BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE

In the Matter of	:	**Docket Nos.:**
	:	
Milk In The Northeast	:	**AO- 14-A73, et al;**
	:	
Marketing Area, et al	:	**DA-03-10**

POST-HEARING BRIEF FOR DAIRY FARMERS OF AMERICA, INC. (DFA) AND DAIRYLEA COOPERATIVE INC.

Marvin Beshore, Esquire
130 State Street
P.O. Box 946
Harrisburg, PA 17108-0946

Date: September 6, 2005

I. INTRODUCTION AND SUMMARY OF ISSUES AND POSITION

This brief is submitted on behalf of Dairy Farmers of America, Inc. ("DFA") and Dairylea Cooperative Inc. ("Dairylea") It addresses all proposals from this hearing which was held June 20–23 in Pittsburgh, Pennsylvania, to consider proposed amendments to all federal milk marketing orders.

In this proceeding the Secretary must reconsider the definition of fluid milk products in all federal milk marketing orders, set out at 7 C.F.R. § 1000.15, in light of changes in milk products and processing technology over the past 30 years since the basic framework of the current definition was put in place. The importance of the fluid milk product definition to both producers and handlers is that it defines Class I utilization, the highest priced classification of milk usage. The fluid milk product definition determines what products, and volumes of producer milk utilized for those products, are Class I. The hearing presents, for the Secretary's decision, one overriding issue of policy with respect to defining fluid milk products, and a number of subsidiary issues of application of the policy to particular product categories or sub-categories.

The central policy issue is: Should the defining criteria for milk components in a beverage be nonfat milk solids or dairy protein? The nonfat milk solids test has been used for several decades, but is now subject to review because of advances in milk component fractionation technology which allow products not contemplated when the nonfat solids test was promulgated. Proposal 7, advanced by the National Milk Producers Federation (NMPF), and supported by DFA and Dairylea, as well as all other producer organizations participating in the hearing, advocates a change to milk protein content to determine whether there are sufficient minimum dairy ingredients to constitute a fluid milk product. All dairy ingredients, including

whey, casein, milk protein concentrates, and all derivatives of MPCs should be included in determining whether there are sufficient ingredients to qualify as a fluid milk product. The whey, however, having already been priced as a part of the milk going into the cheese vat, should not be priced as a fluid milk product.

DFA and Dairylea oppose the proposals which would engraft new exclusions to the fluid milk product definition and supports retention of the existing language which has competently addressed pricing of certain specialty meal replacement, long shelf life, and high protein beverages. Those proposals would provide special pricing status to drinkable yogurt and/or milk beverages made for the health care industry. Furthermore, DFA and Dairylea oppose the H. P Hood proposal which would exempt from Class I treatment specified volumes, in each order, of "new" fluid milk products. These new exclusions are not justified and would erode the basic beverage milk classification of Class I, fluid milk dairy products in the federal order system.

II. BACKGROUND: PROPONENTS, PARTICIPANTS, AND PROPOSALS

A. Participants

1. Dairy Farmers of America, Inc., (DFA) is a Capper-Volstead cooperative association of 13,500 dairy farms producing milk in forty-nine (49) states. DFA regularly markets milk on nine of the ten federal milk orders.

2. Dairylea Cooperative Inc. is a northeast regional Capper-Volstead cooperative of 2400 dairy farmers located in seven states. Dairylea regularly markets milk on three of the ten federal milk orders.

2. The National Milk Producers Federation (NMPF) is the voice of America's dairy farmers, representing through their cooperatives more than 70% of producers in the nation.

3. O-At-Ka Milk Products Cooperative is a major processor of specialty canned and bottled milk and other products. It also processes

4. Select Milk Producers, Inc., and Continental Milk Products, Inc., are Capper-Volstead cooperatives and members of NMPF.

5. The H. P. Hood Company is a national dairy company which operates fully regulated distributing plants in several milk marketing orders, including Order 1.

6. The Milk Industry Foundation is a national trade association whose members include a majority of proprietary handlers in the federal milk order system.

7. The National Yogurt Association is a Washington trade association of the manufacturers of yogurt. Its members include Dannon and General Mills.

8. Bravo! Foods International Corp., Lifeway Foods, Inc., Pepsico, Starbucks Corporation , and Unilever are proprietary companies engaged in the marketing of some dairy products, including kefir. All were represented at the hearing by the Tipton Group, a Washington consulting firm.

9. The Dannon Corporation is an international processor and marketer of dairy and other food products.

10. General Mills, Inc., is a multi-billion dollar diversified food company with operations which include the processing and marketing of yogurt products.

11. Fonterra is the New Zealand dairy industry's marketing presence in the United States. It is a world wide marketer of milk components.

12. Hormel Foods, LLC, is a national firm which processes and markets food products including meats, and a limited range of specialty dairy products.

13. Leprino Foods is a national manufacturer and marketer of Italian cheeses and

whey.

B. Proposals

1. Proposals 1–4, and 7, submitted by cooperative associations, or their trade association, addressed, with some variations, the current nonfat solids percentage test for minimum dairy ingredients in the fluid milk product definition. The cooperative associations participating in the hearing withdrew or abandoned their alternative public proposal and unanimously endorsed proposals 2 and 7 at the hearing.

2. Proposal 1, submitted by DFA, was withdrawn.

3. Proposal 2, submitted by DFA, would amend part 1000 to require the inclusion of all dairy ingredients, including whey, casein, and milk protein concentrate and any of its derivatives, when determining the product make-up for the fluid milk product definition.

4. Proposal 3, submitted by O-At-Ka, was withdrawn at the hearing in favor of the NMPF proposal 7.

5. Proposal 4, submitted by Select and Continental, was withdrawn at the hearing.

6. Proposals 5 and 6, submitted by H.P. Hood, advocate alternative, new systems of exemption or partial exemption from Class I of certain beverage milk products.

7. Proposal 7, submitted by the National Milk Producers Federation, proposes a 2.25% dairy protein percentage test, rather that the current 6.5% nonfat milk solids test, for determination of minimum dairy ingredients in a fluid milk product.

7. Proposal 8, submitted by the Dannon Corporation, would exclude "yogurt-containing beverages" from the definition of fluid milk product.

8. Proposal 9, submitted by General Mills, would exclude from the definition of fluid milk product, beverages containing at least 20 percent yogurt by weight.

9. Proposal 10, submitted by Novartis Corp., would exclude any product intended for

dietary use from the fluid milk product definition. Novartis did not appear at the hearing to explain or offer data in support of the proposal. The proposal as published was supported at the hearing by the witness for Leprino Foods.

10. Proposal 11, submitted by Hormel Foods, LLC, would exclude beverages prepared for the healthcare industry as fluid milk products. This proposal was not endorsed by any other participants at the hearing.

11. The Milk Industry Foundation, the companies represented by the Tipton Group, and Leprino Foods (as its secondary position) opposed any changes to the status quo definition of fluid milk product.

III. THE DEFINITION OF FLUID MILK PRODUCT: SOLIDS NOT FAT VERSUS PROTEIN.

A. The need for an updated definition .

The current fluid milk product definition at 7 C.F.R.§ 1000.15 [1] has been in place in substantially its present form for more than 30 years. It has multiple elements as described by Mr. Hollon in his testimony. First, it establishes the fundamental form and use classification for fluid milk products as "any milk products in fluid or frozen form....that are intended to be used as beverages." Form and use classification is a fundamental criteria of the Agricultural Marketing Agreement Act. See 7 USC § 608c(5)(A). The current definition goes on to identify these products to include but not be limited to: "Milk, fat-free milk, low-fat milk, light milk, reduced fat milk, milk drinks, eggnog and cultured buttermilk, including any such beverage products that

[1] Exhibit A attached to this Brief.

are flavored, cultured, modified with added non-fact milk solids, sterilized, concentrated, or reconstituted." The second tier for the definition identifies component percentages of milkfat and non-fat milk solids as limitations. The maximum butterfat percentage is established at 9%, with the underlying premise being that such highly concentrated fat levels in products takes them out of the beverage category. On the other end of the component definition spectrum, fluid milk products are currently defined to exclude products that contain "by weight less than 6.5% non-fat milk solids, and whey". Prior proceedings indicate that a determination was made that beverages with such limited percentages of milk components should not be classified as fluid milk products as they are not primarily a dairy beverage but a soft drink (or similar product) with limited dairy ingredients. The third aspect of the present language involves the express exclusion of defined products by providing: "The term fluid milk product shall not include: (1) plain or sweetened evaporated milk/skim milk/sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use for a meal replacement that are packaged in medically sealed containers. . . ."

New product technology has challenged that portion of the fluid milk product definition which excludes products with less than 6.5% nonfat milk solids. The Hood Company's "Carb Countdown" product, described at the hearing, is the clearest example of this. "Carb Countdown" is milk by any other name. It is packaged and sold in the same containers in fluid form as milk, skim milk and low-fat milk. However, by Hood's interpretation (not adopted by USDA and subject to ongoing litigation) Carb Countdown has less than 6.5% currently countable[2] nonfat milk solids since the normal level of lactose has been reduced through milk fractionation technology. As a consequence, this new designer milk, promoted as a "dairy

---

[2] Whey is not included in the counted nonfat solids under the present definition.

beverage option," (Exh. 30, p. 2; Suever Tr. 918) which targets the low-carb diet consumer, could be placed in a different (and lower[3]) classified price category than its milk competitors absent clarifying amendments to the fluid milk product definition.

Carb Countdown is a product of technology not foreseen[4] at the time the current order language was promulgated. Proposal 7 updates the criteria for excluding beverages from fluid milk products by focusing on protein rather than total milk solids. As Dr. Roger Cryan of the National Milk Producers Federation testified in detail, the 2.25% protein level is equivalent to 6.5% nonfat milk solids in terms of the volume of producer milk represented. This level is confirmed by analysis of both average component tests in federal order markets since 2000 and by use of the component standards in the federal order price formulae. (Exh. 14, pp. 7-8; Cryan Tr. 169–172) Dr. Cryan's calculations of the 2.25% protein level were unchallenged at the hearing. Dairy protein is, by a factor of more than 10^5, more valuable than the non-protein solids (lactose/milk sugar) in milk. It makes no rational regulatory or economic sense – when these solids can be fractionated and selectively included or excluded in a beverage – to give equal

---

[3] In spite of its much higher retail price. See Exh. 14, App. B (Exh. C attached hereto).

[4] The pace of technological change was described by several witnesses: "[P]roducts are being engineered from ingredients that did not even exist ten years ago." (Taylor, Exh. 14, p.3); "Quantum advances in ingredient technology often make fractionations and derivatives of milk's components more functionally desirable.. . . ." (Tipton, Exh. 32, p.2)

[5] Dairy Market Statistics, Annual prices, per lb. for edible lactose, mostly – $.2162 (2004); $.1891 (2003); and $.1830 (2002). Federal order price, annual average, for protein per lb. – $2.6035 (2004); $2.3770 (2003); and $1.9735 (2002). Source: AMS Dairy Programs website at: http://www.ams.usda.gov/dyfmos/mib/cls_prod_cmp_pr.htm. The three year average value ratio is 11.8 to 1.

weight to ingredients with such grossly disproportionate market values.

Proposal 7 simply recognizes these technological and economic facts in today's dairy marketplace.

B. The operation of Proposal 7.

The important characteristics of Proposal 7 are: (1) the determination of milk protein content in a beverage product would be made by weight, as in the current determination of percent of nonfat milk solids; (2) all milk protein would be included in the determination of the 2.25% level, including whey (which is excluded from non-fat milk solids presently); and (3) the whey portion of the protein continues to be excluded from pricing under the orders.

Importantly, Proposal 7, to its proponent's knowledge (Exh. 14, p. 11), would not change the present classification made by the Market Administrators of any products; and no handler, processor or manufacturer came forward at the hearing to present and discuss a known change of classification.[6]

C. The opposition to Proposal 7.

There are several strains, as we understand them, to the general opposition to conversion to a protein standard for fluid milk product definitions. First, there is the contention that further study should be done or data should be assembled prior to consideration of Proposal 7. This position was argued by the representative of the Milk Industry Foundation, among others. Second, there was the contention (advanced by Ms. Taylor for Leprino, and Mr. Tipton) that changing the standard may restrict dairy product innovation and competitiveness, with the

[6] In contrast with Proposal 7's essentially revenue neutral impact, it is interesting to realize that most of the proposals in the hearing were submitted as attempts by their proponents to use the hearing to ***lower*** the current classification of various products (low card milks – Proposal 5; drinkable yogurt – Proposals 8 and 9; health/dietary specialty products – Proposals 10 and 11).

suggestion that this would be harmful to the interests of all, producers and handlers alike, in the long, if not, short term. Finally, there was an underlying general objection to increasing the price of any milk products. We will discuss these opposition positions in turn.

The contention that more study and, in particular, empirical data is needed to support Proposal 7 is not supported by Departmental practice and is flawed in principle. The contention that studies of product usage or demand elasticities should be done before updating the fluid milk product definition appears to rely at least in part on incorrect premises. There is nothing in the Agricultural Marketing Agreement Act, nor in current Departmental practice which requires a finding of cross-elasticity of demand in order that products be placed in a given classification. It is obvious, just looking at the products in various classes, that many are not interchangeable with each other. Nonfat dry milk and butter are both Class IV; fluid creams and ice milk, for instance, are both Class II; cultured buttermilk and skim milk are both Class I; Ricotta cheese and aged Parmesan are both Class III. Classification decisions have been made historically, and very recently (for instance the national decision reclassifying evaporated milk) without studies indicating cross-elasticities of demand or competitive interaction with other classifications of products. The studies advocated are simply not necessary to informed decision- making by the Secretary with respect to appropriate product classification. The basic decision the Secretary needs to make with respect to the beverage products at issue, such as Carb Countdown, is: Is Carb Countdown more like milk or Yoo-Hoo? The Secretary is quite capable of making that decision upon this record without any additional studies.

The argument that changing the fluid milk product definition from the nonfat milk solids test to a protein test will undermine a long-standing status quo and stifle innovation and perhaps impair dairy's competitiveness with non-dairy alternatives, such as soy, lacks persuasiveness. As

Dr. Cryan so articulately testified: The proposed change is essentially an accounting change. Determining whether beverages are of the "Yoo Hoo" variety (and therefore not fluid milk products) by evaluating their milk ingredient content is the same procedure presently used on the nonfat milk solids basis. It is not anticipated that the result of the classification test will be different in many, if any, cases. The accounting change is an important clarification and updating of the regulation to the current marketplace for milk products and components. Innovation does not require forever-static regulatory criteria.

The general contention that dairy ingredients need to be competitive with other sources of protein, such as soy, is recognized, but wide of the mark in this proceeding. The general price levels for dairy protein are established in the various classes of the Federal Milk Order program. So long as we have a classified price program in which beverage uses are in Class 1, the fluid milk product definition needs to appropriately define beverage uses. That is precisely what Proposal 7 does by using protein as the determinative ingredient. Soy milk and uses of soy protein are offered and will continue to be offered to the consuming public as alternative products to beverage milk. Proposal 7 has no material impact in this marketplace at all.

IV. CLASSIFICATION OF DRINKABLE YOGURT.

Currently some drinkable yogurt products are classified and priced as Class I in the Federal Milk Order system and other yogurt smoothie products are classified and priced as Class II. The volumes of those utilizations are in Exhibit 12 submitted by Mr. Rourke. For 2004, 136 million pounds of Class I yogurt drinks were distributed in the Federal Order system; while 51.4 million pounds of milk were used to produce Class II yogurt-based beverages. (Exh. 12, p.3) It is not possible to know precisely how Proposal 7 would effect, if at all, the classifications of

these products. It is possible that the products, depending on their formulations, could move either way in classification, or remain in the same Class. It would be possible that some presently Class I products would drop to Class II under Proposal 7 if they were high in non protein nonfat solids.[7] On the other hand, high protein smoothies could remain in Class I or move up to Class I.

The yogurt manufacturers, including Dannon and General Mills, wish to revise the fluid milk product definition to expressly exclude all drinkable yogurt as a fluid milk product. The Dannon proposal, proposal 8, would eliminate all "yogurt-containing beverages."[8] The General Mills proposal, Proposal 9, would eliminate products containing at least "20% yogurt (nonfat yogurt, low fat yogurt) by weight". These proposals should not be adopted in either formulation.

In our view the beverage criteria of form and use, in combination with the requirements for milk components applicable to all other dairy beverage products, should continue to determine whether drinkable yogurt is Class I or Class II. It is notable that whether the yogurt is Class I or Class II does not seem to have had any particular impact on the development and marketing of these products. Some of the manufacturers – certainly aware (since they are large, sophisticated handlers) of the classification criteria -- have, nevertheless, formulated and marketed drinkable yogurt products which are Class I, and other drinkable yogurt products which are Class II. See Exh. 12. The sales growth of the Class I side has not been any different than that for the Class II drinkable yogurts, at least so far as any testimony at the hearing demonstrated. The drinkable yogurt category, expressly established as within the Class I ambit

---

[7] Yogurt manufactures did not make product formulations available to the hearing record,

[8] The Dannon witness clarified Proposal 8 to define "yogurt-containing beverage" as containing 20% yogurt by weight. (Box, Exh. 24, p. 10) Thus, proposals 8 and 9 are essentially identical as we understand them.

since at least 1992, is a growth category in the dairy case and there is nothing in this record which suggests that the Classification has materially impeded that growth.

Proposal 7 allows manufacturers to formulate their products with either more or less than 2.25% milk protein by weight. Furthermore, to the extent that the manufacturers may use whey proteins derived from cheesemaking, the proteins will not be priced in Class I. However, to the extent that milk proteins from other than whey are used and total dairy protein by weight exceeds 2.25% of total product weight, there would be Class I classification of the product and Class I pricing for the non-whey protein. It is instructive that the ingredient cost for the difference between Class I and Class II milk protein in yogurt is a few pennies per container, as Elvin Hollon testified. (Hollon Tr. 1171–1172). Mr. Hollon's calculations were conservative, and were unchallenged.[9] The yogurt manufacturers can hardly contend that this potential ingredient cost difference will materially impact this product category.

The central argument for Class II classification of yogurt beverages seems to be that the presence of the yogurt culture makes the product more a "food" than a "drink" or "beverage". This academic debate is interesting, perhaps, but misses the point of milk classification under the Agricultural Marketing Agreement Act which requires first and foremost classification according to 'form and use.'[10] DFA and Dairylea believe that drinkable yogurt is a beverage in form and

---

[9] It is noteworthy that neither the corporate executives from General Mills, nor the witnesses for Dannon and the yogurt trade association, provided any demand elasticity data based on the Class I/II price differences for their products. The issue clearly is not one of sales, but of revenue: corporate bottom line v. dairy farmer bottom line.

[10] The 'form and use' shorthand is drawn from the AMAA at 7 U.S.C. § 608c(5)(A) which authorizes "Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification . . . ."

use and, if its milk ingredients are within the range of ingredients for ordinary milk beverages, it should be classified as are those beverages.[11] Yogurt manufacturers did not demonstrate other compelling dissimilarities of drinkable yogurt from milk beverages. The shelf life is more nearly that of fresh milk beverages than long shelf life hermetically-sealed products, for instance. The production requirements include Grade A milk. The distribution over a broad geographic region is greater than for some milk beverages but it is similar to other specialty milk beverages. In short, no compelling or persuasive case was made to exclude yogurt beverages from the generic category of products used as a beverage including "flavored, cultured, and modified" milk products.

V. THE USE AND PRICING OF WHEY IN THE FLUID MILK PRODUCTS

Proposal 7 changes the manner in which whey is accounted for in determining whether a product is a fluid milk product or not. It includes the volumes by weight of whey in determining the classification of a product. However, it continues the current non-pricing of whey ingredients in Class I use. Both of these treatments of whey - inclusion for classification purposes but not for pricing - are appropriate and justified by the record.

The inclusion of whey in the determination of product classification is necessary for reasonable competitive equity among beverage milk products. If whey protein is not included for classification purposes, handlers will have an incentive to engineer the formulation of fluid milk beverages by including whey proteins in sufficient volumes (weight) to keep non-whey proteins below 2.25%. This would place essentially identical products -- with whey and without whey – in different classes for pricing purposes. We believe this would be a disorderly marketing condition which should be avoided.

---

[11] We note that cultured buttermilk is presently a Class I product and could be argued to have a number of the same characteristics, including cultures, as does drinkable yogurt.

DFA and Dairylea support the continued non-pricing of whey as provided in Proposal 7 and explained by Dr. Cryan. Whey is, by definition, a by-product of cheesemaking defined as such in both FDA and USDA regulations. See 21 C.F.R. § 184.1979 and 7 C.F.R. § 58.805. Both regulations define whey as "the fluid obtained by separating the coagulum from milk, cream, or skim milk in cheesemaking." Allowing whey to be utilized as an ingredient in fluid milk products enables this market for whey to be available to cheesemakers.

An argument was made, by implication, by some participants[12] that it would not be feasible to segregate whey by volume from other dairy protein so that what was subject to pricing and what was not subject to pricing could be impossible to determine. We do not believe this is correct and it should not lead the Department to reject Proposal 7 with respect to non-pricing of whey. The fundamental issue here is: can the volume of dairy protein which is whey be established? There are several answers to this question. First, under the milk order program, it is the obligation of handlers to provide information to the market administrator to allow appropriate classification and pricing of their products. With respect to whey as an ingredient, whey must be so-labeled and identified and marketed with that accountability. Handlers using whey in fluid milk products need to have documentation of the source of the ingredients in order to support the non-pricing of those ingredients. Batch production records, and ingredient purchase records will be basic trails of accountability. These should not be a difficult administrative matters either for the market administrator or for the handlers involved.[13]

---

[12] See e.g., Tr. 270–71 (Farrell cross of Cryan).

[13] This is really not any different, from a record keeping and product component accountability perspective, than the current treatment of whey. Whey is presently excluded from the nonfat milk solids percentage under the fluid milk product definition. There is no record evidence that this has created any problems of record keeping, auditing, or accountability. Consequently, since it is excludable/non-countable under the present language it is certainly

Furthermore, Elvin Hollon testified that there is technology available to chemically determine whether protein is whey or whether it is sourced from milk directly. While resort to chemical analysis of this sort should rarely if ever be required, the Market Administrator would be able to verify the presence (or absence) of sweet whey[14] proteins in a fluid milk product.

VI. THE EXCLUSION OF MEAL REPLACEMENTS IN HERMETICALLY SEALED CONTAINERS

The fluid milk product definition currently expressly excludes products which otherwise could qualify as fluid milk products but which are "formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers." The basis for this exclusion was testified to by Dr. Cryan, Elvin Hollon and particularly Craig Alexander. Mr. Alexander, testifying for O-AT-KA Milk Products Cooperative, related the history of the definition and described some of the products which O-AT-KA packages. Mr. Alexander detailed the market characteristics of the O-AT-KA products in this specialty category. It is instructive to note that there was not any testimony advocating elimination of this exclusion from the fluid milk product category. The exclusion (while arguably less than perfectly precise) has stood the test of time to date, continues to have broad support within the industry, and should be retained.

The Hormel Foods proposal (Proposal 11) to further expand the excluded category to take

---

includable for classification purposes and excludable for pricing purposes under Proposal 7.

[14] While, we understand and acknowledge that detection of acid whey proteins is somewhat more problematic than sweet whey proteins, the characteristics of acid whey do not make it a highly desirable and likely ingredient in fluid milk beverage products.

in all beverages especially prepared for the health care industry packaged in hermetically sealed containers is too broad and should be rejected. So far as we can tell, the proposal relates to a very narrow category of products custom-specified for Hormel which are non-meal replacement milk beverages in cans. We think these beverages should continue to be classified as Class I if they are just that, ordinary beverages and not specialty meal replacement items of the sort described by Mr. Alexander for O-AT-KA.

The Leprino Foods witness testified in support of Proposal 10, which would expand the exclusion by eliminating the meal replacement and hermetically-sealed qualifiers so that any product "especially prepared for dietary use" would be excluded from Class I. This proposal is far too broad and undefined and could potentially cut deeply into Class I use. DFA and Dairylea oppose its adoption.

VII. THE TREATMENT OF PRODUCTS FROM NEW TECHNOLOGY

DFA and Dairylea support a modification to Proposal 7 as explained by Elvin Hollon, Tr. 1168–1170, which would provide a specific means for treating products of new technology for classification purposes.[15] We think it would be useful to include this provision in the fluid milk product definitions so that there is a known and clear means for classifying and administering classified prices with respect to any such products.

The system would basically work like this: (1) if a product was a beverage, by form and

---

[15] We suggest that Mr. Hollon's proposed language is a far superior manner for handling "new" products than, for instance, Hood's proposal 5, as modified, (Exh. 30, p.11) which would provide "exemption" for up to 3 million pounds of sales per marketing order area for the new product. This would be a bureaucratic nightmare creating disparate costs between competing new product marketers, one of whom had several plants from which exempt volumes could be segregated, and the other having a single plant with volume exceeding the "cap."

use, as well as a product of new technology not commercially used or available at the time of promulgation of this regulation, the Deputy Director for Dairy Programs would have the authority to determine the classification of the product for an interim period while a rulemaking proceeding, of the type in which we are presently engaged was called, to consider any necessary modifications to the regulatory language for products of the new technology. The processor of the product would have the opportunity, and the burden, to provide data and information to the Deputy Administrator to support the requested interim classification, if less than Class I. The proposed language (set out in Exh. 33, p. 4, and in Exh. B) is:

(c) Products of new technology . The classification of any product which meets the criteria of paragraph A of this section, and which is produced through the use of milk processing or packaging technology not commercially utilized , and I 'm going to insert the words here, and the United States , at the time of promulgation of this regulation shall be determined by the deputy administrator, Dairy Programs, AMS by applying the purposes and intentions of paragraphs A and B . This determination shall be effective until a permanent classification of the product is established after a hearing pursuant to the Act is held to consider amendment s to this subpart. Such hearing shall be held no later than one year after the interim determination of the deputy administrator is made.

DFA and Dairylea urge the Secretary to provide this explicit means for addressing the classification of any future Carb Countdowns.

VIII. CONCLUSION

DFA and Dairylea urge the department to adopt Proposal 7, with the modifications presented at the hearing and described herein. At the same time, we urge the rejection of proposals 5, 8, 9 10, and 11, which are all inconsistent with the content and intent of proposal 7. Proposal 7 brings the fluid milk product definition into line with current product formulation and technology; uses the most valuable milk component ingredient to determine classification of products; and continues the present structure of the product definition and the present specific

inclusions and exclusions which have worked and continue to work reasonably well. In addition, we propose that new language provide appropriate discretion for the Deputy Administrator for Dairy Programs to classify products of new technology which may be developed and marketed in the future.

Respectfully submitted.

Date: September 6, 2005

By: /s/ Marvin Beshore

Marvin Beshore, Esquire
130 State Street, P.O. Box 946
717.236.0781, Fax 717.236.0791
Mbeshore@mblawfirm.com

Attorney for DFA and Dairylea

EXHIBIT A

7 C.F.R. (2005) – Current Order language

§ 1000.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, fluid milk product means any milk products in fluid or frozen form containing less than 9 percent butterfat that are intended to be used as beverages. Such products include, but are not limited to: Milk, fat-free milk, lowfat milk, light milk, reduced fat milk, milk drinks, eggnog and cultured buttermilk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated, or reconstituted. As used in this Part, the term concentrated milk means milk that contains not less than 25.5 percent, and not more than 50 percent, total milk solids.

(b) The term fluid milk product shall not include:

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk equivalent in any modified product specified in paragraph (a) of this section that is greater than an equal volume of an unmodified product of the same nature and butterfat content.

EXHIBIT B

Proposal 7, as modified:

Reivsions to current order language are in bold; current language to be deleted is indicated by ~~strikethrough~~:

§ 1000.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, fluid milk product means any milk products in fluid or frozen form containing less than 9 percent butterfat that are intended to be used as beverages. Such products include, but are not limited to: Milk, fat-free milk, lowfat milk, light milk, reduced fat milk, milk drinks, eggnog and cultured buttermilk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated, or reconstituted. As used in this Part, the term concentrated milk means milk that contains not less than 25.5 percent, and not more than 50 percent, total milk solids.

(b) The term fluid milk product shall not include:

(1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers, any product that contains by weight less than ~~6.5 percent nonfat milk solids, and whey~~ **2.25 percent protein derived from milk**; and

(2) The quantity of skim milk equivalent in any modified product specified in paragraph (a) of this section that is greater than an equal volume of an unmodified product of the same nature and butterfat content.

(c) Products of new technology . The classification of any product which meets the criteria of paragraph A of this section, and which is produced through the use of milk processing or packaging technology not commercially utilized , and I 'm going to insert the words here, and the United States , at the time of promulgation of this regulation shall be determined by the deputy administrator, Dairy Programs, AMS by applying the purposes and intentions of paragraphs A and B . This determination shall be effective until a permanent classification of the product is established after a hearing pursuant to the Act is held to consider amendment s to this subpart. Such hearing shall be held no later than one year after the interim determination of the deputy administrator is made.

§ 1000.40 Classes of Utilization.

Except as provided in § 1000.42, all skim milk and butterfat required to be reported pursuant to § ----.30 of each Federal milk order shall be classified as follows:

(a) Class I milk shall be all skim milk **(including the skim milk-equivalent of protein derived from milk, where the proportions of skim milk solids have been modified)** and butterfat, **except whey and whey solids**:

(1) Disposed of in the form of fluid milk products, except as otherwise provided in this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) In shrinkage assigned pursuant to § 1000.43(b).

NMPF Appendix B

Selected Drinks Containing Milk or Milk Ingredients

	Package Size (oz.)	Milk equiv. Protein-basis*	Retail Price**	Raw Milk Value			
				Class I	Class II	Diff.	% retail
Class I now							
Hood Carb Countdown, Homogenized	64.0	145%	3.59	0.77	0.68	**0.096**	2.7%
Hood Carb Countdown, 2% Chocolate	64.0	143%	3.59	0.69	0.59	**0.097**	2.7%
Hershey's MilkShakes: Creamy Chocolate	14.0	121%	1.59	0.15	0.13	**0.023**	1.4%
Hershey's Chocolate Shake, 3-pack, brick pack	21.0	110%	1.99	0.20	0.16	**0.035**	1.8%
Reduced fat milk, ndm fortified 2%	128.0	104%	3.89	1.15	0.93	**0.218**	5.6%
Producer milk and producer price	***128.0***	***100%***	***1.32***	**1.32**	**1.10**	**0.220**	**16.6%**
Whole milk	128.0	98%	3.99	1.26	1.04	**0.216**	5.4%
Whole chocolate milk	128.0	97%	4.29	1.26	1.05	**0.213**	5.0%
Reduced fat chocolate milk	128.0	96%	3.79	1.10	0.88	**0.216**	5.7%
Lactaid 100, Lactose-free, 2%	64.0	96%	3.69	0.55	0.44	**0.107**	2.9%
Hershey's Chocolate Milk 2%, 3 brick packs	24.0	96%	1.99	0.20	0.16	**0.040**	2.0%
Class II now							
Starbucks Frappuccino: Coffee Flavor	9.5	72%	1.47	0.06	0.05	**0.012**	0.8%
Starbucks Frappuccino: Vanilla Flavor	9.5	62%	1.50	0.05	0.04	**0.010**	0.7%
Starbucks Doubleshot: Starbucks Doubleshot	6.5	60%	1.75	0.04	0.04	**0.007**	0.4%
Raging Cow: Chocolate Insanity	14.0	60%	n.a.	0.08	0.07	**0.014**	n.a.
Folgers Jakada: Mocha	10.5	59%	n.a.	0.06	0.05	**0.011**	n.a.
Swerve: Chocolate, canned	11.0	52%	n.a.	0.04	0.03	**0.010**	n.a.
Folgers Jakada: Vanilla	10.5	48%	n.a.	0.05	0.04	**0.009**	n.a.
Yoo-Hoo: Strawberry Drink	15.5	35%	1.39	0.04	0.03	**0.010**	0.7%
80 'N Sunny - Strawberry Banana	64.0	24%	2.99	0.13	0.10	**0.025**	0.9%
Yoo-Hoo: Chocolate Drink	15.5	24%	1.39	0.03	0.02	**0.006**	0.4%
80 'N Sunny - Orange Creme	64.0	24%	2.99	0.12	0.09	**0.026**	0.9%

* Approximations based on labelled nutrition information. **Retail prices as of January 12, 2005
Raw milk values based on projected Class I, II, & IV prices for 2005.
Sources: Product labels; www.bevnet.com; www.peapod.com; USDA.

EXHIBIT C