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BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:) **DOCKET NO. AO-14-A73, et al.; DA-03-10**
MILK IN THE NORTHEAST)
AND OTHER)
MARKETING AREAS)

**POST HEARING COMMENTS BY SELECT MILK PRODUCERS, INC. AND
CONTINENTAL DAIRY PRODUCTS, INC.**

I. Introduction, Standing, and Summary

Select Milk Producers, Inc. (Select) and Continental Dairy Products, Inc. (Continental) support NMPF's Proposal 7, withdraws their proposal 4, and oppose any other proposal inconsistent with Proposal 7.

Select is a milk marketing cooperative that pools milk in the Southwest Milk Marketing Area, Southeast Milk Marketing Area, Central Milk Marketing Area, and Arizona-Las Vegas Milk Marketing Area (7 C.F.R. Parts 1126, 1007, 1032, and 1131). Select has a pecuniary interest in the various producer settlement funds of those orders. Select also operates several plants that fractionate milk into different components through ultra-filtration, nano-filtration, and reverse osmosis technology resulting in an end product that is subject to Class I pricing. Continental is a milk marketing cooperative with milk marketed in the Mideast, Southeast, and Appalachian Marketing Areas. (7 C.F.R. Parts 1005, 1007, and 1033).

For purposes of these comments, Select and Continental rely upon the arguments submitted by Dairy Farmers of America (DFA) and National Milk Producers Federation (NMPF) regarding the appropriateness of Proposal 7. Select will focus its comments on two other subjects. First, Select and Continental will show that the change from a solids not fat (SNF) basis to a protein basis in the fluid milk

definition reflects current technology and does not alter fundamentally the current regulations. All the proposal does is clarify the issue. Second, Select and Continental will address the numerous comments regarding the alleged “change” in regulation to allow milk protein concentrates (MPC) in fluid milk products. Proposal 7 merely insures that the existing use of MPC in a beverage at protein levels similar to that of milk can trigger Class I pricing for the product.

II. Changing to a protein basis to define fluid milk is consistent with today’s technology.

Traditionally, fluid milk has been priced based upon fat and skim (or solids not fat.) The SNF in milk included all of the solids as they were in the milk from the cow. Today that is not true. The fractionization of milk is now commonplace, not rare. SNF is thought of in terms of its component protein, lactose and minerals or casein proteins, whey proteins, lactose, calcium and other minerals or even specific proteins.

Some of these components are valuable, generally the protein, and some are not valuable, generally lactose. The means to separate those solids so as to enhance the presence of some and eliminate or reduce the presence of others either did not exist or was impractical for commercial use when the SNF basis defining fluid milk was adopted. Today, the regulations for pricing must recognize this by pricing the most valuable components, not the least or a blend including the least valuable. Proposal 7 does that and should be adopted.

III. The change to a protein basis from SNF in the fluid milk definition does not alter the state of current regulations.

The proposal to modify the definition of fluid milk results only in a clarification of the existing definition. The decision of the Department of Agriculture (“Department”) to price products such as Carb Countdown™ on a Class I basis would be the same with or without the change. The Department has

previously interpreted the term SNF consistently with the regulations governing the pricing and classification of milk. 7 C.F.R. Part 1000.

The regulations governing minimum milk prices consistently utilize the term NFS in referring to the skim portion of milk, unfractionated. As such, when determining the amount of NFS in a product for purposes of classifying it, the Department properly measures the amount of NFS in the producer milk used to make the product. This current interpretation is consistent with references to NFS elsewhere in the regulations.

IV. Regulatory Background

The Department, under the authority of the Agricultural Marketing Agreement Act of 1937, promulgates and administers milk marketing orders. 7 U.S.C. §608c. As part of the regulations applicable to all milk marketing orders, the Department has established classifications of milk from the farm, based upon the use to which the milk is put. The regulations refer to such milk as “producer milk.” *See e.g.* 7 C.F.R. § 1000.44, 1___.13. The Department subjects each of these different classifications to a distinct minimum price, which must be paid by handlers of producer milk. In general, producer milk used in Class I garners a higher price than milk used in the three other classes. Class I milk consists of two distinctly priced components – butterfat and skim milk. The skim component of Class I milk is the SNF found in producer milk. The SNF, while priced as a single component, consists of protein, lactose, and other mineral solids. Collectively, SNF comprise the nutritional value of what consumers would identify as skim milk. Historically, the Department has consistently defined SNF as all the solids found in producer milk that are not butterfat, in other words, the skim milk. This treatment of Class I milk components differs from the definition and pricing of milk used in Class III products. Class III producer milk is priced based on two SNF components

(protein and other solids). This separation of SNF components for pricing applies only to producer milk in Class III, not Classes I, II, or IV.

V. Argument

A. SNF is always measured and priced on a total solids-skim equivalent basis, not on an individual component basis.

The pricing computation for SNF describes all of the SNF in milk, not just protein:

Nonfat solids price. The nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS nonfat dry milk survey price reported by the Department for the month less 14 cents and multiplying the result by 0.99.

7 C.F.R. §1000.50(m). “Nonfat Dry Milk” is skim milk with the water removed. That the regulations equate SNF with all skim and not just components is made clear when compared with the definitions for “protein” and “other solids” used in Class III:

- (n) Protein price. The protein price per pound, rounded to the nearest one-hundredth cent, shall be computed as follows:
 - (1) Compute a weighted average of the amounts described in paragraphs (n)(1)(i) and (ii) of this section:
 - (i) The U.S. average NASS survey price for 40-lb. block cheese reported by the Department for the month; and
 - (ii) The U.S. average NASS survey price for 500-pound barrel cheddar cheese (38 percent moisture) reported by the Department for the month plus 3 cents;
 - (2) Subtract 16.5 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by 1.383;
 - (3) Add to the amount computed pursuant to paragraph (n)(2) of this section an amount computed as follows:
 - (i) Subtract 16.5 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by 1.572; and

- (ii) Subtract 0.9 times the butterfat price computed pursuant to paragraph (l) of this section from the amount computed pursuant to paragraph (n)(3)(i) of this section; and
 - (iii) Multiply the amount computed pursuant to paragraph (n)(3)(ii) of this section by 1.17.
- (o) Other solids price. The other solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS dry whey survey price reported by the Department for the month minus 15.9 cents, with the result multiplied by 1.03.

7 C.F.R. § 1000.50 (n), (o) [Emphasis added].

The SNF price is mutually exclusive of the Protein Price and the Other Solids Price. The former is used in establishing the value for the advance and final Class IV skim milk prices while the latter is used for the advance and final Class III skim milk prices. This is shown at §1000.50(i) and (k) where the skim milk for Class III is defined as 3.1 times the protein price plus 5.9 times the other solids price and Class IV is 9 times the nonfat milk solids price. SNF are described in two parts in Class III and one in Class IV. The Class I skim price applicable to fluid milk products is the higher of the advance Class III or IV prices and makes no distinction between SNF values; it prices all solids. 7 C.F.R. §1000.50(b). Although advance Class III prices can be used to price Class I, it is the combination of components, not the individual components, that set the Class I price.

The use of the term “nonfat milk solids” in 7 C.F.R. § 1000.15(b) must, absent a different definition, mean the same thing as in §1000.50. That definition contemplates all of the components. Thus it is appropriate for the Secretary to measure all SNF used in the manufacturing of dairy beverages such as Carb Countdown™.

B. All fractionated producer milk must be priced on a skim equivalent basis.

The pricing computation for Class I milk encompasses all of the SNF, not just protein or other solids. Class I milk consists of butterfat and SNF. The skim component of Class I milk (the SNF) is priced at the higher of the advance Class III or IV skim milk price. No distinction is made as to the individual SNF values or component values. 7 C.F.R. § 1000.50(b). The former is used in establishing the value for the advance and final Class IV skim milk prices while the latter is used for the advance and final Class III skim milk prices.

The phrase “by weight” does not foreclose the Department measuring SNF on a skim equivalent basis. The phrase is a technical term that specifies that the SNF will be compared to the total product based on their respective weight, as opposed to volume. This still begs the fundamental question of what SNF is being weighed.

Raw milk contains approximately nine pounds of SNF in every hundred pounds. Lactose accounts for more than half of that. Some drinks such as Carb Countdown™ are products that specifically target lactose for removal and retain protein and its attendant nutritional benefits. Lactose is a carbohydrate, and Carb Countdown™ accordingly utilizes as an ingredient milk and/or milk-derived products from which *most of the lactose has been removed*. The ingredient milk utilized is “skim milk retentate” which results from removing water and lactose from milk through ultra-filtration.

Current subsection 1000.43(c) provides the Department the authority to determine the *equivalent* quantity of SNF in products like Carb Countdown™ and price on that basis rather than using the actual amount of the SNF as the petitioners would prefer. Further, this subsection clarifies that a handler must account for milk *used or disposed of* in the process.

The pricing of the entire SNF by regulation further shows that removing lactose does not change the classification. Because the volume of protein and lactose vary widely, the weighted average price known

as the SNF price is significantly lower than the protein price. The milk products that remove lactose skew the ratio of lactose to protein so that the protein content exceeds the lactose. Logically, the value of that protein, if priced as a separate component, would be higher than the SNF price.

The Department's determination that the amount of SNF in such beverages were appropriately measured based on skim equivalency is consistent with other regulations for the milk orders. Outside of Class III pricing, no regulation describes a division of milk into anything other than butterfat and nonfat milk solids. The only way to measure SNF in Classes I, II, and IV is as a whole, not as protein and other solids, as petitioners' argue.

Other regulations assume that SNF is treated as if all components were present. For example, in describing transfers and diversions to other pool plants, SNF are to be determined in terms of classification by excluding the milk equivalent of the SNF. §1000.42(d)(2)(i).

C. Pricing and classification of fractionated milk will ensure proper pricing of new beverages using milk proteins.

Some have argued that under current regulations that the Department disavowed the use of skim equivalency in the classification of fluid milk products in prior commentary. These comments, to the extent they are meaningful at all in the face of contradictory regulations, do not say that at all.

The Department has been reluctant to classify "products containing only a *minimum* amount of nonfat milk solids" as Class I because such products are "not considered as being in the [same] competitive sphere of the traditional milk beverages." 39 Fed. Reg. 8712, 8715 (March 6, 1974) (emphasis added). This statement does not speak to beverages containing protein and no other solids, such that the total SNF fall below 6.5%. Carb Countdown™ contains more than a "minimum amount of nonfat milk solids" and

certainly competes with traditional milk beverages. It is placed next to milk in the dairy case and makes nutritional claims comparable to fluid milk. Carb Countdown™ is not Yoohoo.

Similarly, the comments at 63 Fed. Reg. 4802, 4924 (Jan. 30, 1998) neither discuss nor contemplate a product like Carb Countdown™. The 1998 comments discuss “nonfat solids content,” not protein content. The concern addressed by those comments was a diluted milk product, not a designed and fortified milk alternative.

Contentions that classifying milk products in which the protein has been skewed and lactose removed as Class I constitutes a “fundamental change in interpretation” are erroneous. The Department’s current measurement and pricing of SNF in modified dairy beverages is consistent with, even called for, by the regulations. There has been no change in interpretation, and it will represent a broadening of the clarification of current regulations.

VI. Proposal 7 will not make it legal to use MPC.

A number of witnesses at the hearing opposed the proposals because they believed that adoption of such would allow the use of milk protein concentrates (MPC) to be used in beverages. They provided all kinds of horrors if that happened. The issue in this hearing is not whether the use of MPC is appropriate in dairy beverages because nothing prohibits the use of such ingredients now. What Proposal 7 does is makes sure that if the amount of protein exceeds 2.25% even if some or all of it comes from MPC, the product will be treated as a Class I product. That is a win for producers.

VII. Summary

Select and Continental urge the Department to adopt Proposal 7.

Respectfully submitted,
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