cream, exceeded $7.4 billion in 2020. Table 2 shows the organic dairy market characteristics by subcategory.

Expand Table

Subcategory	2020 Sales ($ M)	2020 Growth (%)	% of organic dairy sales [a]	Avg. premium [b] (%)	Organic premium ($ M)
Milk/Cream	$3,770	11.1	59.2	68	$1,527
Yogurt [d]	1,310	3.9	20.6	30	304

Subcategory	2020 Sales ($ M)	2020 Growth (%)	% of organic dairy sales [a]	Avg. premium [b] (%)	Organic premium ($ M)
Cheese [e]	653	14.3	10.3	73	276
Butter/Cottage Cheese/Sour Cream [d]	492	15.8	7.7	72	207
Ice Cream [e]	142	19.5	2.2	65	56
Total	6,367	10.5	100.0	61	2,370

[a] *The Organic Trade Association's 2021 Organic Industry Survey (p. 67) included eggs as a subcategory for its summary on organic dairy sales, but we have excluded the data on eggs from this table.*

[b] *USDA's AMS weekly reported prices in the 2020 weekly dairy retail report based on the first weekly report in January, April, July, and October. These reports are available at: https://www.ams.usda.gov/market-news/dairy. Average prices of product categories are averages across the four periods weighted by store counts. Premiums are calculated as the: ((Organic Price−Conventional Price)/Conventional Price). Any missing data was supplemented by the previous weeks prices, if available.*

[c] *The dollar value of the organic premium for each category is: (Organic Sales × Premium)/(1 + Premium).*

[d] *The yogurt and butter, sour cream and cottage cheese premiums are respectively the average of the premiums of 32 oz. yogurt products and 1 lb. of butter, weighted by counts of stores advertising organic products. Cheese premiums are for natural varieties in 8 oz. blocks.*

[e] *Price data for organic Ice Cream was only available the first quarter. The premium is calculated with only this data.*

Table 2—Organic Dairy Market—Retail Sales by Subcategory

Table 2 also includes premiums (or "markups") in the prices of dairy products marketed as organic versus nonorganic products. For dairy products, the average organic premium was 61 percent and totaled nearly $2.4 billion in value.[43] In market equilibrium, this markup reflects both the higher costs of organic production and the value consumers place on organically labeled products and their various attributes.

The 2019 NASS Organic Production Survey estimated that U.S. had approximately 3,134 certified and exempt organic dairy farms that milked Start Printed Page 19760 a peak of 363,404 cows in 2019.[44] These organic dairy farms had milk sales of nearly $1.6 billion

in 2019. Total organic milk production in the United States increased to 5.1 billion pounds in 2019, representing a 27 percent increase in production from 2016 and 84 percent increase since 2011. In that same time frame, the number of certified organic farms grew 22 percent over 2016 (2,559 farms in 2016) and grew 70 percent compared to 2011 (1,848 farms in 2011). AMS used the 2019 NASS data for our analysis, as it is consistent with data from the Organic Integrity Database [45] and also includes data on the number of organic dairy cattle maintained by certified operations. The Organic Integrity Database does not include data on the number of organic animals managed by organic operations.

ORGANIC DAIRY FARMS—CHARACTERISTICS AND DISTRIBUTION

Organic dairy farms are, on average, smaller than conventional dairy farms. NASS's Certified Organic Surveys Agriculture (not conducted on an annual or regular basis) show that the number of milk cows owned by organic dairy farms averaged 108 head in 2011, 105 head in 2016, and 108 head in 2019. In contrast, NASS's Census of Agriculture (conducted in every five years) showed the number of milk cows for conventional dairy farms averaged 144 head in 2012 and 175 head in 2017.

Organic dairy farms also have lower yields, on average, than conventional dairy farms. The 2019 NASS Organic Production Survey showed that each organic cow produces about 14,096 pounds of milk annually, or 47 pounds per day over a 300-day lactation period. NASS production data for 2019 shows that across all operations (conventional and organic) average production is 23,391 pounds of milk per animal annually, or 78 pounds per day over the same 300-day period.[46] Despite lower yields, organic dairy farms can be economically viable through the price markups they receive over conventional milk and milk products. Table 2 shows that the average premium for organic dairy products averaged 61 percent at the retail level.

Based on the 2019 NASS Survey of Organic Production Data, Table 3 shows that the highest concentration of organic dairy farms is in the Northeast and Upper Midwest regions,[47] however the large, organic dairy farms in California and Texas represent a large share of output. The five States with the largest number of certified organic dairy farms (Wisconsin, Pennsylvania, New York, Ohio, and Indiana) accounted for 64.5 percent of total farms. However, those States represented less than 25.7 percent of national organic milk production.

By contrast, the West and South Central regions accounted for the highest milk production per farm. The two highest organic milk producing States (California and Texas) represented only 5.13 percent of total certified organic dairy farms, while producing 33.4 percent of the total organic milk nationally. The survey also indicates significant regional differences in the average number of milk cows on dairy farms. For example, California dairies average 372 head per farm, Texas dairies average 4,647 head per farm, and Wisconsin dairies average 60 head per farm. ARMS and NAHMS data show similar patterns of size difference across regions.

Expand Table

	Number of organic dairy farms	Percent of U.S. organic dairy farms	Milk production (pounds)	Percent of U.S. milk production
United States	3,134	100	5,122,684,816	100
California	150	4.79	889,290,462	17.36
Texas	9	0.29	821,868,224	16.04
Wisconsin	525	16.75	440,963,146	8.61
Oregon	40	1.28	321,420,989	6.27
New York	607	19.37	386,732,234	7.55
Pennsylvania	362	11.55	215,797,929	4.21
Vermont	172	5.49	202,401,003	3.95
Washington	45	1.44	136,897,016	2.67
Minnesota	125	3.99	138,891,803	2.71
Ohio	260	8.30	128,388,287	2.51
Idaho	29	0.93	364,524,076	7.12
Indiana	246	7.85	142,678,892	2.79
Michigan	93	2.97	66,684,699	1.30
Iowa	105	3.35	70,705,742	1.38
Maine	88	2.81	61,387,355	1.20

Table 3—Top States With Organic Dairy Farms Compared to Production (2019)

THE ORGANIC DAIRY MARKET—REPLACEMENT ANIMALS

CULL AND MORTALITY RATES

Operations source replacement animals from on- and off-farm sources to replace animals that are sold to other farms, die, or are intentionally removed and sold to slaughterhouses ("culled"). The APHIS NAHMS surveys [48] in 2007 and 2014 provide data on how many animals are culled (removed) from U.S. dairies annually and the reasons for their removal. Most dairy cows were removed for udder problems or reproductive problems, followed by lameness and poor production.[49] In the 2007 APHIS NAHMS survey of dairies, 23.6 percent of all dairy animals were permanently removed from farms that year (excluding cows that died)[50] while the 2014 survey found a corresponding Start Printed Page 19761 annual cow removal rate of 28.4 percent.[51] The 2014 NAHMS survey found that 21 percent of adult organic cows were removed from the U.S. national organic herd that year. These figures include animals that are sold as replacement females to other dairies. The 2014 survey found a lower percentage of cows were permanently removed on small and medium operations (26.0 and 26.3 percent, respectively) than on large operations (29.7 percent).

The same surveys provide information about the deaths of animals on dairies. Overall, annual mortality rates were 7.8 percent for un-weaned heifers, 1.8 percent for weaned heifers, and 5.7 percent for cows (2007 survey). In 2014, NAHMS identified that about 5 percent of adult organic dairy cows die on the farm (compared to 21 percent of adult organic cows that were removed for other reasons). These numbers were roughly consistent with the 2007 report.

Between culling and mortality, a dairy farm would need to raise or purchase females that represent about 30 percent (23.6 percent culled plus 5.7 percent deaths) of the farm's herd size to maintain its size. As a lactating dairy herd (cattle) typically calves about 50 percent female offspring each year, the overall dairy herd should have enough replacement females to replace culled animals and animals that die. This conclusion considers downward adjustments for mortality (using 2007 NAHMS rates noted above of 7.8 percent and 1.8 percent) and additional reduction for culling.[52] The additional (excess) replacement female animals should allow organic dairy operations to expand the number of animals in their herds should they wish to expand. Additionally, producers may choose to breed with sexed semen which will increase the number of female offspring available to the dairy farm.

SOURCING ORGANIC REPLACEMENT ANIMALS

Most organic dairy farms replace culls and deaths with replacement heifers that are born and raised on the farm. The 2014 NAHMS data reports that 96.5 percent of organic replacement heifers are born and raised on the organic operation. An additional 2.6 percent of the replacement heifers are born on the operation and are subsequently raised off the operation before returning to the operation. The remaining 0.9 percent of replacement females are born off the operation and are presumably purchased from other operations.

The 2016 ARMS data (again, the most recent survey of this type) also provides information about how dairies source replacement animals. Overall, ARMS data indicates that in 2016, the average organic dairy farm milked 102.7 cows and added 43.0 replacement animals of all types (cows or heifers of all sizes). Of those replacements, 93.8 percent (40.35 head) were born on the farm (and owned continuously by it) and 85.1 percent (36.62 head) were both born and raised on the farm. Based on 2,559 total dairy farms with a total herd size of 267,523 reported in the Census of Agriculture (2016 data), ARMS data indicates that 110,037 total heifers and milk cows (41.1 percent of the herd) were added to operations in 2016.[53] Purchased animals from off-farm sources included 4,325 milk cows (3.9 percent), 1,953 large heifers weighing more than 500 pounds (0.73 percent), and 559 small heifers weighing less than 500 pounds (0.2 percent).

Exact data on how many of the purchased replacement heifers are transitioned heifers and how many are organically managed from the last third of gestation is not available. For this reason, this RIA calculates costs for two conjectured values for the share of purchased replacements that are transitioned heifers. Furthermore, AMS does not have aggregated data on what approach producers currently use when purchasing replacement heifers. Therefore, AMS does not have data on how many producers are bringing heifers into organic production as nonorganic animals and transitioning them into organic (or purchasing animals transitioned on other organic operations) versus sourcing and managing animals as organic from the last third of gestation. Excluding small heifers (which would not be able to achieve the cost savings of continuous transitioning), AMS uses the 2016 ARMS survey to estimate the total number of large replacement heifers purchased (2,460 large heifers purchased annually) and assumes 25-50% of all large replacements are transitioned for our cost model based on the OIG

report (Audit Report 01601-0002-32) that half of certifiers allowed the practice of continuous transitioning.[54] AMS did not receive comments providing more accurate estimates or objections to this assumption during the comment periods for the proposed rule.

AMS notes that, according to the OIG report, not all certifying agents allow certified operations to continually transition animals. OIG found in a survey of six certifying agents (among the top ten certifying agents for dairy operations) that three allowed certified operations to continually transition animals.

Regulatory Impact Analysis

Comments Received on Costs and Benefits

AMS sought input from the public about the estimated costs and benefits of this rule. AMS published estimated costs and benefits in the 2015 proposed rule and published an updated analysis in May 2021. AMS summarized and responded to these comments below.

Availability of Replacement Animals

In 2015, some comments noted that organic heifer supplies were tight and that the heifers for sale were not of consistently high quality. This led commenters to believe the proposed rule could curtail growth of existing or new operations, restrict milk supply, and raise consumer prices. Some comments urged AMS to seek a consistent standard for all operations while considering that operations may need to grow to meet consumer demand.

A comment in 2015 calculated that a dairy could be expected to raise only enough of its own heifers to grow at an annual rate of 5 percent, after accounting for morbidity and culling. This commenter questioned AMS's conclusion there would be an ample supply of organic heifers under the rule. The commenter estimated that the industry would take time to catch up with the demand for organic heifers (organically managed from the last third of gestation).

Other comments in 2015 argued that there was an adequate supply of organic heifers (organically managed from the last third of gestation) available or that operations would

raise and sell them if the price was higher and reflected the Start Printed Page 19762 cost of raising them. In 2019, commenters claimed there is a surplus of organic heifers (organically managed from the last third of gestation) available to meet market needs and that there is an ample supply of animals even if morbidity/mortality rates are high or heifer selection is aggressive. No comments in 2019 or 2021 claimed that organic heifer supplies were constrained.

AMS response: Based on our analysis of the comments received, AMS continues to believe that sufficient numbers of organic heifers (organically managed from the last third of gestation) would be available after rule implementation to maintain and/or grow existing organic dairies. To mitigate potential and unforeseen impacts, AMS is providing a compliance date of ten months beyond the effective date of this final rule to allow animals in the middle of an approved transition to complete the transition and produce organic milk. AMS received many comments that supported this approach during the comment periods. AMS is also including a variance process for certified operations that are small businesses, and meet certain other specific and limited circumstances. These operations may request a variance from the prohibition on the movement of transitioned animals for specific and limited situations.

Price of Replacement Animals

A commenter in 2019 disagreed with AMS's estimate of a $1,300 cost difference between transitioned animals and organic animals (organically managed from the last third of gestation). The commenter believed AMS's estimate was too high. The commenter further explained that its "discussions with dairy auction sales barns that previously sold organic cattle do not align with that value" and the most common response it received from extension agents in the Northeast was that "demand and verified sales have all but dried up for organic springing heifers [heifers close to calving]."

AMS received many comments in 2019 related to the cost difference for raising heifers organically vs. nonorganically during the first 12 months of life. One commenter found a $469 average cost difference (organic being more costly) per animal. Most comments noted a cost difference from $600 to $1,000 per calf, and some comments noted a difference as high as $1,300 per calf. Commenters tended to use the difference in production costs to describe the financial disadvantage and the harm to operations that source only organic animals (organically managed from the last third of gestation) in

comparison to operations that continually transition heifers to organic production. In 2021, several commenters reiterated the difference in cost of raising dairy replacement heifers under organic management versus conventional management in the first year of life, citing figures from $623 to $1,300 per calf. A few commenters referred to a study by Cornell Cooperative Extension that found an average $884 savings per animal compared to animals raised using organic methods.[55]

Commenters in 2015, 2019, and 2021 generally agreed that implementation of the proposed rule would result in greater demand for organic heifers and would likely increase the price of organic replacement animals. Many commenters viewed this scenario favorably, as it would benefit organic producers who sell organic animals (organically managed from the last third of gestation), as opposed to some heifer-raising operations currently selling transitioned animals. In 2021, one producer commented that in the last decade the market value of organic replacement dairy cattle (organically managed from last third of gestation) is $1,100/head (or more) below the cost of producing them, as the continuous transitioning of non-organic dairy replacements has flooded the market. Another commenter stated that market prices are $1,500 to $1,800 per head, a lower value than the $2,000 or $2,500 value assumed by USDA's analysis.

AMS response: AMS continues to present the costs of the rule as a range based on different potential scenarios (see Table 5). AMS agrees with comments that the price of organic heifers may increase, and we have estimated costs under two scenarios where the price of heifers increases by $500 and where the price does not increase that are discussed further in the section on final rule costs. AMS estimates that the price of an organic heifer (organically managed from the last third of gestation) is $2,000 and up to $2,500 if increased demand drives prices upward. This represents a $1,000 to $1,500 premium for organic animals (organically managed from last third of gestation) animals over transitioned animals. The estimated difference seems to agree with comments that production costs for these animals are $600 to $1,300 higher. AMS recognizes that this price estimate may be high and thus the result might be considered an upper bound of the estimated costs.

Effect on Consumer Milk Price

A commenter in 2015 estimated the rule would increase the cost of producing organic milk by 3.7 to 6.0 cents per half gallon (0.87 percent to 1.42 percent, respectively) and

that the increase would be passed to consumers, thereby negatively affecting consumer demand. However, AMS also received comments in 2015 from organic milk consumers that supported the proposed rule even though they expected the rule to lead to higher milk prices. Other comments noted that if supply of organic milk were to become very restricted under the new requirements, retail prices could increase to a point where consumer demand would flatten or even decrease.

In 2019, stakeholders were more concerned with how consumer milk prices negatively affect organic dairy producers than how they affect consumers. Comments frequently discussed the idea that there is an oversupply of organic milk currently "flooding the market" that are driving consumer prices down. In 2021, commenters were again concerned about an oversupply of organic milk and the subsequent economic hardship for organic dairy farmers. Commenters found that a strict and fair enforcement of the rule would allow for a gradual increase in organic milk production that would match consumer demand. NOP received comments regarding concerns about Concentrated Animal Feeding Operations (CAFOs) producing large quantities of organic milk, with one commenter noting if transitioning remained, it would only further push market power to fewer operations in the industry and another stating their ability to capitalize on transitioning pushed small and mid-sized operations out of production. Commenters stated that the rule would not have a significant effect on consumer milk prices but would positively affect many dairy farmers. One group of dairy farmers reported that 88 operations would be positively impacted by the rule, while only four would face a negative impact.

AMS response: Table 2 figures indicate that the retail premium of organic milk products over conventional milk products is 61 percent. The AMS Dairy Market News for August 9th to 13th, 2021, indicated that the twelve-month average (farm-level) organic milk pay price was $31.55 per hundredweight while forecasting the 2021 all milk price at $17.95 per Start Printed Page 19763 hundredweight. Together these values indicate that the farm-level organic markup is 76 percent. The ERS farm share of the retail price for the milk and dairy basket in 2020 was 30 percent.

Table 5 shows that the total costs of this rule to the organic milk producers' net of transfers would be $1,845,000 under our 50 percent transitioning scenario and $922,500 under our 25 percent transitioning scenario discussed further below. The

Census of Organic Agriculture indicates that farm-level organic milk revenue was $1.585 billion in 2019.[56] Based on these figures, AMS estimates that a final rule would increase producer costs by less than 1%.[57]

Number of Transitioning Animals

One commenter in 2015 estimated there were 60,000 conventional animals transitioning to organic production on new and established dairy farms. The commenter predicted this could lead to an oversupply of milk and decrease in milk price (income for the dairy farm). Another commenter in 2019 believed that "tens of thousands" of animals had transitioned since 2015.

AMS response: AMS recognizes that we do not have precise data on how many animals are transitioned on an annual basis by certified organic operations. Our information, obtained from industry and certifying agents, indicates that most organic dairy farms do not continually transition animals. However, because of the lack of precise numbers available, AMS estimates that transitioned animals comprise 25 percent (low end) to 50 percent (high end) of all purchased replacement animals. AMS did not receive concrete data from comments to support alternative figures.

Changes in Dairy Market Since 2015

In 2019, many comments noted that the organic dairy industry had changed considerably since AMS published the proposed rule in 2015. Primarily, commenters noted a decline in consumer demand for organic milk and increased availability of organic milk and organic dairy cows.[58] Some comments noted that fewer operations are transitioning to organic production due to limited opportunities to secure a contract with a milk handler or because the price premium for organic production is no longer an incentive to transition. Some 2019 comments noted that the cost of the rule would be less than AMS estimated in 2015 due to increased availability of organic replacement animals (organically managed from last third of gestation) and a corresponding drop in prices for these animals.

AMS response: AMS recognizes that the organic dairy market in 2015 differed from the current organic dairy market. Our calculation of costs for this rule is higher than those calculated in 2015 because the cost calculation is based, in part, on the number of

organic dairy operations and total organic herd size. These numbers have both increased since 2015, so the estimated cost is higher.

AMS also notes that there have been significant changes in the organic dairy market starting in 2020 that correspond to the start of the COVID-19 global pandemic. During this time, the demand for organic products, including organic milk and milk products, increased dramatically due to changes in consumer behavior such as a shift to at-home dining (vs. dining out), among other impacts. Organic dairy grew almost 2% in 2019 and 8% in 2020.[59] Data on the current trends in organic replacement heifer markets are limited, but AMS observes relatively stable prices in the non-organic dairy replacement market now compared to pre-pandemic period.[60] The long-term effects of the pandemic on consumer behavior and the organic dairy market, specifically, are difficult to predict, though AMS expects the predicted effects of costs and benefits of our analysis to hold. For this analysis, AMS used the most current information available to present our estimated costs and benefits.

Costs and Benefits (General)

A commenter in 2019 disagreed with AMS's cost analysis in the proposed rule. It stated that the cost analysis "fails to capture the cost inequities of not implementing the proposed rule," and specifically points to its "failure to distinguish production costs between organic and transitioned heifers." Without this information, the commenter argues "neither the agency nor stakeholders can understand the true cost, and true harm, of implementing or not implementing the proposed rule." Furthermore, the commenter calculated the harm to operations that source only organic animals (organically managed from the last third of gestation) using the difference in production costs for transitioned animals and organic animals (organically managed from the last third of gestation). The commenter estimated that 25 percent or 50 percent of all culled organic dairy animals are replaced with transitioned animals and calculated competitive harm of $9.29 million to $18.58 million annually ($469 multiplied by 25 percent to 50 percent of all culled animals using a cull rate of 28.4 percent).

AMS response: The commenter estimates that the competitive harm from the current enforcement practice of allowing transitioned animals is $9.29 million (under the 25 percent scenario) and $18.58 million (under the 50 percent scenario). These estimates are based on the commenter's finding that a conventional heifer costs $462 less to raise

and that organic farms require 79,242 replacement heifers annually (based on a 28.4 percent cull rate and the 2016 organic U.S. herd size of 279,021 head).

AMS understands the commenter's general concern that organic dairy farms need to replace a substantial share of cows each year and that the different application of transition practices by certifiers and producers creates cost disparities. AMS uses the cost difference for purchased replacement heifers (transitioned vs. organically managed from last third of gestation) as its estimate of the per animal increase in costs for dairy farms that have used transitioned animals. AMS recognizes that this does not account for increased costs to operations that might maintain ownership of offspring that are born on-farm, subsequently removed from organic production, and then transitioned back into organic production. AMS understands that most certifiers do not interpret the current regulations to allow this practice. Any increase in the cost of replacement heifers only applies to the purchasers of such animals who would otherwise have purchased transitioned animals. For this reason, AMS believes that applying the cost differential to replacement heifers that are both purchased and unpurchased (*i.e.,* owned) would overstate the cost of the rule.

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As described in our consideration of regulatory alternatives below (see Alternative A), AMS expects that purchases of replacement heifers that are transitioned animals would increase if AMS allowed this practice through regulatory action. Additionally, dairy operations utilizing heifer-raising operations while retaining ownership may switch to operations that use conventional practices and then transition the animals to organic production. Table 4 shows that only 11 percent of operations purchase replacement heifers. The uneven application of the current rule suggests that a smaller share of producers is benefiting from the cost advantage of transitioned heifers at a level higher than that suggested by the average number of head purchased.

Costs of Final Rule

The final rule will likely increase production costs on organic livestock and dairy operations that currently continually transition nonorganic animals and/or operations that source transitioned dairy animals as replacements. Additionally, any dairy that purchases organic heifers may pay higher prices for organic animals due to increased demand, but organic operations selling replacement heifers would benefit from any higher prices.

We assume that farms that exclusively raise their own organic replacement heifers and manage those animals organically from birth would not incur additional costs under the final rule. Similarly, dairy farms that send organic heifer calves to other certified organic operations to have the animals continuously managed as organic (for some period of time before returning to the farm) would not incur additional costs. Finally, nonorganic dairy operations converting to organic production for the first time would not incur new costs during the 12-month transition period; they may transition animals on a one-time basis under the final rule.

Estimated Costs for Dairies

The final rule creates two costs for organic dairy farms. First, dairy farms that transition heifers or purchase transitioned replacement heifers after their initial transition to organic would be required either to purchase higher-cost organic replacement heifers (organically managed from the last third of gestation) or to raise their own replacements by raising organic calves to maturity. This analysis assumes that transitioned animals are sold at a discount compared to organic replacement animals (organically managed from last third of gestation).

Second, by raising the demand for organic replacement heifers, the final rule may raise the price of organic replacement heifers if operations currently selling organic (transitioned) replacement heifers cannot comply with the requirements and operations that sell organic replacement heifers (organically managed from last third of gestation) cannot easily increase offerings. While this price increase is likely to be small, it would raise costs to any organic dairy farm that is a net buyer of organic replacement heifers, regardless of whether it continually transitions animals or purchases transitioned replacement heifers. This same price effect, however, would create an offsetting benefit to any dairy farm that is a net seller of organic replacement heifers.

AMS investigated the additional costs that could possibly arise due to limiting the movement of transitioned animals. Under the final rule, producers are unable to sell their transitioned animals as organic and must take the conventional price for these animals. This cost is likely to only impact producers seeking to liquidate their herd. The final rule does not alter the current regulations that prohibit transitioned animals from being sold for organic slaughter (therefore would not receive the organic premium at end of life)

and operations can continue to manage a transitioned animal rather than sell it for a loss in most cases of continued operation. Only when an operation is forced to sell their animals at the lower conventional price because of the final rule would there be any additional cost due to the prohibition of the movement transitioned. The final rule provides for a variance request process (§ 205.236(d)) that could allow an organic operation to sell their transitioned animal in certain situations (bankruptcy, insolvency, intergenerational transfers).

AMS looked at all operations with listed dairy animals that were suspended or surrendered their organic certification between 2016-2021 and found at most five that could face costs due to limited movement of transitioned animals.[61] Between the five operations, they had less than 300 head in total at the time of exit from the organic market. While the increased costs possibly faced by these operations would increase the total cost of the rule, data indicate that all observed operations would likely have been eligible for the variance and thus been able to avoid additional costs. Because no operations would have faced additional costs due to the prohibition on the movement of transitioned animals between 2016-2021, AMS did not include this as an additional cost in the final analysis.

AMS estimates the costs of the final rule by estimating the total number of replacement animals purchased by U.S. organic dairy cattle operations annually. AMS then estimates the percentage of all purchased animals that do not meet the requirements of the final rule (*i.e.,* the percentage of animals bought by organic operations that are not organically managed from the last third of gestation). Due to the unavailability of precise data, AMS estimated a range of possibilities (25 percent to 50 percent of all purchased animals). AMS received no public comments that provided a more accurate estimate. To calculate costs, AMS then multiplied the number of animals by the price difference between organic (organically managed from last third of gestation) and nonorganic heifers (we use nonorganic heifer prices as a substitute for transitioned animals in the absence of that data). Finally, AMS considered a possible increase for the price of organically managed from the last third of gestation heifers to calculate the maximum expected costs. The data and calculations are discussed in detail below.

The ARMS survey includes farm-level data on purchases and sales of heifers weighing more than 500 pounds, a category that explicitly includes sales of springers.[62] While the ARMS survey does not identify whether purchased heifers have been organic from birth

or have transitioned to organic status, it does identify whether the farms themselves are certified or transitioning to organic status. Since all cattle sold by organic dairies are themselves organic and all cattle sold by non-organic dairies are conventional, this analysis assumes that the difference in the large heifer sales prices for organic or transitioning farms and other farms reflects the difference in costs for those animals. This analysis estimates costs under the alternative assumptions that either 25 or 50 percent of all purchased heifers are transitioned heifers.

AMS used 2016 ARMS data to estimate the number of replacement animals purchased by organic Start Printed Page 19765 operations. (This survey is conducted every 5 years, so these are the most recent numbers available at the time of this writing.) Table 4 provides the average numbers and prices of large heifers bought and sold by organic or transitioning farms, divided into four different size categories, along with figures for all organic or transitioning farms and all other non-organic farms. Compared with their non-organic counterparts, organic and transitioning dairy farms are more likely to purchase large heifers as replacements, and sell a smaller share of their large heifers. On average, organic dairies purchased replacement large heifers at a rate of 0.73 percent of their total herd size (or 0.75 head) and sold large replacement heifers at a rate of 1.27 percent of their total herd size. However, only 10.9 percent of organic and transitioning dairy farms purchased large heifers so that the average farm purchasing heifers bought 6.9 head. Based on a 2019 herd size of 337,540 milk cows,[63] all organic dairies purchase 2,464 large heifers annually. Rounding the large heifer purchase figure to 2,460, these figures imply that 615 purchased heifers are transitioned (rather than organically managed from the last third of gestation) under our 25 percent assumption, and 1,230 are transitioned heifers under our 50 percent assumption.

Expand Table

	1-49	49-99	100-199	200+	All
Organic and Organic Transitioning Farms					
Number of Farms in ARMS Survey	144	114	42	32	
Largest Number of Cows Milked	33	68	132	499	103
L. Heifers Sold (head per operation)	0.31	0.84	0.60	8.02	1.27
Sold L Heifers ($/Head)	$1,350	$1,993	$2,111	$1,918	$1,887
% of Farms Purchasing L. Heifers	8%	16%	10%	7%	10.9%

	1-49	49-99	100-199	200+	All
Purch. L. Heifers as a % of Herd	1.5%	1.0%	1.3%	0.2%	0.73%
Other Farms					
L. Heifers Sold (Head)	1.14	1.37	1.73	9.68	5.5
Sold L Heifers ($/Head)	$600	$1,161	$1,304	$989	$1,012
% of Farms Purchasing L. Heifers	3.3%	7.2%	4.8%	12.1%	8.7%
Purch. L. Heifers as a % of Herd	0.2%	1.0%	0.8%	3.2%	2.9%

able 4—Heifer Purchase and Sales Price and Related Statistics by Dairy Farm Size and Organic Status

[ARMS]

AMS also used the 2016 ARMS data (again, the most recent data source of this type) to estimate the price difference between organic replacement animals and nonorganic replacement animals. Table 4 shows the price at which organic and transitioning dairies sold large replacement heifers. Because the price of transitioned heifers compared to organic heifers (organically managed from the last third of gestation) is not available, our analysis uses the cost of non-organic large heifers as a substitute. This is likely to exaggerate the cost differential. The large heifer selling price of $1,887 at organic and transitioning dairy farms was $865 more than the selling price of $1,012 at non-organic farms. Across individual farm size categories, however, this difference in prices between organic and non-organic selling prices varied across size categories, ranging from $750 (farms with 0-49 cows) to $937 (200+ cows). Based on the data, our analysis assumes that before the imposition of any of the changes, a transitioned heifer costs $1,000 and an organic heifer costs $2,000 so that the difference in price between the two animal types is slightly higher than the largest difference observed in the data.

Related data and public comments support these assumptions on price relationships. The approximately $1,000 price of non-organic bred heifers (our substitute for the price of a transitioned animal) is supported by livestock auction market prices.[64] These data show that bred heifers in the third trimester (*i.e.,* springers) of supreme and approved quality sold for $1,045. Additionally, the assumptions are supported by public comments that indicate it costs between $600 and $1,300 more to raise an organic calf than a nonorganic calf. Comments in 2021 echoed this cost difference. Additionally, several

commenters pointed to an analysis completed in 2019 by the Cornell Cooperative Extension that determined the cost is on average $844 higher per animal for organic management during the first year of life. The study considered not just higher feed costs but also labor, buildings, machinery, health costs, trucking, manure handling and culling.[65]

The increased demand for 1,230 additional organic replacement heifers (organically managed from last third of gestation) under the 50 percent transitioning assumption (or 615 additional organic replacement heifers under the 25 percent transitioning assumption) is not expected to lead to large price increases for organic heifers because the additional organic pasture and feed required for 1,230 additional organic replacements constitutes a very small share of the input requirements for the 103,000 heifers currently retained by organic farms for their own replacements. Therefore, increased demand for organic dairy replacement animals is not expected to lead to dramatic price increases: because the Start Printed Page 19766 increase in demand is relatively insignificant, supply should be able to match demand without spurring substantial price increases. However, this analysis assumes that the increased demand for organic replacement heifers pushes up their price by $500, or 25 percent,[66] to $2,500. In this case, the total cost of purchasing replacement heifers by organic dairy farms would be $6.15 million per year (2,460 replacements animals purchased from off farm at $2,500 per head). This would be the new total cost of purchasing organic heifers rather than the additional cost of purchasing organic heifers, which is considerably less.[67]

Table 5 shows the estimated costs to and intra-industry transfers between organic dairy farms purchasing organic heifers under alternative assumptions on price response and replacement heifer purchases. The costs capture the additional resources need to shift the supply of transitioned cattle into the supply of organic cattle. The intra-industry transfers may arise from the increased demand for organic dairy heifers, after accounting for shift of supply from transitioned supply to organic supply as described above, that may result in increased prices. Industry transfers are costs to a set of dairy farms (or possibly milk processors and consumers) that are exactly offset by benefits to another dairy farm (or possibly milk processors and consumers) which results in no additional resources being produced. When the final rule is enacted, transfers may flow from net buyers of organic heifers to net sellers of organic heifers as the price of organic

heifers increases. If the price of organic heifers does not increase, then no transfers will occur.

AMS expects that organic dairy farms will purchase 2,460 replacement heifers per year based on our analysis of ARMS data.[68] If the price of organic dairy heifers were to be unchanged following the rule, our analysis finds that total costs would increase by $1,230,000 per year under the assumption that 50 percent of purchased replacement animals had been transitioned animals, or costs increase by $615,000 under the assumption that 25 percent of purchased replacement animals had been transitioned animals. In these cases, there are no transfers. If the price of organic dairy heifers rises to $2,500 and 25 percent of purchased replacements are transitioned, our analysis finds that total costs are $922,500 (reflecting 615 new organic replacement heifers purchased for $1,500 over the conventional price) and transfers are $922,500 (reflecting 1,845 previously purchased organic heifers purchased at price $500 higher).
If the price of organic dairy heifers rises to $2,500, and 50 percent of purchased replacements are transitioned, our analysis finds that total costs would be $1,845,000 (reflecting 1,230 new organic replacement heifers purchased for $1,500 over the conventional price) and transfers would be $615,000 (reflecting 1,230 previously purchased organic heifers purchased at price $500 higher). This information is presented in Table 5 below.

Expand Table

Assumptions regarding . . .		Estimated additional costs net of transfers	Estimated transfers
. . . Price response [69]	. . .Transitioning heifers		
The price of organic heifers remains at $2,000	25 percent of heifers are transitioning	$615,000	$0
The price of organic heifers remains at $2,000	50 percent of heifers are transitioning	1,230,000	0
The price of organic heifers rises from $2,000 to $2,500	25 percent of heifers are transitioning	922,500	922,500
The price of organic heifers rises from $2,000 to $2,500	50 percent of heifers are transitioning	1,845,000	615,000

Assumptions regarding . . .		Estimated additional costs net of transfers	Estimated transfers
. . . Price response [69]	. . .Transitioning heifers		

Table 5—Estimated Costs Under Alternative Assumptions for Price Response and the Quantity of Transitioned Animals Purchased by Certified Organic Operations Annually

If some of the sellers of the 1,230 additional organic heifers required under the 50 percent assumption (or the 615 additional organic heifers required under the 25 percent assumption) have costs to supplying these animals that are less than $2,500, then industry transfers would exceed the values stated in Table 5. Increased sales are expected to benefit operations that have more flexibility in capacity (*e.g.,* available pasture) to accommodate raising organic replacement heifers for the organic market. Importantly, sales response across individual farms will likely be uneven and depend on site-specific factors such as the farm's ability to access new buyers and increase organic pasture.

Differences in purchase patterns of milk cows and replacement heifers also vary by size in a way that affects the distribution of costs associated with the final rule. 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* . Eight percent of operations with fewer than 50 cows reported purchasing heifers, and the average number purchased annually was 7 head. Sixteen (16) percent of operations with between 50 and 99 cows reported purchasing heifers, and the average number purchased annually was 4 head. Ten (10) percent of operations with between 100 and 199 cows reported purchasing heifers, and the average number purchased annually was 17 head. Seven (7) percent of operations with 200 or more cows reported purchasing heifers, and the average number purchased was 12 head. Start Printed Page 19767

Based on the range created by the scenarios presented in Table 5,[70] the average dairy with fewer than 50 cows would pay an additional $127-$510; dairies with between 50 and 99 cows would pay an additional $166-$666; dairies with between 100 and 199

cows would pay an additional $439-$1,755; and dairies with 200 or more cows would pay an additional $209-$837. The costs by size of operation are summarized in Table 6.

Expand Table

	Size of Operation			
	Fewer than 50 cows	**50-99 cows**	**100-199 cows**	**200 or more cows**
Number of Farms	1,359	1,076	396	302
Share of Operations	43%	34%	13%	10%
Average Cost Per Farm	$127-$510	$166-$666	$439-$1,755	$209-$837
Total annual cost for purchase of replacement heifers across size class	$173,210-$692,839	$179,127-$716,506	$173,915-$695,660	$63,189-$252,757
Percent of operations that purchased replacement heifers annually	7.6%	16.4%	10.2%	6.8%
Average number of replacement heifers purchased annually (for operations purchasing heifers)	6.68	4.06	17.22	12.33
Cost per operation annually (25% to 50% transitioned heifers) (for operations purchasing heifers)	$1,670-$6,678	$1,016-$4,063	$4,306-$17,225	$3,082-$12,330

Table 6—Costs by Size of Operation for Purchasing Organic Heifers

The costs in Table 6 do not reflect the offsetting effect of transfers (*i.e.,* they only capture the cost of transfers at a producer level, not accounting for how the producers selling will gain from this). For this reason, the sum of the total costs of replacing heifers across all size categories ($0.56 million and $2.37 million) in Table 6 roughly equals the sum costs (net of transfer) and transfers in Table 5 ($0.615 million and $2.46 million) with minor discrepancies reflecting rounding differences.

Effects on Heifer-Raising Operations

Organic dairy operations that continually source transitioned heifers will need to change their practices to meet the requirements of the final rule. In some cases, organic dairy

operations source their transitioned heifers from off-site heifer-raising operations. Here, AMS discusses the potential effects of the final rule on these operations.

A 2011 USDA NAHMS study on heifer-raising operations [71] found that most heifers sent to heifer-raising operations (80 percent) are returned to their dairy of origin. The study also found that most heifer-raising operations receive weaned calves (rather than wet calves) and send them back as pregnant heifers. AMS specifically requested comments and data on the likely impacts on heifer-raising operations. AMS did not receive any data on the number of heifer-raising operations that continually transition animals for sale to organic dairies or on the number of animals raised by such operations annually. Aside from fragmentary evidence in the AMS Organic Integrity Database, AMS does not currently have specific data on the locations, numbers, or sizes of organic heifer-raising operations.[72]

In the absence of specific information, AMS considered that organic dairy operations could be using organic heifer-raising operations to transition animals on a continual basis by taking in nonorganic weaned calves (*e.g.,* 12-month old heifers) and providing organic management for 12 months before returning the pregnant organic heifers to an organic dairy.

Under the final rule, organic heifer-raising operations will not be required to change their *animal production practices.* These operations are certified organic and currently manage animals in compliance with the USDA organic regulations as a requirement of their organic certification. However, the final rule does not allow any operations, once certified, to source nonorganic animals. Therefore, these operations will be able to accept only weaned calves that have been organically managed from the last third of gestation.

Within the analysis, AMS assumed that competitive markets for both transitioning and replacement heifers have resulted in prices for these animals that are sufficiently high enough to allow sellers to recover the cost of raising these animals along with a "normal" rate of return on capital investment. The analysis assumes that the 50 percent conjectured increase in price of organic replacement heifers is sufficient to simultaneously ensure that markets clear (*i.e.,* quantity supplied equals quantity demanded) at the higher number of transacted animals and offset the increased costs to supplying more animals.

As with other aspects of our analysis regarding supply response, AMS assumes that the ability of individual sellers of replacement heifers to adjust management practices to

market conditions will vary with the site-specific characteristics of operations, such as their ability to find new buyers and access to additional organic pasture. Whether heifer-raising operations will increase or decrease sales of organic heifers following the implementation of the rule cannot be determined with the available data.

REGULATORY IMPACTS AND EFFECTS ON CONSUMERS

Most dairies report that they source at least some of their replacement cows from their own calves, and only 11 percent of all dairies purchase replacement heifers, with less than 1 percent of all replacements being purchased externally (off the farm). The majority 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 Start Printed Page 19768 operation that sells organic replacement heifers (organically managed from the last third of gestation). Since the current supply of replacement heifers can be increased without large price increases, as detailed above, it is unlikely that the final rule will significantly increase milk production or milk costs to the consumer.

The final rule will provide producers and consumers of organic foods with multiple benefits that extend beyond the organic livestock producers that are directly impacted. First, the rule will provide uniformity to the enforcement of regulations relating to the origin of livestock, removing avenues for inefficiencies and risks created by different certifier standards and potentially reducing consumer confusion about the nature of production of dairy products. Second, the rule will create uniformity in the application of the USDA organic regulations, by generally requiring organic management for an animal's entire life. This has the potential to decrease information asymmetries associated with the meaning of the organic seal and reduce transactions costs to consumers in interpreting the meaning of the seal with respect to milk products. In addition, some consumers may actually be willing to pay more for milk that they know to have been produced by animals that were managed as organic from the last third of gestation. While other policy options would also achieve consistency, the policy choice to restrict the transitioning of organic dairy animals is considered most consistent with producer and consumer expectations for the organic management of an animal throughout its life.

Together, the provisions in this rule could enhance and protect the value of organic premiums that some consumers are willing to pay for milk certified under the USDA organic regulations, as it reinforces consumer trust and demand in the label. Research has shown that consumers purchase organic products for various reasons.[73] A number of these reasons, including environmental and animal welfare concerns, accrue benefits over the entire period of production. The final rule should increase these consumer benefits (due to increased number of dairy animals that are managed as organic throughout their productive lives) while also protecting against shocks to consumer demand due to reaction to inconsistent practices.

The 2019 NASS Certified Organic Production Survey shows that organic milk is the top organic commodity in sales value, worth $1.6 billion in 2019.[74] Sales of organic milk increased by 14 percent from 2016. At the retail level, the OTA 2021 U.S. Industry Survey [75] found sales of organic dairy products, including milk, cream, yogurt, cheese, butter, cottage cheese, sour cream, and ice cream, exceeded $7.4 billion in 2020. As a result, even a fraction-of-a-percentage increase in willingness to pay would more than justify the quantified costs of the rule. Table 2 shows the organic dairy market characteristics by subcategory.

Organic dairy cattle producers who sell organic dairy females may receive a benefit as part of an intra-industry transfer. AMS estimates that on the high side, the price of an organic heifer may increase by $500 over current prices due to increased demand. If this price increase were to occur, dairy producers who are net sellers of replacement springers would benefit through the intra-industry transfer.

While AMS does not know whether the final rule will increase demand for organic milk, AMS believes there is value in creating a uniform origin of livestock rule that prevents organic dairies from continuously transitioning non-organic animals into organic milk production. If inconsistent practices were to persist in the industry, consumer confidence and the organic premium as a whole would be at risk to confusion about the benefits of the label. Strengthened consumer confidence should be valuable for organic milk producers as it strengthens the value of the organic brand in the mind of consumers.

Survey results from a producer survey, sent out by the Cornucopia Institute to certified organic dairies in the country, provide general support for prohibiting continuous transition of heifers and ensuring a uniform interpretation of organic origin of livestock

rules. Of 174 responses received, 70% supported immediate implementation of a ban on continuous transition of dairy cows, and not a single respondent said allowing continuous transition has had a positive economic impact on their operation. Of the 41 respondents that listed a specific dollar loss resulting from the lack of consistent standards with respect to livestock origin rules, the mean loss reported per milking animal was $490. A total of 86 respondents indicated the uneven standards have had a negative economic impact on their operation, either due to lower heifer prices or lower milk prices. In addition to these quantitative estimates of perceived losses, some producers expressed their opinion that inconsistent interpretation of the origin of livestock rules harm the organic brand, lower milk prices, contribute to an oversupply of organic milk, tilt the market towards large dairies against small dairies, increase psychological stress for farmers, and lead to the loss of organic milk contracts.

AMS sees these observations as indicators of risk to demand for organic dairy product. Studies show that consumers value organic standards for the environmental and health benefits they perceive flowing from them. Lack of consistency in organic standards may shake some consumers' confidence in the label. Reduced consumer confidence could lead to lower demand for organic milk (and perhaps other products), which would lower quantity and price of organic milk products on average. Confidence from organic producers is also important in sustaining the organic market to meet growing demand. If organic dairy producers become discouraged by the known differences in interpretation and application of origin of livestock provisions, they may exit the market, believing the system to be unfair.

Overall, the survey responses identify a series of perceived negative consequences to the respondents individual operations stemming from inconsistent standards, and likewise from any alternative that would continue to allow continuous transition of conventional animals into organic dairy production. Finally, outreach by organic producers on this rule, both to AMS and Congress, emphasize the importance of this rule to the broader organic industry, beyond organic dairy. Inconsistency in the implementation of this set of provisions is seen as part of a broader need to ensure consistent implementation of the standards in accordance with the OFPA. Again, while this consistency could be achieved in different ways, AMS has selected the policy path that aligns with many public comments over many years encouraging the limitation of organic transitions of livestock.

Alternatives Considered

AMS considered alternatives that would be both less stringent (less costly) Start Printed Page 19769 and more stringent (more costly). The alternatives considered are shown in Table 7 and discussed below.

Expand Table

Alternative	Description
(A) Allow Continual Transition for All Operations	Allow any operation to transition nonorganic dairy animals into organic production over a 12-month period on a continual basis.
(B) Prohibit All Transitions	Remove all exceptions for transition of nonorganic animals.

Table 7—Alternatives Considered

Alternative A—Allow Continual Transition for All Operations

AMS considered amending the regulations to specify that any operation could transition dairy animals into organic production over a 12-month period on a continual 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)). The final rule will typically require more than a 12-month period of organic management prior to the sale of milk and milk products for established dairies (*i.e.,* from the last third of gestation). OFPA specifies that dairy livestock be managed organically for a period *not less than* a 12-month period, so AMS could presumably allow transition of any dairy animal into organic production after a period of exactly 12 months of organic management.

This is the legal standard currently in effect. While current regulations allow for continual transition of nonorganic dairy animals into organic dairy operations, that is not occurring under the current regulations. As a result, AMS estimates no immediate changes in costs or benefits associated with leaving existing regulations in place. However, in this scenario, organic dairy farms may be more likely to source or transition animals if the practice is affirmed by the program and universally allowed by certifiers. If more transitioned animals are sourced, more young dairy animals will be treated with antibiotics and other medications prohibited in organic livestock production and/or provide nonorganic feed until one year. Relatedly, operations wanting to assure

consumers that they had raised organic heifers under organic conditions through their entire lives would have to do so under a separate certification program.

ARMS Data indicated that the average organic dairy operation kept 40.4 heifers (or 39.3 percent of its herd) for breeding, of which 36.6 heifers (or 35.7 percent of its herd) were kept for breeding and raised on the operation. The difference of these values (3.6 percent) represents the likely proportion of organic heifers raised on outside heifer-raising operations (as a share of the total herd). If all those animals become transitioned heifers, then an additional 12,154 animals (*i.e.,* 337,540 head * 3.6 percent) would be transitioned. AMS assumes that the price difference between organic (organically managed from the last third of gestation) and transitioned heifers reflects the $1,000 cost difference in raising dairy heifers between these two comparative production systems. In this case, the reduced cost of allowing for continuous transitioning of heifers is $12,154,000.

The potential cost associated with the adoption of the continuous transition for all organic dairies could be illustrated by a deleterious effect on markups to products marketed under the organic label; although a markup reduction is not a cost, from the society-wide perspective taken for purposes of Executive Order 12866 and OMB Circular A-4, it may signify a greater incentive for the (costly) establishment of alternative certifications to USDA organic certification. Table 2 shows that milk products marketed under the organic label earned an average premium of 61 percent over conventional products that total $2.4 billion in total value. A one percent fall in total premiums would be associated with a $24 million reduction in organic premiums at the retail level.

While continual transition could theoretically support a regulatory objective to establish a consistent and uniform standard for all operations, AMS is not selecting this alternative. Based on available information, AMS understands that most established organic dairies can (and do) readily raise dairy animals for a period longer than the 12-month minimum required in OFPA. If AMS selected Alternative A, it would likely be more disruptive to existing operations and require more operational changes than we expect will be required by this final rule. Furthermore, the National Organic Standards Board's recommendations, and stakeholder comments support and inform AMS's decision to not select this alternative.

OFPA directs organic animal production practices to be free of antibiotics (7 U.S.C. 6509(c)(3) and 6509(d)(1)). While a one-time transition allowance is necessary to support growth in the organic dairy market, AMS believes that the policy option that minimizes antibiotics (and provides for lifelong organic management) is the best course to remain true to the broad range of organic production practices described in OFPA. Comments indicate that at least some consumers already expect organic milk is produced without the use of any antibiotics (and other substances prohibited under the USDA organic regulations) and expect organic management of all animals on organic operations from the last third of gestation. Alternative A would not meet these expectations, and adopting the alternative could cause a decline in consumer confidence, lower demand for organic milk and dairy products, and lower organic milk prices for producers. The aforementioned survey results presented by the Cornucopia Institute strongly support this reasoning.

Alternative B—Prohibit All Transitions

A second alternative AMS considered was to remove any allowance for dairy operations to transition animals to organic production, including new and nonorganic dairies seeking to convert to organic production. Under this option, all dairy animals would need to be managed organically from the last third of gestation for milk and dairy products to be sold, labeled, or represented as organic.

The costs of this alternative are threefold. First, producers would bear the increased annual costs of $1,845,000 described in Table 5 and under the one-time transition scenario where 50 percent of heifers are transitioning. Because conventional dairy farms transitioning to organic would also need to purchase heifers and milking cows approximately equal to the size of their current operations, AMS believes this alternative may lead to price increases for organic heifers of significantly more Start Printed Page 19770 than 50 percent. This would increase the costs of the rule.

Second, this alternative would limit the ability of the industry to expand to meet growing demand and could thereby create price instability within the market. In periods of stable demand, firm entry into the organic market is modest, reflecting factors such as population and income growth. In these stable periods under current rules, the cost of producing organic milk for established producers reflects both the higher cost of production in terms of feed costs, land requirements, and animal husbandry practices,

and the higher cost of replacement heifers. In periods of rapid industry growth (*i.e.,* high demand), entrants to this industry bear those costs as well, but also face the significant additional costs of converting land for organic feed and pasture over a 3-year period. Under this alternative, in periods of industry growth (*i.e.,* high demand) new entrants to the industry would face the additional cost of acquiring organic heifers and milking cows under periods of tight supply and this alternative could lengthen the time required for new entrants to begin production. While a subset of organic dairies would see higher returns on sales of heifers, incumbent farms seeking to grow would see higher costs of expanding herds through heifer purchases and the additional time required to certify additional land under the organic program. While some incumbent producers may benefit under this alternative in the short-term, the added costs to entry and expansion would likely foster price volatility for organic heifers and wholesale organic milk, as the industry's ability to quickly expand in response to demand fluctuations would be severely handicapped.

Furthermore, organic heifers are an input to wholesale organic milk production, and wholesale milk is an input to retail organic milk products such as organic cheese, yogurt, butter, and retail-level milk. Bringing organic milk products to market requires complementary investments in retail marketing outlets and brand development. Bernanke (1983), Cabellero and Pindyck (1996), and Carruth et al. (2000) find that increasing input price volatility reduces investment since the value of the option to delay the investment rises with increased uncertainty about the investment's return.[76 77 78] Such volatility could limit long-term growth in organic milk demand if downstream milk processors (for cheese and other milk products) and retailers require an organic milk supply with stable prices to allow for planning of other investments such as equipment, brand promotion, and retail promotion, which in some cases constitutes building retail stores focused solely on the sale of organic products.

This alternative would simplify enforcement of the requirements by applying a single standard, without exceptions, to all organic dairy operations. It would also align the requirements for dairy animals with the requirements for organic slaughter stock, but AMS does not believe this option is necessary for several reasons. First, AMS believes that certifiers will be able to enforce a rule that allows for a limited and well-defined transition. Second, AMS believes that allowing one-time transitions for organic dairy operations maintains market stability while simultaneously preserving the value of the organic label. Transition is also permitted by OFPA (7 U.S.C. 6509(e)(2)). Third, AMS

notes that other aspects of the USDA organic regulations slow entry into this market and believes that eliminating its historic allowance of dairy animal transitions could impact downstream organic processors and retailers, who have invested in the industry based on the expectation of the continuation of regulations that ensure a stable and responsive market supply. Most commenters supported a one-time allowance.

Final 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. Pursuant to the requirements set forth in RFA, AMS performed an economic impact analysis on small entities. Small entities include producers and agricultural service firms, such as handlers and accredited certifying agents. AMS has determined that the final action would impact small entities but that it would not have a significant economic impact on them.

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

Potentially Affected Small Entities

AMS has considered the economic impact of the final action on small entities. Small entities include producers transitioning into organic dairy production, existing organic dairy producers, producers that raise replacement animals for organic dairies, and

certifying agents. AMS believes that the cost of implementing the rule will fall primarily on organic dairies that currently purchase transitioned heifers, although any organic dairies that purchase 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, and farms that raise their own organic replacement heifers would not likely be affected by the rule. AMS believes heifer development operations also could be impacted by this action. However, limited information on the number and size of heifer development operations prevents our estimation of the number of such entities and any increased costs for those entities.

The Small Business Administration (SBA) defines small agricultural service firms, which include certifying agents, as those having annual receipts of less than $8,000,000 (13 CFR 121.201). There are currently 76 USDA-accredited certifying agents; based on a query of AMS's Organic Integrity Database (OID), there are approximately 57 certifying Start Printed Page 19771 agents (38 domestic and 19 foreign) who are currently involved in the certification of organic livestock operations. While certifying agents are small entities that would be affected by the final rule, AMS does not expect that these certifying agents would incur significant costs as a result of this action. Certifying agents already must comply with the current regulations. The recordkeeping burden of these routine certification activities are accounted for in the information collection package OMB #0581-0191, *e.g.,* maintaining certification records for organic dairy operations.

For the final regulatory flexibility analysis, AMS estimated how organic dairy operations of different sizes (small versus large) would be impacted as a result of purchasing only organic dairy replacement animals (organically managed from the last third of gestation). As defined by SBA (13 CFR 121.201), small agricultural producers are those having annual receipts of less than $1,000,000. AMS used this SBA criterion to identify large organic dairy operations as those with cash receipts of more than $1,000,000 and small operations as those with cash receipts of $1,000,000 or less.

Data on the exact shares of organic dairy farms that have sales above and below $1,000,000 are not available. However, ARMS data indicates that the average sales revenue of dairy farms from sales of organic milk and animals is $2,855 per milked cow, a figure that indicates that revenues exceed $1,000,000 for farms with more than 350 head.

Within the 2016 ARMS data, 90 percent of organic dairy farms (300 of the 332) had fewer than 200 milking animals. Lacking more detailed information, AMS assumes that 90 percent of all organic dairy farms, or 2,832 operations of the 3,134 operations, qualify as small businesses under the SBA standard. AMS also assumes that these farms purchase replacement heifers in the same pattern as the average farm with 200 or fewer head. In this case, small organic dairy farms purchase 0.7 replacement heifers on average, with the 11.3 percent of small farms that purchase replacement heifers buying 6.6 head on average. In contrast, large organic dairy farms purchase 0.8 replacement heifers on average, with the 6.8 percent of large farms that purchase replacement heifers buying 12.3 head on average.

Expand Table

	Fewer than 50 cows	50-99 cows	100-199 cows	200 or more cows
Size of Operation				
Number of Farms	1,359	1,076	396	302
Share of Operations	43%	34%	13%	10%
Average Cost Per Farm	$127-$510	$166-$666	$439-$1,755	$209-$837
Total annual cost for purchase of replacement heifers across size class	$173,210-$692,839	$179,127-$716,506	$173,915-$695,660	$63,189-$252,757
Percent of operations that purchased replacement heifers annually	7.6%	16.4%	10.2%	6.8%
Average number of replacement heifers purchased annually (for operations purchasing heifers)	6.68	4.06	17.22	12.33
Cost per operation annually (25% to 50% transitioned heifers) (for operations purchasing heifers)	$1,670-$6,678	$1,016-$4,063	$4,306-$17,225	$3,082-$12,330

Table 8—Costs by Size of Operation for Purchasing Organic Heifers

For this cost analysis (shown in Table 8), AMS assumed that the difference in cost between transitioned replacement heifers and organic replacement heifers (organically

managed from the last third of gestation) is currently $1,000 per head, that half of organic replacement heifers currently purchased are transitioned. In our more conservative scenario, we assumed only 25% of replacement heifers were bought transitioned and would face a $1,000 increase in cost. Our most costly scenario assumes that the increased demand for organic replacement heifers raises their price by $500, for a total of $1,500 in additional costs to 50% of all replacement heifers. Based on our analysis, AMS estimates that, under the final rule, small operations would collectively spend an additional $526,251 (25% at a $1,000 increase cost per head) to $2,105,005 (50% at a $1,500 increase cost per head) for heifers. Large operations would collectively pay an additional $63,189 to $252,757 for heifers. Of the operations that purchase heifers, the average additional cost per operation in the scenarios would be between $1,642 to $6,569 for small operations and $3,082 [79 80] Table 8 summarizes the cost analysis using SBA criterion for small businesses (*i.e.,* producers with less than $1,000,000 in cash receipts).

Expand Table

	Small operations (<$1,000,000)	**Large operations (>=$1,000,000)**
Number of Operations	2,832	302
Total cost (all operations)	$526,251-$2,105,005	$63,189-$252,757
Per operation purchasing replacement heifers	$1,642-$6,569	$3,082-$12,330

Table 9—Cost of Organic Replacement Heifers by SBA Criterion for Small Businesses

To understand the potential costs in context, AMS used the higher average cost estimate per operation from Table 9 the purchase of organic replacement heifers (*i.e.,* $6,569 for small; $12,330 for large) and compared it to the average gross cash farm income for farms with 200 head or fewer and for farms with more than 200 head using a revenue Start Printed Page 19772 estimate from ARMS data that farms earn $2,855 per head. Of farms with 200 head or fewer and an average of $158,003 in sales, the 11.3 percent of farms purchasing replacement heifers will have their costs increase 4.2 percent on average in the costliest scenario. Of large farms with more than 200 head and $1,683,366 in revenue, the 12.33 percent purchasing replacement heifers will see costs increase by 0.7 percent.

It is important to note that these cost figures do not include the potential offsetting effect of transfers or increased revenue from replacement heifer sales as organic replacement heifer prices increase. This revenue is recorded as a transfer in the benefit-cost analysis.

AMS is including additional flexibility for certified dairy operations that are small businesses, specifically, by allowing those operations (in certain limited circumstances) to request a variance from a portion of this final rule. Procedures described at § 205.236(d) allow small businesses to request movement of transitioned animals between certified organic operations in specific and limited situations (*e.g.,* bankruptcy, intergenerational transfers). These procedures should increase flexibility for small business production decisions and lower the upper bound of the costs estimated in Table 9.

AMS has not identified any relevant Federal rules that are currently in effect that duplicate, overlap, or conflict with the final rule. The action will provide additional clarity on the origin of livestock requirements that are specific and limited to the USDA organic regulations.

List of Subjects in 7 CFR Part 205

- Administrative practice and procedure
- Agricultural commodities
- Agriculture
- Animals
- Archives and records
- Fees
- Imports
- Labeling
- Livestock
- 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 amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

1. The authority citation continues to read:

Authority: 7 U.S.C. 6501-6524.

2. Section 205.2 is amended by adding in alphabetical order the terms "organic management", "third-year transitional crop", and "Transitioned animal" to read as follows:

§ 205.2
Terms defined.

*****

Organic management. Management of a production or handling operation in compliance with all applicable 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 is not certified organic but is in the third year of organic management and is eligible for organic certification in one year or less.

Transitioned animal. A dairy animal converted to organic milk production in accordance with § 205.236(a)(2) that has not been under continuous organic management from the last third of gestation; offspring born to a transitioned animal that, during its last third of gestation, consumes third-year transitional crops; and offspring born during the one-time transition exception that themselves consume third-year transitional crops.

*****

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.* Subject to the requirements of this paragraph, an operation that is not certified for organic livestock and that has never transitioned dairy animals may transition nonorganic animals to organic production only once. After the one-time transition is complete, the operation may not transition additional animals or source transitioned animals from other operations; the operation must source only animals that have been under continuous organic management from the last third of gestation.

Eligible operations converting to organic production by transitioning organic animals under this paragraph must meet the following requirements and conditions:

(i) Dairy animals must be under continuous organic management for a minimum of 12 months immediately prior to production of milk or milk products that are to be sold, labeled, or represented as organic. Only certified operations may represent or sell products as organic.

(ii) The operation must describe the transition as part of its organic system plan. The description must include the actual or expected start date of the minimum 12-month transition, individual identification of animals intended to complete transition, and any additional information or records deemed necessary by the certifying agent to determine compliance with the regulations. Transitioning animals are not considered organic until the operation is certified.

(iii) During the 12-month transition period, dairy animals and their offspring may consume third-year transitional crops from land included in the organic system plan of the operation transitioning the animals;

(iv) Offspring born during or after the 12-month transition 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) Consistent with the breeder stock provisions in paragraph (a)(3) of this section, offspring born from transitioning dairy animals are not considered to be

transitioned animals if they are under continuous organic management and if only certified organic crops and forages are fed from their last third of gestation (rather, they are considered to have been managed organically from the last third of gestation);

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

(vii) Dairy animals that complete the transition and that are part of a certified operation are transitioned animals and must not be used for organic livestock products other than organic milk and milk products.

(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 their 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 that are removed from an organic operation and subsequently managed or handled on a nonorganic operation may not be sold, labeled, or represented as organic.

(2) Breeder stock, dairy animals, or transitioned animals that have not been Start Printed Page 19773 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.

(d) A request for a variance to allow sourcing of transitioned animals between certified operations must adhere to the following:

(1) A variance from the requirement to source dairy animals that have been under continuous organic management from the last third of gestation, as stated in paragraph (a)(2) of this section, may be granted by the Administrator to certified operations that are small businesses, as determined in 13 CFR part 121, for any of the following reasons:
(i) The certified operation selling the transitioned animals is part of a bankruptcy proceeding or a forced sale; or

(ii) The certified operation has become insolvent, must liquidate its animals, and as a result has initiated a formal process to cease its operations; or

(iii) The certified operation wishes to conduct an intergenerational transfer of transitioned animals to an immediate family member.

(2) A certifying agent must request a variance on behalf of a certified operation, in writing, to the Administrator within ten days of receiving the request of variance from the operation. The variance request shall include documentation to demonstrate one or more of the circumstances listed in paragraph (d)(1) of this section.

(3) The Administrator will provide written notification to the certifying agent and to the operation(s) involved as to whether the variance is granted or rejected.

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 under this part, except as provided in § 205.236(a)(2)(iii) and (a)(3), 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 under this part.

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Erin Morris,

Associate Administrator, Agricultural Marketing Service.

Footnotes

1. 7 CFR 205.238(c) and 7 CFR part 205 Subpart G. https://www.ecfr.gov/current/title-7/subtitle-B/chapter-I/subchapter-M/part-205/subpart-G .
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2. The July 2013 OIG audit report on organic milk operations may be accessed at the following website: http://www.usda.gov/oig/webdocs/01601-0002-32.pdf .
Back to Citation

3. National Organic Standards Board April 2003 Recommendation on Breeder Stock: Clarification of Rule. Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations .
Back to Citation

4. A complete listing of related documents and NOSB recommendations is found in Sections III and IV below.
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5. NOSB Final Recommendation, June 2, 1994. Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/meetings.
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6. 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).
Back to Citation

7. NOSB Committee Report and Adopted Recommendations, 16 March 1998. Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/meetings .
Back to Citation

8. National Organic Standards Board May 2003 Recommendation on Origin of Livestock: Recommendation for Rule Change (document dated April 2003). Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations .
Back to Citation

9. National Organic Standards Board May 2003 Recommendation on Breeder Stock: Recommendation for Clarification of Rule (document dated April 2003). Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations .
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10. National Organic Standards Board (October 2004) Directive for Origin of Dairy Livestock. Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations .
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11. Harvey v. Veneman, 297 F. Supp. 2d 334 (D. Maine 2004).
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12. Harvey v. Veneman, 396 F. 3d 28 (1st Cir. 2005).
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13. Harvey v. Johanns. Civil No. 02-216-P-H. Consent Final Judgment and Order, 9 June 2005.
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14. NOSB's comment on the proposed rule is available from the NOP by request.
Back to Citation

15. National Organic Standards Board May 2003 Recommendation on Origin of Livestock: Recommendation for Rule Change (document dated April 2003). Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations .
Back to Citation

16. NOP 5003 Dairy Animal Acquisition under the NOP Regulations (dated October 3, 2006). Available from NOP by request.
Back to Citation

17. Summarized in the National Organic Standards Board Recommendation on Origin of Livestock: Recommendation for Rule Change (document dated April 29, 2003). Available online at: https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations .
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18. McDonald, J.M., Law, J., & Mosheim, R. (2020). Consolidation in US dairy farming (USDA ERS. No. 1473-2020-607).
Back to Citation

19. Using the Organic Integrity Database, AMS identified dairy cattle operations with listed organic animals that were surrendered their organic dairy certification between 2016-2021 that would have been labeled a small business under 13 CFR part 121.
Back to Citation

20. The Administrator includes a "representative to whom authority has been delegated to act in the stead of the Administrator" which could be the NOP Program Manager, i.e. the NOP Deputy Administrator.
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21. NOP Program Handbook, NOP 2606 Instruction: Temporary Variances. Available at: https://www.ams.usda.gov/sites/default/files/media/Program%20Handbk_TOC.pdf .
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22. Hughner, R.S., McDonagh, P., Prothero, A., Shultz, C.J., & Stanton, J. (2007) Who are organic food consumers? A compilation and review of why people purchase organic food. Journal of Consumer Behaviour: An International Research Review,6(2-3), 94-110.

23. Wemette, M., Safi, A.G., Wolverton, A.K., Beauvais, W., Shapiro, M., Moroni, P., . . . & Ivanek, R. (2021). Public perceptions of antibiotic use on dairy farms in the United States. Journal of Dairy Science, 104(3), 2807-2821.
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24. Dangi, N., Gupta, S.K., & Narula, S.A. (2020). Consumer buying behaviour and purchase intention of organic food: a conceptual framework. Management of Environmental Quality: An International Journal.
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25. See Audit Report 01601-03-Hy.

26. See AMS-NOP-11-0009-2799.
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27. Approved January 21, 2021.
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28. Total number of currently certified organic operations from Organic Integrity Database, August 7, 2019, https://organic.ams.usda.gov/Integrity.
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29. Variance requests can be viewed by the public at: https://www.ams.usda.gov/rules-regulations/organic.
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30. Applies only to certified organic ruminant livestock producers located in counties designated as primary or contiguous natural disaster areas by Secretary Vilsack. The list of declared State counties is available on USDA's website for Disaster Designation Information.
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31. The July 2013 OIG audit report on organic milk operations may be accessed at the following website: http://www.usda.gov/oig/webdocs/01601-0002-32.pdf.
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32. 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.

33. Zorn, Alexander, Christian Lippert, and Stephan Dabbert. 2009. "Economic Concepts of Organic Certification." Deliverable 5 of the EU FP7 CERTCOST Project: Economic Analysis of Certification Systems in Organic Food and Farming.

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36. Certifying agents are required to send information on certified operations to AMS annually. Current and historical data may be accessed through the Organic Integrity Database at the following link: https://organic.ams.usda.gov/Integrity/. Accessed 11/21/2019.
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37. 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.
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38. The USDA NASS surveys may be found at the following link: https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Organic_Production/.
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39. OTA/Nutrition Business Journal, 2021 Organic Industry Survey. Nutrition Business Journal conducted a survey between January 13 and April 23, 2021, to obtain information for their estimates. Over 120 organic firms responded to the survey. Available online at https://ota.com/resources.
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40. The 2014 Dairy NAAHMS report may be found at the following link: http://go.usa.gov/xKfEh.
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41. Current and historical data may be accessed through the Organic Integrity Database at the following link: https://organic.ams.usda.gov/Integrity/.
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42. Organic Trade Association (OTA)/Nutrition Business Journal, 2021 Organic Industry Survey (pp. 3).
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43. National Retail Report—Conventional vs Organic— https://usda.library.cornell.edu/concern/publications/000000043?locale=en.
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44. USDA NASS. 2017. Census of Agriculture—2019 Certified Organic Survey. Available online at: https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Organic_Production/.
Back to Citation

45. The Organic Integrity Database is available online at: https://organic.ams.usda.gov/Integrity/. AMS identifed approximately 3,180 bovine dairy operations in the database, as of January 2020.
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46. USDA's Milk Production (December 2020) Report available online at: https://downloads.usda.library.cornell.edu/usda-esmis/files/h989r321c/q524kf13h/ws85b748b/mkpr1220.pdf .
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47. USDA's Certified Organic Production Survey available online at: https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Organic_Production/.
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48. 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://go.usa.gov/xKfEh .
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49. USDA APHIS. NAHMS Dairy 2007, 84.
Back to Citation

50. USDA APHIS. NAHMS Dairy 2007, 87.
Back to Citation

51. USDA APHIS. NAHMS Dairy 2014, Report I: Dairy Cattle Management Practices in the United States, 2014. Available online at: http://go.usa.gov/xKfEh , 218.
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52. As an example, a 100-cow lactating dairy herd would produce about 50 heifers annually (i.e., 50 percent of births). Considering this heifer group as a single group, a 7.8 percent mortality rate would reduce the herd to about 46.1 animals by the end of year one (assuming a 7.8 percent mortality rate over the entire year). Additionally, AMS assumes a 10 percent cull rate could further reduce this to 41.5 animals at the end of year one. By the end of the second year, this number could be reduced another 1.8 percent (mortality rate for weaned heifers) to 40.7 animals. Assuming a further 10 percent reduction due to culls, the original 50-animal group may be reduced to 36.6 animals by the end of year two.
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53. The 2017 ARMS survey indicates that the average organic herd size is 102.7 head while the 2016 Census of Organic Production indicates it is 104.5 (= 267,523 head/2,559 farms).
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54. The OIG report does not represent a random sample of operations. No commenter disputed or provided additional data for this estimate through public comment.
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55. Fay Benson. Cornell College of Agriculture and Life Sciences. "USDA Puts Northeast Organic Dairies at a Disadvantage." Small Farms Quarterly. January 13, 2020. https://smallfarms.cornell.edu/2020/01/usda-puts-northeast-organic-dairies-at-a-disadvantage/.
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56. Because of economic effects due to the pandemic and recency of data, AMS does not adjust for inflation in our estimates.
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57. Total industry costs are estimated to be 1.3 billion using organic dairy enterprise budget from Iowa State University Research and Extension.
Source: https://www.extension.iastate.edu/dairyteam/content/iowa-dairy-budgets .
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58. See AMS-NOP-11-0009-2799.
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59. Source: Organic Trade Association (OTA), 2021 Organic Industry Survey.
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60. Source: AMS Feeder and Replacement Auction Data, https://www.ams.usda.gov/market-news/feeder-and-replacement-cattle-auctions .
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61. Using the Organic Integrity Database, AMS identified dairy cattle operations with listed organic animals that were suspended or surrendered their organic dairy certification between 2016-2021.
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62. A springer is a heifer (i.e., a female cow that has not previously calved) that is 7 to 9 months pregnant and will begin producing milk within 0 to 2 months.
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63. USDA NASS 2019 Organic Survey, Table 17, dairy cow inventory as of December 31, 2019. https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/Organics/index.php .
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64. This includes 2019 data collected in the AMS Livestock and Replacement Cattle Reports reported at https://www.ams.usda.gov/market-news/feeder-and-replacement-cattle-auctions for the following five auction: Mid-Georgia Livestock, Jackson, GA; Empire Livestock, Cherry Creek, NY, Mammoth Cave Dairy Auction, Smiths Grove, KY; New Holland Sales Stables, New Holland, PA; and Toppenish Monthly Dairy Replacement Sale, Toppenish, WA.
For the final rule, not all of the auctions previously used had available data. Using the three available reports in August 2021, AMS determined that the average price for non-organic springers was approximately $1,169. While this is higher than our previous measurement, AMS maintains the approximation of $1,000 because of the smaller available sample and the lower price produces an upper-bound on our cost estimates.
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65. Fay Benson. Cornell College of Agriculture and Life Sciences. "USDA Puts Northeast Organic Dairies at a Disadvantage." Small Farms Quarterly. January 13, 2020. https://smallfarms.cornell.edu/2020/01/usda-puts-northeast-organic-dairies-at-a-disadvantage/.
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66. A 25 percent price increase resulting from a 50 percent increase in quantity supplied is consistent with an elasticity of supply of 2.
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67. These costs reflect only those for dairy cattle. Costs for purchasing dairy sheep and goats are not included in this analysis.
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68. This estimate accounts only for replacement animals, not any animals that would be required to facilitate growth in the industry.
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69. As discussed above, AMS has found that organic heifer prices have changed slightly from the proposed rule, but are still close to original estimates and chose to represent organic and conventional heifer prices as $2,000 and $1,000 respectively for simplicity. This does not impact the estimated cost impact of the rule.
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70. Scenario 1 presents the low cost estimate, with only 25% of heifers purchased associated with the additional $1,000 organic premium. Scenario 4 presents the high cost estimate, with 50% of heifers associated with a $1,500 dollar organic premium (the difference between the cost of transition and the increased price due to demand) and 50% of heifers incurring a $500 dollar premium from the increased prices due to increased demand. [The $500 dollar premium is an industry transfer, but AMS keeps the cost for individual operations to better acknowledge the possible high end costs for operations who only purchase animals.]
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71. USDA, Animal Plant Health Inspection Service. Dairy Heifer Raiser, 2011 (October 2012). Available online at: https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nahms/nahms_dairy_studies .
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72. The Organic Integrity Database includes descriptions of the products for which organic farms are certified as recorded by the certifying agent. It lists 220 operations that recorded dairy cattle but not milk production (i.e., a possible indicator for a heifer-raising operation). These operations were often identified as being involved with "dairy cows," "breeding operations," and "replacements." Unfortunately, the database does not provide sufficient information to use in our analysis of heifer-raising operations.
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73. Hughner, R.S., McDonagh, P., Prothero, A., Shultz, C.J., & Stanton, J. (2007) Who are organic food consumers? A compilation and review of why people purchase organic food. Journal of Consumer Behaviour: An International Research Review, 6(2-3), 94-110.
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74. USDA NASS organic surveys are available at: https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Organic_Production/index.php.
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75. Organic Trade Association (OTA)/Nutrition Business Journal, 2021 Organic Industry Survey (pp. 3).
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76. Bernanke, Ben S. (1983) "Irreversibility, Uncertainty and Cyclical Investment", Quarterly Journal of Economics (98) 85-106.

77. Caballero, Ricardo J. and Pindyck, Robert S. "Uncertainty, Investment, and Industry Evolution" International Economic Review (1996)37:641-663.

78. Carruth, A., Dickerson, A., and Henley, A. (2000) "What do We Know About Investment Under Uncertainty?" Journal of Economic Surveys (14)2: 119-154.

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79. Small operations making purchases buy 6.57 heifers and will pay $1,000 more for half those animals and $2,000 on the others. Large operations making purchases buy 12.33 heifers and will also pay $1,000 more for half those animals and $2,000 on the others.

80. As with the Table 6 costs breakout by operation size, total costs in Table 8 ($0.59 million and $2.36 million under the 25 percent transition at $1,000 in cost and 50 percent transition at $1,500 in cost scenarios) roughly equal the Table 4 estimates of costs net of transfers ($0.615 million and $2.46 million). Discrepancies are attributed to rounding errors.

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