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USDA - Federal MILK ORDER HEARING

Sheraton Hotel Station Square
West Station Square Drive
Pittsburgh, PA 15219

Monday, June 20, 2005
8:00 a.m.

BEFORE: PETER M. DAVENPORT
U. S. ADMINISTRATIVE JUDGE

TRANSCRIPT OF PROCEEDINGS

VOLUME I

Reported by:

Michelle L. Hall
Registered Merit
Reporter

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APPEARANCES:

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|--|---|
| U.S. Department of Agriculture: | Office of the General Counsel by Garrett Stevens, Deputy Assistant General Counsel |
| U.S. Department of Agricultural Marketing Specialists: | Gino M. Tosi Antoinette M. Carter Erin C. Taylor Richard L. Cherry |
| Texas Market Administrators: | Todd Wilson |
| Dairy Farmers of America: | Elvin Hollon, Director Fluid Marketing, and Marvin Beshore, Esq. |
| Select Milk Producers, Inc., and Continental Dairy Products, Inc.: | Yale Law Firm by Benjamin F. Yale, Esq. |
| General Mills: | Deb Grocholski, Associate General Counsel |
| O-AT-KA Milk Products Corp.: | Upstate Farmers Cooperative, Inc. by Timothy R. Harner, General Counsel |
| HP Hood and Chelsea Mass.: | Lois Jewell & Associates, P.C. by John H. Vetne, Esq. |
| National Yogurt Association: | Coolley Godward, LLP by Aaron F. Olsen, Esq. |

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APPEARANCES (CONT.):

Bravo! Foods Inter- Linwood Tipton
national Corp.,
Lifeway Foods, Inc.,
Pepsico, Starbucks
Corporation, and
Unilever:

Fonterra, USA: Blank Rome, LLP
by Edward Farrell,
Esq.

Dannon Company, Inc.: James Box

Milk Industry
Foundation: Robert Yonkers

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WITNESS: JOHN P. ROURKE

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| CROSS BY MR. FARRELL | 55 |

WITNESS: ELVIN HOLLON

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WITNESS: ROGER CRYAN, Ph. D.

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P R O C E E D I N G S

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4 JUDGE DAVENPORT: This is a
5 hearing, Docket No. A0-361-A38; DA-03-10. I'm
6 Peter Davenport. I'm the Administrative Law
7 Judge, and this hearing has been set pursuant
8 to notice and is called pursuant to the
9 provisions of the Agricultural Marketing
10 Agreement Act of 1937 as amended and the
11 applicable rules of practice and procedure
12 governing the formulation of market agreements
13 and marketing orders.

14 The purpose of this hearing is to
15 receive evidence with respect to the economic
16 and marketing conditions which relate to the
17 proposed amendments which have been set forth
18 in the proposed rules, and any appropriate
19 modifications thereof to attempted marketing
20 agreements and orders.

21 We are prepared to take testimony
22 from all witnesses, and I ask that any
23 interested parties who wish to introduce
24 exhibits should provide me at the hearing with
25 at least six copies of the exhibits for the

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official record. It would also be helpful if additional copies are available for use of the other participants at the hearing.

Now, just a couple of introductory remarks. For the convenience of all people here, I would ask you at this time to either turn your cell phones to either silent or vibrate mode, or some other mode which would tend to eliminate the disruptions to the hearing.

In other words, we will be taking testimony from witnesses. I would ask that as you come forward to testify, that you either testify from the microphone or we can make other microphones available, that you introduce yourself each time that you, in other words, come to the microphone. The first time I would ask that you spell your name for the hearing reporter and also indicate the entity that you are representing.

Now, this week has been -- or this hearing has been scheduled to last the entire week. I have been approached by a number of people who indicate that they have special

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scheduling needs. It is my intention, if possible, to accommodate those scheduling needs, so we will take those people when they are available to the maximum extent possible.

At this time, I would call upon Garrett Stevens from the Office of General Counsel to add any additional remarks and to introduce the members of the United States Department of Agriculture who are present here today.

MR. STEVENS: Thank you, Your Honor.

My name is Garrett Stevens. I'm with the Office of General Counsel, U.S. Department of Agriculture, Washington, D.C., and there are other people here for the Department who will make their appearances.

MR. TOSI: My name is Gino Tosi, T as in Tom, O-S-I. I'm with the U.S. Department of Agriculture, Agricultural Marketing Service, Dairy Programs, Washington, D.C.

MS. CARTER: Good morning. My name is Antoinette Carter,

1

2 A-N-T-O-I-I-N-E-T-T-E, Carter, spelled
3 C-A-R-T-E-R, with the U.S. Department of
4 Agriculture, Agricultural Marketing Service,
5 Dairy Programs, Order Formulation and
6 Enforcement Branch.

7 MR. CHERRY: Good morning. My
8 name is Richard Cherry, United States
9 Department of Agriculture, Dairy Programs,
10 Washington, D.C.

11 MS. TAYLOR: Good morning.
12 I'm Erin Taylor, also with the Department of
13 Agriculture, Agricultural Marketing Service and
14 Dairy Programs in Washington.

15 JUDGE DAVENPORT: Mr. Stevens,
16 do you want to --

17 MR. STEVENS: Just a minute,
18 Your Honor.

19 JUDGE DAVENPORT: -- introduce
20 Mr. Walker and some of the others who might
21 testify later.

22 MR. TOSI: We have another
23 colleague that's yet to arrive. His name is
24 Todd, T-O-D-D, Wilson, W-I-L-S-O-N. He's
25 employed by the Texas Market Administrator's

1
2 Office in Dallas, Texas. We also have other
3 Market Administrators who are here, and USDA
4 will also be putting on one witness who has
5 prepared statistics on requests in the
6 industry.

7 JUDGE DAVENPORT: Very well.
8 Could I have other general appearances.
9 Mr. Beshore?

10 MR. BESHORE: Marvin Beshore,
11 B-E-S-H-O-R-E. I'm here on behalf of Dairy
12 Farmers of America.

13 JUDGE DAVENPORT: Mr. Yale?

14 MR. YALE: Benjamin F. Yale,
15 Yale Law Office, Waynesville, Ohio. I'm here
16 on behalf of Select Milk Producers, Inc., and
17 Continental Dairy Products, Inc.

18 MR. HARNER: Tim Harner,
19 H-A-R-N-E-R. I'm here on behalf of O-AT-KA
20 Milk Products, O-AT-KA.

21 MR. VETNE: My name is John
22 Vetne, V-E-T-N-E. My appearance is for HP Hood
23 and Chelsea Mass.

24 MS. GORCHOLSKI: Deb
25 Gorcholski, G-O-R-C-H-O-L-S-K-I. I'm counsel

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for General Mills, Inc.

MR. FARRELL: Edward Farrell,
F-A-R-R-E-L-L, with Blank Rome, LLP, on behalf
of Fonterra, USA.

MR. OLSEN: Aaron Olsen,
O-L-S-E-N, on behalf of National Yogurt
Association.

MR. BOX: Jim Box on behalf of
the Dannon Company, Inc.

MR. YONKERS: Bob Yonkers,
Y-O-N-K-E-R-S, on behalf of the Milk Industry
Foundation.

MR. TIPTON: Tip Tipton;
Linwood, L-I-N-W-O-O-D, T-I-P-T-O-N. I'm
appearing on behalf of Bravo!, B-R-A-V-O,
exclamation mark, Foods International
Corporation; Lifeway Foods, Incorporated;
Pepsico; Starbucks Corporation; and Unilever
Corporation.

JUDGE DAVENPORT: Other
participants?

MR. LEINSOL: Yes, sir. I
would like to testify on behalf of Noga Dairy.
Zalmel Leinsol, Z-A-L-M-E-L, L-E-I-N-S-O-L;

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N-O-G-A, Dairy.

JUDGE DAVENPORT: Other appearances? Mr. Stevens?

MR. STEVENS: Your Honor, we have some preliminary exhibits, I guess we would like to go through them if that's proper at this time. You Honor, I have given copies to the reporter, and I have a copy for you, Your Honor.

I think we will just go through them one by one. I believe there are copies in the back of the room. As we identify these, you will know what they are, and then we will have them and ask for their admission.

Let's start with the Notice of Hearing.

JUDGE DAVENPORT: This is the proposed rules, which is Federal Register Volume 70 No. 69, Tuesday, April 12, 2005?

MR. STEVENS: Yes, Your Honor.

JUDGE DAVENPORT: Very well. I have marked that as Exhibit No. 1.

(Exhibit No. 1 was marked for identification.)

1
2 MR. STEVENS: Thank you, Your
3 Honor. The next document is a document
4 entitled, Program Announcement, with the
5 heading "Program Announcement." I believe it
6 is a press release entitled, "USDA Sets Hearing
7 on Proposed Amendments to All Federal's Milk
8 Orders."

9 I would like that marked for
10 identification as Exhibit 2, if I could,
11 please.

12 JUDGE DAVENPORT: So marked.

13 (Exhibit No. 2 was marked for
14 identification.)

15 MR. STEVENS: The next
16 document is a one-page document, Certificate of
17 Officials Notified, signed by Joyce M.
18 McPherson, the docket clerk at the U.S.
19 Department of Agriculture.

20 It has the docket number and the
21 notation of the hearing on it, and it speaks to
22 the notification of the governors of the states
23 listed in that document.

24 I would like that marked for
25 identification as Exhibit 3.

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JUDGE DAVENPORT: So marked.

(Exhibit No. 3 was marked for
identification.)

MR. STEVENS: The next
document is a Determination Re Mailing of
Notice of Hearing with the docket number,
signed by Richard Fleming, one of the Market
Administrators for the southwest marketing
area.

I would like that marked for
identification as Exhibit 4.

JUDGE DAVENPORT: So marked.

(Exhibit No. 4 was marked for
identification.)

MR. STEVENS: The next
document is a Determination Re Mailing of
Notice of Hearing signed by Sue L. Mosley,
Market Administrator for the Florida and
southeast markets.

I would like that marked for
identification as Exhibit 5.

JUDGE DAVENPORT: So marked.

(Exhibit No. 5 was marked for
identification.)

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MR. STEVENS: The next document is a Determination Re Mailing of Notice of Hearing signed by Robert E. Vander Linden, who is the Market Administrator for the central order, with the docket number -- I should say that these are determinations of mailing as noted in the document described.

I would like this marked for identification as Exhibit 6.

JUDGE DAVENPORT: So marked.

(Exhibit No. 6 was marked for identification.)

MR. STEVENS: The next document is, again, a Determination Re Mailing of Notice of Hearing signed by H. Paul Kyburz, Market Administrator for the midwest order.

I would like that marked as Exhibit 7.

JUDGE DAVENPORT: So marked.

(Exhibit No. 7 was marked for identification.)

MR. STEVENS: The next document, another Determination of Mailing signed by Erik F. Rasmussen, Market

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Administrator for the northeast order.

I would like that marked for
identification as Exhibit 8.

JUDGE DAVENPORT: So marked.

(Exhibit No. 8 was marked for
identification.)

MR. STEVENS: The next one,
again, is a Determination of Mailing for the
docket number, and this is signed by James R.
Daugherty, who is the Market Administrator for
the pacific northwest and Arizona-Las Vegas
market orders.

I would like this marked for
identification as Exhibit 9.

JUDGE DAVENPORT: So marked.

(Exhibit No. 9 was marked for
identification.)

MR. STEVENS: Your Honor, I
would like marked as Exhibit 10 a similar
document, Determination of Mailing of Notice of
Hearing, signed by Harold H. Friedly, Jr., who
is the Market Administrator for the Appalachian
marketing area.

I would like this marked as

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Exhibit 10.

JUDGE DAVENPORT: So marked.

(Exhibit No. 10 was marked for identification.)

MR. STEVENS: And the last one is a two-page document that has a memo on the top concerning Certificate of Mailing, and the Certificate of Mailing is signed by David Z. Walker, Market Administrator for the midwest marketing area.

I would like that marked for identification as Exhibit 11.

JUDGE DAVENPORT: So marked.

(Exhibit No. 11 was marked for identification.)

JUDGE DAVENPORT: Are there any objections to any of these preliminary documents? They will be admitted at this time, then, and added to the record.

(Exhibits 1 through 11 were admitted.)

MR. STEVENS: Your Honor, I would like to call John Rourke to the stand.

JUDGE DAVENPORT: Mr. Rourke,

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would you please come forward. Would you raise your right hand, please, sir.

JOHN P. ROURKE

a witness herein, having been first duly sworn, was examined and testified as follows:

JUDGE DAVENPORT: Please be seated. Spell your last name for the hearing reporter.

THE WITNESS: Last name is R-O-U-R-K-E.

DIRECT EXAMINATION

BY MR. STEVENS:

Q. Good morning, John.

A. Good morning.

MR. STEVENS: Your Honor, I would like marked for identification, mine is three pages, I believe they are all three pages, two pages of which are John's statement and a third of which is a table and exhibit, if you will, but I would like it all marked as Exhibit -- I guess we are at Exhibit --

JUDGE DAVENPORT: 12.

MR. STEVENS: 12. Thank you,

1 J. Rourke - Direct

2 Your Honor.

3 (Exhibit No. 12 was marked for
4 identification.)

5 JUDGE DAVENPORT: So marked.

6 BY MR. STEVENS:

7 Q. John, where do you work?

8 A. I work for the Market Information
9 Branch, Dairy Programs, Agricultural Marketing
10 Service.

11 Q. Do you have a background in dairy?
12 Could you describe that briefly for the record.

13 A. Yes. I started working in Dairy
14 Division, predecessor to Dairy Programs, in May
15 of 1970. I have worked in various different
16 positions in Dairy Division. Then I became the
17 chief in the Market Information Branch in about
18 1991.

19 Q. And, John, what is your educational
20 background?

21 A. I have an undergraduate degree from
22 the University of Maryland in economics, and I
23 did postgraduate work at Penn State in
24 agricultural economics.

25 Q. Have you testified in Federal Order

1 J. Rourke - Direct

2 Hearings before?

3 A. Yes. I've testified at several
4 Federal Milk Order Hearings before.

5 Q. Were you asked to prepare
6 information for this hearing?

7 A. Yes, I was.

8 Q. Certain parties asked you to provide
9 information at the hearing today?

10 A. Yes. It was recommended that I put
11 some information together that would be useful.
12 We agreed that that would be basic information
13 and probably would be of use for the hearing.

14 Q. And you brought that with you today?

15 A. Yes, I did.

16 Q. And it's represented in what we have
17 marked for identification as Exhibit 12?

18 A. That is correct.

19 Q. And you have prepared a statement
20 that you would like to enter into the record?

21 A. Yes, I have.

22 Q. Are you prepared to enter that
23 statement at this time, read it into the
24 record?

25 A. Yes, I am.

1 J. Rourke - Direct

2 Q. Please do so.

3 A. My name is John Rourke. I'm the
4 chief of the Market Information Branch, Dairy
5 Programs, Agricultural Marketing Service. One
6 of my areas of responsibility is the National
7 Federal Milk Order Statistics Program.

8 The information that I am presenting
9 today has not been prepared in favor of or
10 opposition to any proposal being considered at
11 this hearing. The information was collected by
12 Market Administrator staffs at my direction and
13 assembled by me.

14 The information on the last page of
15 this document shows annual data for 2004 for
16 selected milk product beverages that are not
17 listed separately in regular published reports.
18 These products have been grouped by class of
19 utilization. If the classification of a
20 product changed during the year, the monthly
21 volumes were included in the applicable class.

22 For each product, the following
23 information shown: Product pound, butterfat
24 test, proportion of total Class I products
25 disposition, and Federal milk order reporting

1 J. Rourke - Direct

2 the product. The data are totals for all
3 orders combined.

4 For nearly all products, individual
5 order data pertained to the operations of fewer
6 than three firms and thus cannot be released
7 without disclosing confidential information.

8 Market Administrators were directed
9 to collect information only from those fluid
10 milk processing plants that actually produce
11 the product. If a regulated distributing
12 plant's only route disposition of one of these
13 products was a resale of a product received
14 from another plant, then the plant was excluded
15 from the data collection.

16 Market Administrators obtained this
17 information from handler reports of receipts
18 and utilization or from audits or handler
19 records. The information collected differs by
20 type of fluid milk processing plant as follows:

21 One, fully regulated distributing
22 plants. For Class I products, the statistic
23 used is "total packaged disposition." This
24 includes route disposition, regardless of
25 destination, packaged transfers to other order

1 J. Rourke - Direct

2 plants, both in the same order or in another
3 order, and packaged transfers to unregulated
4 plants. The term route disposition is used as
5 defined under the order.

6 For Class II products, the milk,
7 skim milk, and cream used to produce the
8 product were recorded. Two, partially
9 regulated distributing plants, (PRDP)-route
10 dispositions in all Federal milk order
11 marketing areas were collected. Some milk,
12 skim milk, and cream used to produce the
13 selected Class II products was reported for
14 this type of plant.

15 Three, regulated or unregulated
16 manufacturing plants - the information is milk,
17 skim milk, and cream used to produce the
18 selected Class II products. Information was
19 not collected from producer-handlers or exempt
20 plants.

21 I have two additional comments.
22 First, the term "total Class I products
23 disposition" means total packaged disposition
24 of products classified as Class I by fully
25 regulated distributing plants. This figure

1 J. Rourke - Direct

2 does not include the selected Class II products
3 shown on the table.

4 Second, under "orders reporting the
5 product," PRDP stands for partially regulated
6 distributing plants.

7 Following is an explanation of the
8 data in the table, using the first line, the
9 data for carb reduced or free beverages.

10 First looking at the last column,
11 there were four orders that reported this
12 product being made by fully regulated plants;
13 the Order numbers are shown. Also, this
14 product was distributed on routes in FMO
15 marketing areas by partially regulated
16 distributing plants; this fact is indicated by
17 PRDP.

18 Going back to the second column,
19 there were 101,490,181 pounds of this product
20 reported; the butterfat test of these products
21 was 1.91 percent.

22 Going now to the fourth column, the
23 101 plus million pounds accounted for 0.23
24 percent of the total pounds of Class I packaged
25 products disposed by fully regulated

1 J. Rourke - Cross - by Mr. Beshore
2 distributing plants.

3 This concludes my prepared comments,
4 and I'm ready for any questions.

5 JUDGE DAVENPORT: Objections
6 to the statement? It will be entered into the
7 record at this time as Exhibit 12.

8 (Exhibit No. 12 was admitted.)

9 JUDGE DAVENPORT: Mr. Beshore?

10 -----

11 CROSS-EXAMINATION

12 BY MR. BESHORE:

13 Q. Good morning, John.

14 A. Good morning.

15 Q. First of all, I would like to thank
16 you for your effort and work with you and your
17 staff and all the Market Administrators in
18 putting together this data, which is your
19 statement, indicates has not previously been
20 published or available, and it's extremely,
21 extremely helpful.

22 You have been working at Dairy
23 Programs for a number of years, I take it?

24 A. Yes.

25 Q. The classification definitions that

1 J. Rourke - Cross - by Mr. Beshore
2 are presently in the order were, a number of
3 them Class I and Class II, were made uniform
4 for the first time in the system in the early
5 1970s; is that about right?

6 A. I believe that's about correct.

7 Q. Were you working in the Department
8 then or --

9 A. Yes, I was.

10 Q. Okay. Now, would you agree with me
11 that the technology for dairy products, fluid
12 milk product production, was quite different at
13 that time than it is today?

14 A. Yes, I would agree that that's true.

15 Q. And one of the differences, maybe
16 one of the primary differences, is the degree
17 to which it's possible with technology today to
18 fractionate the -- to divide out in various
19 ways the components of fluid milk?

20 A. That's correct.

21 Q. Now, you haven't presented any price
22 data. I'm sure we will take notice of some of
23 the official publications which are produced
24 under your supervision and price data, but I
25 wonder if you work with these numbers every day

1 J. Rourke - Cross - by Mr. Beshore
2 and you know them, I think, generally.

3 Would you agree with me that the
4 components of milk have widely -- the solids
5 components have widely differing values in the
6 marketplace?

7 A. By that you mean protein and nonfat
8 solids?

9 Q. Yes.

10 A. That would be a correct statement.

11 Q. And protein today under the Federal
12 Orders, approximately what's the price of
13 protein per pound?

14 A. It's probably somewhere in the
15 neighborhood of \$2.15 per pound.

16 Q. Now, the other nonfat solids in
17 milk -- whey, for instance -- what
18 approximately is the value of dry whey?

19 A. Under solids value is in the
20 neighborhood of 10 to 15 cents.

21 Q. Versus the \$2.15 for protein?

22 A. That's correct.

23 Q. Now, is there published weekly under
24 your direction and marketing information a
25 price for the market price of lactose?

1 J. Rourke - Cross - by Mr. Beshore

2 A. The under the Dairy Market Use
3 Service, the weekly price for lactose I believe
4 is somewhere around 20 cents a pound. A little
5 less than that right now.

6 Q. So then protein, whey, lactose, are
7 they the primary -- of course whey being a
8 species of protein, a portion of protein -- are
9 those the primary nonfat solids in milk?

10 A. Yes. Yes.

11 Q. Let me turn to Page 3 of Exhibit 12
12 for a couple of questions.

13 There is somewhat of a difference, I
14 take it, in the volume figures for the Class I
15 versus Class II in the sense that Class I is
16 volumes of product distributed, Class II is
17 volumes of product that was used to produce the
18 listed products; is that correct?

19 A. That's basically correct.

20 Q. Okay. So that, for instance, where
21 you have yogurt-based beverages in both
22 categories, in Class II, yogurt-based
23 beverages, the actual shelf volumes may be
24 somewhat greater than the volumes shown in the
25 table?

1 J. Rourke - Cross - by Mr. Beshore

2 A. Shelf volume, you mean the weight of
3 the product on the shelf?

4 Q. Yes.

5 A. That is correct.

6 Q. Because there may be ingredients
7 other than the milk ingredients used to produce
8 the product?

9 A. Correct.

10 Q. Now, the percentages in the fourth
11 column of Page 3 of Exhibit 12, for Class II,
12 those are percentages, if I understood you
13 correctly, not of Class II product -- Class II
14 usage in the system, but of Class I usage in
15 the system; is that correct?

16 A. Correct. The volume number that
17 those are percentages of shown in the footnote
18 three, 44 billion plus pounds, and that is
19 total Class I packaged disposition.

20 Q. Why are there yogurt-based beverages
21 in both class categories?

22 A. Why are there?

23 Q. Yes.

24 A. There are composition of the
25 products. Some of the composition of the

1 J. Rourke - Cross - by Mr. Beshore
2 products falls into the Class I category and
3 some falls in the Class II category.

4 Q. Is that basically the 6.5 percent
5 nonfat solids?

6 A. It's my understanding that that's
7 correct, that the Class II beverages would fall
8 in the less than 6.5 percent nonfat solids,
9 less than the compositional standard.

10 Q. And currently, that 6.5 percent
11 nonfat solids are considered equal, so to
12 speak, for that percentage test? Would that be
13 correct? Pound of protein -- percent of
14 protein and a percent of lactose are the
15 same -- or quantity?

16 A. I'm not sure I understood your
17 question.

18 Q. Okay. For the 6.5 percent under the
19 present definitions is of nonfat solids
20 irrespective of the type of nonfat solids?

21 A. Correct.

22 Q. So that a product with, you know,
23 6.5 units of protein is considered on the same
24 basis as a product that would have 6.5 percent
25 units of nonprotein to nonfat solids?

1 J. Rourke - Cross - by Mr. Yale

2 A. I'm not sure about how that -- how
3 the particular product is accounted for.

4 Q. Okay. In any event, as you
5 indicated, the 6.5 does not differentiate
6 between nonfat solids or among nonfat solids?

7 A. That's correct.

8 MR. BESHORE: Thank you.

9 JUDGE DAVENPORT: Other cross?
10 Mr. Yale?

11 -----

12 CROSS-EXAMINATION

13 BY MR. YALE:

14 Q. Good morning.

15 A. Good morning.

16 Q. To follow up with a few other
17 questions.

18 JUDGE DAVENPORT: Mr. Yale,
19 for the hearing reporter, would you state your
20 name again.

21 MR. YALE: Benjamin F. Yale on
22 behalf of Select Milk Producers and Continental
23 Dairy Products. Sorry.

24 BY MR. YALE:

25 Q. Mr. Rourke, the lactose-free

1 J. Rourke - Cross - by Mr. Yale
2 beverages, when you use the term "lactose
3 free," are you referring to those where they
4 hydrolyzed the lactose and made it for like
5 LactAid and some of the other type drinks or is
6 this one in which the lactose has been removed?

7 A. These are the products where the
8 lactose has been processed and it's LactAid
9 type products.

10 Q. Are you familiar with how that
11 process works or that --

12 A. A little bit.

13 Q. It takes -- lactose is a double
14 sugar; is that right? And this process breaks
15 it down into two simple sugars?

16 A. That's my understanding, yes.

17 Q. So this isn't necessarily reflecting
18 something that is removed, the lactose?

19 A. It's my understanding that lactose
20 is basically still in that product.

21 Q. Just to make it clear, all we have
22 is for 2004, there is -- we have no data
23 available that one can try to estimate to see
24 whether there's a growth in any of these
25 products over the last five years?

1 J. Rourke - Cross - by Mr. Yale

2 A. I do not -- I do not have any.

3 Q. And the information you used to put
4 this together is not readily available to the
5 public, it was only available to the
6 Department?

7 A. That's correct.

8 Q. Now, are you aware of a product
9 being marketed in the southwest and Texas in
10 particular called Utopia, a designer milk that
11 puts -- the lactose has been reduced and the
12 protein has been enhanced?

13 A. I'm not familiar with that product,
14 no.

15 MR. YALE: You indicated that
16 Todd -- is he going to testify?

17 MR. TOSI: No.

18 BY MR. YALE:

19 Q. Are you familiar with the
20 computation that's used under the present
21 system to determine the skim equivalent of some
22 of these products?

23 A. I'm aware of it. I don't know how
24 familiar I am with it.

25 MR. YALE: I would make a

1 J. Rourke - Cross - by Mr. Yale
2 request whether the Department would have
3 anybody that can testify as to how they compute
4 the skim equivalency and can get that into the
5 record.

6 A. I would be willing to take a shot at
7 it, if you want.

8 Q. You are willing to take a shot?
9 I'll give you a try. The problem is I'm not
10 all that great at it, either, so we will walk
11 through this together.

12 Generally, what is the skim
13 equivalent? What does that mean?

14 A. Skim equivalent is basically an
15 arithmetic computation to come up with the
16 volume of skim milk that would be -- that the
17 different components would convert to.

18 Q. In other words, you take the product
19 at hand and you determine how much that is
20 equivalent to what skim milk would be in the
21 same volume or another volume?

22 A. You would take that -- whatever the
23 component is that you are trying to convert
24 back to skim milk, and you would convert it to
25 its equivalent volume of skim milk that would

1 J. Rourke - Cross - by Mr. Yale

2 be basically used to produce that product.

3 Q. And today, what particular component
4 are they using to come up with the skim
5 equivalent? Do you know, what is the practice?

6 A. They use nonfat dry milk or
7 condensed skim, depending on what might be used
8 in the fortification process, or it depends on
9 what the product is, I guess, as to what
10 component might be used to convert to the
11 skim --

12 Q. You could use just protein; right?

13 A. Yes.

14 Q. Are you familiar with the process of
15 how that skim equivalency is determined? The
16 math that goes through -- let me ask you --

17 A. I've not been through the math, no.

18 Q. Are you aware of the fact that use
19 of specific gravity of each of the components
20 to come up with a per gallon weight of the
21 product that's compared to the producer milk?

22 A. I might be aware of that, but I
23 don't know how to do it.

24 MR. YALE: We may have to put
25 on some other evidence on that, but I would

1 J. Rourke - Cross - by Mr. Yale
2 like to have official notice taken of two
3 books. One is -- or articles. One is
4 Atherton, A-T-H-E-R-T-O-N, and others, and the
5 title of it is "Chemistry and Testing of Dairy
6 Products," the Fourth Edition, and referencing
7 particularly Page 42 and Table 2.6, and Paul F.
8 Sharp and the title of that is "Density of Fat
9 in Different Temperatures," in the Journal of
10 Dairy Science Volume 11, Page 259, a very old
11 article, 1928, is still very much used.

12 Q. And just going back to you,
13 Mr. Rourke, you would not be able to then
14 testify how he used specific gravity and
15 arrived at the final skim in the fortification?

16 A. No, I would not.

17 Q. Finally, on this table, this lists
18 only those products in which the Market
19 Administrators have determined to either be
20 Class I or Class II under the market; is that
21 correct?

22 A. The products listed are those that
23 were in the original requests for the data.

24 Q. Okay. Now, looking at the Class II,
25 you are aware, are you not, that it is possible

1 J. Rourke - Cross - by Mr. Yale
2 to produce a Class II product and not be -- and
3 that plant not be subject to the Order
4 regulation have to report, is that right, if
5 it's only a Class II plant?

6 A. That's correct.

7 Q. Do we know whether there are any
8 plants -- based on your requests that you made
9 to the Market Administrator, are there any
10 plants that are producing any of the products
11 under that second part of the table that are
12 being marketed but would not have been on this
13 report?

14 A. I would assume that to be the case,
15 yes.

16 Q. And, similarly, other products --
17 well, let me ask you this question: Are you
18 familiar with the product called Swerve?

19 A. I have heard of that, yes.

20 Q. Do you know how that would fit under
21 either one of these two or if at all?

22 A. I'm not familiar with the
23 classification of that product.

24 Q. Have you drank it?

25 A. I don't believe I've had Swerve, no.

1 J. Rourke - Cross - by Mr. Vetne

2 MR. YALE: So then we won't
3 ask your opinion. Okay. I have no other
4 questions. Thank you.

5 JUDGE DAVENPORT: Other cross?
6 Mr. Vetne?

7 -----

8 CROSS-EXAMINATION

9 BY MR. VETNE:

10 Q. I'm John Vetne, V-E-T-N-E,
11 attorney. I represent HP Hood and Chelsea
12 Mass.

13 Mr. Rourke, your responsibilities in
14 Dairy Programs are related to market
15 information and statistics; is that correct?

16 A. That's correct.

17 Q. Your responsibilities do not include
18 a role in determination of what products are
19 Class I or Class II?

20 A. That's correct.

21 Q. And you do not apply in your work
22 for the Dairy Programs the skim equivalent or
23 component equivalent formulas that are used by
24 others in the program; is that correct?

25 A. Could you repeat that question?

1 J. Rourke - Cross - by Mr. Vetne

2 Q. You were asked some questions about
3 skim equivalent formulas and you had some
4 general idea. Am I correct that you do not
5 apply those in your work, those formulas?

6 A. That's correct.

7 Q. And you are not involved in
8 development of those formulas?

9 A. No, I'm not.

10 Q. The data on the table, on the last
11 page of your testimony, for 2004 -- let me look
12 at the Class I products first.

13 You are, however, involved in
14 producing statistical compilation, including
15 Federal milk Order Market Statistics have been
16 published annually and monthly or bimonthly for
17 a long time?

18 A. That's correct.

19 Q. And towards the end of the annual
20 Federal Milk Order Market Statistics
21 publication, there is and has been for a long
22 time a table showing distribution of Class I
23 products by handlers and broken down to various
24 types of products?

25 A. That's correct.

1 J. Rourke - Cross - by Mr. Vetne

2 Q. And in that table, which I don't
3 have in front of me, the products broken down
4 are whole milk, two percent milk, one percent
5 milk, skim milk, and at the bottom there is a
6 category for other?

7 A. Correct.

8 Q. Okay. Would the Class I products
9 that are listed here for 2004 be those products
10 that are included in the "other" category in
11 the Federal Milk Order Market Statistics?

12 A. Some of these products may be
13 included in the -- like butterfat content
14 regular-type products. It depends on the
15 Market Administrator has some latitude in how
16 that product is reported. The miscellaneous or
17 other category may include these. It may
18 include some other products as well.

19 Q. The miscellaneous or other category
20 of Class I products distributed, would it be
21 correct to say that those include all products
22 that are not eligible to be labeled as milk?

23 A. I would say that's not true.

24 Q. That is not true?

25 A. That's not true.

1 J. Rourke - Cross - by Mr. Vetne

2 Q. Is it your belief that some products
3 shown as whole milk, one percent milk, two
4 percent milk, or fat-free or skim milk include
5 products that are not eligible to be labeled as
6 milk?

7 A. I would say that is a possibility
8 that some volume shown under those products may
9 be some of these products that are shown here.

10 Q. Is there a standard or guideline for
11 the development of those statistics that would
12 place it in one category or another in that
13 table in the annual statistics?

14 A. There is not a guideline for where
15 the products are placed on that table.

16 Q. The products in your table,
17 lactose-free beverages, those are products
18 that, I think you described, are simply
19 lactose -- the lactose in the milk is
20 neutralized and converted to other sugars?

21 A. Correct.

22 Q. And they would be labeled milk?

23 A. It would be my understanding.

24 Q. Do you know whether any of the
25 carb-reduced or carb-free beverages in the

1 J. Rourke - Cross - by Mr. Vetne
2 first line of this are labeled or eligible to
3 be labeled milk?

4 A. I do not know that.

5 Q. Do you know whether any of the
6 yogurt-based beverages are labeled or eligible
7 to be labeled as milk?

8 A. I do not know that, either.

9 Q. In the category of Class I products,
10 under the -- to the far right there is the
11 PRDP, partially regulated distributing plants,
12 those could include and probably do include
13 plants located in California that market
14 packaged products into Federal Orders; correct?

15 A. That's correct.

16 Q. As far as the classification of
17 those products is concerned, you don't know
18 whether California classifies those products as
19 Class I or Class II?

20 A. All of these products?

21 Q. Yes.

22 A. No, I don't.

23 Q. Do you know whether the carb-reduced
24 or carb-free beverages are Class I or Class II
25 in California?

1 J. Rourke - Cross - by Mr. Vetne

2 A. It seems to me my understanding that
3 they are not Class I in California.

4 Q. They are not Class I. Do you know
5 whether any of the yogurt-based beverages are
6 Class I or Class II in California?

7 A. I do not know that.

8 Q. Do you know whether any of the
9 products that are listed in your table as
10 Class II products are instead Class I in
11 California?

12 A. I do not know that, either.

13 Q. With respect to the products in
14 Class I in your table, do you know whether any
15 of the carb-reduced or carb-free beverage
16 volumes shown there include products that have
17 more than 8.25 solids nonfat as required by the
18 FDA for milk?

19 A. I do not know the specific solids
20 nonfat content of those products.

21 Q. And also with respect to those
22 products, the carb-reduced or carb-free
23 beverages, are you aware that -- strike that.

24 Is it your understanding that those
25 are all products to which Dairy Programs

1 J. Rourke - Cross - by Mr. Vetne
2 attributes more than 6.5 percent solids nonfat?

3 A. I do not know if that's completely
4 true across the board.

5 Q. Again, that's somebody's
6 responsibility other than your own?

7 A. Correct.

8 Q. You talked again about the skim
9 equivalent process. Are you aware that Dairy
10 Programs also uses a component equivalent
11 process attributing to these products
12 components that are removed?

13 A. Yes. I believe I know -- I believe
14 I understand what you are talking about, yes.

15 Q. I think it was Mr. Beshore asked you
16 a question to the effect that you tally up the
17 solids nonfat, it doesn't matter what the
18 nature of the solids is, whether it's protein
19 or lactose or something else?

20 A. That's my understanding.

21 Q. Are you aware that Dairy Programs
22 includes, among other things, milk protein
23 concentrate, milk protein isolate, whey
24 protein, casein, calcium caseinate as milk
25 solids to be tallied in the 6.5 percent?

1 J. Rourke - Cross - by Mr. Vetne

2 A. Yes, I am.

3 Q. And are you aware that at some point
4 prior to 2004, those products were not included
5 in the tally of milk solids nonfat for the
6 determination of 6.5 percent?

7 A. I don't know what the time period is
8 when they were not, but at one point in the
9 past they were not.

10 Q. And are you aware that for some of
11 these milk ingredient derivatives, USDA applies
12 a formula to be discussed to determine a milk
13 component equivalent?

14 A. That's my understanding, yes.

15 Q. With respect to the Class II
16 beverages or Class II products -- first of all,
17 these are all beverages; is that correct?

18 A. Yes.

19 Q. And these are the type of products
20 that are at issue in the various proposals in
21 this Notice of Hearing; is that your
22 understanding?

23 A. I'm not enough familiar with what --
24 with what the proposals do to make that
25 determination.

1 J. Rourke - Cross - by Mr. Vetne

2 Q. Do you know whether there are any
3 Class II beverages on the market that are not
4 included in one of the four categories of
5 Class II products in your table?

6 A. Infant formula I don't believe is on
7 this -- is in a Class II product that's on --
8 is not on this table.

9 Q. So infant formula is not included in
10 the meal replacement category?

11 A. I don't believe so.

12 Q. Are you aware of any other beverages
13 in Class II that are not included in the
14 volume?

15 A. No, I'm not.

16 Q. And going back to our discussion on
17 the Federal Milk Order Market Statistic
18 Publication, there is for Class II similar to
19 Class I a table at the end of those
20 publications annually that list the volume of
21 milk and cream, skim milk, used to produce
22 various specified products such as cottage
23 cheese, frozen desserts, cream, frozen yogurt,
24 and then there's a column for other Class II
25 use?

1 J. Rourke - Cross - by Mr. Vetne

2 A. Correct.

3 Q. And then other Class II use column,
4 that the total there that is not represented by
5 identified products includes miscellaneous
6 cream, it includes bakery products, candy,
7 milk, soup, milk to commercial food processing
8 establishments as well as these miscellaneous
9 beverages; is that correct?

10 A. Probably not entirely. I would
11 think it's -- I'm not sure if the yogurt-based
12 beverages are necessarily reported separately
13 from the Order or not.

14 Q. So the yogurt portion may or may not
15 be under the yogurt column?

16 A. Correct.

17 Q. But the other non-yogurt beverages
18 would be part of the other products that are
19 not identified in the FMOMS?

20 A. Correct.

21 Q. The Federal Milk Order Market
22 Statistics table that reports Class I in
23 various products is posted on the Internet;
24 correct?

25 A. Correct.

1 J. Rourke - Cross - by Mr. Vetne

2 Q. And for calendar year 2004, the data
3 for Class I no longer includes an "other"
4 category. Do you know why that is?

5 A. I don't believe we posted the
6 particular table that you were talking about
7 earlier, I don't believe that's on the Internet
8 yet for 2004.

9 Q. For Class I products?

10 A. For that particular table that you
11 referenced earlier that shows the annual data
12 by product.

13 Q. Okay.

14 A. We do have other types of
15 information on other statistics such as sales
16 data that have broader cap orders.

17 Q. So it's your intention to use past
18 comparable data for 2004 comparable to 2003 and
19 prior years?

20 A. Correct.

21 MR. VETNE: Thank you.

22 JUDGE DAVENPORT: Other cross
23 of this witness? Yes, sir.

24 -----

25

1 J. Rourke - Cross - by Mr. Vetne

2 CROSS-EXAMINATION

3 BY MR. LEINSOL:

4 Q. Good morning.

5 JUDGE DAVENPORT: Once again,
6 would you please identify yourself --

7 MR. LEINSOL: Zalmel Leinsol.
8 I'm the President of Noga Dairy in Long Island,
9 New York.

10 For the record, you can blame me for
11 sitting here today because I'm the first one to
12 come up with this concept in the United States
13 14 years ago of yogurt shakes. I'm the first
14 one. We share the same distribution. The
15 Frusion came first. Smoothie tried to
16 duplicate my product later on. Later on,
17 Yoplait came and Stanfield products and so on.

18 This is Class II (indicating), it's
19 a yogurt everyone's familiar with. It's a
20 Class II yogurt cup. It's the same product
21 with a new definition that you are trying to
22 establish. The only difference, you take this
23 cup, you stir it, you pour it, you get in this
24 product (indicating) exactly the same product,
25 the same content, the same solids.

1 J. Rourke - Cross - by Dr. Cryan

2 Right now, according to the old
3 definition, this one has less than 6.5 percent
4 solids. That's why it's still considered a
5 Class II product. Originally, 14 years ago
6 when I came first with the product, it was 8.25
7 percent, but Market Administration came to me
8 and asked me for more money to classify it as
9 Class I, so I changed the formula.

10 I added a little bit more
11 stabilizers and I reduced the amount of solids
12 inside and it became Class II. But according
13 to the new definitions that you are trying to
14 establish, the only difference would be just
15 the package. You need to define what you call
16 beverage. It's my point. It's the same
17 product. It doesn't make sense to me. Thank
18 you.

19 JUDGE DAVENPORT: Other cross?
20 Very well. Mr. Cryan?

21 -----

22 CROSS-EXAMINATION

23 BY DR. CRYAN:

24 Q. Excuse me. Good morning. My name
25 is Roger Cryan, C-R-Y-A-N. I'm with the

1 J. Rourke - Cross - by Dr. Cryan
2 National Milk Producers Federation, and with
3 that representation I will ask questions to
4 clarify this. Thanks again. Thanks for the
5 data, John. I appreciate that. It's very good
6 data.

7 Let me ask you, the Class II
8 products, I think a lot of this has gone on
9 before, but the Class II products are per pound
10 on a used to produce basis; is that correct?

11 A. That's correct.

12 Q. So that means the products would
13 have to be under 6.5 percent -- well, for
14 the -- the ones that are under 6.5 percent
15 nonfat milk solids, necessarily the pounds on
16 the shelf would be more than the pounds that
17 are listed in the table; is that correct?

18 A. That would be correct.

19 Q. Okay. Thank you. And there was a
20 little bit of talk about the Class I conversion
21 factors, and I was -- I don't know if the
22 record is very clear on that.

23 It's my understanding that in a
24 sense the product will be converted into an
25 equivalent of milk volume according to its

1 J. Rourke - Cross - by Dr. Cryan
2 content, solids content, and that that can
3 never be more than a one for one.

4 It will always be either, for
5 example, a gallon of product can produce -- can
6 contain up to a gallon of Class I milk but no
7 more than that, is that correct, in terms of
8 the Federal Order accounting?

9 A. There are standard conversion
10 factors for converting units into pounds of
11 milk for standard type products, which is whole
12 milk, low fat milk, chocolate milk, and it is
13 a -- those factors are based on the butterfat
14 content and the nonfat solids content.

15 Q. Okay. But 100 pounds of -- 100
16 pounds of Class I sales as measured by the
17 Market Administrator for statistics can't
18 involve -- okay. What share of the U.S. fluid
19 market is represented by Federal Order sales?

20 A. Federal milk orders, this particular
21 data series is probably somewhere in the
22 neighborhood of 75 percent.

23 Q. Okay.

24 A. In the total U.S.

25 MR. CRYAN: Thank you.

1 J. Rourke - Cross - by Mr. Tipton

2 JUDGE DAVENPORT: Mr. Tipton?

3 -----

4 CROSS-EXAMINATION

5 BY MR. TIPTON:

6 Q. Tip Tipton, with the Tipton Group.
7 Good morning, John.

8 A. Good morning.

9 Q. You I think noted that infant
10 formulas were not included with the meal
11 replacement data?

12 A. That's my understanding, yes.

13 Q. And why were they not?

14 A. I believe we have the data request
15 specifically asks for meal replacements. We
16 interpreted that to mean the specific type of
17 exclusion that's in the Class II definition,
18 and that infant formula was listed separately
19 from meal replacement.

20 So we took that to mean that they
21 were just interested in the meal replacement
22 type product, not the infant formula.

23 Q. So there's no distinction in the
24 Order, is there, between a meal replacement and
25 an infant formula?

1 J. Rourke - Cross - by Mr. Farrell

2 A. I don't know if the meal replacement
3 has to be in a specific type of container or
4 not. I am not familiar enough with that. But
5 as far as classification is concerned, they are
6 in the same class.

7 Q. I was just wondering what basis you
8 made the distinction between what is an infant
9 formula and what is a meal replacement.

10 A. I didn't have a basis for that, for
11 the distinction, besides the fact of what was
12 specifically asked for in the request.

13 MR. TIPTON: Thank you.

14 JUDGE DAVENPORT: Yes, sir.

15 MR. FARRELL: Thank you. Good
16 morning, Your Honor. It's Ed Farrell,
17 F-A-R-R-E-L-L.

18 -----

19 CROSS-EXAMINATION

20 BY MR. FARRELL:

21 Q. Just a clarifying question, if you
22 will.

23 On the Class II product list, what
24 is included in the category less than 6.5
25 percent?

1 J. Rourke - Cross - by Mr. Farrell

2 A. I don't know if I know the specific
3 products that are included in that category.

4 The names of the products, I think there are
5 some beverages that are -- I don't know -- I
6 don't know the names of the specific products.

7 Q. Would infant formula be included in
8 that category?

9 A. I do not believe so.

10 Q. The problem I'm having is that that
11 category would seem to encompass all the
12 Class II products; right? I mean, if you just
13 take a category and call it less than 6.5
14 percent, doesn't that capture all of your
15 Class II products?

16 A. In this particular data collection,
17 it was to capture those products that are not
18 specifically otherwise listed.

19 Q. Did you submit for the record the
20 request from the Market Administrators for this
21 information?

22 A. I --

23 MR. STEVENS: No.

24 A. No.

25 Q. Would that be available? It would

1 J. Rourke - Cross - by Mr. Farrell
2 certainly I think help to clarify this issue.
3 The concern of course is that there is not
4 double accounting.

5 A. That -- I don't think there's
6 anything confidential in the specific request
7 from the Market Administrators.

8 MR. STEVENS: I'm informed
9 that we don't have it here with us. So you can
10 ask and they will take your request.

11 MR. FARRELL: Well, we would
12 ask that it be submitted for the record.

13 JUDGE DAVENPORT: So noted.

14 MR. FARRELL: Thank you. I
15 have no further questions.

16 JUDGE DAVENPORT: Other
17 questions of Mr. Rourke?

18 Well, Mr. Rourke, apparently you
19 can step down.

20 (Mr. Rourke was excused.)

21 JUDGE DAVENPORT: Ms. Carter,
22 do we have any other government witnesses at
23 this time?

24 MS. CARTER: No, Your Honor,
25 we do not.

1 J. Rourke - Cross - by Mr. Farrell

2 JUDGE DAVENPORT: Very well.

3 I guess at this point I would sort of like a
4 feel as to how you wish to proceed, whether
5 there are people that have particular
6 scheduling problems today, and I'll repeat this
7 on the basis each and every day: If there are
8 people that do need to be heard that would need
9 a specific time, we would try to accommodate
10 those.

11 MR. BESHORE: Might we go off
12 the record for a minute and talk about how many
13 witnesses we have and the possible order? It
14 might be more efficient to do it that way.

15 JUDGE DAVENPORT: Let's do
16 that. Why don't we take our break early at
17 this time. Maybe you all can caucus and see if
18 there is some consensus as to how you want to
19 proceed, and then we will go on from there.

20 How long do you think you might
21 need, Mr. Beshore?

22 MR. BESHORE: Ten minutes.

23 JUDGE DAVENPORT: Okay.

24 (Recess was taken.)

25 JUDGE DAVENPORT: We're back

1 J. Rourke - Cross - by Mr. Farrell
2 in session.

3 Mr. Beshore, would you summarize
4 some of the discussion that took place during
5 the break among you and your other
6 representatives.

7 MR. BESHORE: Yes. We did
8 have an informal discussion at the break among
9 most of the interested parties participating.
10 The consensus was that we proceed at this time
11 with Mr. Hollon's testimony, Dr. Cryan,
12 Mr. Alexander, Mr. Leinsol.

13 JUDGE DAVENPORT: Mr. Leinsol.

14 MR. BESHORE: From there,
15 there are a number of other persons who may be
16 available prepared to testify later on this
17 afternoon.

18 JUDGE DAVENPORT: Very well.
19 It is also possible that some people are going
20 to modify their proposals, which I guess in the
21 interest of fairness that if anyone is going to
22 do that, that they make sure that they be
23 prepared to distribute those and at least give
24 some advanced notice so that we don't go down
25 one path and then have to reverse ourselves.

1 E. Hollon - Direct

2 Very well. Mr. Hollon, would you
3 raise your right hand.

4 ELVIN HOLLON

5 a witness herein, having been first duly sworn,
6 was examined and testified as follows:

7 -----

8 JUDGE DAVENPORT: State your
9 full name, please.

10 THE WITNESS: My name is Elvin
11 Hollon.

12 JUDGE DAVENPORT: Mr. Beshore?

13 -----

14 DIRECT EXAMINATION

15 BY MR. BESHORE:

16 Q. Mr. Hollon, would you please state
17 your business address and business position for
18 the record.

19 A. I'm employed by Dairy Farmers of
20 America. Our offices are on Executive Hills
21 Boulevard in Kansas City, Missouri.

22 My title is Director of Fluid
23 Marketing and Economic Analysis. I've been
24 with Dairy Farmers of America, or a
25 predecessor, since 1979, and my day-to-day

1 E. Hollon - Direct

2 duties, at this point, one of them specifically
3 deals with regulatory affairs, Federal
4 Marketing Orders, both at the Washington level,
5 if you will, and individual Market
6 Administrator level.

7 I do not do day-to-day milk
8 marketing activities, but I work closely with
9 the folks in our organization who do that. I
10 do economic studies, price analyses, some price
11 forecasting. In the past, I have had from 10
12 to 12 years in the upper midwest a day-to-day
13 responsibility and day-to-day job in buying and
14 selling milk in the fluid sector as well as the
15 manufacturing sector.

16 And I've also worked in the
17 southwest area in a role there dealing with
18 buying and selling of milk and regulatory
19 issues and also spent part of my time dealing
20 with national agricultural policy with DFA.

21 Q. What is your educational background,
22 Mr. Hollon?

23 A. I have a Bachelor of Science Degree
24 in how to make cheese and ice cream, a dairy
25 manufacturing degree, and Master's degree in

1 E. Hollon - Direct

2 agricultural economics and both from Louisiana
3 State University.

4 Q. Have you previously testified in
5 Federal Order proceedings?

6 A. I have testified in numerous Federal
7 Order proceedings dating back to the '80s.

8 Q. Do you have a statement that you
9 have prepared and made available?

10 A. I do. It's eight pages.

11 MR. BESHORE: I would like
12 Mr. Hollon's statement to be marked the next
13 consecutive exhibit.

14 JUDGE DAVENPORT: Exhibit 13,
15 Mr. Beshore.

16 (Exhibit No. 13 was marked for
17 identification.)

18 MR. BESHORE: I have
19 distributed copies of it on most of the tables
20 of the room at the break, and there are
21 additional copies on the table in the rear. If
22 anyone does not have one, there should be
23 plenty available.

24 At this time, I would ask that
25 Mr. Hollon be recognized as an expert in his

1 E. Hollon - Direct

2 field of agricultural economics and marketing
3 and present his statement which has been marked
4 as Exhibit 13.

5 JUDGE DAVENPORT: Does anyone
6 require voir dire of this witness? He is
7 accepted as an expert.

8 BY MR. BESHORE:

9 Q. Would you precede please,
10 Mr. Hollon.

11 A. Yes. I will have one addition to my
12 statement in the second paragraph. This is
13 also being presented or endorsed by Dairy
14 League Cooperative, Inc.

15 Statement of Dairy Farmers of
16 America, Inc. Dairy Farmers of America, DFA,
17 is the proponent of Proposals 1 and 2. DFA is
18 a member-owned Capper Volstead cooperative of
19 12,800 farms producing milk in 49 states. DFA
20 pools milk on nine of the ten Federal Milk
21 Marketing Orders.

22 Dairy League Cooperative, Inc., is a
23 Capper Volstead cooperative of 2,400 farms
24 producing milk in seven states. Dairy League
25 pools milk on three of the ten Federal Milk

1 E. Hollon - Direct

2 Marketing Orders.

3 DFA is a supporter of Federal Milk
4 Marketing Orders. Orders are an economically
5 proven marketing tool for dairy farmers, and we
6 believe without them, dairy farmers' economic
7 livelihood would be worse.

8 The central issue of this hearing is
9 to refine the definition of fluid milk product
10 so that the classification system can function
11 fairly for dairy farmers and be clearly written
12 to reflect both current industry conditions and
13 technology capabilities in the industry. This
14 hearing is in response to changes in technology
15 now commonplace in the dairy industry.

16 The proposals we support represent
17 our attempt to modernize Order regulations to
18 keep pace with technology. Failure to address
19 this issue will be detrimental to the members
20 of DFA both in their day-to-day dairy farm
21 enterprises and in the milk processing
22 investments that they have made.

23 There have been and may continue to
24 be protests concerning what some perceive as an
25 unfair change in the rules. Our position is

1 E. Hollon - Direct

2 that the Orders always need to be changed to
3 keep pace with the industry. So long as
4 classified pricing is part of the Order system,
5 there will be changes in classification
6 definitions and rules.

7 Of course, all changes in
8 classification would be avoided if all products
9 were in the same class; but we do not think
10 that is the best long-run interest of producers
11 or processors, and the history of regulations
12 seem to support that opinion.

13 The dairy industry is constantly
14 changing. Mergers, plant closings, plant
15 openings, shifts in consumer tastes and
16 preference, new cost constraints, new economics
17 of scale, new packaging and new environmental
18 constraints and new products are always
19 cropping up. To expect that the Order system
20 would remain totally static is neither likely
21 nor reasonable.

22 Dairy industry advances in milk
23 component fractionalization, product
24 engineering and packaging technology have come
25 together to form a fertile environment for new

1 E. Hollon - Direct

2 dairy products. Mergers in the dairy
3 processing industry and renewed interest by
4 major players in the food industry in
5 milk-based beverages make this environment more
6 likely to spawn new products.

7 The nationwide footprint of these
8 new businesses makes it certain that new
9 products will get wide distribution and market
10 penetration. This is great news for dairy
11 farmers. New products can mean new sales for
12 milk. But the dairy farmers need the structure
13 provided by Orders to recover their share of
14 the revenues generated by these new products
15 and to insure that inequality in bargaining
16 power in the marketplace will not force them
17 into accepting a lower price than is available
18 from market returns.

19 It is very clear that the existing
20 fluid milk product standard, FMP, does not
21 allow the Order system to keep pace with
22 technology. The fluid milk product standard
23 currently in place does not adequately
24 recognize the demand for dairy proteins; thus
25 it does not price them properly.

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2 The physical characteristics and
3 intended use of many of the new dairy-based
4 beverages clearly position themselves as
5 alternatives to traditional milk beverages -
6 yet their formulation and composition under the
7 current outdated provisions makes them
8 Class II.

9 In many of, if not most of, these
10 situations, the nonfat solids driven regulation
11 and formulation of these products causes them
12 to fall just below the Class I standard; at the
13 same time it is the characteristics derived
14 from the milk proteins that make the products
15 desirable to consumers. Perhaps some of these
16 beverages were formulated intentionally to fall
17 just short of the existing fluid milk product
18 standard.

19 The current standard was put in
20 place when processes such as ultra-filtration
21 and milk component fractionalization were
22 textbook predictions for the future. Now that
23 they are mainstream realities, the regulations
24 need to be updated.

25 We believe that the best solution to

1 E. Hollon - Direct

2 this problem is through the hearing process.
3 While perhaps slower than we'd like, hearings
4 gather information in a rational and fair
5 manner, allow all interested parties to
6 participate in the gathering and examination of
7 the data and advance, oppose, and dissect how
8 to use the data best in regulating the
9 industry.

10 This is a better long-run solution
11 than a regulation by administrative action on
12 the part of USDA or request action via
13 Congress.

14 This is not a new problem for the
15 Order system. A 1974 decision addressing this
16 product classification (39 Federal Register
17 8714) noted:

18 "It is possible that a product very
19 similar in composition and form to chocolate
20 milk could be marketed under the label of a
21 milkshake mix for the purpose of having a lower
22 classification apply to the product. Since
23 such a product would actually have the same
24 general form and purpose of other fluid milk
25 products, now classified as Class I under these

1 E. Hollon - Direct

2 orders, it should be included in the Class I
3 classification.

4 "It is necessary, though, to provide
5 some means of distinguishing between such a
6 product and the general category of milkshake
7 mixes that are being sold in competition with
8 frozen desserts. For this purpose, the total
9 solids content of the product should be used.

10 "A standard of 20 percent or more
11 total milk solids should encompass the
12 milkshake and ice milk mixes intended for use
13 as a type of frozen dessert. Mixes with less
14 solids are similar composition to chocolate
15 milk and other flavored fluid milk products and
16 should be a Class I product."

17 Later in the same decision, a lively
18 debate is concluded as follows: (39 Federal
19 Register 8715):

20 "The primary concern with any fluid
21 milk product definition is that it clearly
22 defines the product or types of products that
23 are intended to be included in the definition.
24 The fluid milk product definition included
25 herein, which incorporates both the listing of

1 E. Hollon - Direct

2 specified products and the use of composition
3 percentages, should meet this requirement.
4 Incorporation of this definition in each of the
5 32 orders will provide a uniform basis for
6 identifying those products that are to be
7 defined as fluid milk products."

8 We continue to advocate the
9 structural position taken in this decision -
10 form and use of a product should be the primary
11 guideline which the Secretary uses in
12 classifying products. But in addition and in a
13 supplementary role, the Secretary should
14 establish guidelines using product composition
15 and there should continue to be specific
16 inclusion or exclusion of some products when
17 appropriate.

18 Finally, this 1974 decision
19 anticipated the very situation that we find
20 ourselves in now when noting (39 Federal
21 Register 8716):

22 "A refinement of such standards may
23 be appropriate once there has been an
24 opportunity to evaluate the applicability under
25 actual market conditions."

1 E. Hollon - Direct

2 In so many words, as the industry
3 evolves, the standards and definitions may need
4 review.

5 The Secretary reached similar
6 conclusions in the reform process when after
7 careful review of the "form and use" test,
8 product composition standards, and
9 inclusion/exclusion process, he concluded that
10 no change in the "6.5 percent nonfat solids
11 standard" was warranted. (63 Federal Register
12 4824).

13 However, just as with other issues -
14 such as "dual pooling", performance standards,
15 emergency transportation funding,
16 classification of evaporated and condensed
17 milk, payment dates, and issues surrounding
18 producer handlers, the Secretary has seen fit
19 to recognize changes since the 2000 reform
20 decision, hold hearings, find for and against
21 proposals and issue interim recommended and
22 final decisions. The hearing today is simply
23 another step in this important process of
24 continually updating Federal Order regulations.

25 Since 1999, there have been a wide

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2 range of new products formulated and marketed
3 by the dairy industry. (Roger Cryan's
4 statement on behalf of the National Milk
5 Producers Federation lists many of them.)

6 There have been several
7 administrative decisions dealing with
8 classification of these new beverages, and
9 there is presently a legal proceeding brought
10 pursuant to Section 15(A) of the AMAA (7 USC
11 Section 608c(15)(A)) which challenges the
12 application of the current regulations. Now is
13 the right time to deal with the need to update
14 the fluid milk product definition.

15 DFA is abandoning its Proposal 1.
16 Upon review, we concluded that it is not the
17 best way to address the changes needed in the
18 fluid milk product definition.

19 The zero tolerance standard we
20 proposed is overly restrictive and would cause
21 excessive administrative costs to regulate
22 beverages with minor percentages of dairy
23 components.

24 We fully support Proposal 7 as
25 offered and testified to by the National Milk

1 E. Hollon - Direct

2 Producers Federation.

3 We continue to support Proposal 2.
4 It is procedural in nature with no specified
5 language to put into the regulations. It
6 requests that the standard for measure of all
7 the quantity of dairy proteins present in a
8 beverage include any and all dairy protein
9 sources including whey and whey products.

10 However, for pricing purposes, these
11 same whey and whey products that are sources of
12 proteins in beverages that become fluid milk
13 products as a result of the new language, will
14 not be up-charged as Class I.

15 We oppose any attempt to dilute the
16 current Class II definition. We oppose
17 Proposal 8 by Dannon, 9 by General, 10 by
18 Novartis, and 11 by Hormel on this basis.

19 Furthermore, we do not at this time
20 support any proposals that would change or
21 modify the exclusion language now present in
22 Section 15(b). This would include any change
23 in the terms infant feeding, dietary use, meal
24 replacement, or hermetically sealed. The 1993
25 Order decision (58 Federal Register 12659

1 E. Hollon - Direct

2 (March 5, 1993)) noted:

3 "The amended orders should specify
4 that a Class II classification of milk used to
5 produce formulas especially prepared for infant
6 feeding or dietary use should apply to only
7 formulas that constitute replacement for meals,
8 rather than merely having some added vitamins
9 and minerals.

10 "In addition, the cost of extra
11 packaging and the Class II attributes of having
12 an extended shelf life and being distributed
13 over a wider area justify Class II
14 classification for hermetically sealed
15 packaging, while fresh product with limited
16 shelf life should be Class I."

17 We feel there is not sufficient
18 reason or support to make any changes in these
19 criteria at this time.

20 We think Proposal 7 deals with the
21 issues better than Proposal 4 as offered by
22 Select Milk Producers and Continental Farms.
23 Proposal 5(a) places unreasonable burdens on
24 the Secretary to determine classification and
25 would result in a never-ending challenge of his

1 E. Hollon - Direct

2 various determinations that would be damaging
3 to the Orders.

4 Proposal 5(b), to the extent we
5 understand it, waters down the Class II
6 standards and we do not support it either.
7 Perhaps, after hearing testimony on that
8 proposal, we may see it in a different light.
9 But for now we think Proposal 7 is the best
10 solution.

11 We thank the Secretary for calling
12 this proceeding and look forward to the final
13 decision as the next step in the process of
14 keeping Orders up to date with the industry.

15 JUDGE DAVENPORT: Objection to
16 his statement as offered? Anything to add, to
17 correct? Mr. Beshore?

18 MR. BESHORE: Mr. Hollon is
19 available for questions.

20 MR. YALE: Is this going to be
21 Exhibit 13?

22 JUDGE DAVENPORT: Yes, sir.
23 Mr. Yale?

24 MR. YALE: Benjamin F. Yale on
25 behalf of Select Milk Producers and Continental

1 E. Hollon - Cross - by Mr. Yale
2 Dairy Products, Inc.

3 -----

4 CROSS-EXAMINATION

5 BY MR. YALE:

6 Q. I was afraid you wouldn't get any
7 cross-examination.

8 A. I knew you would rise to the
9 occasion.

10 Q. Just a couple of questions I want to
11 elaborate.

12 As I understand, Mr. Cryan is going
13 to discuss at length the changes that have
14 occurred in the marketplace since 2000 in
15 regards to the new products?

16 A. He will have some data on new
17 products and some of the technical and math
18 points dealing with the 2.25 protein standard.

19 Q. But you would agree that since the
20 debate leading up to our reform, and even 2000,
21 that we have seen in the marketplace a
22 significant addition of products that were not
23 in existence prior to that time?

24 A. Yes, I would agree with that.

25 Q. And Carb Countdown or the low-carb

1 E. Hollon - Cross - by Mr. Yale
2 type mixes or milks, or whatever, are one of
3 those products that was not in existence at
4 that time?

5 A. Yes, I would agree with that
6 statement.

7 Q. You would also agree, would you not,
8 that it's the addition of those types of
9 products that has really brought the great
10 concern to make the changes we are making
11 today?

12 A. That sharpened the focus and led us
13 to conclude we needed to make some changes in
14 the standard.

15 Q. Okay. Now, you mentioned -- I want
16 to just kind of go through a couple of points.

17 You have gone through, as you call
18 it, a zero tolerance to approximately 2.25
19 percent protein; right?

20 A. Yes.

21 Q. And I understand that Dr. Cryan will
22 explain why the 2.25 is the number as opposed
23 to something else; is that right?

24 A. Yes.

25 Q. So I won't ask you that question.

1 E. Hollon - Cross - by Mr. Yale

2 But you make a comment at the bottom
3 of the first statement to the effect that
4 formulations will come just below the standard.

5 A. Yes.

6 Q. And that would be in any standard
7 that we set; right?

8 A. There will always be -- if there is
9 a line, there will always be some attempt to
10 get on one side or the other of the line, I
11 agree.

12 Q. The -- I'll leave it at that.

13 I wanted to talk to you a minute
14 about the hermetically sealed. How do you
15 distinguish -- by the way, what does it mean to
16 you to be hermetically sealed?

17 A. I'm really not prepared to dig into
18 that. I've read through some of that, and I do
19 not do a very good job of explaining those
20 things, so I'm going to decline the
21 opportunity.

22 Q. So you cannot explain the difference
23 between that and an aseptically packaged ESL
24 beverage?

25 A. That's correct.

1 E. Hollon - Cross - by Mr. Yale

2 Q. Can you put a number -- you
3 indicate, of course I know you are quoting the
4 Department, but you talk about an extended
5 shelf life for Class II.

6 Can you give a number of where the
7 shelf life begins to make it a Class II as
8 opposed to a Class I product?

9 A. Extended. I don't have -- I do not
10 have a number.

11 Q. Do you know how you can distinguish
12 between that and say some of the UHT packaged
13 milk?

14 A. They are packaged in different
15 forms, manners, and processes. But as far as
16 the biology that goes with each one, I suspect
17 you could get into a pretty extensive debate
18 about those, and I'm just not prepared to do
19 that.

20 Q. Let's talk about packages for a
21 moment.

22 We just had earlier this morning a
23 description -- one that looks like a little
24 bottle and the other a cup. Is there some way
25 that we can distinguish the packaging that says

1 E. Hollon - Cross - by Mr. Yonkers

2 this is Class I as opposed to Class II?

3 A. I think there's some FDA decision,
4 some FDA language that deals with hermetically
5 sealed that probably would provide some
6 guidelines.

7 MR. YALE: That's all I have,
8 Your Honor.

9 JUDGE DAVENPORT: Thank you.
10 Mr. Williams, are we able to hear in the back?

11 MR. WILLIAMS: No.

12 JUDGE DAVENPORT: Yes, sir?

13 MR. YONKERS: Bob Yonkers with
14 the Milk Industry Foundation.

15 -----

16 CROSS-EXAMINATION

17 BY MR. YONKERS:

18 Q. Good morning, Mr. Hollon.

19 A. Good morning, Mr. Yonkers.

20 Q. On Page 4, I numbered your pages
21 here, you talk about supporting -- the DFA
22 supports that form and use be the primary
23 guidelines in that first unquoted paragraph
24 there.

25 Would you support that even if it

1 E. Hollon - Cross - by Mr. Yonkers
2 had -- if it was demonstrated that it may have
3 an impact on producer revenue?

4 A. It begins to get into a question of
5 it's pretty hard to tell where those revenue
6 amounts are drawn. The guideline of form and
7 use has been pretty standard, so I think that's
8 probably where we would draw the first line at,
9 is that something would be form and use, and
10 then we move from there into the composition
11 and specifically inclusion/exclusion.

12 Q. You said the first line as opposed
13 to primary guideline, as you said in the
14 testimony. So there are other things you would
15 want looked at?

16 A. Well, it would be those three: form
17 and use, and then composition standard, and
18 then inclusion/exclusion. So form and use --

19 Q. None of those would be an impact on
20 producer revenue? You are not really concerned
21 with producer revenue impacts?

22 A. At this time, I would say yes to
23 that question. We would follow those
24 guidelines.

25 Q. Near the bottom of Page 2, you make

1 E. Hollon - Cross - by Mr. Yonkers
2 a statement about the characteristics derived
3 from milk proteins are what make the products
4 desirable to consumers.

5 Do you have market research? Have
6 you conducted any market research on consumers
7 that demonstrate that protein is their primary
8 interest in those products?

9 A. That statement comes primarily from
10 the personnel in our Formulated Foods Group
11 within DFA, who we make some products that fit
12 this definition as well as others, and in my
13 discussions with those co-workers like my --
14 you know, other co-workers as to why this
15 product formulation is this way, the standard
16 is that way, this use -- I drew that conclusion
17 from there.

18 Q. Are they going to be testifying
19 later?

20 A. They are not.

21 Q. These are people who conduct market
22 research on the characteristics of products
23 that are valuable to consumers?

24 A. These are people who make the
25 products. People come to them and say, I would

1 E. Hollon - Cross - by Mr. Yonkers
2 like to make product XYZ, I want a beverage
3 there, I want to be able to do that, I want to
4 be able to target the market, and I want to
5 meet the standard.

6 I don't think anyone in DFA does
7 direct market research; however, the people
8 that come to them with products, with a request
9 to make products, bring that with them.

10 Q. Okay. Thank you.

11 I think -- on Page 4, there in the
12 middle, you actually quote from the '74
13 decision, USDA decision, "A refinement of such
14 standards may be appropriate once there has
15 been an opportunity to evaluate their
16 applicability under actual market conditions."

17 A. Yes.

18 Q. You didn't really testify to any
19 actual market conditions. Did you say the
20 National Milk witness would be doing so or --

21 A. Yes. The market conditions that I
22 would testify to would be new products on the
23 market and where we seen those, looked at some
24 of those, looked at the composition standards,
25 looked at the formulation, made a conclusion

1 E. Hollon - Cross - by Mr. Yonkers
2 that the fluid milk product standard needs to
3 be changed.

4 We have done all the things, and
5 Roger Cryan will have some additional data on
6 that. We looked at that information, and
7 that's what led us to make the proposals that
8 we made and abandoned and modified the one we
9 did.

10 Q. But you don't have any actual market
11 data on the market share of those products or
12 the market penetration?

13 A. I do not, other than what's already
14 presented by --

15 Q. Or their substitutability of the
16 existing products in the fluid milk product
17 definition?

18 A. I do not have that data.

19 MR. YONKERS: Thank you very
20 much.

21 JUDGE DAVENPORT: Other cross?
22 Mr. Vetne?

23 MR. VETNE: John Vetne.

24 JUDGE DAVENPORT: Mr. Vetne,
25 they had a little hard time hearing in the

1 E. Hollon - Cross - by Mr. Vetne
2 back, so if you would, make sure you speak into
3 the microphone, if you would.

4 -----

5 CROSS-EXAMINATION

6 BY MR. VETNE:

7 Q. Good morning, Mr. Hollon.

8 A. Good morning, Mr. Vetne. Welcome
9 home.

10 Q. Welcome back. Thank you. Am I
11 correct that DFA in this proceeding does not
12 believe that enhancement of producer revenue is
13 a factor in its classification position?

14 A. We are always interested in producer
15 revenue and think that classified pricing helps
16 producers to accommodate that.

17 Q. Let me see if I can refine my
18 question. Are you supporting the NMPF
19 proposal?

20 A. Yes.

21 Q. Do you do so because you believe it
22 will enhance producer prices?

23 A. After looking at the proposal that
24 we made and the alternatives that were out --
25 that were noticed for the hearing and our

1 E. Hollon - Cross - by Mr. Vetne
2 objective was to include the fluid milk product
3 definition, we support the National Milk
4 proposal because we think it is the best one to
5 do that.

6 Q. Do you believe it will enhance
7 producer prices?

8 A. Yes.

9 Q. And you believe that enhancement of
10 producer prices should be a significant factor
11 as a matter of policy by the Secretary in
12 classification decisions?

13 A. Yes.

14 Q. You refer to history of regulation
15 and you cite some regulatory history.

16 Are you familiar with the 1962
17 report of the Federal Milk Order Study
18 Committee to the Secretary of Agriculture, also
19 known as the Norris Committee Report?

20 A. I'm familiar with it.

21 Q. Are you familiar with it enough to
22 be familiar with the portion that discusses the
23 rationale for classification of products in
24 Class I versus others?

25 A. Not directly with the Norris report.

1 E. Hollon - Cross - by Mr. Vetne
2 I've not read -- you had it put on the Internet
3 now, but I've not gone back and looked through
4 those pieces of it.

5 Q. Okay. Are you at least familiar
6 with the practice of USDA in evaluating whether
7 a milk beverage is purchased as a substitute
8 for purchases that would otherwise be made in
9 fluid milk products as a criterion in
10 classification decisions?

11 A. I'm not aware that USDA does that
12 type of analysis.

13 Q. Do you believe that a measure of
14 whether a product competes directly with
15 traditional fluid milk beverages should be a
16 factor in classification decisions?

17 A. Well, again, we would look first to
18 form and use, and then the product composition,
19 and then the inclusion and exclusion, and so to
20 some extent that may figure in. I don't know
21 that that would be the primary criteria, but it
22 would be a part of the criteria.

23 Q. Okay. So let me see if I
24 understand.

25 If the data -- if market data -- you

1 E. Hollon - Cross - by Mr. Vetne
2 refer to change in market conditions. If
3 market data shows that a product offered to
4 consumers does not cause a consumer to buy that
5 product instead of fluid milk, you would still
6 support putting that product in Class I?

7 A. Well, I need to know some of the
8 other perhaps information about it and -- but
9 yes. Yeah, I would -- yes, we would.

10 Q. Yes. So your proposal in its
11 structure is essentially indifferent to whether
12 there is consumer product substitution?

13 A. Consumer product substitution would
14 help to define. You may have a product that
15 now is in Class II that market data may show is
16 being substituted in Class I. I think that
17 would be a criteria that would lead us to want
18 to see that product in place.

19 Q. The proposal that you support,
20 however, does not contain a component to
21 measure that?

22 A. That's correct. I think those
23 components sometimes are very argumentative and
24 sometimes hard to have as a standard.

25 Q. Would it be correct to say that the

1 E. Hollon - Cross - by Mr. Vetne
2 product -- the proposal that you support infers
3 irrebuttably that if it has those
4 characteristics, it does substitute for fluid
5 milk consumer purchases?

6 A. Why don't you try that question
7 again.

8 Q. Would it be correct to say that the
9 proposal you support infers and does so
10 irrebuttably that the products captured in
11 Class I are substitutes for traditional fluid
12 milk products?

13 A. So the form and use is beverage
14 product and is similar to other milk beverage
15 products that meets the composition standard
16 defined and it's not specifically excluded, it
17 would be in.

18 Q. It would not only be in, but with
19 all those characteristics, therefore, consumers
20 would buy that product instead of picking up a
21 gallon of fluid milk?

22 A. I don't think I would say it that
23 way. I think they would consume those products
24 in the form and use similar to what it is
25 Class I products; therefore, it would be a

1 E. Hollon - Cross - by Mr. Vetne
2 Class I product, and producers would be
3 entitled to the value and purchasers would be
4 required to pay the value at minimum basis of
5 other Class I products.

6 Q. So the proposal in your view does
7 not make an inference one way or the other
8 whether there is actual product substitution,
9 only whether it's consumed in the class?

10 A. Yes.

11 Q. Your testimony speaks of improper
12 pricing of dairy proteins. How would the NMPF
13 proposal change the way dairy proteins are
14 priced?

15 A. The pricing would be driven on a
16 protein basis, not only on just the solids
17 basis. That would provide the signal.

18 Q. Would it be correct to say that the
19 proteins -- protein composition of milk would
20 not change at all under the NMPF proposal?

21 A. Protein -- the protein composition
22 of milk from the cow?

23 Q. The protein pricing. The protein
24 pricing portion of the Federal Order System
25 would not change?

1 E. Hollon - Cross - by Mr. Vetne

2 A. That's correct.

3 Q. Protein would not be priced
4 differently under the NMPF proposal?

5 A. That's correct.

6 Q. What would be priced differently
7 would be the water or moisture added to the
8 product?

9 A. I don't think I would say it that
10 way.

11 Q. How would you say it?

12 A. That the determination for whether a
13 product is Class I or Class II would have a
14 different line 2.25 percent protein, and then
15 the pricing of the components would then be
16 driven by the prices underneath.

17 Q. The processing activity, however,
18 that would add -- that would bring it to
19 Class I is the addition of water to whatever
20 milk component created the Class I
21 classification?

22 A. I'm not an expert in that area, but
23 I think there are some other solids, both milk
24 and dairy derived, and other solids that are
25 not that affect that composition.

1 E. Hollon - Cross - by Mr. Vetne

2 Q. That's true. But to the extent a
3 product meets the NMPF milk protein standard,
4 the difference between whether it's going to be
5 Class I or Class II is the added water? Making
6 a beverage out of that product that has that
7 component base?

8 A. Again, I think there will be some
9 other components that will figure into that
10 other than just, you know, liquid --

11 Q. Other in the proposal?

12 A. No. Other components in the
13 product.

14 Q. In the product?

15 A. Yes.

16 Q. That could be true. But the milk
17 equivalent for purposes of Class I
18 classification is the milk component plus the
19 water, up to whatever natural relationship they
20 have in whole milk?

21 A. I have no more to add.

22 Q. You don't know how USDA applies its
23 skim milk equivalent or component equivalent
24 formulas?

25 A. Is that the same question?

1 E. Hollon - Cross - by Mr. Vetne

2 Q. Yes. My question is do you not know
3 how USDA applies its skim milk equivalent or
4 milk component equivalent formulas?

5 A. To the extent of my investigation
6 into that says that USDA measures the milk into
7 the front door of a plant, classifies all the
8 products, prices the components at the
9 equivalent of the milk at the front door of the
10 plant.

11 If there is more components than the
12 products going out, then they are priced
13 differently as under the fortification rules.

14 Q. Does DFA manufacture any or process
15 any milk beverages that would be affected by
16 any of the proposals at this hearing?

17 A. Yes.

18 Q. What are those?

19 A. Sorry, that part is not -- is
20 proprietary, the specific names of the product
21 and the relationships with the manufacturers.
22 But suffice to say that we do manufacture some
23 on both sides of the equation. Some that would
24 not be changed and some that would be.

25 Q. Is Sport Shake one of those products

1 E. Hollon - Cross - by Mr. Vetne
2 that might be affected by one of the proposals?

3 A. Again, that's a proprietary
4 question.

5 Q. The proposal that you support, as
6 stated in your testimony, does not propose to
7 change in any way dietary use milk replacement
8 category of dairy beverages; is that correct?

9 A. We would oppose any of the proposals
10 that may weaken that standard and consider the
11 current standard to be satisfactory.

12 Q. Are you aware that the USDA in the
13 guidelines of the Market Administrator opined
14 that if there is a legitimate basis for
15 disagreement about whether a product is a meal
16 replacement or meal supplement, that it should
17 be in Class II?

18 A. I am not aware of that opinion.

19 Q. Assuming that that is a guideline of
20 the Dairy Programs branch, you propose nothing
21 to eliminate the gray area between a meal
22 replacement or a snack?

23 A. I have no comment on the opinion
24 part of your question, but we make no proposals
25 to change the current standard, and we would

1 E. Hollon - Cross - by Mr. Vetne
2 oppose any that in our view would make it
3 weaker.

4 Q. On Page 4 of your testimony, you
5 espouse the establishment of guidelines by the
6 Secretary using product composition.

7 Are you in that portion of your
8 testimony referring to guidelines other than
9 the content of the Code of Federal Regulations?

10 A. I think that the composition
11 standard I was referring to here was the
12 2.25 percent protein standard as opposed to the
13 6.5 percent solids nonfat standard. That's the
14 only change that we are supporting.

15 Q. You were not addressing guidelines
16 originating from Dairy Programs and going to
17 Market Administrators on how to apply the
18 rules?

19 A. I don't have any access to what
20 those are nor any opinion on their
21 applicability.

22 Q. On the fifth page of your statement,
23 at the bottom, you refer to whey and whey
24 products that are sources of protein, and you
25 state that the whey and whey products will not

1 E. Hollon - Cross - by Mr. Vetne

2 be up-charged as Class I.

3 If a product is reclassified from
4 Class II to Class I under the NMPF proposal,
5 what is it that will be up-charged?

6 A. The portion of the products
7 attributable to equivalent -- I don't know if
8 volume is the right word -- but volume of milk.

9 Q. Let's take an example. Let's say
10 that a milk beverage contains, among other
11 things -- its only milk deriving ingredient is
12 whey protein isolate, and it has in that
13 protein that is the minimum under the proposal,
14 and water is added to make it a beverage; okay?

15 In that example, what is it that is
16 being up-charged and how is it being measured?

17 A. I think in that example there would
18 be no up-charge because the only product is the
19 whey product.

20 Q. It would not be a Class I product?

21 A. No. I think it would be deemed a
22 Class I product, but there would be no other --
23 if that was the only protein that was in it,
24 then that would be -- it would be priced at the
25 whey equivalent price, not the Class I

1 E. Hollon - Cross - by Mr. Vetne
2 equivalent price.

3 Q. Let me see if I understand
4 correctly.

5 So there would be no skim milk
6 equivalent calculated under your proposal for a
7 beverage that contains only whey protein
8 isolate?

9 A. I didn't try to do this particular
10 calculation, so I may want to change my mind
11 later, but at the moment, that's what I would
12 say would be no.

13 Q. Okay. And whey presumably, at least
14 if it comes from a Federal Order source, is a
15 byproduct of cheese has already been priced?

16 A. That's correct.

17 Q. And if a whey equivalent is
18 measured, how would that be done? Would it be
19 at the current whey equivalent price or the
20 whey equivalent price at the time of
21 manufacturing?

22 A. I don't have an opinion on that.

23 Q. Okay. But you believe that the
24 product I described containing only whey
25 protein isolate as the only milk-derived

1 E. Hollon - Cross - by Mr. Vetne
2 ingredient should not be up-charged on a skim
3 equivalent basis?

4 A. Again, I think that's correct, but I
5 reserve the right to change my opinion after
6 some consultation.

7 Q. Okay. And with respect to products
8 that include whey protein isolate, as well as
9 other milk derived ingredients, would a portion
10 be prorated to the whey equivalent price and a
11 portion prorated to, say, solids nonfat?

12 A. I don't know how they do that math.
13 I need to have to figure that out first before
14 I could answer that.

15 Q. Do you have an understanding of how
16 or whether that is done currently?

17 A. I do not.

18 Q. What other product that contains
19 primarily calcium caseinate, do you have --

20 A. Rather than go through every
21 possible product, why don't we leave this
22 question line where it is. If there is a
23 change, it would apply to all. If there is not
24 a change, then it wouldn't apply.

25 Q. Okay. Is there a witness that will

1 E. Hollon - Cross - by Ms. Grocholski
2 follow you that may be able to elaborate
3 further on the application of the NMPF proposal
4 to specific milk derivative ingredients?

5 A. Yes.

6 Q. Mr. Cryan?

7 A. Mr. Cryan.

8 MR. VETNE: That's all I have
9 for now. Thank you.

10 JUDGE DAVENPORT: Thank you.
11 Other cross of this witness?

12 -----

13 CROSS-EXAMINATION

14 BY MS. GROCHOLSKI:

15 Q. Deb Grocholski for General Mills.
16 Mr. Hollon, are you familiar with yogurt
17 smoothie products produced by Yoplait, Dannon,
18 and others?

19 A. I am. My daughter is a great fan of
20 those.

21 Q. That's nice. Do you have any data
22 on how consumers use these products?

23 A. They eat them. In my household,
24 they are consumed. That would be the only data
25 I have is my own personal experience with them.

1 E. Hollon - Cross - by Mr. Tipton

2 MS. GROCHOLSKI: That's all I
3 have. Thank you.

4 JUDGE DAVENPORT: Mr. Tipton?

5 -----

6 CROSS-EXAMINATION

7 BY MR. TIPTON:

8 Q. Mr. Hollon, how are you, sir?

9 A. Just fine. Good morning.

10 Q. Good morning. Have you done a study
11 or an analysis of the products that would be
12 included in Class I by this proposal that are
13 not now in Class I?

14 A. There is some comments on that in
15 Mr. Cryan's testimony, and to the best that we
16 can determine, only some of the low-carb
17 products would perhaps change classification,
18 and they are currently being regulated Class I.
19 So I'm not aware that there is any products
20 that would move from two to one.

21 Q. So if there is no change except in
22 the low-carb products --

23 A. And they are already being priced as
24 Class I now.

25 Q. Even though they are below the

1 E. Hollon - Cross - by Mr. Tipton

2 6.5 percent nonfat solids content?

3 A. That may be a gray area that was
4 debatable. But currently they are priced as
5 Class I.

6 Q. Would you be happy if it were only
7 the low-carb products that were changed?

8 A. No. Our overriding goal is that we
9 see some changes on the technological side of
10 the industry and regulations aren't up to
11 speed, and so it's always better to try to be
12 as up with the curve or ahead of the curve as
13 you can.

14 So that's our overriding goal is to
15 try to make sure that the regulations, as best
16 it can, matches the conditions in the industry.

17 Q. But you have not done analysis of
18 the market and some products that are out there
19 in which might change the -- which might be
20 changed in classification as a result of this
21 proposal?

22 A. Again, as I said before, there are a
23 list of products that we could find, and we did
24 not find any whose regulation would be changed.

25 Q. And Mr. Cryan would present that

1 E. Hollon - Cross - by Mr. Tipton

2 list?

3 A. He's got a list in his statement of
4 some of the products we were able to find in
5 the marketplace.

6 Q. Do you know whether the USDA has
7 done an analysis of the products that would be
8 changed in classification as a result of this
9 proposal?

10 A. I'm not aware if they have done
11 analysis or if they have not.

12 Q. Earlier in comments about revenue to
13 dairy farmers, if you feel that the only
14 product that is captured into the Class I that
15 may not currently be in Class I are the
16 low-carb products, what do you think that does
17 to revenue to the dairy farmers?

18 A. Well, first of all, you have to say
19 what do we have up to now and then what do we
20 have, you know, out in the future? So up to
21 now, there would perhaps be no revenue change.

22 Q. So you would make a change in the
23 classification on the speculation that somebody
24 might do something sometime that might have
25 some impact on decreasing producer revenue?

1 E. Hollon - Cross - by Mr. Tipton

2 A. Well, it wouldn't be speculation
3 because the technology is there. There are
4 products that are either available or may be
5 changed. In fact, the question about an hour
6 and a half ago where the maker said that they
7 deliberately added stabilizers to their product
8 to evade the Class I regulation, and so --

9 Q. Would your proposal pick those up?

10 A. It depends on the protein
11 composition. If it is on the right side of the
12 2.25 percent, then it would pick those up. If
13 it's not, it would not.

14 Q. So you don't know whether that would
15 have an impact on producer revenue?

16 A. Again, if it would -- if it caused
17 formulations to be in Class I, it would be a
18 positive impact.

19 Q. Now, I didn't understand part of
20 your response. But at this time, you don't
21 know that producer revenue would be increased
22 if this proposal -- if your proposal was
23 adopted?

24 A. I think at this point in time it
25 would be close to revenue neutral.

1 E. Hollon - Cross - by Mr. Tipton

2 Q. The next questions, I made a note
3 here, but I can't find it in your testimony,
4 but I think you mentioned something, used a
5 word ambiguity in the current definition?

6 A. Yes, sir.

7 Q. And could you describe what that
8 ambiguity is because given the fact that there
9 is a very concrete standard of 6.5 percent as
10 the nonfat solids as the minimum amount or the
11 maximum amount you have to not be Class I or
12 the minimum amount to be Class I, what is the
13 ambiguity about that?

14 A. I think that the existing standard
15 when it was put in place, some of the things
16 that could be done technologically weren't
17 either -- either weren't doable or weren't done
18 regularly or maybe weren't conceptualized.
19 Therefore, the standard represented the
20 realities at that point in time, and the
21 measure of a 6.5 percent nonfat solids standard
22 was a reasonable standard.

23 However, that's no longer
24 reasonable, but the regulation still reflects
25 that. So the conflict, the ambiguity, the

1 E. Hollon - Cross - by Mr. Tipton
2 tension, if you will, between what the standard
3 is and what is technologically feasible doesn't
4 match up. That's what needs to be modernized
5 or changed, just like it has been in 2000 and
6 '93 and '72, and somebody referred to an
7 earlier date in the '60s.

8 Q. But what's the ambiguity in that?
9 Because it's fairly simple, straightforward,
10 the direction given in the decision that
11 accompanied that regulation change was explicit
12 in how it was to be calculated, so what is the
13 ambiguity?

14 If you have nonfat solids, milk
15 derived nonfat solids, I think there's one
16 excluded, caseins or one of the caseins, what
17 is the ambiguity in that if it's that specific
18 as to what is included and what is not
19 included?

20 A. I think the -- the way I would
21 answer your question is that the letter of the
22 law would seem reasonably clear. That's what
23 you are driving at. Everybody could measure
24 6.5 percent. But the spirit of the law which
25 says form and use ought to drive how a product

1 E. Hollon - Cross - by Mr. Tipton
2 is classified.

3 Beyond that, product composition;
4 beyond that, some specific inclusion and
5 exclusion, those things are now foggy, and
6 there are some products that to our point of
7 view fit the form and use and to be intended as
8 a beverage should be Class I in our view that
9 are not or may not be down the road because of
10 technology.

11 The word ambiguity, that's the
12 description of it.

13 Q. If you were to change to the protein
14 standard, you really wouldn't have the concern
15 over the amount of nonfat solids that were in
16 the product so long as the protein standard
17 were not --

18 A. Protein standard would become the
19 measure and nonfat solids would not be the
20 measure.

21 Q. I think in response to some
22 questions from John Vetne about substitution, I
23 wanted to follow up on that a little bit.

24 I don't recall what you said about
25 substitution, but I think the question really

1 E. Hollon - Cross - by Mr. Tipton
2 dealt with the issue are you trying to capture
3 those products which might be substitutes for
4 milk? Is that your purpose?

5 A. That's one of the purposes. Again,
6 following the guidelines, if there's products
7 that ought to be Class I by using those
8 guidelines, we would like to see them Class I,
9 and some of those are substitutes for milk.

10 Q. But how important in the hierarchy
11 of things are substitutes for milk in the sense
12 that there are a lot of substitutes for milk,
13 some of which, in fact most of which, by far
14 most of which, don't even have any dairy
15 products in them?

16 A. I suppose we wouldn't capture any of
17 those.

18 Q. Right. So do you have any concern
19 about developing products that fit maybe a
20 buffer zone to compete with the products that
21 the Federal Order program doesn't have any
22 jurisdiction over, particularly if it doesn't
23 affect producer revenue?

24 A. I think that's part of the rationale
25 why we dropped our support of a zero standard

1 E. Hollon - Cross - by Mr. Tipton

2 and supported a 2.25 percent standard.

3 Q. You talked in some of your testimony
4 about the new technology, I think you talked
5 about it several times, the new technology,
6 making it possible to fractionate and have
7 different components and combine them in
8 different ways. Then you talked about mergers
9 and acquisitions. I think you referred to in
10 the dairy business primarily, but making it
11 setting up the dairy industry that there was a
12 lot of this was happening.

13 Do you know or have you looked at
14 the beverages or drinkable products that are
15 presented in the market today that are produced
16 by dairy processing companies, in quotes,
17 versus nondairy processing companies? Have you
18 made that comparison?

19 A. We've looked at some of them. Not
20 looked -- I don't know if we looked at all of
21 them or not, but we've looked at some of them.

22 Q. How many products do you have that
23 were produced in the dairy processing -- of
24 these new products that were produced in the
25 dairy processing industry as opposed to

1 E. Hollon - Cross - by Mr. Farrell

2 nondairy processing firms?

3 A. I don't have a number.

4 Q. Do you have any idea?

5 A. I don't have a quantity number.

6 There are some on all sides of the ledger, and
7 there may be indeed some that are, you know,
8 under the market name of X that maybe we make.
9 I don't know the list of all the products that
10 we make.

11 Sometimes it's not apparent who
12 makes them or what manufacturing arm they are
13 made of, just who it is marketed by.

14 Q. Thank you.

15 A. Yes, sir.

16 JUDGE DAVENPORT: Other cross?
17 Mr. Farrell?

18 -----

19 CROSS-EXAMINATION

20 BY MR. FARRELL:

21 Q. Good morning.

22 A. Mr. Farrell, I must apologize, I
23 wasn't paying attention when you introduced
24 yourself this morning. I was looking at notes.
25 Can you tell me again who you represent.

1 E. Hollon - Cross - by Mr. Farrell

2 Q. Ed Farrell with Blank Rome,
3 representing Fonterra USA.

4 A. Thank you.

5 Q. In your statement, and this is
6 picking up on some of Mr. Tipton's questions --

7 JUDGE DAVENPORT: Just a
8 little louder, Mr. Farrell. I can see hands.

9 Q. Picking up on some of Mr. Tipton's
10 questions with respect to substitution, you
11 talk in your statement about product
12 engineering, packaging, all these trends that
13 are going on with respect to dairy proteins.

14 A. Yes, sir.

15 Q. Are you aware of what is going on
16 with respect to soy proteins?

17 A. Generally. Not specifically, but
18 generally.

19 Q. Are there the same source of trends
20 going on?

21 A. I suspect that there are, and
22 anybody that has a product to sell is looking
23 to market it and sell it in as many ways as
24 they can.

25 Soy protein or soy products is the

1 E. Hollon - Cross - by Mr. Farrell
2 same -- would be the same as dairy products,
3 looking for avenues to develop in the
4 marketplace.

5 Q. Clearly you are aware of soy milk in
6 the marketplace?

7 A. Yes, I am.

8 Q. And soy ingredients?

9 A. Yes, sir.

10 Q. In your support of the National Milk
11 proposal, have you considered what the impact
12 might be with respect to dairy protein
13 competitiveness with soy protein?

14 A. Do you want to flesh out the
15 question a little bit more?

16 Q. Maybe we will take it from a
17 slightly different angle.

18 A. Okay.

19 Q. I think this morning you were
20 talking about the people within your
21 organization that come to you talking about
22 product formulation.

23 A. Yes, sir.

24 Q. Do they ever come to you and talk to
25 you about competing formulations that they are

1 E. Hollon - Cross - by Mr. Farrell

2 going up against?

3 A. Yes, I do.

4 Q. That are protein? What do they tell
5 you about that?

6 A. Generally, there are two or three
7 statements that they make frequently, and bear
8 in mind their background and their, perhaps
9 their day-to-day goals are a little different,
10 but they will frequently say that soy proteins
11 are sometimes a more economical choice than
12 dairy proteins. So as that drives a formula,
13 there is an eye to that.

14 They will frequently say that the
15 functional characteristics of dairy proteins
16 are considerably better than the soy proteins,
17 and the third thing they say with some
18 consistency is that the soy-based products have
19 a flavor profile that usually has to be masked
20 if you use it in a quantity, a very large
21 quantity, and that's usually not true with the
22 milk proteins.

23 Beyond that, there's some cost
24 differences, some functionality differences,
25 and flavor differences.

1 E. Hollon - Cross - by Mr. Farrell

2 Q. All right. With respect to the cost
3 differences, would the proposal you are
4 supporting increase or decrease those cost
5 differences?

6 A. It could conceivably increase them
7 if solely cost was the only parameter. You
8 also have, bear in mind, the functionality of
9 the flavor parameters, and you have to take
10 them all into account.

11 Q. With respect to that one parameter,
12 you would be creating a competitive
13 disadvantage for milk proteins?

14 A. That's always a moving target and,
15 again, I preface my statement with saying the
16 background of the folks who raised that
17 concern, they will frequently say that soy
18 proteins are a lesser priced alternative.

19 MR. FARRELL: Thank you very
20 much.

21 JUDGE DAVENPORT: Yes, sir.
22 Mr. Yonkers.

23 -----

24 MR. YONKERS: Thank you, Your
25 Honor.

1 E. Hollon - Cross - by Mr. Yonkers

2 -----

3 CROSS-EXAMINATION

4 BY MR. YONKERS:

5 Q. Bob Yonkers for the Milk Industry
6 Foundation again.

7 Elvin, I'm intrigued. Mr. Vetne --
8 excuse me, Mr. Hollon, it's so formal here,
9 it's tough for me to do -- he asked some
10 questions about on Page 5 where you were
11 talking about whey, and I looked at your
12 testimony, and you are very careful to, in both
13 places, there to say whey and whey products,
14 whereas your Proposal No. 2 just says the word
15 whey, and Proposal No. 7 of National Milk has a
16 change that stops right before the word whey,
17 so I assume it's intending to have that word
18 whey remain.

19 Do you draw a distinction between
20 whey and whey products? When somebody says
21 whey, what do you think of? I want USDA to
22 understand what -- Mr. Vetne asked you a few
23 questions about whey protein isolates and some
24 things, when you think of whey, what do you
25 think of?

1 E. Hollon - Cross - by Mr. Yonkers

2 A. Again, I'm not the best at running
3 through all the product accountability, but I
4 think the issue at hand is when you reach a
5 point where there is a fortification question,
6 then those products wouldn't be up-charged.

7 As long as the finished product is
8 proportionate to that of milk going into it,
9 then I think all of these components are going
10 to be priced in Class I. When you reach the
11 fortification issue, they are not going to be
12 up-charged.

13 Q. Is that kind of a clarification of
14 my misunderstanding of Proposal 2 as you are
15 talking about fortification?

16 A. Well --

17 Q. Let me give an example. If you have
18 a product that's got milk protein from a
19 non-whey source of 2 percent protein, and it's
20 got a half a percent whey, as I read Proposal
21 No. 2, that would be more than the 2.25 percent
22 protein threshold, but you would only up-charge
23 the two percent, not the other half percent
24 that came from whey; am I correct?

25 A. I'm going to stop while I'm still

1 E. Hollon - Cross - by Mr. Yonkers
2 behind and clarify that question for the next
3 time it comes around. It will come from me
4 again or from Roger again.

5 Q. Okay. And I believe also you said
6 in response to one of Mr. Vetne's questions
7 that whey is already priced and pooled?

8 A. Yes.

9 Q. Of course, that only referred to
10 pool milk?

11 A. Yes.

12 Q. Not the nonpool milk?

13 A. Yes.

14 Q. It would receive a price, it
15 wouldn't be a Federal Order price, but that's
16 not a relevant consideration in your opinion;
17 is that true?

18 A. Unless you get into the used to
19 produce category.

20 Q. If instead of using a whey derived
21 or whey product, use the milk protein
22 concentrate or casein, if there's a plant
23 manufacturing that, wouldn't that already be
24 priced and pooled under an order?

25 A. Yes. If it got pooled into the

1 E. Hollon - Cross - by Mr. Yonkers
2 accountability allocation process, it would
3 flow through that. But, yes, it would have
4 been priced at some point, the milk.

5 Q. You are still recommending if the
6 milk protein content or casein was used, it
7 would receive that up-charge?

8 A. Back to where I was a minute ago and
9 say, let me collaborate a little bit and come
10 back to that.

11 MR. YONKERS: Okay. Thank you
12 very much.

13 JUDGE DAVENPORT: Other cross?
14 Mr. Yale?

15

16 CROSS-EXAMINATION

17 BY MR. YALE:

18 Q. Benjamin F. Yale on behalf of
19 Select Milk Producers and Continental Dairy
20 Products. I have some follow-up questions on
21 questions and answers that you had. I want to
22 follow up on Mr. Yonkers, so we understand.

23 A. Now that line of questioning
24 again --

25 Q. I understand. But I think you can

1 E. Hollon - Cross - by Mr. Yonkers

2 answer this.

3 A. All right.

4 Q. The purpose of the whey protein
5 is -- well, let me back up.

6 You talk about the fact that because
7 you set a barrier, say a 2.25 percent protein,
8 that there may be people who would formulate
9 the protein at say two percent and bring in
10 some other proteins to get it at a more desired
11 formula, 2.7, whatever the formula is, for the
12 sole purpose of avoiding having to treat it as
13 a Class I product?

14 A. That would be a likely alternative.

15 Q. Right. And what the addition of the
16 whey and the whey protein does is that it makes
17 sure that they cannot use dairy proteins to
18 avoid the classification and that scenario
19 because if they had two percent of the casein
20 proteins and added a half a percent of the whey
21 protein, although that would give them a
22 formula above the 2.25, if you don't include
23 the whey, they would be out of the Class I
24 product; right?

25 A. I think I'm going to collaborate

1 E. Hollon - Cross - by Mr. Yonkers

2 with my other guys before I go down this path.

3 Q. Well, but I -- but that -- so you
4 don't understand why the whey is added into the
5 formula? Is that what you are saying?

6 A. It's the accountability process that
7 I'm just not very good at.

8 Q. Okay. And you say you are going to
9 confer with your colleagues, does that mean you
10 will be back on the stand to answer this
11 question or you think they are going to be able
12 to answer the question?

13 A. One of the two of those will be the
14 answer.

15 Q. Now, I want to -- there was a line
16 of questions by Mr. Vetne regarding -- I think
17 even Mr. Tipton -- the idea that if it looks
18 like regular milk, then that's -- if it
19 competes with the fluid milk product, that
20 that's somehow a determinative factor, or at
21 least that's the implication of the question.

22 Do you recall those lines of
23 questions?

24 A. I recall those questions.

25 Q. All right. Is it -- the only

1 E. Hollon - Cross - by Mr. Yonkers
2 reason -- well, first of all, you would agree
3 that there's a legitimate reason to classify
4 the use of milk products so as to protect the
5 Class I products that we have; is that right?

6 A. That's correct. That's why you have
7 a fluid milk product definition.

8 Q. Right. So the fact that there may
9 be some products out there that are directly
10 competing with milk and in fact using milk
11 proteins and components, it's only appropriate
12 for the Department to consider making them
13 Class I in order to protect the classified
14 pricing system?

15 A. Yes.

16 Q. But that's not the only reason, is
17 it?

18 A. No.

19 Q. All right. There can be products
20 out there that are beverages that use milk
21 components that may not directly compete with
22 Class I, but they nonetheless ought to be
23 considered as Class I?

24 A. That's a part of the rationale. If
25 it follows the form and use product

1 E. Hollon - Cross - by Mr. Yonkers
2 composition, the inclusion/exclusion, if it
3 fits all the parameters of Class I, then the
4 processor should pay the minimum and the
5 producer should receive the revenues.

6 Q. Part of the rationale is those
7 products are benefits from the dairy proteins
8 the producers are providing?

9 A. Yes, and the form and use
10 classification.

11 Q. In a higher use classification?

12 A. Yes.

13 Q. And you would consider, would you
14 not, that the use of any dairy protein in a
15 beverage is a higher use than any other
16 product?

17 A. Yes.

18 Q. And this is regardless of whether it
19 comes in the form of the protein, nonfat dry
20 milk or whey -- I guess the whey you've taken
21 out; is that correct?

22 A. That's been the standard since the
23 beginning of the classification system.

24 MR. YONKERS: And the other --
25 I'm going to defer until we see if there is

1 E. Hollon - Cross - by Mr. Leinsol
2 going to be somebody to answer the question I
3 want to ask. I defer. Thank you.

4 JUDGE DAVENPORT: What I
5 propose at this time is let's take about a
6 ten-minute break, and let's proceed on after
7 that.

8 (Recess was taken.)

9 JUDGE DAVENPORT: All right,
10 ladies and gentlemen, let's get back in
11 session.

12 Is there any other cross of
13 Mr. Hollon? Mr. Leinsol.

14 -----

15 CROSS-EXAMINATION

16 BY MR. LEINSOL:

17 Q. I would like to ask you, do you have
18 any doubt or concrete proof that your beverages
19 detract from a Class I state?

20 A. To the extent that they are consumed
21 as a beverage and Class I products are
22 considered to be beverages.

23 Q. Yes, do you have any data to prove
24 that actually the yogurt beverages detract from
25 the sales of Class I?

1 E. Hollon - Cross - by Mr. Leinsol

2 A. Detract from the sales of Class I?

3 Q. Basically, that's why we are here, I
4 guess, because I believe that the main claim is
5 that for farmers got hell because of all kind
6 of beverages, yogurt beverages, Class I sales
7 declined, so this is the main reason why we are
8 here.

9 My question is if you have any data
10 or concrete proof, evidence that this is the
11 case, that actually the beverages, yogurt
12 beverages, detract from the Class I sales?

13 A. That's --

14 Q. That's my question.

15 A. That's not the main reason why we
16 are here.

17 Q. That's what my understanding is.

18 A. Well, the fact that yogurt is
19 consumed as a beverage and some yogurt is
20 priced as Class II would be -- that would be
21 some revenue that farmers wouldn't -- would not
22 receive and so --

23 Q. Have you considered the beverages,
24 the yogurt beverages, as a milk replacement,
25 basically? This is the case.

1 E. Hollon - Cross - by Mr. Leinsol

2 A. Yogurt beverages would be dairy
3 ingredients that are consumed in fluid form,
4 and we are seeking to change the definition to
5 make it fit with the technology that beverages
6 that are consumed in fluid form should be
7 Class I.

8 Q. Yes. But you do so because you
9 believe that they are milk replacement. That's
10 why you do it. That's exactly why you do it.

11 A. We would do so because we think --

12 Q. This is about --

13 A. I disagree with your assessment.

14 Q. You disagree. Do you have any proof
15 or concrete evidence, for example, about I
16 would say how much of the soy milk or other
17 milk replacement detract from Class I sales?
18 If you have any data on the soy milk.

19 A. Our proposal would not price soy,
20 except to the extent that it had more than
21 2.25 percent dairy protein in it. So I don't
22 have any information about soy milk sales.

23 Q. Do you have any data how much the
24 trend called wellness industry is affecting the
25 sales of Class I?

1 E. Hollon - Cross - by Mr. Leinsol

2 A. I'm sorry, would you repeat that?

3 Q. If you have any data or information
4 about how much the trend called wellness
5 industry, wellness awareness, is affecting the
6 sales of Class I in the United States?

7 A. No.

8 MR. LEINSOL: You don't? No
9 further questions. Thank you.

10 JUDGE DAVENPORT: Thank you,
11 sir.

12 Any other cross-examination of this
13 witness? Mr. Tosi?

14 -----

15 CROSS-EXAMINATION

16 BY MR. TOSI:

17 Q. Good morning, Elvin. Thank you for
18 appearing at the hearing today.

19 A. Good morning, Mr. Tosi.

20 Q. I have several questions I would
21 like to ask you.

22 Would it be your organization's
23 position that the fluid milk product definition
24 continue to be structured the same as it
25 currently is? By that I mean where part A

1 E. Hollon - Cross - by Mr. Leinsol
2 names products and a section that provides for
3 exclusion, or another way to look at that is to
4 continue with a compositional standard?

5 A. Yes.

6 Q. To the extent that you are speaking
7 towards the need for provisions for the fluid
8 milk product provision to be updated, if you
9 will, to account for technological changes,
10 what would make you think that updating things
11 in the way that you are proposing, at least,
12 and perhaps others, with respect to looking
13 towards the future, that we're going to address
14 the concerns that you have here about
15 technology?

16 A. It is apparent that in the way you
17 can take milk components apart and put them
18 back together, that that's a technological
19 change and advancement. It wasn't too many
20 years ago that that wasn't as feasible as it is
21 now, and we think it will become more and more
22 feasible.

23 To the best that we can determine,
24 the characteristics of dairy proteins that are
25 most desirable from the nutrition and

1 E. Hollon - Cross - by Mr. Leinsol
2 functional , flavor point are embedded in the
3 proteins, and as they affect the fluid milk
4 product definition.

5 So we think that this change will be
6 a better definition along the guidelines of the
7 current Section 15 with its Section A and B,
8 and the way it's pieced together, this will be
9 a better definition than the current one we
10 have and more reflective of the demands of the
11 industry.

12 So I don't know that we can ever get
13 that regulation -- no regulation of anything
14 can ever get totally ahead of the trend line.
15 I think that would be somewhat impossible. But
16 we try to stay as close to it as we can, and we
17 think the proposal we made does that.

18 Q. With regard to the imperfect view of
19 the future and knowing exactly what we need
20 today, would you be supportive of a
21 modification to the fluid milk product
22 definition that would allow the Department some
23 degree of latitude to deal with situations that
24 are completely unforeseen by all industry
25 participants at this time to determine what the

1 E. Hollon - Cross - by Mr. Leinsol
2 classification of any particular in the future
3 product may be?

4 A. At the headline level, I would say,
5 you know, that sounds like a good idea. But I
6 think I would want to see some more detail.
7 Sometimes if there's so much latitude given to
8 the regulator, then they get harassed by the
9 industry from every front and they get
10 paralyzed.

11 There is some comfort in being able
12 to say, here's what it says, here's what I'm
13 going to do. So I'm not -- you know, to borrow
14 an analogy in the performance hearings, we
15 supported giving the Market Administrator some
16 discretion over a certain number of items, but
17 we felt like there was probably some reason to
18 limit that to some extent.

19 So I -- I can see the concept is not
20 such a bad one, but I think I want to have some
21 more detail because I don't want us to get so
22 hung up that there's a lawsuit every time
23 something new comes out, because we will never
24 get anywhere.

25 So the thought process, yes. But I

1 E. Hollon - Cross - by Mr. Leinsol
2 think I would like to know a little bit more
3 about the latitude then before I commit any
4 further.

5 Q. Okay. Would you be of the opinion on
6 that currently milk order regulations do not
7 specifically define what is meant by such terms
8 as infant formula, dietary use, meal
9 replacement, hermetically sealed?

10 A. There is some definition and
11 specificity about those items, and certainly
12 the industry has operated on practice going
13 backwards some, and I think there are probably
14 some FDA -- I know there are some FDA
15 definitions about some of those terms.

16 I suppose in any case you can ask --
17 anybody can say it would be more specifically
18 defined than it is. Our proposal is such that
19 we did not offer any more support.

20 Q. All right. If I understood your
21 testimony correctly, and I want to ask some
22 questions about that and make sure that I
23 understand that that's exactly what --

24 A. Okay.

25 Q. -- DFA's position is, is it true

1 E. Hollon - Cross - by Mr. Leinsol
2 that you are of the opinion that one of the
3 criteria for determining when something should
4 be a Class I product deals with issues that
5 have to do with substitutability?

6 A. That would be part of the criteria.
7 Not the only criteria, but part of the
8 criteria.

9 Q. Okay. That part of the criteria
10 should be whether or not product increases
11 producer revenue?

12 A. That should be part of the criteria.

13 Q. That some of the criteria should be
14 the expected impact on consumer demand?

15 A. Yes, that should be part of the
16 criteria.

17 Q. Okay.

18 A. That gets to be a harder criteria to
19 measure, but that gets to be part of the
20 criteria.

21 Q. To the extent that these additional
22 criteria should give rise to challenging that
23 our basis for classification are the basis of
24 intended form and use -- excuse me, on the
25 basis of form and intended use, what advice

1 E. Hollon - Cross - by Mr. Leinsol
2 would you give the Department about that?

3 A. I would start off with form and use
4 first and work my way down. Then I would look
5 to the product composition standard because
6 that's a more measurable definable.

7 So we are going to set up in a
8 hearing process where everybody has their
9 opportunity for input instead of criteria.
10 Again for form and use, being consumed and
11 intended to be consumed as a beverage in some
12 form.

13 And then if there is a compositional
14 criteria, that would come next, and then if
15 there is some reason to specifically include or
16 exclude something, that would come next.

17 And, you know, subsequent arguments
18 I would say would be the burden would be on the
19 arguer to say -- to try to convince the
20 Department that they should fall into the
21 inclusion or exclusion list rather than the
22 other way around.

23 Q. Yes.

24 A. I think it's pretty hard for the
25 Department to determine a future product.

1 E. Hollon - Cross - by Mr. Leinsol

2 Q. With regard to form and intended
3 use, when something fluid -- excuse me, when
4 something is fluid, would you be of the opinion
5 that most of us would recognize when something
6 is fluid?

7 A. I would be of the opinion that most
8 would recognize when something is fluid.

9 Q. And now when we look at what
10 intended use means, how do we determine intent,
11 or how should we determine intent?

12 A. I think that's going to be "most of
13 us can recognize" type of thing, and there is
14 going to be some gray area. I would suspect
15 that the harder somebody tries to convince you
16 it wasn't intended to be consumed as a
17 beverage, it's more than likely going to be
18 just the opposite.

19 Q. So with that in mind, for these gray
20 areas, as you just described, would it be
21 appropriate for the Department to, for example,
22 when in doubt about a particular product
23 classification, that the Department rely on
24 form and intended use?

25 A. Yes. That -- I would say that would

1 E. Hollon - Cross - by Mr. Leinsol
2 be the ultimate fall-back is when you get --
3 when it gets to that point, that form and use
4 would be the first line.

5 Q. But in that regard, you don't want
6 to give the Department any latitude to make
7 that decision? Because I think you testified
8 that you were concerned that we would end up in
9 arguments and that we would never get anything
10 done.

11 A. Yes. But pressed to that point, I
12 would say, yes, that form and use as most could
13 define, that most would accept, would be --
14 that it would be the ultimate -- the end
15 result, and perhaps at that level, the less
16 latitude the better.

17 MR. TOSI: Okay. That's all I
18 have. My colleague, Antoinette Carter, has
19 some questions for you.

20 -----

21 CROSS-EXAMINATION

22 BY MS. CARTER:

23 Q. Good morning, Elvin.

24 A. Good morning.

25 Q. Antoinette Carter, USDA. I just

1 E. Hollon - Cross - by Ms. Carter
2 have a few questions, the first of which are
3 just clarifying questions.

4 Your Proposal No. 2, you have
5 indicated that you are -- the DFA is in support
6 of Proposal No. 7.

7 A. Yes, ma'am.

8 Q. Which would remove the 6.5 nonfat
9 standard and replace it with a protein
10 standard?

11 A. That is correct.

12 Q. So in Proposal No. 2, you are just
13 simply, I guess, would be striking the "or
14 nonfat milk solids, nonfat solids equivalent
15 basis" from your proposal, and it would be
16 strictly the milk ingredients would be
17 calculated based on a protein equivalent
18 standard?

19 A. That would be correct.

20 Q. And along those lines, in terms of
21 any dairy ingredients, can you specifically
22 identify what ingredients would be included or
23 should be included?

24 A. As soon as I try to do that,
25 Mr. Farrell will come up with one that I had

1 E. Hollon - Cross - by Ms. Carter
2 never thought of or never heard of or nobody
3 ever made. So I think that's one of those
4 areas where I will have to give the Secretary
5 some discretion.

6 If it started out as a dairy
7 ingredient and somehow something got added to
8 it or formulated and modified, I would say it
9 would still be a dairy ingredient, but I don't
10 have an ironclad way to do that.

11 Q. Would you agree that I guess in
12 providing that the regulations, if your
13 proposal was adopted, should list the types of
14 ingredients but indicate that it's not an
15 all-inclusive listing?

16 A. That would be -- yes, that would be
17 a good way to do that and the right way to do
18 that.

19 Q. And I know you are reluctant to
20 start listing, but if I run down a list, could
21 you say yes or no if those are the type of
22 ingredients --

23 A. Sure.

24 Q. -- you perceive being included?
25 Milk protein concentrate?

1 E. Hollon - Cross - by Ms. Carter

2 A. That would be included in the
3 calculation of milk protein.

4 Q. Whey protein concentrate?

5 A. It would be included.

6 Q. Milk protein isolates?

7 A. They would be included.

8 Q. Whey?

9 A. It would be included.

10 Q. Casein?

11 A. It would be included.

12 Q. Calcium caseinates?

13 A. It would be included.

14 Q. Again, that's not an all-inclusive
15 list?

16 A. That's correct.

17 Q. But those are some of the things
18 that you would be including --

19 A. All of those products would have
20 some amount of real protein, and some would
21 have more and some would have less. Some would
22 have other things in it like calcium caseinate
23 would have calcium in it. The caseinate milk
24 protein piece of it.

25 Q. In your opinion, what is the role or

1 E. Hollon - Cross - by Ms. Carter

2 the intent of the fluid milk product

3 definition?

4 A. To define those products that are
5 Class I that are deserved, if you will, or
6 would have a higher value associated with them,
7 and would define -- just like, you know, Class
8 II defines certain products, Class III defines
9 certain products, you have to have a definition
10 if you are going to have a classification
11 system. No different than an airplane says
12 this is a first class seat and this is a coach
13 seat.

14 Q. I believe earlier you mentioned FDA
15 had a definition for hermetically sealed, what
16 constitutes hermetically sealed containers.

17 What role, in your opinion, should
18 FDA regulations play with regard to product
19 classification under Federal Marketing Orders?

20 A. If it makes it easier for the
21 Secretary to include some of their definitions,
22 and Orders do include some of those
23 definitions, then I think that's the role. I
24 think the Secretary should be the ultimate
25 deciding as far as Federal Milk Marketing

1 E. Hollon - Cross - by Mr. Wilson
2 Orders go. But if there's some benefit that
3 can be gained by some existing knowledge, then
4 the Secretary should use that.

5 Q. You mentioned that DFA I guess is
6 comprised of about 12,800 farms.

7 A. Yes, ma'am.

8 Q. Are most of those considered small
9 businesses?

10 A. They are.

11 MS. CARTER: I think that's
12 all I have.

13 JUDGE DAVENPORT: Other
14 questions of Mr. Hollon?

15 -----

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q. Todd Wilson, U.S. Department of
19 Agriculture.

20 Good morning, Mr. Hollon.

21 A. Good morning, Mr. Wilson.

22 Q. In your Proposal 1, I realize you
23 abandoned that proposal, but if we could
24 discuss maybe parts of that, some of that
25 section.

1 E. Hollon - Cross - by Mr. Wilson

2 In that, there is a term that we
3 describe, "concentrated products," and what
4 that term means in the Federal Order System.
5 How would you define a product that has
6 approximately -- well, let's say we have a
7 whole milk product that we concentrate down to
8 2.5 times, so it would have a total solids
9 content of roughly 30 percent, 32 percent
10 maybe, and if we had a similar product of skim
11 milk, and we also concentrated that down to the
12 same concentration level, 2.5 times, it would
13 fall below that 25.5 percent total solids in
14 the definition, how would you correlate those
15 two together and offer some guidance, maybe?

16 A. I have no guidance to offer you.

17 Q. Would you consider them the same
18 product as far as --

19 A. No.

20 Q. -- fluid milk product in the
21 definition?

22 A. Oh, in the fluid milk product
23 definition?

24 Q. Yes, sir.

25 A. I had not considered that. I think

1 E. Hollon - Cross - by Mr. Wilson
2 on the surface, I would consider them not the
3 same product, but I haven't given that any
4 further thought.

5 I can see where you have different
6 components that -- different component total,
7 different component volumes, but I haven't
8 contemplated that.

9 Q. You had alluded that you would maybe
10 with Mr. Cryan would offer some more
11 information on the up-charge of Class I. Would
12 you be --

13 A. I'm going to defer to him. You can
14 get ready.

15 MR. WILSON: Very good.
16 That's all I have.

17 JUDGE DAVENPORT: Mr. Yale,
18 you are smiling. Does that mean you are going
19 to --

20 MR. YALE: I have a follow-up
21 to the government's questions, if nobody else
22 has any.

23 JUDGE DAVENPORT: Come
24 forward, please.

25 MR. YALE: I appreciate this.

1 E. Hollon - Cross - by Mr. Yale

2 -----

3 CROSS-EXAMINATION

4 BY MR. YALE:

5 Q. You mentioned in response to one of
6 the questions to Mr. Tosi that one of the
7 factors was consumer demand?

8 A. Yes.

9 Q. Now, is that a function of the fact
10 that the pricing has an impact on consumer
11 demand that it may be better for producer
12 revenue that if it was a lower price, it would
13 increase demand and, therefore, increase demand
14 for dairy products would yield more money in
15 total to producers as opposed to the higher
16 classification? Is that the consumer demand?

17 A. It's a mix of all of those issues
18 that are in there.

19 Q. How does, under the Act, consumer
20 demand itself be a driving force in the
21 classification?

22 A. I think form and use is the ultimate
23 classification, so there's not a -- it may be
24 one of those "also" factors that may be
25 considered. But form and use is the top

1 E. Hollon - Cross - by Mr. Vetne

2 reason. Top classification reason.

3 Q. Okay. Then there was also, in
4 talking about the application of whether it
5 should be Class I, or whatever class it is, and
6 the Department had the discretion, and
7 sometimes it's obvious where it belongs and
8 sometimes there's a gray area, I think you used
9 the word gray area?

10 A. Yes.

11 Q. Would it be your position, if in
12 doubt, the default would be Class I?

13 A. That would be our position.

14 MR. YALE: I have nothing
15 else. Thank you.

16 JUDGE DAVENPORT: Mr. Vetne.

17 -----

18 CROSS-EXAMINATION

19 BY MR. VETNE:

20 Q. John Vetne, in response to some
21 questions from the government concerning
22 discretionary latitude.

23 The current definition for the
24 threshold is 6.5 percent solids nonfat. If
25 Proposal 7 is not adopted and the solids nonfat

1 E. Hollon - Cross - by Mr. Vetne
2 standard is retained, do you believe it is
3 necessary to -- it would be advisable to
4 provide more detail in the regulations
5 themselves as to what constitutes solids
6 nonfat?

7 A. I hadn't really thought of it from
8 that perspective. I would say yes. If the
9 Proposal 7 is not adopted or -- then there
10 might be some need for some additional
11 guidelines, but I'm not prepared to offer any.

12 Q. Okay. The government also asked you
13 a question about the current structure of
14 Section 15 of the General Provisions and
15 perhaps Section 40, which is classification.

16 Are you aware that in making
17 classification determinations, USDA currently
18 employs a used to produce process in some form
19 for component equivalence of milk derivatives?

20 A. I'm aware that they do that.

21 Q. But the Class I rule itself only
22 states disposed of in the form of. Do you
23 believe that this hearing should address
24 whether or not to change that language disposed
25 in the form of a fluid milk product?

1 E. Hollon - Cross - by Mr. Vetne

2 A. Ask that again. You trailed off at
3 the end.

4 Q. Do you believe that this hearing
5 should address whether or not to change that
6 provision of the Order?

7 A. The --

8 Q. The one that describes Class I as
9 product, fluid milk product, disposed in the
10 form of fluid milk products?

11 A. I'm sorry, John, I'm not following
12 your question.

13 Q. All the other classifications
14 classify milk on the basis of milk used to
15 produce.

16 A. Okay.

17 Q. Class I does not.

18 A. Okay.

19 Q. And yet USDA to some extent is
20 currently applying a used to produce practice
21 in classification determinations?

22 A. You mean in terms of coming up with
23 a volume equivalence of the various components?

24 Q. Yes.

25 A. Okay.

1 E. Hollon - Cross - by Mr. Vetne

2 Q. Do you believe it is advisable -- do
3 you have an opinion on whether it would be
4 advisable to address that portion of the
5 General Provisions?

6 A. I do not have an opinion. I have
7 not given that any thought.

8 Q. Okay. And in discussing the
9 characteristics, in response to some questions,
10 the characteristics of the products that you
11 believe ought to be in Class I, with that in
12 mind, can you describe the characteristics of
13 milk beverages that would be retained in
14 Class II under Proposal 7 that make it
15 appropriate for those products to be in
16 Class II rather than Class I so we can
17 differentiate characteristics?

18 A. The ones that come to mind are the
19 ones that are specifically excluded, and some
20 of them have to do with, you know, are they
21 intended as a meal replacement? Do they have a
22 wide distribution that their packaging gives
23 them a longer, you know, shelf-life time frame?

24 Those have been discussed in the
25 earlier decisions and we proposed -- we didn't

1 E. Hollon - Cross - by Mr. Vetne

2 propose to make any changes in any of those.

3 Q. How do the characteristics of those
4 products differ from products that you would
5 include in Class I under Proposal No. 7? All
6 of the factors that you listed, I was following
7 them: they are in beverage form, you drink
8 them, they have a certain percentage.

9 All those things can be applied to
10 some of the products that you propose to retain
11 in Class II. What, if any, are the
12 characteristics of those products that
13 distinguish them from the products you propose
14 to put in or retain in Class I?

15 A. They somehow meet the specific
16 inclusion or exclusion definition that's
17 already there.

18 Q. Are there any market characteristics
19 that come to your mind?

20 A. Again, they would be the definition
21 of the things that are there now.

22 Q. Are there any consumer response
23 characteristics that come to your mind?

24 A. They meet the definition of the
25 things that are there now.

1 E. Hollon - Cross - by Mr. Vetne

2 Q. Are there any producer price
3 characteristics that come to your mind?

4 A. They meet the definition of the
5 things that are there now.

6 MR. VETNE: Thank you.

7 JUDGE DAVENPORT: Additional
8 cross? Apparently there's none, Mr. Hollon.
9 It looks like you may step down.

10 Mr. Beshore?

11 MR. BESHORE: I don't have any
12 redirect at this time, and Mr. Hollon would be
13 stepping down subject to the possibility that
14 he may be re-called after Dr. Cryan.

15 JUDGE DAVENPORT: If he's
16 here, you are certainly able to re-call him.

17 MR. BESHORE: Thank you.

18 JUDGE DAVENPORT: Raise your
19 right hand.

20 -----

21 ROGER CRYAN, Ph.D.,

22 a witness herein, having been first duly sworn,
23 was examined and testified as follows:

24 JUDGE DAVENPORT: Please be
25 seated. Tell us your full name, please.

1 Dr. Cryan - Direct Testimony

2 THE WITNESS: My name is Roger
3 Cryan, C-R-Y-A-N. I am co-counsel, and I would
4 like to make a prepared statement, and I would
5 ask that that statement that I just handed to
6 the court reporter be entered into the record
7 as a numbered exhibit.

8 JUDGE DAVENPORT: The exhibit
9 has been marked as Exhibit 14.

10 (Exhibit No. 14 was marked for
11 identification.)

12 JUDGE DAVENPORT: You may read
13 your statement.

14 THE WITNESS: My name is Roger
15 Cryan. I have been Director Of Economic
16 Research for the National Milk Producers
17 Federation, or NMPF, for five years. Before
18 that, I was an economist in the Atlantic Milk
19 Market Administrator's Office in the USDA. I
20 have a Ph.D. in agricultural economics from the
21 University of Florida.

22 National Milk is the voice of
23 America's dairy farmers representing over
24 three-quarters of America's 67,000 commercial
25 dairy farmers through their memberships in

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Dr. Cryan - Direct Testimony

NMPF's 33 member cooperative associations.

Those members include:

Agri-Mark; Arkansas Dairy
Cooperative Association; Associated Milk
Producers, Incorporated; California Dairies,
Incorporated; Cass-Clay Creamery, Incorporated;
Continental Dairy Products, Incorporated;
Cooperative Milk Producers Association; Dairy
Farmers of America, Dairywomen's Marketing
Cooperative, Incorporated; Dairylea
Cooperative, Incorporated; Ellsworth
Cooperative Creamery; Farmers Cooperative
Creamery; First District Association; Foremost
Farms USA; Just Jersey Cooperative; Land
O'Lakes, Incorporated; Lone Star Milk
Producers, Incorporated; Manitowoc Milk
Producers Coop.; Maryland-Virginia Milk
Producers Cooperative Association,
Incorporated; Michigan Milk Producers
Association; Mid-West Dairywomen's Company;
Niagara Milk Cooperative, Incorporated;
Northwest Dairy Association; Prairie Farms
Dairy, Incorporated; St. Albans Cooperative
Milk Creamery, Incorporated; Scioto County

1 Dr. Cryan - Direct Testimony

2 Co-op Milk Producers Association; Select Milk
3 Producers, Incorporated; Southeast Milk
4 Incorporated; Swiss Valley Farms Company;
5 Tillamook County Creamery Association; United
6 Dairymen of Arizona; Upstate Farms Cooperative,
7 Incorporated; and Zia Milk Producers.

8 National Milk developed Proposal
9 No. 7, which was published in the notice of
10 this hearing and now urges its adoption.
11 Proposal 7 would strengthen the current
12 standard for Class I products by closing
13 certain unintended loopholes that have opened
14 in the Federal Order definition of fluid milk
15 product as a result of changes in technology.

16 Proposal 7 would accomplish this
17 without reclassifying any existing products and
18 following established principles of form and
19 use.

20 Proposal 7 would first replace the
21 6.5 percent nonfat milk solids minimum with a
22 2.25 percent milk protein minimum; and, second,
23 delete whey from the products exempted from the
24 definition so that whey proteins would count
25 towards the 2.25 percent minimum, but without

1 Dr. Cryan - Direct Testimony

2 establishing reconstitution up-charges for whey
3 ingredients used in these products.

4 Proposal 7 could be effected by the
5 following changes in the language of the
6 regulations. The language is included in the
7 prepared statement. In effect, it substitutes
8 the 6.5 percent nonfat milk solids provision
9 as a minimum for fluid milk product with
10 2.25 percent protein derived from milk
11 standards and deletes whey as one of the
12 exemptions.

13 A conforming provision that is
14 included in this statement would essentially
15 exclude the skim milk equivalent of the protein
16 derived from milk where the proportion of skim
17 milk solids have been modified and except whey
18 or whey solids from the Class I milk pricing.

19 Processing technology has evolved
20 significantly since the advent of the Federal
21 Milk Marketing Order System. When the Order
22 system was first established 70 years ago,
23 whole milk could be separated into cream and
24 skim milk, and these two components could be
25 recombined to make the limited set of

1 Dr. Cryan - Direct Testimony

2 traditional dairy products.

3 Today, whole milk can be
4 commercially separated into a large number of
5 distinct components, including numerous
6 butterfat fractions, various proteins, lactose
7 and minerals. The components can be recombined
8 to create a much larger array of products than
9 was previously possible.

10 This technological capacity to
11 segregate and manipulate very discrete milk
12 components has effectively rendered some
13 Federal Order definitions and certain elements
14 of Federal Order accounting obsolete.

15 For example, the skim milk component
16 of whole milk can now be further separated
17 through the process of ultra-filtration into at
18 least two subcomponents, one containing nearly
19 all the milk proteins and another containing
20 mostly lactose.

21 Although both milk proteins and
22 lactose are considered to be nonfat solids, all
23 of the market value of skim milk is in the milk
24 proteins, while lactose has no or even negative
25 market value.

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2 Now that valuable milk protein
3 solids can be separated from worthless lactose
4 solids, defining Class I products or accounting
5 on the basis of total nonfat solid content
6 makes little sense. Dairy components can be
7 manipulated and new products created merely to
8 avoid Class I pricing, which could undermine
9 the purpose of the Federal Order System.

10 Milk-based beverages can be created
11 that contain 100 percent or more protein
12 contained in unmodified milk but which have
13 less than 6.5 percent by weight nonfat solids
14 because the lactose has been taken out or
15 reduced or replaced with an alternative
16 sweetener.

17 The requirements of a minimum
18 6.5 percent nonfat milk solids in the current
19 fluid milk product definition was originally
20 intended to exclude beverages that have been
21 watered down until they no longer resembled
22 milk. See for example 30 Federal Register
23 11277. I won't offer those citations in the
24 rest of this.

25 However, with new technology, fluid

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2 milk-based beverages that contain all the
3 protein value of whole milk which are developed
4 to look like milk and compete with milk can
5 avoid Class I pricing merely because some
6 valueless lactose has been removed and
7 replaced.

8 This not only undermines the Federal
9 Order System, it also makes no economic sense.
10 Determining the milk equivalent with such a
11 product on the basis of undifferentiated total
12 nonfat milk solids severely undervalues protein
13 and overvalues lactose.

14 The principles underlying full
15 component pricing are that the value of the
16 components in various classes of dairy products
17 should be paid by handlers and received by
18 producers. That was a principle employed in
19 the Order formula with respect to Class III
20 pricing, producer of milk pricing.

21 When fluid milk products all
22 contain, more or less, the same portions of
23 skim components defining and pricing fluid milk
24 products using a nonfat milk solids standard
25 was a minor problem. Now that the valuable

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2 skim components can be separated from the lower
3 valued components, and used in varying
4 proportions, there can be a serious inequity.

5 New technology has also made the
6 exclusion of whey from the fluid milk product
7 definition a serious problem. The whey
8 exclusion was originally intended to avoid
9 Class I pricing for low-valued liquid whey
10 beverages that did not compete with fluid milk.

11 Since then, improved technologies
12 and a much more highly developed whey
13 processing industry have create new potential
14 for whey and whey products to serve as a
15 partial substitute for other milk solids.

16 The authors of the exclusion did not
17 anticipate these technological changes, so the
18 original language did not explicitly limit the
19 exclusion to this single liquid whey beverage.
20 Now, however, the whey exclusion could arguably
21 be applied to many new products that contain
22 some amount of whey ingredients.

23 Today fluid milk beverages can be
24 created in which some amount of whey is
25 substituted for traditional milk solids so that

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2 the resulting beverage would fall just below
3 the 6.5 percent "nonfat solids" threshold in
4 the fluid milk product definition.

5 In such a situation, the beverage
6 would contain most of the valuable protein --
7 most of the protein value of whole milk, would
8 resemble and compete with whole milk and yet
9 would arguably be exempt from Class I pricing.

10 These are not hypothetical problems.
11 These are already real-world and concrete
12 examples. Carb Countdown, which is a trademark
13 of HP Hood Company, is produced by and under
14 license to the HP Hood Company, is an example
15 of the inadequacy of the current rules to deal
16 with new products.

17 Carb Countdown has been classified
18 as both a Class I and a Class II product.
19 Although it is currently being treated as a
20 Class I, that classification is being
21 challenged by its makers under Section
22 8(c)(15)(A) of the Agricultural Marketing
23 Agreement Act, because the product contains
24 less than 6.5 percent nonfat milk solids. This
25 sub-6.5 percent content is achieved by two

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2 means at issue in this hearing:

3 First Carb Countdown contains whey
4 solids which are not currently treated by USDA
5 as a nonfat milk solids for purposes of
6 defining a fluid milk product or pricing
7 Class I milk. Second, the lactose content of
8 Carb Countdown is substantially reduced; so
9 although it contains 150 percent of the
10 protein, or 140 or 130 percent of the protein,
11 including whey protein of a similar volume of
12 milk, it contains less than 6.5 percent nonfat
13 milk solids.

14 Carb Countdown is clearly designed
15 to be similar in form and use to fluid milk.
16 It is also a market substitute for milk, as is
17 borne out by two separate studies. I have
18 exhibits I will offer at the end of this
19 testimony.

20 A study by a market research firm
21 IRI of consumer switching behavior indicates
22 that 98.4 percent of Carb Countdown sales are
23 taken from established Class I fluid milk
24 products and only 1 percent of the sales
25 represent expansion of the fluid milk product

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2 category.

3 A panel study by the NPD Group
4 indicates that Carb Countdown is used in the
5 same ways that milk is used, that only 14
6 percent of its customers went from buying no
7 milk to buying Carb Countdown, and that 71
8 percent are switching from milk to more or less
9 Carb Countdown.

10 That is, only 14 percent of Carb
11 Countdown buyers are clearly adding to overall
12 milk sales. Another 15 percent didn't know or
13 weren't sure how their Carb Countdown purchases
14 affected their overall use of fluid milk
15 products.

16 There is also an emerging U.S.
17 market for lactose-free and reduced-lactose
18 fluid milk beverages. NMPF maintains these
19 products are more analogous to fat-free and
20 reduced-fat milk and should be priced under the
21 Order system of Class I products.

22 The lactose content of milk has no
23 significant value for any consumer sector
24 except for its mild sweetness which can be
25 easily replaced with alternative sweeteners

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2 with increasingly little taste difference.

3 Federal Order data presented by USDA
4 at this hearing indicates that at least
5 437 million pounds of milk were used to produce
6 Class I beverages with reduced lactose content
7 under Federal Order regulation and that a
8 larger volume of such products were sold. This
9 is about 1 percent of total Federal Order
10 Class I sales.

11 The success of a lactose-free "light
12 milk drink" in Finland demonstrates the
13 potential that lactose-free and lactose-reduced
14 milk drinks have to duplicate the growth of
15 fat-free and low-fat milk in the United States.
16 This Finnish product, produced with a new
17 proprietary technology, was introduced in 2001.

18 By 2004, the company manufacturing
19 the product expected to sell 40 million liters
20 of the product in Finland, which on a per
21 capita basis would be the equivalent of about 5
22 billion pounds of sales in the United States,
23 and that is an exhibit. That article will be
24 offered as an exhibit.

25 The objective of this hearing should

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2 be to clarify the status of such products
3 according to form and use principles underlying
4 the Federal Order System. NMPF asserts that
5 these products are Class I in accordance with
6 those principles. If NMPF's proposed
7 amendments were adopted, they would be Class I
8 in fact.

9 Protein should define fluid milk
10 products. The regulations should clarify the
11 Class I status of these products for the same
12 reasons that skim and reduced-fat milks were
13 reclassified from Class II to Class I in many
14 Federal Order markets in the 1950's and 1960's.

15 In those hearings, USDA specifically
16 cited the growth of skim or reduced-fat milk
17 sales, and the resulting price-based
18 inequities, as a basis for reclassification.
19 This was based on a decision in 1968 revising
20 the Section 1002, for example, as of January 1,
21 1967.

22 Federal Order pricing should
23 appropriately reflect changes in technology and
24 market conditions. In the 1930's, it was
25 common practice to pay producers strictly

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2 according to the butterfat in their milk. So
3 initially this practice was made part of the
4 Federal Order language.

5 Over time, all Federal Orders were
6 changed to reflect and take into account the
7 growing importance in market value of the skim
8 portion of whole milk.

9 In 1968, the New York-New Jersey
10 order became the last order to make such
11 changes to include skim and reduced-fat milks
12 in Class I, and to price and account for milk
13 on the basis of skim milk as well as butterfat.
14 That is based on the same decision in 1968.

15 That decision contained nearly all
16 the same logic that must apply in this hearing.
17 I quote, "The butterfat accounting procedure
18 was adopted in recognition of the fact that the
19 states of New Jersey and New York within which
20 the marketing area lies did not permit the
21 standardization of milk for fluid uses. Under
22 such circumstance, a butterfat accounting
23 procedure was considered to be appropriate.

24 "However, standardization has been
25 permitted in New Jersey since mid-1964 and in

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2 New York since November 1, 1966. Permissive
3 standardization is done to lower butterfat
4 content of the finished product. Accordingly,
5 the butterfat equivalent accounting procedure
6 employed under the Order does not insure a full
7 accounting in Class I of the total value of
8 milk and skim milk actually utilized for fluid
9 purposes.

10 "Accounting for milk and milk
11 products on a skim milk and butterfat
12 accounting basis and pricing in accordance with
13 the form in which, or the purpose for which
14 such skim milk or butterfat are used or
15 disposed of, is the most appropriate means of
16 securing complete accounting on all milk
17 involved in market transactions.

18 "Milk is disposed of in the market
19 in a wide variety of forms representing
20 different proportions of butterfat and skim
21 milk components of milk which may be greatly
22 changed from the proportions of such butterfat
23 and skim milk in milk as it is first received.

24 "Moreover, the present accounting
25 method coupled with the practice of

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2 standardization does not achieve uniformity of
3 product cost among handlers. Lack of
4 uniformity in the cost of the same product
5 results from difference in the butterfat
6 content of milk received from producers and
7 from differences in the extent to which
8 standardization is practiced.

9 "The skim and butterfat accounting
10 system herein adopted is the only practical
11 means, in view of standardization, of assuring
12 that the producers will receive the full
13 utilization for their milk." That's 33 Federal
14 Register Page 188, January 5, 1968.

15 The same decision also put those
16 products, fluid milk products -- the same
17 decision changes the fluid milk product
18 definition to the previous fluid milk product
19 definition in that market only defines Class I
20 products between 3 percent and 5 percent
21 butterfat. This decision in 1968 made the
22 change to include skim and reduced-fat milk
23 products as Class I as well.

24 The same logic applies in 2005 as
25 the dairy industry confronts the economic

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2 course dictated by new technology. Simply
3 stated, the total nonfat solids accounting
4 procedure in the 6.5 percent nonfat solids
5 threshold are not outdated; they reflect the
6 prior generation of technology, not technology
7 today.

8 Total nonfat solids was an
9 appropriate standard before there was
10 standardization of skim milk components for
11 fluid uses. However, standardization has been
12 feasible for some time, and now can be used to
13 lower the total nonfat solids content of the
14 finished product by reducing the least valuable
15 component - lactose.

16 Accordingly, the total nonfat solids
17 equivalent accounting employed under the orders
18 does not ensure full accounting in Class I of
19 the total volume of milk and skim milk actually
20 utilized for fluid purposes, or the real value
21 of that milk.

22 Accounting for the skim milk in
23 modified fluid milk products on a protein basis
24 and pricing in accordance with the form in
25 which, or the purpose for which, such skim milk

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2 and butterfat are used or disposed of, is the
3 most appropriate means of securing complete
4 accounting on all milk involved in market
5 transactions.

6 There is no real difference in form
7 between a fluid milk product in which lactose
8 has been retained, and a fluid milk product for
9 which the lactose has been removed and replaced
10 by an alternative sweetener, and yet current
11 rules would permit these two products to be
12 priced very differently.

13 This violates a core principle
14 underlying the entire Federal Order System.
15 There are also no real differences or purpose
16 for many of the new products developed. For
17 example, a drink such as a low-carb milk
18 substitute is used exactly in the same way as
19 milk according to the NPD survey data cited
20 above, which I will also offer into evidence.

21 But although it contains 150 percent
22 of its measure of milk protein, it might by one
23 interpretation be defined as Class II, under
24 the current nonfat solids standard.

25 In 2004, an estimated 625 -- in this

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2 sentence, okay -- in this sentence, it says, in
3 2004, an estimated 625 million pounds of milk
4 were used to produce various types of
5 carb-reduced drinks building market data for a
6 hearing.

7 I would have to amend that based
8 on Mr. Rourke's testimony that Federal Order
9 data represents about 75 percent of fluid milk
10 product marketing in the U.S., this original
11 number was based on 70 percent.

12 I took the 437 million pounds that
13 Mr. Rourke reported as sales for lactose and
14 carb-reduced and free products, and divided
15 that by 70 percent to arrive at 625 million.
16 If I divide 437 million pounds by 75 percent,
17 according to the testimony, I get 584 million
18 pounds of milk used to produce these types of
19 carb-reduced drinks.

20 According to IRI, a market research
21 firm, 98.4 percent of these sales replaced
22 traditional Class I sales, and only 1 percent
23 of sales representing expansion of the fluid
24 milk product category. That's a restatement.

25 The protein equivalent accounting

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2 system is the only practical means, quoting
3 from the original decision, the only practical
4 means in view of standardization, of assuring
5 that producers will receive the full
6 utilization for their milk.

7 In other words, for the same reasons
8 that skim milk and butterfat accounting and the
9 price was deemed appropriate for Class I
10 products in 1968, so in 2005 is it appropriate
11 to fix a protein threshold for fluid milk
12 product.

13 Because of these problems and
14 obvious inequities, NMPF proposes to replace
15 the 6.5 percent nonfat solids standard in the
16 fluid milk product definition to the
17 2.25 percent true protein standard. This would
18 define the fluid milk products on the basis of
19 the skim component that has value to producers,
20 to processors, and to consumers, and which
21 contributes fluid milk's most characteristic
22 attributes of nutrition, flavor, and texturing.

23 Clarifying the status of milk
24 protein concentrates as milk solids. In
25 proposing a protein standard for fluid milk

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2 products, NMPF intends that the protein content
3 of any and all dairy-derived ingredients be
4 counted, including, but not limited to, milk,
5 skim milk, milk protein concentrate, casein and
6 caseinate, whey, whey protein concentrates, and
7 any other milk-derived ingredients, including
8 those not currently defined as nonfat milk
9 solids for the purpose of defining fluid milk
10 product. I would include calcium caseinate,
11 sodium caseinate, and any other dairy-derived
12 protein.

13 Similarly, in proposing that whey
14 and whey products not be counted toward pricing
15 Class I milk, we do not propose to exclude any
16 other milk-derived ingredient.

17 The evolution of filtration
18 technology, which allows the fractionation of
19 skim milk components by mechanical means to put
20 skim milk fractions in a different light than
21 when they were obtained by chemical methods.
22 Those older methods altered the proteins and
23 other components sufficiently to provide some
24 justification for distinct treatment.

25 However, under current technology,

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2 when these fractions are unaltered and do not
3 suffer the chemical changes that made their
4 predecessors a poor ingredient in beverage use.

5 These fractions, when dried, are
6 Class IV products, in common with nonfat dry
7 milk. Given this status, and given the new
8 technology, justification no longer exists for
9 distinguishing these products from other nonfat
10 solids in fluid milk products.

11 Establishing the protein equivalent
12 of the 6.5 percent nonfat solids test. We
13 propose 2.25 percent as the protein standard
14 for fluid milk products, because it most
15 accurately reflects the protein equivalent of
16 the current 6.5 percent nonfat solids
17 standards.

18 In other words, NMPF contends that
19 this standard reflects the "normal" proportions
20 of nonfat solids to protein in milk. Federal
21 Order protein standards and measures are unique
22 because they focus on a measure of true
23 protein. They are different from nutrition and
24 labeling standards and measures which are
25 typically based on "crude" protein, including

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2 nonprotein nitrogen. Therefore, it is most
3 appropriate to use Federal Order sources to
4 establish standards for protein and nonfat
5 solids test.

6 One of those can be the average
7 test -- one of these sources is the weighted
8 average nonfat solids and protein tests of
9 producer milk in the Federal Order markets
10 which price the components in producer milk.
11 These are calculated by the Agricultural
12 Marketing Service -- collected and compiled by
13 the Agricultural Marketing Service, and
14 published in their annual Federal Order
15 Statistics and on the Dairy Programs Web site,
16 which data is available at
17 www/ams.usda.gov/dyfmoms/mib/fmoms.htm.

18 In the six Federal Order markets for
19 which a full year's component data is available
20 for 2004, the weighted average nonfat solids
21 test was 8.74 percent and the weighted average
22 protein test was 3.04. Therefore, the protein
23 test, which is most equivalent to the
24 6.5 percent nonfat solids test, can be
25 calculated as follows:

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2 3.04 percent average protein over
3 8.74 percent average nonfat solids is a ratio
4 of .3478. When applied to the 6.5 percent
5 nonfat solids standard gives us 2.26 percent
6 protein -- 2.26 percent protein minimum
7 standard.

8 An alternative source for
9 establishing the proportion between protein and
10 nonfat solids is the current Federal Order
11 language, which establishes standard tests for
12 Class III skim milk of 3.1 percent protein and
13 9 percent nonfat solids.

14 Since these are used to establish
15 the Class I price when the advance Class III
16 price is higher than the advance Class IV
17 price, this is an equally valid basis for
18 calculating a minimum protein test for Class I
19 products.

20 These tests were established during
21 the Federal Order reform process on the basis
22 of milk tests determined to be representative
23 of U.S. producer milk. Using this source, one
24 obtains almost identical results.

25 3.1 percent protein over 9 percent

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2 nonfat solids is a ratio of .3444 applied to
3 the 6.5 percent nonfat solids standard gives a
4 protein minimum of 2.24 percent.

5 For a more complete comparison and
6 conclusion is a table on this page that
7 compares the results from using average
8 component tests since 2000 with the results
9 from using the component standards in the
10 Federal Order price formulas and produces a
11 range from 2.24 to 2.26.

12 NMPF proposes that 2.25 is the
13 midpoint of this range and is an appropriate
14 protein minimum to replace the 6.5 percent
15 nonfat milk solids minimum.

16 Accounting for protein. We believe
17 it's important to account for protein to
18 conform to the protein standard. Establishing
19 the protein standard for fluid milk products
20 raises certain administrative issues with
21 respect to establishing skim milk equivalents
22 for modified fluid milk products.

23 Modern practices such as the use of
24 ultra-filtered fluid milk or reconstitution
25 using dairy protein concentrates make nonfat

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2 solids a very poor basis for establishing a
3 product's fundamental milk content. As
4 discussed earlier in this testimony, the value
5 of skim milk lies in the protein.

6 For this reason, the skim milk
7 equivalent of Class I beverages in which the
8 proportions of skim solids are modified should
9 be established on a protein basis. This should
10 apply to any beverage whose skim components
11 include any dairy ingredients with
12 protein-to-other solids ratio that has been
13 altered from natural milk.

14 However, the Class I equivalent
15 should not be set at greater than the volume of
16 the product. That is, no more than 100 pounds
17 of milk equivalent contained in 100 pounds of a
18 modified fluid milk product should be priced at
19 Class I. Any such excess by this accounting
20 should be clearly considered as fortification
21 and priced accordingly. NMPF asserts that this
22 accounting can be achieved by the amendment to
23 Section 1000.40 proposed above.

24 Deleting the whey exemption. NMPF
25 asserts that the Federal Order System must

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2 never retain rules that unintentionally contain
3 incentives to create new dairy drinks based on
4 whey protein for the sole or principal purpose
5 of avoiding Class I regulation.

6 NMPF's proposal to delete the
7 current whey exemption would correct this
8 problem. It would also address
9 misinterpretation in the treatment of whey
10 ingredients that has developed over the years.

11 At the same time, NMPF's proposal is
12 balanced. NMPF does not propose to charge
13 Class I for whey ingredients. This will allow
14 for the continued development of new products
15 that are distinct from fluid milk without the
16 burden of regulation under the Federal Orders.

17 Defining whey. According to the
18 Food And Drug Administration, "Whey is the
19 liquid substance obtained by separating
20 coagulum from milk, cream, or skim milk during
21 the cheese making procedure and may have the
22 acidity adjusted by the addition of safe and
23 suitable ph-adjusting ingredients prior to
24 pasteurization."

25 This is from a memo available dated

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2 December 11, 1992, and available at
3 www.cfsan.fda.gov/~ear/MI92-16.html. Various
4 other whey products, including reduced-lactose
5 whey, reduced-minerals whey, and whey protein
6 concentrate are all, according to their
7 respective definitions, derived from "whey," as
8 should any other "whey" product, by reasonable
9 interpretation. This is based on 21 CFR
10 184.1979.

11 Since whey and whey products must be
12 derived from the coagulation of cheese, it does
13 not consist simply of certain proteins
14 separated out from milk by any process; rather,
15 it must have been directly affected by the
16 cheese-making process. As such, it is a
17 substitute, but an imperfect substitute, for
18 unaffected milk solids in a beverage.

19 It is for these reasons that we
20 propose to define whey and whey products as
21 nonfat milk solids with respect to the minimum
22 2.25 percent protein test for fluid milk
23 products, but to exclude these products from
24 Class I pricing.

25 We ask that the decision from this

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2 hearing make such a definition of whey
3 explicit, to avoid impacts from future
4 alternative interpretations by FDA.

5 Counting whey toward the definition
6 of fluid milk products. Although the original
7 whey exemption was intended to exclude bottled
8 whey from regulation, it is currently being
9 interpreted to exclude whey and whey products
10 from a product's nonfat milk solids content
11 even when used as an ingredient in a beverage
12 with substantial complete milk content.

13 In at least one case, a product
14 marketed as a substitute for fluid milk
15 contains enough whey so that were it counted as
16 such in the fluid milk production definition,
17 the product would contain over 6.5 percent
18 nonfat milk solids, although most of the total
19 nonfat milk solids are not whey.

20 In that case, whey is used to regain
21 some of the flavor, texture, and nutrition of a
22 dilute milk product. Although such product
23 could compete with fluid milk, it would
24 currently be priced at Class II.

25 To avoid such loophole uses of whey,

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2 where whey is not the naturally preferred dairy
3 product, we propose that whey be dropped from
4 the list of exclusions from the fluid milk
5 product definition. At the same time, we do
6 not believe that whey should be repriced as
7 Class I for several reasons:

8 First, whey has already been priced
9 within the Class III formula, and establishing
10 an up-charge procedure for whey is problematic.
11 Second, and more importantly, whey is not a
12 wholly effective substitute for milk and
13 beverage use. A drink made entirely of whey
14 products does not effectively duplicate the
15 form and use of fluid milk, and NMPF does not
16 believe that, at the current time, the
17 innovative use of whey in beverages results in
18 beverages that compete with existing fluid milk
19 products.

20 For these reasons we have proposed
21 conforming amendments to Section 40 that would
22 exclude whey and whey products from the
23 calculation of Class I values.

24 The impacts of proposed changes.
25 NMPF estimates that the current impacts on

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2 producers and processors are expected to be
3 zero or near zero. Rather than making
4 fundamental changes in the Class I standard,
5 these recommendations reinforce the current
6 standards under new technology.

7 As far as we have been able to
8 determine, there would be no change to the
9 current USDA classification of any established
10 products. Any future impact would be very
11 limited. For the types of products at issue,
12 the difference in raw milk costs between
13 Class I and Class II is a very small share of
14 the retail price.

15 Producers are paid, on average,
16 after these products are sold at retail. There
17 is no reason for raw milk cost increases to be
18 amplified in the retail price. Consumer demand
19 response to a pass-through of these costs
20 should be small to negligible. To the extent
21 that there is an impact on processors, it would
22 be in the direction of greater equity of milk
23 pricing.

24 Furthermore, any future product that
25 would be Class II under the current rule, but

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2 Class I under our proposed change, would be of
3 similar form and use to and a substitute for
4 current Class I products.

5 In addition, many of the products
6 that are near the current 6.5 percent nonfat
7 solids standard did not exist before that
8 standard was established or were created to
9 take advantage of the price difference.

10 It is to be expected that many of
11 the products that would come under Class I
12 regulation -- many of the future products that
13 would come under Class I regulation as a result
14 of the change to protein accounting and the
15 inclusion of whey proteins would be similarly
16 formulated to take advantage of this pricing
17 gap and, as such, are not entitled to
18 prospective consideration.

19 Clarifying the Class I status of
20 current low-carb products maintains their
21 present positive impact on producer revenue.
22 If these were put in Class II based on one
23 possible interpretation of the current
24 standard, the producer revenue would be reduced
25 as a result of the substantial 70 percent to

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2 almost total 98 percent of their sales that
3 come as substitution for traditional Class I
4 sales, based on the substantial difference
5 between the Class I and Class II prices and
6 based on the significant share of milk proteins
7 in these products that have been imported, and
8 there's an attached table, that I will look at
9 in a moment, that looks at a number of milk
10 drinks that are currently Class I and currently
11 Class II.

12 It compares their retail prices at a
13 point in time, according to what I can find, on
14 January 12 of this year. It compares the raw
15 milk values of these products based on what I
16 can determine of their formulation on the
17 assumption that all proteins were complete milk
18 proteins, and the difference between Class I
19 and Class II values for the raw milk content
20 and what that difference in raw milk value is
21 as a share of the retail price.

22 As you can see, for most of these
23 products that retail at the producer level, the
24 difference in the skim value is 16 percent, 16
25 to 17 percent. But the retail level ranges

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2 from less than a half a percent to under 6
3 percent, which substantially reduces the impact
4 on producers with measures of elasticities of
5 demand. That is to say as to the extent to
6 which consumers respond to change in the price,
7 it is cut down proportionally to that share of
8 the retail price.

9 So, for example, if the retail
10 price -- if elasticity, if the demand
11 elasticity for one of these new products is
12 negative one, and the retail -- the raw milk
13 cost of the product is 5 percent of the retail
14 price, and in effect the similar response to
15 increase the raw milk price would be .05,
16 negative .05 rather than negative 1, which will
17 come to bear I understand tomorrow or the day
18 after.

19 We also are here to address -- I'm
20 also here to address some of the other
21 proposals which we believe are inconsistent
22 with the proposal we are supporting. We have
23 proposed and are supporting.

24 NMPF opposes Proposal 5, which would
25 define beverages with less than 6.5 percent

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2 nonfat milk solids as fluid milk products if it
3 were demonstrated that the beverage competes
4 directly with the other fluid milk products and
5 that Class I pricing of the product would
6 increase producer revenue.

7 NMPF contends that a less subjective
8 definition, derived from these considerations
9 but rooted in physical characteristics, is
10 necessary for the fair administration of
11 Federal Order pricing. Which is to say that
12 the criteria that had been discussed are --
13 should be the basis for establishing a rule.
14 But the rule should be cut and dried as much as
15 possible to establish a clear physical basis
16 for defining Class I from Class II.

17 NMPF opposes Proposal 6. Proposal 6
18 is intended to allow USDA to include any dried
19 dairy ingredient toward the 6.5 nonfat solids
20 standard for fluid milk products. This would
21 allow whey, whey products, casein, and milk
22 protein concentrates in dry form to be included
23 in the nonfat solids calculation; while
24 presumably liquid and ultra-filtered wet whey
25 and liquid ultra-filtered milk ingredients

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2 would continue to be defined as nondairy
3 ingredients.

4 For the reasons detailed in the
5 explanation of our proposal, we believe that
6 fluid milk products should be defined on the
7 basis of their total dairy protein content,
8 regardless of the form of the ingredient, and
9 that the whey ingredients should not be priced
10 in Class I, also regardless of the form of the
11 ingredients.

12 We can see no justification for this
13 distinction and oppose it as not going far
14 enough to clarify the fluid milk product
15 definition.

16 NMPF opposes Proposal 8. Proposal 8
17 would exempt all "yogurt-containing beverages."
18 Yogurt drinks are similar in form and use, as
19 well as nutritional profile, to other flavored
20 milks, and they are presumably a close market
21 substitute for these. This would severely
22 weaken the fluid milk product definition.

23 In addition, yogurt drinks are
24 Grade A products subject to the same pasturized
25 milk ordinance as fluid milk and is a highly

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2 perishable dairy product and would depend upon
3 the same regional supply of fresh fluid milk as
4 do fluid milk products.

5 In fact, the only basis for
6 spoonable yogurt being in Class II is the form
7 and use distinction from fluid milk beverages.
8 Absent that distinction, there is no basis for
9 yogurt drinks to be excluded from the fluid
10 milk product definition. There is no basis for
11 this exemption, and NMPF opposes it as an
12 unjustified weakening of the fluid milk product
13 definition.

14 NMPF opposes Proposal 10.
15 Proposal 10 would remove the qualification on
16 exempted "dietary use" by removing the words
17 "(meal replacement) that are packaged in
18 hermetically-sealed containers." Removing
19 either the "meal replacement" or the
20 requirement for "hermetically-sealed
21 containers" is problematic.

22 The meal replacement qualifier is
23 important in defining the nature of the
24 exemption. All milk that is consumed and
25 digested has been put to dietary use, and

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2 leaving that term unqualified is tantamount to
3 eliminating the fluid milk product definition
4 altogether.

5 The exemption is intended for
6 products that are specifically formulated to
7 replace a full meal. According to the decision
8 which introduced this definition to several
9 Texas markets, they are "specialized food
10 products prepared for limited use. Such
11 formulas do not compete with other milk
12 beverages consumed by the general public."

13 That is 39 Federal Register 11277,
14 March 27, 1974, and I also cite 58 Federal
15 Register 12659, March 5, 1993.

16 Although production of dairy
17 beverages in a "hermetically-sealed" container
18 is now easier than ever and cannot alone be
19 adequate to set a product apart, it remains one
20 important element to distinguishing this
21 limited use from the bulk of fluid milk
22 products. I would cite the same sources.

23 In demonstration of how technology
24 for hermetically-sealed products has changed, I
25 would like to introduce when I'm completed an

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2 article titled, "Aseptic In Winchester," which
3 is about a very excellent plant in Winchester,
4 Virginia, which has reached the point now where
5 they can process milk in shelf-stable bottles,
6 plastic pine bottles shelf stable without
7 refrigeration, which is quite a change, and
8 bears very importantly, I think, on
9 considerations of any suggestions that change
10 this definition.

11 Inclusion of meal replacement is
12 fundamental to this exemption, but until there
13 is adequate basis for a more specific
14 definition of meal replacement, the container
15 qualification is necessary, and may continue to
16 be in any case. For this reason, NMPF opposes
17 any change to this particular exemption.

18 NMPF opposes Proposal 11.

19 Proposal 11 adds an exemption from the fluid
20 milk product definition for "nutrient enhanced
21 fortified formulas, especially prepared for the
22 health care industry that are packaged in
23 hermetically-sealed containers."

24 As written, this may be interpreted
25 too broadly. Although an exemption of this

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2 type might resemble the limited use intended in
3 the 1974 decision cited above, it must be
4 defined more clearly to set it apart from fluid
5 milk products generally. For this reason, NMPF
6 opposes this proposal as it is currently
7 written.

8 Conclusion: National Milk, as a
9 representative of U.S. dairy producers, asserts
10 that it is important to strengthen the current
11 fluid milk product definition without unduly
12 redefining existing Class II products as
13 Class I. NMPF's proposal accomplishes these
14 two objectives.

15 I thank the Department for the
16 opportunity to testify. I would ask that
17 official notice be taken of a number of things:
18 The Food And Drug Administration Memo M-1-92-16
19 from December 11, 1992, available at
20 www.cfsan.fda.gov/~ear/MI92-16.html.

21 I would ask that official notice be
22 taken of the Federal Order of Market Statistics
23 Annual Summary for 2004, which will be
24 published -- is not yet published in paper
25 form, but most of these are available on the

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2 Internet at the Agricultural Marketing Service
3 Web site. I would also ask that notice be
4 taken of the Packaged Fluid Milk Sales in
5 Federal Milk Order Markets: By Size and Type
6 Of Container and Distribution Method During
7 November 2003," which is published by the USDA
8 Agricultural Marketing Service, Dairy Programs.
9 I would ask that the predecessor reports dating
10 back to 1957 also be taken notice of.

11 This exhibit -- this statement has
12 two attachments. Appendix A is a list of the
13 cooperative members of the National Milk
14 Producers Federation and Appendix B is the
15 table I discussed to offer some details on the
16 number of beverage products.

17 At this time, I would like to offer
18 into the record several exhibits. The first
19 one is -- do I hand them out first? I would
20 ask that the following be entered as exhibits.
21 The first is "Aseptic in Winchester," published
22 in "Dairy Food Magazine," December 2004, Pages
23 50 through 55 inclusive. I ask that that be
24 entered.

25 I ask that an article entitled

1 Dr. Cryan - Direct Testimony

2 "Finnish Attitude" published in the "Tetra-Pak
3 Company Magazine," No. 89 in 2004, Pages 24 and
4 25 be included in the record.

5 I ask that a PowerPoint presentation
6 entitled, "Low Carb Milk: Review of Retail
7 Sales & Analysis of Hood Carb Countdown's
8 Source of Volume," given by Dairy Management,
9 Incorporated, on January 13 of this year, be
10 included in the record.

11 And, finally, that a study entitled,
12 "Carb Countdown Awareness Check," which was
13 issued by the NPD Group on January 19, 2005,
14 also be put into the record.

15 I had mentioned each of these --
16 should I stop now?

17 JUDGE DAVENPORT: I'm going to
18 mark these 14A, 14B, 14C, and 14D for
19 identification at this time.

20 (Exhibit Nos. 14A through 14D
21 were marked for identification.)

22 THE WITNESS: I would like to
23 go over very briefly, as I said, "Aseptic in
24 Winchester" demonstrates the extent to which
25 something that could be interpreted as aseptic

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2 packaging or hermetically-sealed packaging is
3 becoming more standard, improves processing
4 technologies, and the better plants are
5 allowing this type of packaging to become
6 standard, and I think that's important to
7 consider.

8 The article "Finnish Attitude" from
9 "Tetra-Pak Magazine" demonstrates another
10 technology, a separate technology, that would
11 reduce lactose content of milk products and
12 offers another apparently -- it's another
13 product that could substitute for milk, and it
14 could, according to this article, be something
15 in the neighborhood of 10 or 15 percent of the
16 market now in Finland could be occupied by this
17 lactose-free product which in my thinking
18 demonstrates an analogy to low-fat and fat-free
19 milk 20 or 30 years ago or 30 or 40 years ago.

20 MR. VETNE: Your Honor, before
21 Mr. Cryan proceeds --

22 JUDGE DAVENPORT: Let's let
23 him finish with his description of what those
24 exhibits are, and we will take up your
25 objection afterwards.

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2 MR. VETNE: Okay.

3 THE WITNESS: The PowerPoint
4 presentation details the methodology and
5 results of a study taken by IRI Market Research
6 for DMI to examine the marketing expansion, the
7 potential for Carb Countdown to expand the
8 overall milk market and its impacts, potential
9 impacts, on -- its implications for promotion.
10 But the same conclusions are relevant with
11 respect to this hearing.

12 Finally, the panel study issued by
13 the NPD Group, to which I've included the raw
14 survey data, demonstrates specifically the
15 extent to which Carb Countdown is, first of
16 all, used as a -- used for the same types of
17 things that regular milk is used, and also
18 which is outlined -- it's in there -- and it
19 also describes the extent to which the
20 purchases of Carb Countdown had to replace the
21 purchases of regular milk. That's my
22 description.

23 MR. YALE: One question. Was
24 that last one 14D?

25 JUDGE DAVENPORT: 14D, yes.

1 Dr. Cryan - Direct Testimony

2 MR. YALE: Can we get copies
3 made of that so we can see it?

4 JUDGE DAVENPORT: We need
5 additional copies.

6 THE WITNESS: I've handed out
7 all the copies that I had. There were copies
8 on the back table. I don't know if
9 summaries -- there were summary sheets as well.

10 JUDGE DAVENPORT: Does that
11 conclude the direct portion of your testimony?

12 THE WITNESS: Yes.

13 JUDGE DAVENPORT: Very well.
14 In view of the hour, I would propose that we go
15 ahead and take our break at this time and then
16 I will recognize Mr. Vetne and the others who
17 have objections at that time.

18 Ladies and gentlemen, what is your
19 pleasure? Maybe an hour and a half to allow
20 everyone to get lunch?

21 MR. BESHORE: That's fine.

22 JUDGE DAVENPORT: Let's
23 reconvene.

24 MR. BESHORE: If there were --
25 I know Mr. Vetne rose. I'm not sure whether it

1 Dr. Cryan - Direct Testimony

2 was to get copies of the exhibits or
3 objections, but if there are objections, it
4 might be useful to know what they are before we
5 consider the exhibits after lunch.

6 JUDGE DAVENPORT: Very well.
7 Let's just state the basis for the objection,
8 and then we will go from there.

9 MR. VETNE: Your Honor, John
10 Vetne. I will have some objections. I will
11 know better what they are after I've had a
12 chance to see the exhibit.

13 I didn't get a copy of -- I didn't
14 get a copy of the exhibits. They appear to
15 be -- they are certainly studies not presented
16 by this witness or conducted by this witness.
17 They appear to be excerpts. We don't know the
18 questions.

19 They are clearly hearsay. Whether
20 they are the type of reliable hearsay that this
21 record should receive, we don't know. I'm
22 hoping to be able to study a copy of the
23 exhibit so I can make an intelligent objection,
24 but that's just the gist of it.

25 JUDGE DAVENPORT: Very well.

1 Dr. Cryan - Direct Testimony

2 Are there other objections that are going to be
3 offered? That being the case, let's try to be
4 back at 1:30, and we will take it up again.

5 (Recess was taken lunch.)

6 JUDGE DAVENPORT: It looks
7 like the hour is upon us again. Mr. Cryan will
8 resume the stand. Mr. Vetne?

9 MR. BESHORE: I would -- with
10 respect to the objections to the exhibits,
11 before they are acted upon, I would like the
12 opportunity to ask some questions of the
13 witness with respect to the documents.

14 JUDGE DAVENPORT: Very well.
15 Mr. Vetne, do you wish to yield to Mr. Beshore?

16 MR. VETNE: If he's going to
17 add foundation to the exhibits, I might refine
18 my objection.

19 JUDGE DAVENPORT: Very well.
20 Mr. Beshore, it looks like you get first crack.

21 -----

22 CROSS-EXAMINATION

23 BY MR. BESHORE:

24 Q. Dr. Cryan, you are an economist by
25 profession; correct?

1 Dr. Cryan - Cross - by Mr. Beshore

2 A. By education and profession, yes.

3 Q. By education and profession, okay.

4 Now, the exhibits to which preliminary
5 objections have been lodged, marked as
6 Exhibits 14C and 14D, are these studies that's
7 the IRI study and the NPD study, 14C and 14D
8 respectively, are they the type of studies to
9 which -- the type of information upon which you
10 as a professional economist would rely in
11 formulating the professional opinions to which
12 you have testified today?

13 A. Yes. They are the kind of studies I
14 would rely on as a professional, and the kind
15 of studies I did rely on in developing this
16 testimony.

17 JUDGE DAVENPORT: Dr. Cryan,
18 your remarks are sort of tailing off a little
19 bit. Either pull the microphone closer or
20 speak up just a little.

21 THE WITNESS: Okay.

22 MR. BESHORE: That's all I
23 have with respect to the exhibits.

24 JUDGE DAVENPORT: Very well.

25 Mr. Vetne?

1 Dr. Cryan - Cross - by Mr. Vetne

2 MR. VETNE: Your Honor, I
3 would like to voir dire the witness a little
4 bit about the exhibits before I post my
5 objection.

6 JUDGE DAVENPORT: Go ahead.

7 -----

8 CROSS-EXAMINATION

9 BY MR. VETNE:

10 Q. Mr. Cryan, you referred to the IRI
11 study. Is that the study that you refer to in
12 the last page of your exhibit, Page 14, as
13 low-carb milk retail sales, et cetera,
14 PowerPoint presentation?

15 A. Yes.

16 Q. Given by Dairy Management, Inc., and
17 what you propose to mark here as an exhibit is
18 the PowerPoint presentation rather than the
19 study; correct?

20 A. That's what I have, yes.

21 Q. You do not have a copy of the study?

22 A. I do not have a copy of the study.

23 There was some --

24 Q. Does anybody in your employ have a
25 copy of the study?

1 Dr. Cryan - Cross - by Mr. Vetne

2 A. There is no one in my employ.
3 Nobody -- nobody in National Milk has a copy of
4 the study right now. I attempted to -- there
5 were some hang-ups in the last week trying to
6 get a cleaner copy directly produced by IRI,
7 but this was all -- my understanding is all of
8 this was essentially directly transmitted
9 through DMI from IRI.

10 Q. Through DMI from IRI?

11 A. That's right.

12 Q. DMI is Dairy Management, Inc.?

13 A. That's right.

14 Q. And Dairy Management, Inc., is a
15 milk promotion organization of dairy farmers?

16 A. That's right. They are an agency
17 that administers research and promotion program
18 under the oversight of the Dairy Programs, AMS
19 Dairy Programs.

20 Q. And the Board of DMI consists of
21 members of those cooperatives that are members
22 of your organization?

23 A. I'm not sure about -- there is an
24 overlapping membership, but I'm not sure what
25 the administrative structure is.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. Is this a, to your understanding, a
3 study for which DMI paid?

4 A. It is, yes. In fact, as a matter of
5 fact -- both of these studies, the MPE study
6 and the IRI study, were both paid for by DMI in
7 the interest of determining whether it made
8 sense to promote the products in question.

9 Whether it made sense to assist in the
10 promotion of products in question, specifically
11 with respect to, you know, selling more milk
12 and whatnot.

13 Q. All right. Do you have a copy of
14 the solicitation or request for the study which
15 defines any parameters from DMI?

16 A. I do not.

17 Q. Does anybody in your organization
18 have a copy of such requests?

19 A. Not to my knowledge.

20 Q. Do you know the questions that were
21 asked, how they were presented by IRI?

22 A. The IRI study is based on analysis
23 of scanner data.

24 Q. Scanner data?

25 A. It was based on analysis of

1 Dr. Cryan - Cross - by Mr. Vetne
2 individual customers who were signed up in
3 this. They, when they purchase products, they
4 bring them home and they scan them in the setup
5 that's created so this company can track what
6 people buy.

7 Q. Is that sort of like the ACNielsen
8 scanner data?

9 A. I believe so.

10 Q. So the study shows what people buy?

11 A. That's right.

12 Q. It doesn't show why they buy it?

13 A. In this case, the methodology is
14 based on how people switch from one product to
15 another. How they switch from milk to Carb
16 Countdown or vice versa.

17 Q. It consists of consumers that are
18 volunteers, to your knowledge?

19 A. That's my understanding.

20 Q. Who volunteer to scan, and do you
21 know how many consumers that consists of?

22 A. I don't.

23 Q. To your knowledge, does the study
24 differentiate -- does the -- strike that.

25 Does the study disclose anything

1 Dr. Cryan - Cross - by Mr. Vetne
2 about consumers who were going on a
3 carb-reduced diet who would have -- who were
4 purchasing milk and would have quit purchasing
5 milk but for the Carb Countdown alternative
6 available to them?

7 A. Not that specifically. This study
8 does not -- this study indicates how folks
9 change their -- how folks buy over time. So if
10 they seem to be switching from one product to
11 another product, it shows up. In the NPD
12 survey, there are questions --

13 Q. I'm just asking -- I'm asking -- I
14 don't want to get your answers to my questions
15 confused. I'm asking about the IRI study.

16 It really says nothing about
17 consumer motive or consumer perception, the IRI
18 study?

19 A. It says something -- it tells us
20 about what people actually did, which is
21 generally more important than what they believe
22 or say they are going to do.

23 Q. Okay. Does the study reveal
24 anything about choice of -- choice or changes
25 in choices of product for reasons of price?

1 Dr. Cryan - Cross - by Mr. Vetne

2 A. I do not believe it does, no.

3 Q. Now, let's go to the -- oh, I want
4 to go back to that IRI study.

5 Where consumers have -- in the
6 study, is it your understanding that scans are
7 done by the consumers on a volunteer basis,
8 number one; correct?

9 A. Uh-huh.

10 Q. And it doesn't reveal anything about
11 either changes in the composition of the
12 household or changes in the diet of members of
13 the household?

14 A. Not to my knowledge, no.

15 Q. And, now, with respect to the NPD
16 Group study to which you referred, do you have
17 a copy of the underlying data that was used in
18 assembling that study?

19 A. Yes. It's been presented as -- it's
20 been presented. It's been offered as an
21 exhibit.

22 Q. I haven't seen that document you are
23 holding.

24 A. There were a limited number of
25 copies in the back.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. And this relates to Carb Countdown,
3 a product produced by my client?

4 A. That's correct.

5 Q. That is particularly one I have not
6 seen, but I will ask you about it anyway. I
7 find it surprising that a copy was not provided
8 to me when that's my client and my client's
9 position.

10 A. I apologize for that. I should have
11 given you a copy of that.

12 Q. Who paid for that study?

13 A. I believe DMI paid for that as well.

14 Q. DMI is Dairy Management, Inc.,
15 consisting of producers --

16 MR. BESHORE: Mr. Hollon
17 offers his personal copy of the exhibit for
18 Mr. Vetne.

19 Q. And Dairy Management, Inc., is an
20 organization that consists of producers
21 spending promotion assessment money deducted
22 under the Federal Promotion Program; correct?

23 A. It is an organization that's
24 administrated -- that administers a program of
25 jargon and speech promotion and research.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. It comes from producer monies?

3 A. It's paid for by producer money
4 under mandatory check-up.

5 Q. And managed by producer
6 representatives?

7 A. Yes. Indirectly.

8 Q. Did National Milk Producers
9 Federation or any of its members to your
10 knowledge request DMI to undertake these
11 studies?

12 A. Not to my knowledge.

13 Q. Does that mean you don't know, for
14 example, if FDFA asked its members on the DMI
15 Board to start this process?

16 A. I don't -- I don't know what the
17 process was. I don't know where -- how it was
18 initiated or how they decided to do it.

19 Q. Again, do you have a copy of the
20 outgoing request for proposals or requests for
21 a study from DMI to the NPD Group describing
22 what they wanted and how they wanted it?

23 A. I do not.

24 Q. Do you know whether the -- I have a
25 note here that says this was an Internet study?

1 Dr. Cryan - Cross - by Mr. Vetne

2 Questions were asked on the Internet?

3 A. I am not you aware of that.

4 Q. Do you know how the questions were
5 asked?

6 A. I understand that they have a --
7 they have -- in a similar way, they have people
8 who agree to participate in panel surveys. I
9 don't know if questions are asked -- it would
10 be more efficient, I assume, to ask questions
11 by the Internet.

12 Q. Do you know whether the questions
13 were structured by Dairy Management, Inc., or
14 by NPD?

15 A. The questions were developed at DMI.
16 It is my understanding that --

17 Q. Do you know whether the results
18 would show consumers and to what degree
19 consumers switched from conventional fluid milk
20 to Carb Countdown because they were going on a
21 diet and would have stopped buying dairy
22 beverage altogether?

23 A. It -- okay. This data does identify
24 people according to their -- to diet regime,
25 how they -- their self-described diet regime,

1 Dr. Cryan - Cross - by Mr. Vetne
2 and there is quite a bit of detail. But I'm
3 not sure that it would specifically identify
4 people who would go onto a specific diet and
5 stop drinking milk and -- because I think it
6 was --

7 The categories, it asks folks
8 according to the diet regimen if they are on a
9 low-carb diet in the past year, and it
10 separates out the breakdown of these questions.

11 So if there are folks that bought
12 Carb Countdown, there are several categories of
13 those who bought Carb Countdown, it asks
14 whether they are buying more milk in total now
15 that they are buying Carb Countdown, whether
16 they are buying the same amount of milk but
17 switching from milk to Carb Countdown, whether
18 they are buying less milk now that they are
19 buying Carb Countdown, or whether they are only
20 switching -- whether they are only buying Carb
21 Countdown because they weren't buying milk
22 previously.

23 Q. And this was the household
24 responses?

25 A. I believe so. Household, yes.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. So the purchaser in a household may
3 be buying milk or beverages of any kind for
4 multiple members of the household, each of whom
5 has different motives, and, again, the motives
6 is not revealed; correct? The motive --

7 A. The motives would have -- you would
8 have to infer the motives from their
9 descriptions -- from their descriptions of
10 their diet regime and their -- yes.

11 Q. In some cases, is it your
12 understanding that the survey responder was
13 responding for other members of the household
14 concerning the survey responder's food
15 purchases?

16 A. I'm not sure. I don't know that.

17 MR. VETNE: Your Honor, I
18 think that's enough.

19 Here is the significant problem I
20 find with both of these. One of which we only
21 have PowerPoint presentations and don't have
22 the study at all, and we're asked to draw
23 conclusions from highlights given by the
24 PowerPoint presenter to people that pay for the
25 study or dairy farmers who have stake.

1 Dr. Cryan - Cross - by Mr. Vetne

2 The other one, we have apparently
3 some initial data. But with respect to all,
4 Hood, to whom this is specifically directed,
5 has had no opportunity to examine the
6 underlying data, to present the data to a
7 survey expert of its own to determine the
8 quality, neutrality, and reliability.

9 It is clearly hearsay, and I'm
10 addressing whether this is the kind of reliable
11 hearsay which might be received at this
12 hearing. We just do not know enough about it,
13 and the very interested party to whom this is
14 directed is seeing this NPD survey for the
15 first time and has never seen, and we still
16 don't have available, the underlying survey,
17 the other survey. We just don't know.

18 We can't even argue its reliability
19 because we haven't been able to present it to
20 experts. I'm not a statistician or a survey
21 person, but I would desperately love to have
22 the opportunity if this is received to present
23 it to a survey expert and would ask that if it
24 is received, that the record remain open until
25 then, and if it's not going to remain open

1 Dr. Cryan - Cross - by Mr. Vetne
2 until then, that these exhibits and the
3 references thereto and the testimony be -- the
4 exhibits not be received and the testimony be
5 stricken. Thank you.

6 JUDGE DAVENPORT: Other
7 parties to be heard concerning objections to
8 these exhibits?

9 MR. YALE: I would say on
10 behalf of Select and Continental, we have no
11 objection.

12 JUDGE DAVENPORT: Any other
13 party that wishes to advance reasons for
14 objection? Mr. Yonkers?

15 MR. YONKERS: Your Honor, Bob
16 Yonkers, the Milk Industry Foundation. We also
17 don't have any opportunity to direct any
18 cross-examination to the actual people who
19 prepared either one of these studies to
20 cross-examine them on any of the research
21 methods used.

22 MR. VETNE: Your Honor, my
23 client has advised me of one additional
24 substantial concern.

25 Hood apparently asked DMI for the

1 Dr. Cryan - Cross - by Mr. Vetne
2 actual study underlying the PowerPoint
3 presentation, and DMI refused to give it to
4 them. This was about a month ago.

5 We were aware that there was
6 something that had been done, but we asked for
7 the study, and it was declined.

8 JUDGE DAVENPORT: Very well.
9 I'm going to rule that the Exhibits A through D
10 are admissible. They will be appended as part
11 of his testimony as a partial explanation of
12 his conclusions. For that reason, they will be
13 given such weight by the parties making the
14 decision that may be appropriate.

15 Of course, Mr. Vetne, you have the
16 opportunity to rebut this in post hearing
17 proceedings.

18 (Exhibits 14A through 14D were
19 admitted.)

20 JUDGE DAVENPORT: Is there a
21 cross-examination of Mr. Cryan at this time?
22 Mr. Yale?

23 -----

24
25

1 Dr. Cryan - Cross - by Mr. Yale

2 CROSS-EXAMINATION

3 BY MR. YALE:

4 Q. Good afternoon.

5 A. Good afternoon, Ben.

6 Q. Ben Yale on behalf of Select Milk
7 Producers and Continental Dairy Products. I
8 got a small issue because it was kind of a
9 potpourri, so we will kind of balance it out.

10 Your testimony suggested that -- I
11 guess it doesn't really suggest -- the 6.5
12 percent has been the historic level that the
13 Department issues, and you have explained how
14 to, rather than look at all the solids nonfat,
15 to look at just protein, and you derived this
16 2.25 percent; is that correct?

17 A. Right.

18 Q. Okay. Do you have any reason why
19 the 6.5 percent of solids nonfat and now the
20 2.25 percent of the protein is an appropriate
21 number? How do --

22 A. Are you asking why we don't pursue
23 a --

24 Q. A different number.

25 A. A different number, something that

1 Dr. Cryan - Cross - by Mr. Yale
2 is not equivalent to 6.5 percent?

3 Q. Right.

4 A. Well, I guess what it comes down to
5 is that we weren't really looking to, you know,
6 to -- we weren't really looking to change
7 things. We were looking to fix what we've got.

8 We were really looking to clean up
9 the current standard, the -- there may be an
10 argument to -- with new technology, that there
11 may be -- it may be easier to develop products
12 that are under that standard. However, I don't
13 believe there's a substantial record to
14 demonstrate that yet.

15 Q. Which I think, and I'm not trying to
16 speak for the Department, but kind of the
17 question asked of Hollon leads up to that, at
18 what point and how rapidly does the industry
19 then respond to such a technology that comes up
20 and say, for example, is able to provide any
21 competitive product of 1.8 percent protein?

22 Is that just a situation that would
23 come back and ask for a new number? Is that --

24 A. I believe if the -- if the
25 circumstances arose that there was reason to

1 Dr. Cryan - Cross - by Mr. Yale
2 believe that a product of 1.8 percent protein
3 threatened to undermine the fluid milk product
4 definition, then it would be appropriate to
5 come back for a new hearing.

6 Q. Okay. So the primary role of this
7 number is a protection of the existing Class I,
8 not just -- that's the primary role; is that
9 correct?

10 A. Right. It represents -- it
11 represents the status quo rather than any
12 substantial basis for that number itself. We
13 presume that the record at the time it was
14 established is reasonable.

15 Q. Are you aware of any products that
16 are currently being marketed that use milk
17 protein in a beverage that would not come under
18 this definition?

19 A. I am not aware of any products that
20 would -- I'm not aware of any products whose
21 current classification by the USDA would
22 change. There may be some, but I'm not aware
23 of any.

24 Q. Are you aware of any that if it were
25 dropped to 2 percent or 1.5 percent that it

1 Dr. Cryan - Cross - by Mr. Yale

2 would change?

3 A. I think there are a number of
4 products that are just below the standard. At
5 the time that the standard was implemented --
6 it's my understanding at the time the standard
7 was implemented, there were no products near
8 the standard, near that 6.5 percent but that
9 category of products developed on the basis of
10 that.

11 I don't know that those products
12 would continue to be manufactured if the
13 standard were reduced. I don't know where the
14 sales would move.

15 Q. I didn't ask my question right, so I
16 want to try this a different way.

17 True protein, we are talking about
18 the percent of protein in the product, are you
19 aware of any products currently being marketed
20 as a beverage that contain less than two
21 percent true protein?

22 A. Yoo-Hoo has a small line.

23 Q. Do you know what the percentage is?

24 A. I don't have that with me, no.

25 Well, I do have it. Let's see. It must be

1 Dr. Cryan - Cross - by Mr. Yale
2 about -- give me a moment. It must be about
3 27 -- about 27 percent protein.

4 Q. Does that represent the highest --
5 other than those who are like the Carb
6 Countdown and the others, but would that
7 represent the high end of those that are using
8 some dairy protein but not a significant
9 amount?

10 A. No. There's a range of products
11 that -- my statement includes a table, and it
12 shows a selected number of products that range
13 from the 80 'N Sunny, which is a combination of
14 fruit and milk, and Yoo-Hoo, which both have
15 about somewhere in that neighborhood of
16 three-quarters of a percent of protein up to --
17 up through a number of coffee drinks that are
18 relatively close to the standard, as are
19 Hershey's chocolate drink and a few similar
20 products that are very close to the standard.

21 Q. While in answer to the prior
22 question you did some math off of this table,
23 right, to approximate the percentage of protein
24 in Yahoo?

25 A. Yoo-Hoo.

1 Dr. Cryan - Cross - by Mr. Yale

2 Q. Yahoo we search, Yoo-Hoo we drink.

3 A. Yes.

4 Q. Can you explain what the math was so
5 that we have that in the record and be able
6 to --

7 A. Well, in this case, the table I have
8 is I've shown these products on the milk
9 equivalent on a protein basis where I took the
10 crude protein measures that are on the labels
11 and the labeling standards, and I took whatever
12 those protein standards -- whatever that
13 protein test was, labeled protein test of its
14 product, and divided it by the standard protein
15 content of producer milk according to the
16 USDA's nutritional database.

17 Q. Okay. But looking here where it
18 says milk equivalent protein basis, for
19 example, Starbucks Frappuccino, coffee-flavored
20 substitute, 72 percent --

21 A. Those are necessarily they are
22 approximations because the grams -- the protein
23 content is listed in grams.

24 Q. Right.

25 A. So you can sort of jump from seven

1 Dr. Cryan - Cross - by Mr. Yale
2 grams to eight grams because not all of -- not
3 all of these products have the same serving
4 size, you don't get the same jump with all of
5 products.

6 Q. But with this number, the
7 72 percent, can I compute the approximate
8 percent of protein in the product based on the
9 volume or the weight?

10 A. Approximately, yes.

11 Q. How could I do that?

12 A. For the percent or the --

13 Q. So that I can be able to -- you
14 indicated --

15 A. The percent of the total line?

16 Q. You said, for example, Yoo-Hoo you
17 thought was about .7 percent protein?

18 A. Right.

19 Q. And --

20 A. What I did for that was I started
21 with 3 percent -- about 3 percent -- this is
22 approximations, about 3 percent protein in
23 milk, and that times the percentage is being
24 roughly the protein content of each of these
25 products.

1 Dr. Cryan - Cross - by Mr. Yale

2 Q. Three times .35 would give me --

3 A. Three times .35 would give you about
4 1 percent.

5 Q. Okay. And down here where the
6 Yoo-Hoo chocolate drink, 24 percent, three
7 times that would give you .75?

8 A. Yes.

9 Q. Should it be more than 3.1 times
10 that rather than the 3?

11 A. Well, it's -- I believe that this
12 is -- this is for whole milk.

13 Q. Which is 3.1; isn't it? Or is that
14 right?

15 A. It's -- I don't know if it would be
16 about 2.9, I think.

17 Q. Okay.

18 A. Skim would be about 3.1. So I use
19 three as a useful approximation. Many of these
20 are necessarily approximations because of the
21 limitations of the nutritional data in
22 measuring a full gram in a relatively small
23 serving size.

24 Q. So then in doing that, if one looks
25 up here at the Starbucks Frappuccino, we are

1 Dr. Cryan - Cross - by Mr. Yale
2 going to be looking at approximately
3 3 percent, right, protein?

4 A. The Frappuccino?

5 Q. Yes. The coffee flavored in the
6 first one.

7 A. It would be -- it would be about
8 2.2. It would be just about --

9 Q. I'm sorry, 2.2. So depending on --
10 this one here would become very close to the
11 2.25 percent; right?

12 A. Pretty close.

13 Q. Okay. Is there a -- so I
14 understand, your rationale for them not
15 including the Starbucks Frappuccino is because
16 it's not included there now, and your purpose
17 is not to add any new products that would be
18 regulated?

19 A. As I have testified, the problem
20 I've testified about is a problem of changing
21 technology and changing product compositions.

22 Most of these products -- most of
23 the products that are close to the limit,
24 they -- when they use milk ingredients, they
25 essentially are using milk. They are not using

1 Dr. Cryan - Cross - by Mr. Yale
2 fractionated proteins. As a result, they would
3 not be affected by the change in the
4 accounting.

5 Q. Okay.

6 A. Because what we are really talking
7 about -- what I'm really testifying about today
8 is an accounting problem.

9 Q. Why do you say it's an accounting
10 problem?

11 A. Because we have been accounting for
12 these volumes on the basis of nonfat milk
13 solvents. We have been accounting for them and
14 defining them on -- we should be defining them
15 on the basis of the valuable component, which
16 is protein.

17 Q. Very good. On that basis, then,
18 when -- I use that word "when," as if it's
19 going to happen but it probably will -- but at
20 this point most of the protein products we have
21 seen, they either use the casein products in
22 total or they use the whey proteins, okay, and
23 the question comes with the use of the whey
24 protein isolates.

25 By the way, let's get some -- can

1 Dr. Cryan - Cross - by Mr. Yale
2 you help me define, the record doesn't really
3 show what the three different types of proteins
4 are so that it's clear on the record. What is
5 a -- what is a whey protein?

6 A. A whey protein is a protein
7 contained in whey. Whey is, as I define the
8 product, of the coagulation of cheese.

9 Q. Okay. And the casein proteins are
10 what?

11 A. Casein proteins are the proteins
12 that remain in the cheese matrix when the
13 process is completed.

14 Q. Or the casein micelle?

15 A. Casein micelle?

16 Q. Micelle.

17 A. I don't know what that is.

18 Q. Then sometimes whey proteins are
19 called free proteins because they are not
20 connected to each other, they seem to flow.
21 Have you ever heard that term?

22 A. I haven't. I'm not a dairy
23 scientist.

24 Q. Whey protein isolates, what is your
25 understanding of that?

1 Dr. Cryan - Cross - by Mr. Yale

2 A. When the whey is separated from
3 primarily the lactose in order to -- much of
4 the standard is for whey. I think it's over
5 90 percent, something like 90 percent protein.
6 I don't know if that's the correct number. But
7 something like 90 percent protein from whey
8 would be considered a whey protein isolate.

9 Q. Let's move away from dairy science
10 then, sir, get into another area. I wanted to
11 change subjects here.

12 You indicated that the whey protein
13 is to be used as a basis to determine whether
14 or not the product is Class I or not; is that
15 right?

16 A. That's right.

17 Q. So I understand it, the purpose of
18 that is that a product would not be able to be
19 formulated to replace some of the true protein
20 with the whey protein for purposes of staying
21 below the 2.25 percent?

22 A. Right.

23 Q. All right. But you are only going
24 to price the true protein and not the whey
25 protein?

1 Dr. Cryan - Cross - by Mr. Yale

2 A. Right.

3 Q. Okay. Now --

4 A. No, I'm sorry. It's not true
5 protein. It's all true protein. What we are
6 talking about -- I guess what we are really
7 talking about is complete proteins other than
8 whey proteins. Any proteins other than whey
9 proteins. I'm not sure if there is a term that
10 describes that other than to by exclusion.

11 So we would price all dairy proteins
12 other than whey proteins, but we would count
13 all dairy proteins to determine -- in order to
14 qualify a product as Class I or not.

15 Q. Let me ask you this question. I
16 lied to you, I'm going to go back to dairy
17 science again so --

18 Is it your understanding that if
19 there is no cheese process and no coagulation
20 of the cheese, that there are no whey proteins
21 in the milk?

22 A. That is my understanding, and that
23 would be my preference if the decision
24 specifies that.

25 Q. All right. Because if that's not

1 Dr. Cryan - Cross - by Mr. Yale

2 the case, then the whey proteins actually do
3 exist in the milk --

4 A. The same proteins that are in whey
5 do exist in the milk, but to my understanding,
6 they are not whey proteins until they are
7 derived from the cheese-making process.

8 Q. And I want to make this clear,
9 because those same proteins that we did not do
10 the cheese coagulation, did not create the whey
11 proteins, but those proteins do exist with the
12 casein proteins in natural milk, it's not your
13 position that in determining whether or not the
14 2.25 percent or the pricing is done, that if
15 it's all that milk, that even those proteins
16 need to be included in the pricing; is that
17 right?

18 A. That's right. Absolutely.

19 Q. It's only if they are whey proteins
20 which you define as the byproduct of the
21 coagulation of the cheese?

22 A. That's right. That's very important
23 to make that distinction.

24 Q. Now, there's two issues I want to
25 bring up with that that I want to also make

1 Dr. Cryan - Cross - by Mr. Yale

2 clear.

3 Are you aware of the fact as we have
4 it now that reconstituted milk, that the plant
5 that produces the powder or the reconstitution,
6 that there's a choice of what order that the
7 milk is pooled under is Class I?

8 A. I was not aware of that until a
9 discussion less than two hours ago.

10 Q. Okay. Now, you are not suggesting,
11 are you, that although the whey is included in
12 the Class I, that it can be used to allow the
13 area in which produces the whey to claim the
14 right to that Class I proceeds in the pool, are
15 you?

16 A. No.

17 Q. All right. So there's going to be
18 no change there, it will be the plant that has
19 the root distribution -- produces the product
20 and has the root distribution in the marketing
21 area; right?

22 A. If they are -- again, I'm not aware
23 of that. If I accept the assertion that those
24 provisions exist for the plant shipping, the
25 reconstituted ingredients to have the choice of

1 Dr. Cryan - Cross - by Mr. Yale
2 where to pool that milk, I would say --
3 accepting that that's the fact -- I would say
4 that it would be very important to define that
5 as only applying to use of ingredients that are
6 actually counted in the price of the Class I
7 milk, that there would be no, you know, no
8 back-door way for unvalued components to be
9 used as the basis for capturing Class I value
10 for market that shipped whey. So I would agree
11 with that.

12 Q. Okay. Now, you also indicated in
13 your testimony that part of the reason that you
14 don't want to price the whey proteins is that
15 they are priced already in the Class III.

16 A. Well, that requires a little bit of
17 explanation.

18 The problem is not so much that they
19 are priced already because, as you know,
20 Class IV ingredients have also been priced, but
21 for Class IV ingredients, it's easier to
22 identify the value that's been assigned to the
23 ingredients ahead of time and talk about an
24 up-charge to Class I.

25 With the whey, whey has been priced

1 Dr. Cryan - Cross - by Mr. Yale
2 through the Class III formula, but the share of
3 the value associated with the whey is very --
4 would be very hard to identify because the
5 whey -- you know, the Class III components, you
6 price the protein, some of that protein ends up
7 in the whey. The other solids are based on the
8 whey price, but they are only applied to
9 nonprotein and components.

10 So it's establishing an up-charge
11 for whey for Class I is a very, very
12 involved -- very problematic. It's very
13 difficult to say how we are going to do that.
14 I think the cleaner thing, since it's a
15 distinct product and a distinct ingredient that
16 is not a wholly effective substitute for other
17 dairy ingredients in fluid milk, the reasonable
18 thing is to not price it.

19 Q. I don't recall -- you were not
20 involved in the 2000 proceedings to establish
21 the current make allowances of yields and stuff
22 for Class III?

23 A. I was working for the Marketing
24 Administrator in Atlanta, so my involvement in
25 that was a little different.

1 Dr. Cryan - Cross - by Mr. Yale

2 Q. Right. So I want to ask the
3 question, you can tell me whether you can
4 answer it or not, but isn't it fair to say that
5 the whey proteins in the way the formula was
6 established for Class III are not included in
7 the price of the Class III?

8 A. No, I wouldn't say that. The
9 complicated thing about the Class III is that
10 the -- that the proteins are being priced on
11 the basis of the cheese yield of the milk.

12 Q. Right.

13 A. And the whey value -- the price of
14 whey that feeds back into the Class III, the
15 overall Class III value, includes a whey
16 protein component.

17 Most of the larger part of the value
18 of whey is the value of the protein in the
19 whey, but because of the -- as I was saying,
20 because of the pricing formulas, they just used
21 that cheese value for all the protein on tests
22 for the milk, and they applied the whey value,
23 which includes some of the protein value, unto
24 the other science.

25 So they balanced -- they roughly

1 Dr. Cryan - Cross - by Mr. Yale
2 balance out, but they are not exactly
3 calibrated, but they balance out closely enough
4 to offer a Class III value. So I wouldn't
5 say -- there isn't anything that's missing from
6 the overall formulation, they are just not
7 always -- they are not calibrated on a very --
8 they are not calibrated exactly right.

9 Q. The 5.9 that's used basically
10 reflects the value or the amount of lactose and
11 minerals in the milk; right?

12 A. The approximate volume of --

13 Q. Approximate volume. But the protein
14 formula that you mentioned has implicit
15 90 percent protein utilization in the formula;
16 are you aware of that?

17 A. I believe that -- I vaguely recall
18 that, but I wouldn't swear that that's correct.
19 Yes.

20 Q. And that that other 10 percent
21 represents the whey protein?

22 A. That's right, and the value -- the
23 approximate value of that whey protein is
24 captured in the other solids price in the milk.

25 Q. I want to move to another topic

1 Dr. Cryan - Cross - by Mr. Yale
2 here. I want to talk about the
3 hermetically-sealed issue.

4 Frankly, I am a little confused. I
5 think -- I'm going to try to state what I think
6 you were trying to say and see if I am correct.
7 I'm not trying to argue against you, I just
8 want to make sure I understand it.

9 The hermetically sealed and the meal
10 replacement have to come together, because if
11 you use them individually, you might have some
12 unintended results? Is that in that exclusion
13 or am I missing something?

14 A. I think until we -- until we
15 establish a better definition for meal
16 replacement, it's -- it is an important
17 distinguishing characteristic of the product to
18 be hermetically sealed.

19 I believe that that requirement was
20 established originally for a couple of reasons.
21 First of all, if it's durable, it is less
22 dependent on the immediate fresh milk supply.

23 JUDGE DAVENPORT: Speak a
24 little more directly into the microphone. If
25 you can, keep your voice up.

1 Dr. Cryan - Cross - by Mr. Yale

2 THE WITNESS: Okay. I'm
3 losing my voice already.

4 And the meal replacement certainly
5 as we -- as I discussed, dropping in the meal
6 replacement requirement would allow for any
7 product that is essentially -- well, that is
8 hermetically sealed to become Class II just on
9 that basis.

10 You know, as processing technology,
11 as packaging technology evolves, that could be
12 everything. We could see -- in ten years, we
13 could see all of our milk being packaged in
14 shelf-stabling packaging. That obviously would
15 undermine the Federal Order Classified Pricing
16 System.

17 Q. So isn't it really to say that it's
18 a product that is hermetically sealed that is
19 used for meal replacement is really the
20 definition that you are -- so that the
21 hermetically sealed is limited by the uses to
22 which it --

23 A. That's right. So that there would
24 be no change in the current definition -- in
25 the current exemption for meal replacement and

1 Dr. Cryan - Cross - by Mr. Yale
2 infant formula.

3 Q. And does National Milk have a
4 position on the proposal that a meal
5 replacement could be defined by anyone that
6 contains at least 25 percent of the recommended
7 daily adult allowances of the primary vitamins
8 and nutrients for a diet?

9 A. I don't know. We have a position
10 against any weakening of the exemptions.

11 Q. So if this isn't a weakening, it
12 might be?

13 A. We don't have a position on it.

14 Q. And this is kind of a follow-up on
15 two questions I asked of Mr. Hollon.

16 You would agree, though, that since
17 2000, there has been significant change in the
18 market of products that are using the new
19 technologies, is that correct, such as Carb
20 Countdown and the like?

21 A. They don't represent a large share
22 of the market, but they sure represent a large
23 increase from the almost nonexistent base.

24 Q. I think your statement was that they
25 moved from, paraphrasing, moved from the

1 Dr. Cryan - Cross - by Mr. Yale

2 theoretical to the actual?

3 A. Yeah.

4 Q. From the textbook to the
5 marketplace?

6 A. I would say that is an effective
7 paraphrasing of what I said.

8 I think the experience in Finland,
9 what little I understand about it, what little
10 I see about it in the magazine article,
11 indicates a substantial potential which has
12 always been -- theoretical potential for
13 carb-reduced and low-carb beverage system
14 becomes as commonplace as low-fat, you know,
15 skim milk.

16 Q. The potential would be that you
17 could have a 3.1 percent protein and no lactose
18 and they could add Splenda or something, some
19 artificial sweetener, and have a product that's
20 very comparable but noncompetitive with regular
21 milk?

22 A. I would say that the product that
23 has been engineered by other of your clients --
24 that is the client that you work for now,
25 Select -- they have reduced the lactose,

1 Dr. Cryan - Cross - by Mr. Yale
2 increased the protein, and used lactase enzymes
3 to break down the remaining lactose so that it
4 has a -- which is a much sweeter product, much
5 sweeter sugar. They have not attempted to --
6 they made a simpler product and have not
7 attempted to make it a Class II product, and it
8 is very close to milk in my opinion.

9 I tasted one of the prototypes, and
10 it was much closer to milk than any other
11 low-carb or low-lactose milk substitute that I
12 have tried. It is probably close enough --
13 it's certainly close enough that with any
14 flavoring, it would be -- you wouldn't notice
15 the difference.

16 Q. You are aware that that's being
17 priced as Class I at this point?

18 A. I recognize it is, yes.

19 Q. One final question, issue.

20 In determining the proteins to use
21 for this Class I, the fact that the plant would
22 use imported caseins, should that have any
23 impact on the decision whether or not you
24 should consider it Class I?

25 A. For a Federal Order pricing?

1 Dr. Cryan - Cross - by Mr. Yale

2 Q. Yes.

3 A. I think for Federal Order purposes,
4 it would be reconstitutionally like any other.
5 I think the issue in that case would be Grade A
6 requirements and public health requirements
7 rather than Federal Order issues.

8 Q. Now, that leads me to another
9 question. I was going to bring it up with
10 someone else, but since you brought it up, I
11 will bring it up.

12 Does the product still have to be a
13 Grade A product to be considered Class I under
14 your proposal? Is that a necessity?

15 A. I don't think so. I mean, we
16 classify products that are not Grade A
17 products. I don't think there's a reason for
18 that requirement since we are talking about
19 pooling plants, regulated plants, what they
20 use, what they produce.

21 I guess in theory a plant could be
22 established that could produce a non-Grade A
23 product, and they could receive Grade B milk in
24 order to avoid Federal Order regulation. I
25 don't know whether that would be worth it.

1 Dr. Cryan - Cross - by Mr. Yale

2 Q. But my question is that some of
3 these products might not have a Grade A because
4 of their importation or other -- dried products
5 might not be Grade A, but they are still able
6 to sell them, a beverage possibly at the
7 2.25 percent protein level. Does the fact that
8 it does not have a Grade A designation, does
9 that mean that the Department should not
10 consider that a beverage? That's my question.

11 A. No.

12 Q. No, they should not look at that
13 issue?

14 A. It should be considered a beverage.
15 I mean, if you use non-Grade A ingredients for
16 fortification and reconstitution and thereby
17 avoided Federal regulation, that would have a
18 tendency to undermine -- lead to inequitable
19 pricing.

20 MR. YALE: I have no other
21 questions. Thank you.

22 JUDGE DAVENPORT: Mr. Tipton?

23 -----

24

25

1 Dr. Cryan - Cross - by Mr. Tipton

2 CROSS-EXAMINATION

3 BY MR. TIPTON:

4 Q. Hi, Roger.

5 A. Hi, Tip.

6 Q. I got a number of questions. I
7 would like to start with a more general
8 question and go to some more detailed ones.

9 But earlier, and I think you talked
10 about it, too, was the basis for classification
11 being form and use? Did you talk some about
12 that?

13 A. (Witness nods).

14 Q. The discussion that I hear is people
15 talking about form and use, and form they often
16 talk about in the case of Class I, that being
17 liquid, and use is use as a beverage is kind of
18 the general characterizations, I gathered.

19 Now, I would like to ask you to talk
20 a little bit about what is liquid? When is
21 something not liquid?

22 A. I believe there is a definition in
23 the Order about when it's fluid and when it's
24 not. I don't know the number off the top of my
25 head. 20 percent solids, 40 percent solids. I

1 Dr. Cryan - Cross - by Mr. Tipton

2 forget. I don't -- I couldn't tell you the
3 exact definition.

4 Q. If I have a product, I'm putting up
5 a product, and the product is very viscous, and
6 it is drinkable in the sense that if you tip it
7 up and hold it there for a while, the product
8 will flow out of the container, is that liquid?
9 Is that a beverage?

10 A. I suppose it depends on how you are
11 marketing it.

12 Q. No. You are one that's saying, and
13 others of yours saying, that if it's a
14 beverage, if it's intended for a beverage, it's
15 Class I. I'm trying to get at a question of
16 how do you make that determination?

17 A. It's based on form and use, and if
18 the product is sold as a beverage, it's a
19 beverage.

20 Q. Well, most of those aren't
21 necessarily sold as beverages, the consumer
22 decides what they actually do with the product.
23 A lot of milk is not consumed as a beverage
24 that's sold to the consumer in containers.
25 There are a lot of other products that are sold

1 Dr. Cryan - Cross - by Mr. Tipton
2 to consumers in containers that might be a pint
3 container or might look like a bunch of cream
4 products that are sold to consumers that are
5 not intended as beverages but they kind of look
6 like a milk container.

7 How do you make that distinction?
8 What is a beverage?

9 A. I think it's -- I think most people
10 recognize when something is being sold as a
11 beverage.

12 Q. Tell me what that difference is.

13 A. It's in a bottle as a beverage.
14 It's how things are sold to be used. I mean,
15 that's -- I think it's pretty clear.

16 Q. Yeah. When you say form, what do
17 you mean by form? When you say classified
18 according to form, what do you mean by that?

19 A. I think -- by form, I mean that I
20 believe that the standard should be based on a
21 physical compositional basis such as
22 2.25 percent protein minimum, less than
23 9 percent butterfat and so forth.

24 Q. And use?

25 A. Beverage use.

1 Dr. Cryan - Cross - by Mr. Tipton

2 Q. Okay. Now, let's go back to form.
3 When you talk about form, I'm going to come
4 back to this viscous product. We used to talk
5 about the straw theory, can you suck it through
6 a straw? If you can, it must be liquid enough
7 that it could be used as a beverage.

8 How do you determine that? How does
9 the Market Administrator determine that in a
10 consistent way, is it drinkable?

11 A. Let me look it up for you. It
12 becomes concentrated when it has more than
13 25.5 percent total milk solids. So according
14 to the Federal Order, it's a fluid milk -- it
15 can be a fluid milk product up to 25.5 percent
16 total milk solids. Anything over that is
17 concentrated milk.

18 Q. And accepted with a Class I?

19 A. I can't say that for sure. There's
20 a lot of folks who could answer that question.
21 I wouldn't say that for sure, but that would be
22 my assumption.

23 Q. So a product, using that definition,
24 a product that has 25 percent total solids,
25 total milk solids, I presume, is not a

1 Dr. Cryan - Cross - by Mr. Tipton

2 beverage?

3 A. Apparently not.

4 Q. Now, the thing that always confuses
5 me when you talk about form and use, the
6 comparison usually goes back to milk, but if
7 you didn't already have milk in Class I, what
8 is the basis for putting it in Class I?

9 It's not just form and use because
10 other products have form and have specific
11 uses. So that is not a very differentiating
12 criteria. So if you are going to start, what
13 is the basis for putting it in Class I?

14 A. What is the reason for classifying
15 milk pricing right from the start?

16 Q. What is the reason for putting it in
17 Class I?

18 A. What is the reason for -- that's the
19 same as saying, what is the reason for having
20 Class I? Is that the question?

21 Q. That could be the question. If you
22 want to answer that, go ahead.

23 A. The Federal Orders were established
24 to provide -- to help insure a steady, reliable
25 supply of fluid milk for the public, and in

1 Dr. Cryan - Cross - by Mr. Tipton
2 order to minimize the instability of milk
3 marketing within city markets, and now today in
4 larger regional markets, the proceeds from the
5 higher value Class I milk were shared.

6 There was a -- it was established
7 before the Federal Orders were implemented that
8 there's a higher value and a higher cost to
9 supplying a fluid plant than to supplying
10 manufacturing plants, and that that extra value
11 was -- is shared within the market, and the
12 higher value for Class I is to compensate the
13 market for supplying on a steady basis the
14 beverage milk market.

15 Q. If you thought that -- the Class I
16 price, do you think that generates more revenue
17 than if you didn't have a Class I -- didn't
18 have Class I?

19 A. Yes.

20 Q. If you thought a product or
21 products, or Class I for that matter, the whole
22 category, didn't generate more revenue for
23 dairy farmers, would you keep it?

24 A. I would have to talk to my Board
25 about that. But right now, our position is

1 Dr. Cryan - Cross - by Mr. Tipton
2 that -- I maintain that Class I does enhance
3 producer revenue. I don't know that that is
4 necessarily a relevant point for this
5 proceeding, but I believe it does.

6 Manufactured product prices are
7 downsize limited by world markets and by
8 support prices, and for no other reason, it's a
9 clear bump to producers having Class I
10 differentials.

11 Q. So you think the current Class I
12 prices enhances producer revenue?

13 A. I believe they do. But I do not
14 necessarily believe that that's relevant to
15 this hearing.

16 Q. Now, if you add products to that
17 Class I definition that do not enhance producer
18 revenue, what do you think about those? Should
19 they be added?

20 A. What is relevant is the degree of
21 similarity in substitution form and use between
22 the larger grouping of products that we
23 think -- because it's important to maintain a
24 clear-cut physical compositional basis for
25 defining Class I, and may or may not have

1 Dr. Cryan - Cross - by Mr. Tipton
2 products that are, individual products, that
3 would be better one way or the other.

4 But the underlying principle is to
5 clarify form and use as the basis for the
6 Class I classification.

7 Q. If I heard you correctly, and
8 correct me if I didn't, but you would say the
9 basis for having that product that does not
10 enhance producer revenue is to protect the
11 Class I uses that you have?

12 A. I do not -- well, it -- okay. I
13 have -- I have looked over the testimony that
14 we have that this is all leading up to, and
15 more important than the impact on total
16 producer revenue associated with selling more
17 product, or at least as important, is the
18 impact on producer revenue per hundredweight.

19 One can have a situation where
20 producers have \$100 million in revenue and
21 it's -- they are getting the equivalent of \$10
22 hundredweight for that milk. And by adding
23 products that substitute for other products,
24 and to have some net increase in the volume of
25 milk sales, you might have an extra -- you

1 Dr. Cryan - Cross - by Mr. Tipton
2 know, might have an additional million dollars
3 in sales, but because the net impacts only pay
4 producers another \$2 hundredweight for those
5 additional million pounds of sales.

6 In that case, their total revenue
7 has been increased but their well-being has
8 not. But there is a difference between what is
9 good for producers and what maximizes the total
10 producer revenue.

11 If you work twice as much for 10
12 percent more salary, you are not getting a good
13 deal.

14 Q. So you would favor putting in
15 Class I products that you know are going to
16 reduce producer revenue?

17 A. That are going to reduce producer
18 revenue? As I said, it all depends on the
19 circumstances. It depends on more than just
20 that simple fact. It's not that simple.

21 Q. Are there any of these products that
22 you are proposing to put into Class I?

23 A. We are not proposing to put anything
24 into Class I because right now, according to
25 our interpretation of our proposal, there are

1 Dr. Cryan - Cross - by Mr. Tipton
2 no products that will change classification
3 from the way the USDA is presently treating
4 them.

5 Q. How is USDA -- on your last sheet of
6 your paper, you have Starbucks Frappuccino
7 coffee flavored, and I think I understand what
8 that milk equivalency protein basis is at
9 72 percent, but I believe -- would that not
10 make that possibly a Class I product?

11 A. Well, it's an approximation. So it
12 may round up to appear to be Class I, but I
13 believe it isn't.

14 Q. So would you change your protein
15 level if that would be the case here? Because
16 that is the case. I think if you multiply it
17 out, that product would probably be in Class I.

18 If your proposal would put that in
19 Class I, would you change the protein level?

20 A. It shouldn't change the -- it
21 shouldn't be in Class I because it's using milk
22 in natural proportions. So that is probably a
23 rounding issue that makes it appear to be over
24 the limit.

25 Q. But if it is not a rounding issue?

1 Dr. Cryan - Cross - by Mr. Tipton

2 A. Would we change our proposal?

3 Q. Yes.

4 A. No.

5 Q. So you would put it in Class I?

6 A. I think -- I don't think I would be
7 the final word.

8 Q. Your word wouldn't be the final
9 word?

10 A. And I don't think that a product --
11 most of these products that are just below the
12 level can be adjusted up or down in small
13 amounts anyway.

14 So, again, I believe this is a
15 rounding issue that makes it appear to be
16 Class I because I know that the Market
17 Administrator in Kansas City and other markets
18 where this is being produced are vigilant about
19 this type of thing, and they wouldn't allow a
20 Class II product to contain a Class I level of
21 nonfat milk solids.

22 Q. It's not Class I now because of the
23 6.5 percent nonfat solids standard. But
24 apparently under your proposal, as you are
25 suggesting it, which is the milk equivalency of

1 Dr. Cryan - Cross - by Mr. Tipton
2 protein, it could go to Class I. So that's
3 part of the problem here.

4 You talk about the 2.25 percent
5 protein level that would become the -- I
6 understand you would eliminate the 6.5 percent
7 of nonfat solids, that's your proposal?

8 A. That's our proposal.

9 Q. And the 2.25 would mean that you
10 would be classifying some products in Class I
11 that -- because that's based off of the
12 6.5 percent nonfat solids, and skim milk to be
13 skim milk has got to have approximately the
14 9 percent, or to be skim milk, it has to be
15 8.25 under the Federal regulations.

16 If -- so you would have products
17 that would get picked up in Class I, but would
18 you prohibit them from calling them milk
19 because they wouldn't meet the standard, but
20 you process them like milk because you allege
21 that they compete with milk; is that correct?

22 A. There is -- the connection -- there
23 is no connection today -- there are products
24 like Skim Deluxe which are not allowed to be
25 called milk even though they essentially

1 Dr. Cryan - Cross - by Mr. Tipton

2 contain as much as milk does.

3 There is a wide variety of products
4 that are in essence substitutes for milk that
5 contain practically the same thing as milk that
6 are clearly Class I products according to our
7 current standards that are not allowed to be
8 called milk.

9 So the idea that -- milk is a very
10 basic product, very basic product. It's the
11 lactose secretion of bovine, that's what it is.
12 Once you start modifying it, start adding
13 modifiers, and once you substantially modify
14 it, you don't call it milk anymore, and that's
15 appropriate.

16 However, there's a big difference
17 between saying this is Class I or this is
18 Grade A or this can be called milk. There's --
19 the connection -- I don't really see that the
20 connection is so tight that I'm not sure where
21 you are going with that.

22 Q. Well, I am going with you're
23 proposing to expand the coverage of a lot of
24 different kinds of products. You are also
25 proposing to --

1 Dr. Cryan - Cross - by Mr. Tipton

2 A. No, we are not proposing to expand
3 the coverage of anything. We don't see any
4 products that we are going to change the
5 regulation. We are looking to clarify and
6 clean up the accounting currently under the
7 definition currently so that we can put some
8 problems to bed.

9 Q. Okay. So then why not allow those
10 other products that everybody keeps talking
11 about that are coming down the pike because of
12 the technology that you testified to, why not
13 allow those to remain wherever they are?

14 If you are trying to get one
15 product, why don't you get that one product
16 instead of applying the regulation to a bunch
17 of products that don't even exist?

18 A. When you talk about it being one
19 product, you are talking about it being one
20 product in the same way that skim milk is one
21 product.

22 It's a large category that is going
23 to just continue to grow and ultimately will
24 be -- ultimately could be a very substantial
25 share of fluid milk sales.

1 Dr. Cryan - Cross - by Mr. Tipton

2 Q. But it's not now, none of the
3 products are.

4 A. The carb-reduced and low-carb --
5 carb-free products are -- they are a reality,
6 and it makes much more sense to make a
7 regulatory change now and a accounting change
8 now when it's still a relatively small product
9 than to wait until every plant in the country
10 has invested in these things on the basis of
11 one -- the sooner we act on this, the better.

12 Q. Well, I can see that from your
13 viewpoint of being -- of wanting to protect all
14 of the Class I sales from competition, but in
15 the developing markets, might it not be better
16 to let them develop to see if they can gain
17 some market share before regulating?

18 A. There's no grounds for that kind of
19 exemption in the Act. There's no precedent for
20 that in Federal Order regulation. I don't see
21 the justification for that.

22 Q. Then you just wouldn't have to
23 change the Order. It's the way it is right
24 now. If you left it the way it is, that would
25 be the result.

1 Dr. Cryan - Cross - by Mr. Tipton

2 A. We are essentially leaving it the
3 way it is. There is an issue of whether
4 6.5 percent, 2.25 are appropriate or whether it
5 should be -- they should be lower.

6 We concluded that in order to
7 minimize the disruption, in order to simplify
8 this change, that we would pursue -- just
9 switch essentially the change in the accounting
10 rather than the change in the actual level.

11 We believe that that is more than
12 fair, more than reasonable, and we are sticking
13 to that.

14 Q. If -- I want to switch to a
15 different subject.

16 Who gets -- let's say that you are
17 making a product and using imported casein in
18 it, who gets the revenue under your proposal
19 when you calculate the protein equivalency and
20 charge the higher Class I price? Who gets that
21 revenue?

22 A. The up-charge would go into the
23 pool, the producer pool.

24 Q. Say they didn't produce milk, that
25 pool didn't -- no producer in that market

1 Dr. Cryan - Cross - by Mr. Tipton

2 produced the milk, but they get the benefit?

3 A. That's right.

4 Q. Isn't that very similar to putting a
5 tariff on it?

6 A. No.

7 Q. Why not?

8 A. Because it's a marketwide pooling
9 program.

10 Q. But you don't have to charge an
11 up-charge?

12 A. You don't have to use it for fluid
13 use, either.

14 Q. I know that. But if I bring it into
15 the United States and you are going to take
16 money on that product and put it into the pool
17 and not return it to the people who shipped
18 that product in, it seems to me you are
19 creating a barrier to that product.

20 A. If you were to -- if you were to
21 produce -- if you were to produce nonfat dry
22 milk in a plant in California and ship it to
23 Alabama and have it be reconstituted as a fluid
24 milk product, the same rules would apply to the
25 up-charge going to the producer pool.

1 Dr. Cryan - Cross - by Mr. Tipton

2 Q. I think -- I agree with that.
3 That's a very domestic view. But I'm talking
4 about imported products.

5 A. I understand you are talking about
6 imported products. But I'm saying the domestic
7 product is treated exactly the same as an
8 imported product.

9 So it is not a tariff, it is a
10 marketwide pooling program that has no -- makes
11 no distinction, no discrimination between
12 foreign and domestic product.

13 Q. I suspect you may be an expert in
14 this, if not, I suspect you might want to look
15 at the WTO rules because I suspect it has some
16 WTO problems doing that on the imported
17 products, but we will go on.

18 On the last page, you list a number
19 of products. Are these the -- how did you
20 arrive at that list? Are these the products
21 that are in the market now? Are there more,
22 are there less?

23 A. This is a sampling of products that
24 were of interest, that were the numbers -- the
25 relevant numbers were available to a large

1 Dr. Cryan - Cross - by Mr. Tipton
2 degree. It's not a thorough or comprehensive
3 list of products. It is a -- it addresses just
4 a handful of things that were known to me or
5 that I could find.

6 There's an Internet site called
7 bevnet.com, and they have information on a
8 number of specific beverages, and I found some
9 of the things on that. They detailed
10 nutritional and ingredient information.

11 I used those as much as I could, and
12 I also used labeling -- label information for
13 some of the products like Carb Countdown and
14 Hershey's milkshakes and Lactaid and
15 Frappuccino Double Shot.

16 Q. Do you know whether you or anybody
17 else, including the government, has a list of
18 the products that might be affected by these
19 proposals?

20 A. We don't have a list. No one has
21 brought to our attention any products that
22 might be affected. There may be products.
23 Nobody has told us definitely that there are
24 products.

25 One product has been suggested, but

1 Dr. Cryan - Cross - by Mr. Tipton
2 only as a possibility. We do not have a
3 comprehensive list. However, it is clear that
4 it is not a very large number of products, even
5 if there are some. To the best of our
6 knowledge, we are not certainly aware of any
7 product that would change regulation.

8 Q. So you don't think there are very
9 many products that are even on the market that
10 are competing, as you would say -- whether they
11 are or not is another question -- but those
12 products that you would put in Class I because
13 they are being sold as beverages that are not
14 Class I now? You don't think there are many of
15 those?

16 A. I don't believe there are any, but
17 there may be one or two we missed. I'm
18 interested to know if you have any.

19 Q. No, my question goes to the -- I do
20 know of a lot, but my question goes to the
21 issue of if you know -- you need to know who
22 you are going to regulate before proceeding to
23 propose the regulation, and I haven't been able
24 to find anybody so far that's got a list of
25 who's going to get regulated or who even

1 Dr. Cryan - Cross - by Mr. Tipton
2 potentially is to be regulated, so I'm asking
3 you if you got a list that would help identify
4 the universe of the products that are --

5 JUDGE DAVENPORT: That's been
6 asked and answered, Mr. Tipton.

7 MR. TIPTON: Excuse me?

8 JUDGE DAVENPORT: I believe
9 that's been asked and answered.

10 A. I would be happy to see your partial
11 list.

12 Q. I don't have one. I was asking for
13 yours.

14 A. You said you know of a lot that will
15 be regulated by this change. You just said
16 that.

17 Q. I said I knew a lot that are in this
18 category. Anyway --

19 With respect to whey, if there are a
20 number of beverages, many of them in the sports
21 drink area, that the only ingredient, only
22 dairy-derived ingredient, that they might
23 contain would be whey, how does your proposal
24 apply to that?

25 A. If they -- if their only dairy

1 Dr. Cryan - Cross - by Mr. Tipton
2 ingredient is whey, they might be considered
3 technically a Class I product but there
4 wouldn't be any pricing. They would not be
5 priced as a Class I product.

6 There would be no up-charge because
7 of the -- because they would in effect be
8 converted back to zero volume, the plant would
9 be unregulated because it would be under
10 150,000 pounds in Class I sales.

11 Those product pounds would all be
12 converted back to zero, and there would be no
13 regulation.

14 Q. But would they be subject to
15 reporting?

16 A. Only to satisfy the Market
17 Administrator that there was less than 150,000
18 pounds of sales.

19 Q. And would they be subject to
20 auditing?

21 A. I think it would be pro forma. I
22 don't think it would be --

23 Q. But they would be subject to those
24 requirements?

25 A. They would be subject only to the

1 Dr. Cryan - Cross - by Mr. Tipton
2 extent that they could demonstrate -- to my
3 understanding, only to the extent that they
4 could demonstrate their exemption. Exempt
5 plants only have to demonstrate that they are
6 exempt.

7 Q. So your intent would be that they
8 not be included under the Order?

9 A. That they not --

10 Q. Those plants --

11 A. That that volume not be regulated.
12 If the only product the plant was making that
13 contained dairy protein, or was a product that
14 contained only whey protein, then it would
15 not -- in effect, it would not be regulated.

16 It would be exempt as having less
17 than 150,000 pounds of Class I sales, and so it
18 would be exempted on a size basis.

19 Q. I have one other question, and I
20 want to go back to the list of the products
21 that you have in the appendix.

22 Do you know how well or how poorly
23 those products are doing? For example, Raging
24 Cow, do you regard that as a threat?

25 A. I believe it's off the market. I'm

1 Dr. Cryan - Cross - by Mr. Tipton

2 sure it's off the market.

3 Q. What about Jakada?

4 A. I believe that is off the market as
5 well.

6 Q. Swerve's off the market.

7 A. But I don't maintain that these are
8 threats. I maintain that these are Class II
9 products, and we don't propose to change the
10 regulation, the status of these products.

11 Q. But I understood you to say that you
12 wanted this action taken because you were
13 fearful there were other products that were
14 going to be developed that might come along the
15 pike, and these products have been on the
16 market but they haven't done well; correct?

17 A. But these products would not be
18 affected by our proposal.

19 MR. TIPTON: I think that
20 concludes mine.

21 JUDGE DAVENPORT: Very well.
22 Yes, sir.

23 -----

24

25

1 Dr. Cryan - Cross - by Mr. Leinsol

2 CROSS-EXAMINATION

3 BY MR. LEINSOL:

4 Q. You just answered the question
5 basically that naturally I'm very concerned
6 about my own plant, its future, so I would like
7 to make it very clear.

8 This is the product that I produced
9 about 14 years ago (indicating). It has about,
10 I calculate, about 4.5 percent milk solids,
11 nonfat milk powder, and about 1 percent whey
12 protein concentrate.

13 And your definition, will it affect
14 my product, would classify it as Class I or it
15 will stay Class II?

16 A. You said it's about 4 percent nonfat
17 milk --

18 Q. 4.5 and 1 percent solids. 5.5 and
19 one percent whey protein. Together it's 6.5.

20 A. If it's right at 6.5, part of the
21 component is -- part of the component is nonfat
22 dry milk and the other part is protein --

23 Q. It's 1.5 percent fat content, but
24 fat content is out of the definition.

25 A. Right. But the protein, is the whey

1 Dr. Cryan - Cross - by Ms. Grocholowski
2 protein concentrated?

3 Q. Concentrated 34 percent.

4 A. 34, it should be the same. There
5 should be no change.

6 Q. Should be no change.

7 A. You should be right at the same
8 level in terms of -- should be right on the
9 line, the same position for -- because 34
10 percent whey protein concentrate contains the
11 same proportion of protein --

12 Q. It would be excluded. I just wanted
13 to make sure. Thank you very much.

14 A. You're welcome.

15 JUDGE DAVENPORT: Ms.
16 Grocholowski.

17 -----

18 CROSS-EXAMINATION

19 BY MS. GROCHOLSKI:

20 Q. Okay. Mr. Cryan, is that -- did I
21 get that right?

22 A. Cryan, right.

23 Q. You state in your testimony that
24 form and use --

25 A. I'm sorry, I don't remember who you

1 Dr. Cryan - Cross - by Ms. Grocholowski
2 are.

3 Q. Deb Grocholowski, General Mills.

4 A. Thank you.

5 Q. You state in your testimony that
6 form and use is the primary factor in
7 determining classification; is that correct?

8 A. Correct.

9 Q. Okay. In considering use, I note
10 that you focus on whether a product competes
11 with fluid milk. For example, you cite the NPD
12 Group data that you say demonstrates that Carb
13 Countdown is used as a substitute for fluid
14 milk.

15 So can we agree that the NPD Group
16 data is a respected and widely used source for
17 this type of data?

18 A. Well, as the cross-examination
19 pointed out -- as I pointed out on
20 cross-examination or as I answered, the
21 questions are -- the questions are designed by
22 the people who commission the study. But
23 the -- but presumably the results --

24 Effectively, it's a survey
25 commissioned by DMI conducted by NPD. I think

1 Dr. Cryan - Cross - by Ms. Grocholowski
2 it's a good study. I think it demonstrates --
3 it's not perfect, but I believe it demonstrates
4 that most use is substituting for milk.

5 Q. So you and I can agree that NPD
6 Group does a pretty good job of putting this
7 kind of data together?

8 A. It seems to me they do, yes.

9 Q. You indicate in your opposition to
10 Proposal 8 that yogurt drinks are similar to
11 flavored milks and might be -- and must be a
12 close market substitute for flavored milks.

13 Now, do you have any consumer data
14 such as the NPD data to support this statement
15 with respect to yogurt drinks?

16 A. I do not have data with respect to
17 that, but they are -- but by form and use, they
18 are a beverage containing -- if they are in
19 Class I, they contain over 6.5 percent nonfat
20 milk solids, so in form and use, they are
21 Class I.

22 Q. If they are above the 6.5 percent?

23 A. Right.

24 Q. Is your position. But you don't
25 have any consumer data to show actually how

1 Dr. Cryan - Cross - by Ms. Grocholowski
2 yogurt drinks are used by consumers?

3 A. I do not.

4 Q. Okay. I also note from your
5 testimony that you do not oppose or you do not
6 have a specific paragraph opposing Proposal
7 No. 9. Does this mean that you support
8 Proposal No. 9? And if you would like, I can
9 read it for you.

10 A. Proposal No. 9 has such conditions
11 that would make it more restrictive than our
12 proposal because it indicates that it would
13 exclude products with no more than 2.2 percent
14 skim milk protein provided and it contains at
15 least 20 percent yogurt.

16 Anything with less than 2.2 percent
17 protein under our proposal would be Class II.

18 Q. I don't know if this was with the
19 commentary or not, but the No. 9 proposal would
20 not calculate whey, add whey into the protein.

21 A. Okay. That's a separate issue.

22 Q. Okay. Well, let's talk about whey
23 for a minute.

24 I note from your testimony that you
25 indicate that the value of whey is the

1 Dr. Cryan - Cross - by Ms. Grocholowski

2 protein -- the value of dairy components --

3 A. Of skim milk components. The
4 primary value of skim milk components is in the
5 protein, especially when it's still in the milk
6 and hasn't been separated because there's costs
7 associated with separation that didn't really
8 capture most of the value.

9 Most of the price of lactose is
10 associated with the cost of separating it out
11 from the other milk components.

12 Q. Are there other nutritional
13 differences between nonfat dry milk and whey
14 protein concentrate besides lactose? Let's
15 assume that we are comparing nonfat dry milk to
16 whey protein concentrate at 80 percent.

17 A. They have a different -- I'm sorry,
18 whey protein concentrate at 80 percent compared
19 to nonfat dry milk?

20 Q. Right.

21 A. If you take away the difference in
22 lactose, if you just look at the proteins, they
23 have a different -- they would have a different
24 profile. I guess, you know, in nonfat dry
25 milk, the proteins are about 80 percent casein,

1 Dr. Cryan - Cross - by Ms. Grocholowski
2 when in whey they are the other 20 percent. So
3 that exclusively, those are the other 20
4 percent.

5 Q. Is there a difference in the level
6 of calcium, potassium, phosphorus?

7 A. I don't know. I don't know.

8 Q. Do consumers drink milk to get other
9 nutrients like calcium, potassium, and
10 phosphorus?

11 A. They get it to -- they drink it to
12 get calcium. I'm not aware of issues of
13 phosphorus, and what was the other one?
14 Potassium?

15 Q. Calcium, potassium, phosphorus.

16 A. Okay. I presume from the line of
17 questioning that there is a higher level of
18 potassium and phosphorus in whey protein
19 concentrate than there is in nonfat dry milk.

20 Q. Well, I don't want to force out our
21 testimony too much, but there is at least ten
22 times the calcium in nonfat dry milk than there
23 is in whey protein concentrate.

24 One final note, and this isn't a
25 question, it's a clarification: Yogurt

1 Dr. Cryan - Cross - by Mr. Farrell

2 Q. And how about if the product used
3 was milk protein concentrate, how would the --
4 how would the casein and the whey portions of
5 that ingredient be treated?

6 A. Milk protein concentrate is not the
7 byproduct of cheese production, cheese
8 coagulation, so it does not have whey
9 components. It may have the same proteins as
10 whey, but it has a complete set of milk
11 proteins, and that, according to our proposal,
12 that would be treated both for defining the
13 product as a Class I, and it would be included
14 in the pricing of the Class I.

15 Q. So you would -- and how would you
16 calculate the charge on that whey protein?

17 A. What whey protein?

18 Q. The whey protein that's in milk
19 protein concentrate.

20 A. It would be -- it's protein like
21 just like protein in milk. It would be
22 up-charge on the protein equivalent basis, the
23 way I would see it. The administration is up
24 to the Department how they finally decide.

25 But the way I would see it done is

1 Dr. Cryan - Cross - by Mr. Farrell
2 that it would be charged on a protein
3 equivalent basis, the same way that nonfat dry
4 milk is up-charge right now for reconstitution.

5 By the same token, to the extent
6 that it is beyond reconstitution and
7 fortification, it would remain -- in effect,
8 it would remain a Class IV product.

9 Q. Okay. So just to be clear on the
10 record, there would be a charge for the whey
11 protein content in a milk protein concentrate
12 ingredient, but there would not be a charge for
13 the whey protein content in a whey protein
14 concentrate; is that correct?

15 A. No, that's not correct. There is no
16 whey protein in milk protein concentrate. Whey
17 protein is necessarily a byproduct of cheese
18 production.

19 Q. Where do you find that definition of
20 whey protein?

21 A. I cited it in my testimony.

22 Q. Could you refer to it for me,
23 please.

24 A. Whey protein concentrate has a
25 definition in 21 CFR 184, 1979, again. That's

1 Dr. Cryan - Cross - by Mr. Farrell

2 21 CFR, 184, 1979. You are not writing it
3 down.

4 Q. No. That's the definition of whey
5 protein concentrate.

6 A. That's right.

7 Q. I'm trying to understand how you
8 differentiate between the protein in whey
9 protein concentrate and the protein from the
10 whey component of milk protein concentrate. I
11 want to understand exactly how you
12 differentiate between those two proteins.

13 A. The proteins in milk that has not
14 been turned into cheese are the proteins in
15 milk that are the same proteins in a milk
16 protein concentrate or in skim milk from the
17 farm or --

18 They are the same set of proteins
19 and they are priced across the board the same
20 way. The only difference we're talking about
21 is whey after cheese-making process.

22 Q. How about whey after the manufacture
23 of casein?

24 A. I don't know that -- I don't know
25 whether that's whey. I'm not sure.

1 Dr. Cryan - Cross - by Mr. Farrell

2 Q. Cheese production and casein
3 production are --

4 A. I'm not adequately familiar with the
5 casein production process to know whether --

6 Q. Well, it produces whey as a
7 byproduct just as the production of cheese
8 does.

9 A. If it meets the definition according
10 to the FDA memo, then I suppose that would be
11 whey.

12 Q. Okay. So if, for example, we take
13 the whey, which was the byproduct of casein
14 production, and we incorporate that along with
15 say sodium caseinate into a product, then we
16 will have a different charge calculation than
17 if we add milk protein concentrate?

18 A. I suppose so. In that case saying
19 we would use -- if it was casein, casein would
20 be accounted for in the protein base just the
21 same as pound for pound -- the same as nonfat
22 dried milk, but then the whey would be priced
23 lower because it's a byproduct of the process.

24 I have a hard time imagining it
25 would be worth doing that, but -- breaking it

1 Dr. Cryan - Cross - by Mr. Farrell
2 out and putting it back together again. But
3 there are elements of Federal Orders that
4 involve different prices that you could --
5 You could go about, for example,
6 drying powder and put it into a Class II
7 product, and the differential between Class IV
8 and Class II is designed to make sure that
9 that's not quite worth it. So I would
10 assume -- I would be interested to know whether
11 it was worth it, but I can't imagine -- I have
12 to imagine it would have a sufficiently
13 detrimental impact on product quality to break
14 something out of the casein and whey and then
15 put it back into the reconstitution of a fluid
16 milk product.

17 Q. Why would you make all these
18 assumptions about product development?

19 A. You are right, I shouldn't. I'll
20 just leave it at that.

21 Q. Just moving back to some of the whey
22 beverage products that Mr. Tipton was talking
23 about, these sports nutrition products.

24 A. Uh-huh.

25 Q. Which are significantly whey --

1 Dr. Cryan - Cross - by Mr. Farrell

2 A. Uh-huh.

3 Q. -- as a source of protein. Now,
4 again, my understanding of your testimony is
5 that it would certainly be a wash. I mean, it
6 would be used in the calculation, but then
7 there would be no charge?

8 A. Right.

9 Q. Are these beverages?

10 A. If they are beverages, they are
11 beverages, yes. He was talking about a
12 beverage, so, I mean --

13 Q. Well, I'm getting at form and use.

14 A. Okay.

15 Q. How is the form and use of those
16 products different than the form and use of
17 some of the products that you have listed on
18 the back of your statement?

19 A. We believe that whey is a
20 sufficiently imperfect substitute for -- whey
21 proteins are sufficiently an imperfect
22 substitute for whole milk proteins in a
23 beverage that the product whose entire dairy
24 content is whey ingredients is not a
25 sufficient -- is not really competing with

1 Dr. Cryan - Cross - by Mr. Farrell

2 milk.

3 Q. How about a beverage product whose
4 sole milk protein ingredient is potassium
5 caseinate? Would you like to drink that?

6 A. I have never had it, and I won't
7 speculate about product development anymore.

8 Q. That was -- that's okay. But you
9 would somehow differentiate between a beverage
10 product where the sole milk ingredient was
11 sodium or calcium or potassium caseinate on the
12 one hand and with a product whose sole dairy
13 ingredient was whey on the other?

14 A. Yes.

15 Q. Work with me for a minute.

16 If, for example, these whey
17 beverages were not to be excluded from the
18 charge, what would be the magnitude of the
19 up-charge? I know there are problems
20 calculating it, but just in terms of magnitude,
21 where would that up-charge lie?

22 A. I couldn't say. It's --
23 establishing a basis for the up-charge is
24 problematic, as I've said, and I would not
25 start to say what -- how to do it. I don't

1 Dr. Cryan - Cross - by Mr. Farrell
2 propose to do it, and I don't -- I wouldn't
3 suggest how to go about doing it.

4 Q. Would it be fair to say that it
5 would be significantly more than the up-charge,
6 for example, from Class IV to Class I?

7 A. It depends entirely on how it's
8 calculated.

9 Q. Okay. I need to understand why it's
10 so hard to calculate.

11 A. It's difficult to calculate because
12 you have to start -- in order to -- the
13 up-charge has to be based on the Class I value
14 of the component, the ingredients once it's
15 been reconstituted, minus what has already been
16 paid for.

17 And as I said earlier to Mr. Yale,
18 defining that value is difficult to do because
19 when cheese and whey are produced, the
20 cheese-making process -- the price formula, the
21 Class III price formula, captures -- roughly
22 captures the total value of the milk that goes
23 into it, but it doesn't necessarily assign a
24 protein value for the casein and another
25 protein value for the proteins that end up in

1 Dr. Cryan - Cross - by Mr. Farrell

2 the whey, and another value for the lactose.

3 What it does, it lumps the whey
4 protein values into the price that's paid for
5 the lactose, the other solids, while the
6 protein is being -- the protein that includes
7 the whey protein is being paid for the cheese
8 value.

9 So that you have this component that
10 is being -- whose value -- the formula really
11 derives from one side but ends up being paid on
12 the other side. So you could either use the
13 protein price, the Class III protein price, for
14 the whey protein as a basis, in which case it
15 probably wouldn't be any higher than the
16 up-charge for Class III -- it may be higher,
17 may be lower, may be in the same magnitude --
18 or you could use some sort of the protein
19 equivalent value from the other solids value,
20 in which case it would be much lower, and the
21 up-charge would be larger.

22 So it really depends on how you
23 choose to do it. It's not really clear what
24 the right way to do it is.

25 Q. Okay. But yet you can figure out a

1 Dr. Cryan - Cross - by Mr. Vetne
2 way to assess the up-charge on the whey protein
3 content of the milk protein concentrate that's
4 used as an ingredient?

5 A. On the complete protein content of
6 the milk protein concentrate, that's right.

7 MR. FARRELL: Okay. Thank
8 you. I have no further questions.

9 THE WITNESS: You're welcome.

10 JUDGE DAVENPORT: Mr. Vetne?

11 -----

12 CROSS-EXAMINATION

13 BY MR. VETNE:

14 Q. John Vetne for HP Hood.

15 Mr. Cryan, there was some documents
16 left on the back table concerning the -- a
17 request originating from National Milk
18 Producers Federation, which was the basis for
19 the data compiled by Agricultural Department
20 Exhibit 12.

21 Were you involved in preparing that
22 request?

23 A. I was, sir. Is that my signature?

24 Q. You know, your letter isn't
25 included. All that's included is material

1 Dr. Cryan - Cross - by Mr. Vetne
2 from -- originating from the Department
3 concerning your request. Not your actual
4 request.

5 Did you prepare the templates of
6 data for Class I fluid milk product definition
7 hearing, did you provide that to the
8 Department?

9 A. No, I did not.

10 Q. You simply told the Department the
11 kind of data that you wanted them to collect;
12 is that correct?

13 A. That's right. I requested it at the
14 time when our positions were not yet fully
15 established. So there was a degree of
16 exploratory -- there was some exploratory
17 nature to the data.

18 Q. Mr. Rourke testified that under the
19 line on the table on Exhibit 12, lactose-free
20 beverages, that that includes Lactaid and some
21 other lactose-neutralized products.

22 May I ask why you requested that
23 item of products in this hearing?

24 A. I guess the lactose-free beverages
25 include things like Lactaid, which are

1 Dr. Cryan - Cross - by Mr. Vetne
2 relatively a well-established category of
3 products, and we assumed, and I think it was
4 borne out in the NPD data which is here, that
5 Lactaid actually is a very strong substitute --
6 that they are a very strong substitute for one
7 another.

8 To some degree, people who consume
9 Lactaid are -- tend to switch to this, the
10 other one, the IRI -- will tend to switch --
11 will tend to try the Carb Countdown as an
12 alternative because of the lower lactose
13 content, because a lot of the folks
14 obviously -- a lot of the folks that use
15 Lactaid use it because of lactose intolerance,
16 and that issue is currently addressed by Carb
17 Countdown.

18 Q. Do any of the proposals directly or
19 indirectly suggest a change to the
20 classification of lactose-free beverages as
21 identified in Exhibit 12?

22 A. They do not propose a change to
23 Lactaid because Lactaid contains all the milk
24 solids. They are altered, but they are not
25 removed.

1 Dr. Cryan - Cross - by Mr. Vetne

2 The reason we were looking at that
3 was because we wanted to also understand that
4 there is a substantial volume of Class I milk
5 being sold in that category, and it is a
6 category of Class I milk that is a closely
7 related form and use, and it is an economic
8 substitute, a very close economic substitute,
9 with the Carb Countdown.

10 Q. So that category of milk -- Lactaid
11 is called milk, it's on the label; isn't it?

12 A. I don't know.

13 Q. You don't know. Okay. That
14 category was not included as a category that
15 would be affected by some of these proposals,
16 but rather -- that the classification of which
17 could be changed -- but rather as a category of
18 conventional fluid milk products, with which
19 you perceive competition from these beverages?

20 A. That they serve similar -- they can
21 serve similar uses, yeah. Right. That's
22 right. I would say yes.

23 Q. Looking at Page 2 of your proposal
24 on this whey thing again, by excluding whey and
25 whey solids, is it your intention that only the

1 Dr. Cryan - Cross - by Mr. Vetne
2 product pounds in a fluid milk product that
3 constitutes the whey ingredient would be
4 excluded from the up-charge? The alternative
5 to that is the whey equivalent of those whey
6 solids?

7 Do you understand my question?

8 A. If the accounting is done on a
9 protein basis -- I'm sorry, I don't understand
10 the question.

11 Q. All right. Let me give an example.
12 Let's say I develop a product that has two
13 percent milk protein concentrate and two
14 percent whey protein and isolate --

15 A. Are you saying -- okay. Are you
16 saying it has two percent protein from an MPC
17 and two percent protein from a whey product?

18 Q. Yes. So the total is four percent,
19 so it's eligible to be looked at as Class I.
20 And in that product there's added water, it's a
21 beverage.

22 Would the volume to be up-charged as
23 a skim milk equivalent of the added water be
24 prorated between the whey protein and the milk
25 protein concentrate or would some other

1 Dr. Cryan - Cross - by Mr. Vetne

2 accounting method apply to such a product?

3 A. Again, it's not my decision exactly
4 how to handle this. But if it were, the whey
5 would essentially be treated as if it wasn't
6 there.

7 Once you've determined it's Class I,
8 and you move on to pricing the product, the
9 whey ingredient, you are treating it
10 essentially as if they weren't there, and the
11 MPCs would be accounted for on a protein basis
12 prorated to what the protein content of normal
13 skim milk, according to the standards, which is
14 3.1 percent in the skim part.

15 So if you -- if it's a skim product
16 and it's 2 percent protein from MPCs, it would
17 be accounted for as for, you know, 2 over 3.1
18 as a share of the milk volume.

19 Q. You are aware that whey starts out
20 as a liquid, a bit like skim milk; correct?

21 A. Yes.

22 Q. And when it's dried, it contains
23 nonfat solids in roughly the same proportion as
24 skim milk, a little bit fewer actually solids
25 to the water? Are you aware of that?

1 Dr. Cryan - Cross - by Mr. Vetne

2 A. Yeah, it's about -- yeah.

3 Q. And then you take -- in both cases,
4 you take those solids and fractionate them
5 further and get proteins.

6 It's your intention, as I understand
7 it now, that none of the whey protein solids
8 will be treated as if associated with the
9 original moisture contained in it, but the milk
10 protein concentrate protein portion will be
11 treated -- will be allocated to the water as
12 much as possible, until you get to the natural
13 relationship between water and protein and
14 milk?

15 A. Okay. I can restate it or you can
16 restate it.

17 Q. Please restate it.

18 A. Again, for the whey -- the whey
19 would be treated -- once you get past the
20 qualifying product as a Class I product,
21 defined as a fluid milk product, Class I
22 product, the whey would then be treated as if
23 it was a nondairy ingredient again, a nondairy
24 ingredient, and the other would be -- the other
25 proteins that would be accounted for as the

1 Dr. Cryan - Cross - by Mr. Vetne
2 milk equivalent, and so those proteins on a
3 milk equivalent basis would be treated as
4 Class I volume, and that would be the volume.

5 So, for example, if you had
6 2 percent -- let's say roughly 2 percent
7 protein and it's supposed to be -- and the
8 standard is 3 percent, if it's two-thirds of
9 the protein that would be in milk, then it will
10 affect -- when you have sell 100 pounds of that
11 product, you are credited by the Market
12 Administrator of selling 66 and two-thirds
13 pounds of Class I product.

14 Q. Okay. What if the whey came in
15 liquid form?

16 A. It's whey. It's just as if you are
17 using water for reconstitution, once you get
18 past the qualification.

19 Q. You would exclude from any up-charge
20 all of the whey that came in liquid form?

21 A. Yes.

22 Q. But if the whey came in dry form,
23 you would add back or attribute back the water
24 that was originally associated with it?

25 A. I'm not sure what you mean by that.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. If whey came in powder form and that
3 was added to a product and made the difference
4 in the protein standard that you propose, the
5 water originally associated with that whey
6 would not be subtracted from --

7 A. No.

8 Q. -- the product for up-charge
9 purposes?

10 A. No. And, again, this is all my
11 suggestion about how this would be
12 administered, and it's not my decision to
13 make.

14 Q. Your testimony on Page 3 says that
15 the current system undervalues the protein and
16 overvalues lactose.

17 How does your system, Proposal 7
18 that you are espousing, provide additional
19 value to protein that is not there now?

20 A. Proposal 7 would recognize -- by
21 recognizing the protein content of the product
22 as the basis for measuring the value of the
23 milk in the product, it would be more
24 accurately putting the value of the components
25 in proportion -- the value of the product in

1 Dr. Cryan - Cross - by Mr. Vetne
2 proportion to the value of the components.

3 Q. Then it would not increase the
4 protein value of the milk, would it?

5 A. As I've said, it's an accounting
6 issue. What we are proposing is an accounting
7 reform rather than a substantial change in the
8 overall definition of Class I.

9 Q. I'm trying to understand what you
10 mean by "undervalues protein."

11 Does either the handler pay more for
12 protein or the producer receive more for
13 protein under Proposal 7?

14 A. I'm not sure I can answer that
15 question because I'm not sure of the details of
16 how it's being handled right now.

17 Q. Are you aware that the Class I
18 differential, which would be the up-charge
19 we're talking about, is returned to the
20 producer as part of the producer price
21 differential, PPD?

22 A. Do I -- am I aware of that?

23 Q. Yes.

24 A. If there's anything left, yes.

25 Q. Yes. If there's an up-charge on

1 Dr. Cryan - Cross - by Mr. Vetne
2 these products for reconstituted meal protein
3 concentrate, the protein price wouldn't change,
4 but the PPD might increase a small amount?

5 A. It might. I'm not sure. I'm sorry,
6 ask me the question again.

7 Q. If there is an up-charge as a result
8 of any of these proposals, yours included --

9 A. An up-charge on products that are
10 not currently being up-charged?

11 Q. On a dairy beverage?

12 A. Such as MPCs or something along that
13 line?

14 Q. If there's an up-charge on any dairy
15 beverage as a result of any proposal, including
16 yours, that up-charge would flow to producers,
17 if at all, through the PPD, not in the protein;
18 is that correct?

19 A. Yes.

20 Q. And the handler similarly would not
21 pay more for protein but pay a compensatory
22 payment for a differential?

23 A. If they are paying -- if they are
24 paying for -- they would pay more for protein,
25 if the current accounting --

1 Dr. Cryan - Cross - by Mr. Vetne

2 I don't know what the current
3 accounting is right now. But if the current
4 accounting were as might be implied from the
5 language of the Orders, then a product that
6 had -- that had five percent protein but only
7 six percent nonfat solids was going to pay, you
8 know, two-thirds -- pay for two-thirds of the
9 Class I value, that is six-ninths.

10 If the normal composition is nine
11 pounds of nonfat solids per 100 pounds of milk
12 and a handler with five pounds of protein and
13 only one more pound of lactose is going to pay
14 on the basis of the nonfat solids, if it's
15 being prorated on the basis of nonfat solids,
16 in that case, the handler is underpaying for
17 the protein that they are using.

18 They are underpaying into the
19 Class I pool for the quantity of milk that they
20 are putting in because they are really using
21 100 pounds of milk and cutting the nonfat
22 solids down, so it's only 66 pounds of milk, in
23 effect.

24 So what this offers is a more
25 accurate and equitable accounting system for to

1 Dr. Cryan - Cross - by Mr. Vetne
2 establish a milk equivalent and for defining
3 the product as Class I or not.

4 Q. The additional amount, if any, that
5 would be paid however is accounting a pound
6 payment in the form of a differential?

7 A. It establishes a more equitable
8 definition of how -- what the volume of product
9 is. That's right.

10 Q. And that extra payment is on the
11 fluid portion, not the protein portion?

12 A. Well, in Class I -- that's a matter
13 of interpretation.

14 Q. Further along in the same sentence,
15 you use the words "serious inequity." Now that
16 skim components can be separated, et cetera,
17 there can be serious inequity.

18 Inequity between whom? Whose
19 interests are you suggesting are harmed by
20 inequity and whose interests would be bettered
21 by putting more equity into your proposal?

22 A. There is inequity between the
23 handler who is in a lactose-reduced formulation
24 and paying for a smaller volume of milk based
25 on that accounting and the handler who is using

1 Dr. Cryan - Cross - by Mr. Vetne
2 milk containing complete nonfat milk solids and
3 is paying the full value.

4 I do not know that that's how that's
5 being accounted right now. That is a matter of
6 contention. That contention and that confusion
7 are one of the reasons that we are here so that
8 we can clarify these standards and these
9 procedures to make everything more fair and in
10 line with the principles of the form and use.

11 Q. So the more fair and the more
12 equitable attributes of your proposal are
13 handler versus handler issues; am I correct?

14 A. Well, yes, for an example. That was
15 an example.

16 Q. I asked what you meant by serious
17 inequity, and that's the answer you gave me.
18 If there is more to it, please continue.

19 A. Well, there are also inequities
20 between handlers who are using 100 pounds of
21 milk to produce 100 pounds of product but they
22 are only accounting for 60 pounds of product
23 and producers who are seeing their protein,
24 full measure of their protein, being put into a
25 product but only getting the Class I value for

1 Dr. Cryan - Cross - by Mr. Vetne
2 two-thirds of it. That's a hypothetical.

3 Q. And that inequity is not a
4 competitive inequity, as you described before,
5 it's perceived to be a revenue inequity that
6 producers aren't getting paid enough for one of
7 their products; am I correct?

8 A. They are not getting paid in a way
9 that's consistent with the underlying
10 principles behind the Federal Order Pricing
11 System.

12 Q. But the latter thing that you
13 described as inequity, would you agree, is not
14 competitive inequity?

15 A. Yes. But the example of the two
16 handlers is a competitive inequity.

17 Q. Notwithstanding your perception of
18 competitive inequity between handlers, are you
19 aware of any handler that has a proposal that
20 either asserts or proposes to cure interhandler
21 inequity?

22 A. O-AT-KA is one handler who proposes
23 to.

24 Q. O-AT-KA is a handler in that it's --
25 it makes reports, it's owned by farmers'

1 Dr. Cryan - Cross - by Mr. Vetne
2 cooperative associations; correct?

3 A. That's correct. It doesn't make
4 them any less a handler.

5 Q. I agree with that. Let me rephrase
6 the question then.

7 Are you aware of any processor of
8 milk that complains at this hearing of
9 competitive inequity with another proprietary
10 processor of milk that complains of competitive
11 inequity between another proprietary processor
12 because the current system results in unfair
13 costs?

14 A. Well, they were not sufficiently
15 troubled to carry a position with their
16 organization or to come here and testify, no.

17 Q. But you still believe this is for
18 handlers' own good?

19 A. I didn't say that. I said that
20 there are -- can be inequities between handlers
21 of one type of product and handlers of the
22 other following that exact same logic that
23 carried in the issue of skim and low-fat milk
24 in the New York-New Jersey Order in 1968. The
25 issues are practically identical.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. The bottom of Page 3, you testified
3 that Carb Countdown has been classified both as
4 a Class I product and as a Class II product.

5 What is your source of knowledge for
6 that?

7 A. I think it was one of your clients.

8 Q. Okay.

9 A. And I'll take his word for it.

10 Q. On the next page, you opine -- or
11 state, rather -- that whey solids in Carb
12 Countdown are not currently treated by USDA as
13 nonfat milk solids for purposes of defining a
14 fluid milk product in pricing Class I milk.

15 What is the source of your knowledge
16 to make that statement?

17 A. I talked to somebody at Dairy
18 Programs. If it's incorrect, I would be happy
19 to correct it.

20 Q. When did you talk to somebody in
21 Dairy Programs?

22 A. Sometime in the last four months, at
23 least.

24 Q. At the bottom of Page 6, in the
25 underscored paragraph first line, you again use

1 Dr. Cryan - Cross - by Mr. Vetne
2 the term "obvious inequities."

3 Do you mean anything by that use
4 other than what we discussed previously?

5 A. No. I think probably those two
6 issues of competitive inequities between
7 handlers and processor and producer is probably
8 covered.

9 Q. The bottom of Page 7 under the
10 heading, "establishing the protein equivalent,"
11 at the end of the third line, National Milk
12 Producers Federation contends that this
13 standard of 2.25 percent protein reflects
14 "normal" proportions of nonfat solids to
15 protein in milk.

16 Now, milk doesn't normally contain
17 as little as 2.25 percent protein.

18 A. Contains a normal -- it normally
19 contains some ratio of nonfat solids to
20 protein, and that ratio I believe is normally
21 the same ratio of 2.25 to 6.5 percent.

22 Q. Oh, okay. So you're not claiming
23 that 2.25 percent is normal, only that the
24 relationship between 2.25 and 6.5 is about the
25 same?

1 Dr. Cryan - Cross - by Mr. Vetne

2 A. That's right.

3 Q. At the bottom of Page 9, "deleting
4 the whey exemption," you reference a
5 misinterpretation in the treatment of whey
6 ingredients that has developed over the years.

7 What misinterpretation are you
8 talking about?

9 A. It is my understanding that the
10 whey, as I indicated in my testimony, it is my
11 understanding that the whey exemption was
12 originally intended for liquid whey in a
13 bottle, and that the treatment of whey
14 ingredients over time as a nondairy ingredient
15 versus a pricing qualification is something of
16 an -- is an unintended distortion of that.

17 Q. All right. Now, moving to Page 10,
18 middle of the page, the paragraph beginning, in
19 at least one case, a product marketed as a
20 substitute for milk contains enough whey, et
21 cetera, et cetera, what case are you talking
22 about?

23 A. It's my understanding that Carb
24 Countdown is such product, and, again, I would
25 be happy to be corrected.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. Is that the one case?

3 A. That's the one I'm aware of.

4 Q. You conclude, "Although such product
5 could compete with fluid milk, it would be
6 currently priced at Class II."

7 A. Actually, that's a typo. It should
8 say, quote, currently could be priced at
9 Class II. This was touched by several hands,
10 and I would appreciate if that would be changed
11 in the record from would to could.

12 Q. All right. You opine on Page 11 and
13 several times in your testimony in response to
14 cross that no product currently classified
15 would be changed as a result of your proposal.

16 How do you know that?

17 A. I would be happy to be corrected.

18 Q. Did you speak without any inquiry
19 whatsoever?

20 A. I examined every product that I
21 could find information on, every product that
22 was brought to my attention, and I did not find
23 any that were -- that were -- that would have
24 changed the regulation.

25 That doesn't mean that I saw every

1 Dr. Cryan - Cross - by Mr. Vetne
2 single product, but I saw a substantial
3 sampling of products, and I didn't find any
4 that fell into that category.

5 Again, I would be very happy to know
6 of any because it's been -- I have been
7 questioned, and I would be happy to say there
8 are some exceptions, and then to be immediately
9 asked how could I possibly know there are none.

10 Q. These are products that you are
11 referring to on the last page of your
12 testimony?

13 A. The last page?

14 Q. Page 16.

15 A. Yes.

16 Q. Okay. How did you become aware of
17 the Class II classification of the products
18 listed there as Class II now?

19 A. I -- well, I checked some of the
20 ones -- I checked with manufacturers or I
21 checked with USDA folks or I just assumed in
22 the case of products with very low protein
23 tests that they were Class II.

24 Again, I would be happy to be
25 corrected if any of these are wrong.

1 Dr. Cryan - Cross - by Mr. Vetne

2 Q. Okay. What USDA offices did you
3 contact for that information when you checked
4 with the USDA?

5 A. I know I have asked Cliff Carmen of
6 Dairy Programs about several products. I am
7 not sure if I talked to anybody else about
8 that. The procedure is that they will not
9 provide a list of products, but they will
10 answer any inquiries about individual products.

11 Q. Are you aware that USDA has a list?

12 A. I'm not aware, but they can usually
13 look up something either in a file or a memo or
14 by calling somebody.

15 Q. All right. Let's take a look for a
16 moment at products which are not specifically
17 identified as proteins of milk or whey but may
18 be derived from such as lactoferrin.

19 If that's an ingredient, how would
20 it be, if at all, tallied in the 2.2 percent?

21 A. Well, it is a component of milk. If
22 it's derived from whey, per se, then it would
23 be treated as a whey solid. If it was derived
24 from filtration of -- mechanical filtration
25 separation without achieving the process, then

1 Dr. Cryan - Cross - by Mr. Vetne
2 it would be treated as one component for
3 pricing in Class I for Class I products.

4 Relatively high value. It is a
5 separate protein. I understand it's a
6 relatively high value product, but I don't know
7 the difference between Class I and Class II
8 really amounts to anything. It is a component
9 in milk, per se. It's just one protein among
10 many.

11 Q. Well, as a component, it may have a
12 high price, regardless, but it will produce a
13 price for the water if it's Class I and not if
14 it's Class II. That's -- that's really what
15 we're talking about is the difference between
16 Class I and II.

17 A. We are talking about something
18 like -- yeah, I'm talking about something like
19 the difference between Class I and Class II for
20 a gallon of raw milk is about 22 cents based on
21 projections for this year at the beginning of
22 the year, but that may be different. But it's
23 in the neighborhood of 18, 20, 22, 24 cents.

24 Q. One of the merits, as I understand
25 it, you perceive of the Proposal 7 is that it

1 Dr. Cryan - Cross - by Mr. Vetne
2 will not change products classified under the
3 current rules? Am I correct that you see that
4 as a merit?

5 A. In practical terms, we see that as a
6 merit.

7 Q. Okay. And if that turns out to be
8 wrong, do we start from scratch?

9 A. If it turns out to be wrong, it
10 turns out to be wrong, marginally
11 incrementally. I don't think we can expect to
12 have zero change at all.

13 If there is a product that falls
14 into that -- into that narrow category or it
15 would change, I would not change our position.

16 Q. If there is -- however, if something
17 comes up that is significantly affected between
18 the current rules and proposed rules, would you
19 suggest that maybe the Department would start
20 from scratch and look at the whole thing again?

21 A. No. Our decision-making process
22 looking at this was really about whether we
23 were going to support the change in the
24 accounting at the same level or change the
25 accounting and lower the level, and the

1 Dr. Cryan - Cross - by Mr. Olsen

2 close substitutes, and there is not really
3 adequate basis for separating them out.

4 Ultimately, even if an individual
5 product doesn't fit the mold exactly right, the
6 general category -- the definitions have to be
7 clear.

8 Q. Do you have any data demonstrating
9 that people use these products in the same way
10 that they use fluid milk?

11 A. I don't have data on that.

12 Q. Do you have any data on how the
13 products are marketed, that they are marketed
14 in competition with flavored milk?

15 A. They are marketed in bottles for the
16 use as a beverage.

17 Q. Do you have any data that shows that
18 they are marketed in competition with fluid
19 milk?

20 A. I don't, except form and use.

21 Q. But you don't have data that shows
22 that people use them in the same way that they
23 use flavored milk?

24 A. There is some -- I don't have
25 anything I can enter. We've looked at a study,

1 Dr. Cryan - Cross - by Mr. Olsen
2 actually, that compared a number of dairy
3 products, including yogurt drinks, and they
4 were -- there was some substitutability between
5 yogurt drinks and flavored milk that was pretty
6 substantial, but I'm not sure if I have enough
7 to put into the record.

8 I don't think I really have -- I
9 didn't -- I wasn't interested in -- I wasn't
10 pursuing yogurt. So I guess we do have some
11 data, but I don't have anything to present at
12 this hearing.

13 Q. We have your presumption but no
14 data?

15 A. It's not a presumption. We have --
16 there was a study that IRI did for DMI that
17 looked at a whole range of products. They were
18 looking for opportunities in areas where they
19 could pursue new beverages.

20 In fact, they are looking for
21 Class II beverages they can promote without
22 affecting Class I sales. I believe that was
23 roughly what they were doing.

24 What they found is there is kind of
25 a scattering, and they are all -- the yogurt

1 Dr. Cryan - Cross - by Mr. Yonkers
2 drinks did fall in relatively close to other
3 flavored milk drinks on the count of on the
4 low-fat side.

5 I know that's not a very
6 satisfactory answer, but I don't have anything
7 to present. But you asked the question, so
8 that's the best I have for you right now.

9 MR. OLSEN: Thank you.

10 THE WITNESS: Sure.

11 JUDGE DAVENPORT: Yes, sir.

12 Mr. Yonkers?

13 -----

14 CROSS-EXAMINATION

15 BY MR. YONKERS:

16 Q. Bob Yonkers, Milk Industry
17 Foundation.

18 Roger, I'm going to take you back to
19 a time in your life which, something I had to
20 go through also many years probably before you
21 did, but let's talk about economics.

22 You have used the term either in
23 your direct testimony or in answers in
24 cross-examination market substitute or products
25 being close substitutes for each other.

1 Dr. Cryan - Cross - by Mr. Yonkers

2 From an economic perspective, if
3 somebody said, I want you to do a consumer
4 demand analysis and tell me if a product has a
5 substitute or a complement, or a substitute or
6 not a substitute, how would you design that
7 analysis? What would you look for? What would
8 you do?

9 A. Well, one approach is to just
10 eyeball things. The first step really is to
11 look at -- look at form and use. Things that
12 are similar in form and use are the first
13 candidates for substitution.

14 I would also be interested in --
15 there's a lot of ways to approach it, but among
16 the ways to approach it would be looking at
17 sales patterns and looking -- and then
18 surveying folks, like NPD has, about how they
19 use things and what they are replacing with.

20 And then, of course, there's also,
21 if you got the time and data, you can do demand
22 estimations, you know, estimations demand
23 systems based on, you know, approximating
24 elasticities of products.

25 Q. Could you, you know, to the extent

1 Dr. Cryan - Cross - by Mr. Yonkers
2 that you are familiar with either from your
3 training or your continuing keeping up with the
4 profession of agricultural economics, have you
5 seen any consumer demand analysis papers
6 published in peer review journals like the
7 "American Journal of Agricultural Economics" or
8 "Review of Agricultural Economics" that uses
9 form and use or sales patterns to establish
10 whether their products, two products they are
11 looking at are substitutes or complements?

12 A. The academic and economic profession
13 is very driven by using fancier, more
14 complicated mathematical models.

15 So to the extent that a simpler
16 methodology doesn't meet that professional
17 itch, doesn't scratch that professional itch,
18 you are not going to see much of that.

19 Q. I'm familiar with the "publish or
20 perish," trust me.

21 I guess the point that I'm trying to
22 get at is doesn't substitute have a very
23 specific meaning in economics, agricultural
24 economics? When you talk about two products
25 being substitutes, doesn't that have a very

1 Dr. Cryan - Cross - by Mr. Yonkers
2 specific meaning in the economic literature, in
3 textbooks?

4 I'm not just talking about journals
5 now, textbooks, how do you define --

6 A. In one particular framework, you
7 know, in specifically the, you know, the
8 neoclassical framework that serves as a basis
9 for most mathematical -- well, not for most --
10 for most equations -- that's not right
11 either -- for the kind of framework where you
12 do econometric estimations, you are often going
13 to use a measure of the price relationship and
14 cross-price elasticities as the basis for
15 substitution.

16 But, of course, you know, that's
17 not -- that's not the beginning and end of
18 substitution. You know, those -- that's really
19 just one indicator of substitution that is
20 really about a relationship between two
21 products being similar in form and use and
22 being perceived by folks as something they can
23 use one for the other.

24 And which there are other ways of
25 demonstrating that they do that like, for

1 Dr. Cryan - Cross - by Mr. Yonkers
2 example, asking them. When you ask them and
3 they say, well, we stopped using this because
4 we are using the other thing instead. When you
5 stopped reading "The Post" because you are
6 getting "The Times," or when you start
7 drinking -- when somebody says in a survey that
8 I'm using Carb Countdown, so I stopped using
9 milk, those kinds of things are also indicators
10 of substitution.

11 Whether or not that is directly, you
12 know -- whether that satisfies methodologically
13 or not is -- I will leave to you. But it is
14 just as valid an indicator of the economic
15 concept of substitution.

16 Q. Well, if you ask them and they did
17 indicate that they had substituted one for the
18 other, wouldn't that show up in the type of
19 demand analysis I'm talking about using an
20 econometric model? Wouldn't you see that?

21 A. I would -- I expect if it was
22 designed right, yes.

23 Q. You mentioned that after talking
24 about the form and use and sales patterns and
25 surveying folks, you mentioned if you had

1 Dr. Cryan - Cross - by Mr. Yonkers
2 enough time and money doing -- time and data
3 doing, time and data, you would do a demand
4 systems in elasticity?

5 A. In your hypothetical scenario where
6 somebody came to me and said --

7 Q. Right.

8 A. Yes. I'm not saying I'm going to go
9 do it.

10 Q. But we have had time to do this. I
11 mean, the first USDA request for additional
12 comments and proposals was made at the summer
13 of 2003. You know, we're two years later now,
14 so there has been a fair amount of time.

15 I'm just curious why NMPF, National
16 Milk Producers Federation, didn't think of
17 doing that and clearly could have shown that
18 there was product substitution using a demand
19 analysis as economists would look at a demand
20 analysis system.

21 A. Well, we talked to -- I spent a good
22 amount of time talking to Matt Stockton who was
23 working with Jug Capps, in addition to your
24 study. I assume you will be presenting that
25 today?

1 Dr. Cryan - Cross - by Mr. Yonkers

2 Q. If I could just state for the
3 record, they didn't do any work for the Milk
4 Industry Foundation. They did work for another
5 organization which I do some work for, and
6 because of we can't use that data in the same
7 framework, so -- our contract does not permit
8 us to use that data in the same framework.

9 A. Okay. That could explain some other
10 things. And we talked about the methodology,
11 and we talked about the approach, and it was
12 pretty clear that the kind of model that you
13 are talking about when you are breaking out,
14 you know, elements of the fluid milk sector,
15 fluid milk products, that it really starts to
16 explode. It's very difficult to do that kind
17 of a model, especially looking at substitution
18 among these related -- these related products.

19 So there were some practical
20 difficulties even conceiving of doing a study
21 that would deal with, you know, yogurt drinks
22 and semi-milks and carb-reduced milks and all
23 these fine gradations within the dairy
24 category.

25 It just wasn't practical to start

1 Dr. Cryan - Cross - by Mr. Yonkers
2 talking about large numbers of categories in
3 that kind of a demand analysis, and then if you
4 start to only to use those limited numbers
5 of -- limited number of subcategories, then you
6 don't have a large enough universe to give you
7 an accurate picture of the substitution.

8 So even though in theory that's a
9 nice thing to do, it doesn't necessarily --
10 it's not necessarily workable.

11 Q. I guess I'm not quite getting your
12 understanding.

13 Certainly if you are using like a
14 weekly data, you mentioned a study from IRI,
15 obviously they have weekly supermarket scanner
16 data for numerous weeks. If you have large
17 categories, what is the limiting factor there
18 when you have a lot of observations that you
19 can use in a time series that's not very long
20 in terms of the time period it shows? What is
21 the constraint?

22 A. The constraint for --

23 Q. Why can't you do a study like that?
24 What is the problem from having a large number
25 of categories? Econometrically, what is the

1 Dr. Cryan - Cross - by Mr. Yonkers

2 problem?

3 A. What IRI did isn't econometrics.
4 It's a much simpler calculation. The more
5 complicated the calculation gets, the larger
6 your number -- your data has to be. It almost
7 has to increase geometrically as your
8 calculation gets more complicated in order to
9 get good results.

10 Q. Valid results.

11 A. Valid --

12 Q. Statistically significant results.

13 A. Statistically significant.

14 Q. Okay. I'm going to come back to the
15 two studies you mentioned just briefly
16 because -- were you involved in the meeting
17 when -- I know the IRI was a PowerPoint, I
18 don't know about the NPD study, it didn't look
19 like a PowerPoint.

20 It even mentions in the IRI it was
21 one of -- the third slide I believe says
22 something about an October 20 meeting. I
23 assume there was probably a meeting where this
24 PowerPoint presentation was made.

25 Were you present in any of those

1 Dr. Cryan - Cross - by Mr. Yonkers

2 meetings?

3 A. I don't -- I was at a meeting in
4 Chicago, but I don't remember if I was -- I
5 don't remember -- I was never -- I was never at
6 a meeting where this particular study was
7 presented.

8 Q. So you don't know what the
9 discussion was around it or if there was any
10 additional materials presented as part of that
11 study?

12 This could have been an excerpt from
13 a larger presentation or larger discussion or
14 even a full paper?

15 A. It's my understanding this was their
16 entire presentation that was made in the DFA
17 offices on January 13. But I don't -- I
18 don't -- I was not there, so this was the --
19 this was the version that I had access to.

20 Q. And you weren't present at the
21 October 20 meeting that's referred to in --

22 A. I am not sure if I was at that
23 meeting or not. If this same data was
24 presented, I was not there. But I may not have
25 been -- it may not have been. So I was at a

1 Dr. Cryan - Cross - by Mr. Yonkers
2 meeting in Chicago that fall. I don't know if
3 I would --

4 Q. Had they discussed research around
5 dairy-based beverages during that meeting you
6 were at in the fall?

7 A. Yes. We talked about it.

8 Q. Do you know if anyone from AMS --
9 I've been fortunate enough through my other job
10 that that I wear that I can share data -- to be
11 at two meetings at DMI headquarters where we
12 discussed research relating to dairy products.
13 In that case they happened to be about
14 elasticity studies that was done by researchers
15 at the University of Wisconsin and Cornell, but
16 it indicates there was someone presenting from
17 Marketing Services, Dairy Division of Marketing
18 Services, at those meetings.

19 Do you know if anybody from the Ag.
20 Marketing Services were present at either the
21 January 13 or the October 20 or at any other
22 meeting where these results were discussed?

23 A. If the October 20 meeting was the
24 one I was at, then there was -- then there was
25 somebody from AMS, it was a committee meeting

1 Dr. Cryan - Cross - by Mr. Yonkers
2 of the DMI Board. But I don't -- I don't know
3 if I was there.

4 Q. Okay. Whether that was the same
5 one?

6 A. Right.

7 Q. You mentioned -- well, did you get
8 written permission from anyone to use this --
9 if you weren't present at the meeting,
10 obviously you weren't the one who was handed
11 the study at the meeting, the January 13
12 meeting.

13 Did someone hand this to you and say
14 you can use it for this purpose? Did you
15 obtain written or oral permission, from anyone
16 at DMI to introduce it into this hearing
17 record?

18 A. I had -- for this presentation? For
19 this one?

20 Q. The IRI one, yes.

21 A. I don't remember. I mean, I --

22 Q. Do you remember where you got that
23 PowerPoint from?

24 A. I must have gotten it from either
25 Alan Reid at DMI or somebody at DFA. I believe

1 Dr. Cryan - Cross - by Mr. Yonkers
2 it's all we discussed, but I couldn't tell you
3 exactly when or with who.

4 MR. YONKERS: All right.
5 Thank you. I have no further questions.

6 JUDGE DAVENPORT: Cross?
7 Mr. Yale?

8 -----

9 CROSS-EXAMINATION

10 BY MR. YALE:

11 Q. Ben Yale on behalf of Select Milk
12 and Continental Dairy Products.

13 There has been a lot of talk about
14 comparing the use of yogurt and substitution of
15 bottled milk and others. You were here this
16 morning and you heard the testimony of Elvin
17 Hollon; right?

18 A. Yes.

19 Q. And you heard the cross-examination?

20 A. Yes.

21 Q. And the question was asked
22 regarding, and I'm going to ask you the same
23 question, the Department or the Secretary has
24 the authority and the obligation to classify
25 milk products based upon what?

1 Dr. Cryan - Cross - by Mr. Yonkers

2 A. Form and use.

3 Q. And that does not -- and the use, if
4 it's a higher value use, it can be at a higher
5 classification, is that correct, if the
6 Department -- if the Department finds that?

7 A. Yes.

8 Q. Is there any obligation that within
9 that higher class that they have to substitute
10 one for the other?

11 A. I don't think so.

12 Q. So if the Department finds that a
13 drinkable yogurt, for example, has a higher use
14 value than other products, they can -- the
15 Department is within its prerogative to
16 classify that as Class I even if it does not
17 absolutely substitute for Class I, or bottled
18 milk as we know it?

19 A. I would have to look at the Act
20 again, but that sounds right.

21 MR. YALE: Okay. I don't have
22 any other questions.

23 JUDGE DAVENPORT: Other cross?
24 Mr. Beshore?

25 -----

1 Dr. Cryan - Cross - by Mr. Beshore

2 CROSS-EXAMINATION

3 BY MR. BESHORE:

4 Q. I have just a couple of questions,
5 Roger.

6 Just to follow through on Ben's last
7 questions there, we've got in classification,
8 milk product classification, we've got all
9 sorts of products in the same class that are
10 not substitutes for each other, such as butter
11 and powder in Class IV; do you agree?

12 A. Yes.

13 Q. In Class II, for instance, ice cream
14 and yogurt?

15 A. Yes.

16 Q. Whatever else, fluid creams and ice
17 cream; correct?

18 A. Uh-huh.

19 Q. So substitutability is not a
20 requirement for classification in the same
21 class? I mean, absolute substitutability;
22 correct?

23 A. Correct. Between any two products,
24 right.

25 Q. Now, let's talk about, you were

1 Dr. Cryan - Cross - by Mr. Beshore
2 asked by Mr. Vetne, I think, about competitive
3 equity and, you know, who's got -- you know,
4 it's kind of like whose got a dog in the fight,
5 I guess.

6 Among the National Milk producer
7 members, are any of those cooperatives also
8 Class I processors?

9 A. Of who?

10 Q. The members of the National Milk
11 Federation?

12 A. Yes. Quite a number. I can tell
13 you a few of them.

14 Q. It's Exhibit A to Exhibit 14. How
15 many of them have Class I processing facilities
16 of their own?

17 A. Cass-Clay Creamery, Dairy Farmers of
18 America.

19 Q. There is a few joint ventures?

20 A. Foremost Farms, I believe. I don't
21 know all of them. Maryland-Virginia has a
22 number, has several claims, Berry Farms Dairy,
23 Swiss Valley Farms, Upstate Farms. A number of
24 them have Class I operations.

25 Q. Northwest Dairyman?

1 Dr. Cryan - Cross - by Mr. Beshore

2 A. That's, of course, Northwest Dairy
3 has quite a number of plants. Quite a large
4 volume.

5 Q. So when your membership was
6 evaluating the position to advance in this
7 hearing, would it be fair to say that they were
8 taking all of their interests into account,
9 including their Class I processing --

10 A. I would say so. Their share of the
11 fluid market is not inconsiderable.

12 Q. Now, let's look at it another way.
13 As looking at the dairy farmer members just as
14 sellers to other companies for processing, is
15 it in the sellers' interests to have equity
16 between its customers in terms of the
17 classification of pricing of the raw milk
18 product?

19 A. Absolutely.

20 Q. And isn't it one of the favorite
21 games in the business, if you look at it that
22 way, for the buyers to work on the price with
23 the seller because of competitive inequities
24 that may be, you know, arguments about
25 competitive equity that may be available to

1 Dr. Cryan - Cross - by Mr. Beshore

2 them?

3 A. Yes.

4 Q. And in the marketplace, as the
5 saying goes, the last load and the lowest price
6 controls?

7 A. Yes. Yes.

8 Q. You've mentioned DMI and the DMI
9 studies and that sort of thing.

10 Just so the record is complete, DMI
11 is subject to USDA oversight and supervision
12 because it administers the required by law milk
13 promotion funds; correct?

14 A. That's right. Everything they do is
15 subject to the USDA oversight. These studies
16 were, like I said, were part of an attempt to
17 understand the return to producers of promoting
18 products, promoting -- or assisting with the
19 promotion and development of particular types
20 of products which they are actively involved in
21 across the board.

22 Q. And, in fact, they, DMI, and its
23 dairy farmer directors, use promotion funds to
24 fund the promotion of proprietary products if
25 they determine that it would enhance producer

1 Dr. Cryan - Cross - by Mr. Beshore
2 revenues?

3 A. That's right.

4 Q. And that was the purpose for
5 exploring how low-carb milks work in the
6 marketplace; correct?

7 A. Yes.

8 Q. Now, you've been --

9 A. The bottom line is if they spend
10 money promoting a product and that is expanding
11 sales, it's win-win. It's good for everybody.
12 If they spend resources and funds promoting a
13 product that's just robbing Peter to pay Paul,
14 then it's a waste of the farmers' money.

15 Q. Now, the data that Mr. Rourke placed
16 in the record was a result of your request to
17 him, as has been testified; correct?

18 A. That's right.

19 Q. Do you have any objection to making
20 your written request for purposes of
21 clarification as it's been referred to a number
22 of times an exhibit here?

23 A. No, I don't object.

24 MR. BESHORE: Okay. I think
25 I've got one copy but only one copy. Let me

1 Dr. Cryan - Cross - by Mr. Beshore
2 see if we can identify that and ask Mr. Cryan
3 to identify it, and then we will see that
4 copies are obtained.

5 I have a two-page letter dated
6 April 26, 2005, that I would ask to be
7 marked --

8 JUDGE DAVENPORT: Let's tender
9 it as Exhibit 5 for identification -- or 15,
10 excuse me, for identification.

11 (Exhibit No. 15 was marked for
12 identification.)

13 Q. See if you can identify it.

14 A. I believe, yes, this is the letter.
15 I would make a point -- make a note that there
16 were some minor changes in the effective
17 request based on requests for clarification.

18 I asked for carbohydrate-reduced
19 beverages and carbohydrate-free beverages, and
20 in discussion with Mr. Rourke, I indicated that
21 I was interested as well in Lactaid, and he
22 pointed out that those are not carbohydrate
23 reduced because of the carbohydrates are broken
24 down to other carbohydrates then removed from
25 the product.

1 Dr. Cryan - Cross - by Mr. Beshore

2 I indicated that I was interested in
3 the lactose-free beverages as well as
4 carb-reduced beverages. Otherwise, I believe
5 we just followed through with the original
6 request.

7 Q. Okay. So Exhibit 15, with the oral
8 clarification that you have just testified to,
9 represented the request that you made that
10 resulted in the data Mr. Rourke presented?

11 A. That's right. And he did a
12 wonderful job putting it all together, putting
13 together data that didn't really exist until it
14 was extracted from the raw data of the Federal
15 Orders.

16 MR. BESHORE: I would ask that
17 Exhibit 15 be received, Your Honor.

18 JUDGE DAVENPORT: Any
19 objection? Exhibit 15 for identification will
20 be admitted as Exhibit 15.

21 (Exhibit 15 was admitted.)

22 JUDGE DAVENPORT: Other
23 questions? Mr. Tosi?

24 -----

25

1 Dr. Cryan - Cross - by Mr. Tosi

2 CROSS-EXAMINATION

3 BY MR. TOSI:

4 Q. Good afternoon, Roger. I want to
5 thank you for being at the hearing today.

6 A. Thank you.

7 Q. I wanted to ask you some questions
8 that are similar or identical to the ones that
9 I asked Mr. Hollon earlier this morning.

10 Is National Milk Producers
11 Federation satisfied with respect to the
12 structure of the fluid milk product definition
13 in where we describe fluid milk products both
14 by naming products and then providing some sort
15 of criteria for the exclusion of products that
16 would not be fluid milk products?

17 A. Are we satisfied with the current
18 structure?

19 Q. Yes.

20 A. We're satisfied with the current
21 structure in -- I mean, as I said -- well,
22 let's see.

23 We have a position to amend it, and,
24 otherwise, we are satisfied with the --

25 Q. I understand that you are proposing

1 Dr. Cryan - Cross - by Mr. Tosi
2 what you are proposing in Proposal 7, but the
3 notion that we are going to name products like
4 we do in paragraph A, part 15, Section 15 --
5 maybe if I help you out here.

6 A. I guess so.

7 Q. When you look at your fluid milk
8 product definition that you were kind enough to
9 put in your written testimony --

10 A. Yes, I see that it says products --

11 Q. Part A names products, for example,
12 low-fat milk, white milk, fat-free milk, et
13 cetera?

14 A. Right.

15 Q. I'm referring to that as naming
16 products.

17 A. I think that's probably a helpful
18 illustration for clarity, especially for folks
19 who are not especially familiar with the
20 Federal Order.

21 Q. And then in part B where we talk
22 about things that would not be fluid milk
23 products or it establishes certain
24 compositional standards that helps us decide
25 whether or not something is a fluid milk

1 Dr. Cryan - Cross - by Mr. Tosi
2 product, you are satisfied with those two key
3 features of how the definition is structured?

4 A. Well, I think in that case it goes
5 beyond illustration. I guess it tends to
6 define.

7 I suppose it might be better to
8 establish physical standards a little more
9 specific than the list of products. However,
10 in some sense, that's done because you have
11 definitions of what these products are later on
12 and are kind of based on physical standards.

13 I'm not sure -- I don't -- I'm not
14 sure to what extent these definitions are based
15 on FDA definitions products and to what extent
16 they are not. I suppose it is important that
17 there not be any gaps. On occasion we may have
18 a definition for this product that goes up to a
19 certain test --

20 JUDGE DAVENPORT: To the
21 extent we might be talking about two different
22 things, Mr. Tosi, is the gist of your question
23 as to the format of the regulation as opposed
24 to the actual content?

25 MR. TOSI: Yes, sir. That's

1 Dr. Cryan - Cross - by Mr. Tosi

2 correct, Your Honor.

3 A. So was I answering your question or
4 was I rambling?

5 Q. I got a little bit of each out of
6 it.

7 What I was trying to relate is that
8 the notion that the '74 classification decision
9 that's been referred to several times here at
10 this hearing made a purposeful decision to name
11 products as well as provide compositional
12 standards, and my line of questioning was
13 trying to get to do you think that's still the
14 appropriate way to approach the structure of
15 how we decide if something is or is not a fluid
16 milk product?

17 A. Well, I suppose ideally there would
18 be some sort of -- you know, to name products,
19 sort of define points within a set where the
20 ideal may be to define the boundaries of the
21 set. So I think they are both useful.

22 I suppose there's a certain balance
23 that's necessary in -- just off the top of my
24 head, I don't know exactly what that is, but I
25 certainly trust you to come up with it.

1 Dr. Cryan - Cross - by Mr. Tosi

2 Q. Would you agree that even if your
3 proposal were adopted, that there may still be
4 instances of some time in the future we would
5 have gray areas of trying to determine whether
6 or not a product should or should not be a
7 fluid milk product?

8 A. I think the current gray area is
9 really a result of a good faith effort to
10 reconcile traditional principles of form and
11 use with outdated regulations. I don't doubt
12 that that may happen again.

13 We're dealing with it today, and
14 hopefully that will take care of it for a
15 while. But, inevitably, it's the nature of
16 Federal Orders that as market conditions
17 change, we have to go back and make some
18 changes in the Federal Order language.

19 Q. I had asked Mr. Hollon this question
20 or a similar question, and I would like to ask
21 the same of you.

22 To the extent that there comes a
23 situation that sometime in the future where
24 we're in a gray area, would you be supportive
25 of any modifications to your proposal that

1 Dr. Cryan - Cross - by Mr. Tosi
2 would give the Department a little bit of
3 latitude for interpretation provided if that
4 was on the basis of form and intended use?

5 A. Such as a provision that says, "or
6 such other products as determined by the
7 Secretary," that kind of thing?

8 Q. That may be one way of handling it.
9 Then I was going to ask you what advice you
10 would give us on how to do that.

11 A. Well, I think clear rules are
12 important up front, but it's -- but we have
13 seen how difficult they can be when you are
14 kind of caught in between a rock and a hard
15 place.

16 I suppose maybe some sort of interim
17 authority to handle it, depending if a hearing
18 would make sense.

19 Q. All right. Let me give you a
20 hypothetical situation.

21 Let's assume there is a product out
22 there that its form and intended use is fluid,
23 and its intended use is to be used like milk,
24 things that we know -- traditionally think of
25 when we think of milk.

1 Dr. Cryan - Cross - by Mr. Tosi

2 To the extent that we're riding on
3 some exclusionary factor that may arise in the
4 future, for example, 2.23 percent protein, that
5 there comes some technology that sometime in
6 the future where we can take protein and
7 fractionate it and fractionate it again such
8 that it may give rise to challenging the
9 protein standard, its applicability, would you
10 want the Department to have some flexibility in
11 saying perhaps that product is best classified
12 as a fluid milk product because of its intended
13 form and use?

14 A. No. Now, this answer is just on my
15 own, obviously. This is -- I would say that it
16 might be reasonable to, again, to offer some
17 interim authority if the underlying -- what we
18 want are regulations that are as clear as
19 possible that are set out in black and white
20 what rules are. If those cease to be adequate,
21 then they need to be changed, and then that
22 means a hearing.

23 However, recognizing the problems
24 associated with, you know -- recognizing the
25 potential for problems for products that come

1 Dr. Cryan - Cross - by Mr. Tosi
2 in before you have time to do that, you know
3 how long this process can take, I would say
4 that it would be reasonable to have some sort
5 of interim authority pending a hearing to make
6 a determination outside of that, outside of
7 that standard.

8 That may be a reasonable approach.
9 But that would really be something that should
10 depend on a very substantial change in the
11 circumstances. I'm not sure how you would do
12 that.

13 Q. Well, let's try a real example.
14 Let's use Carb Countdown, for example. Would
15 you be of the opinion that it's a Class I fluid
16 milk product based on what you think you
17 understand about how this product -- what its
18 composition is and how it's intended to be
19 used?

20 A. I --

21 Q. Form and use?

22 A. I believe the form and use and a lot
23 of the things, it's fundamentally a Class I
24 product, yes.

25 Q. And if the manufacturers of this

1 Dr. Cryan - Cross - by Mr. Tosi
2 product say, well, we don't think so, we think
3 it should be Class II, and they give us their
4 because, are you saying then that every time
5 we come into a potential conflict in the
6 future, that we should come to a hearing to
7 resolve that product's classification?

8 A. I think if the rules are inadequate
9 to the circumstance, it's time to go back to
10 hearing, yes.

11 Q. And so you are saying no latitude to
12 the Department in terms of --

13 A. No, I'm not saying -- I'm saying
14 perhaps an interim -- latitude on an interim
15 basis pending a hearing. I don't think -- I
16 think that -- I think that's the only thing
17 that's fair to everybody involved.

18 I think Elvin's right, there is a
19 lot of pressures involved, and it ultimately
20 has to be decided out in the open. It's a
21 difficult -- it's very -- I know this has been
22 a very difficult -- this product has been a
23 very difficult situation for a lot of folks,
24 and there has to be some light at the end of
25 the tunnel for -- at least for a hearing.

1 Dr. Cryan - Cross - by Mr. Tosi

2 I think for somebody to come up and
3 face a set of rules and then be told, well, we
4 think for some deeper underlying principles,
5 this may be a problem. So I think as an
6 interim on some emergency basis pending a
7 hearing, it might be reasonable.

8 But I wouldn't say as a permanent
9 thing that it makes -- that it's -- I would say
10 it shouldn't be a permanent thing. If the
11 rules are broken, they've got to be fixed.

12 Q. If the rules are broken, they have
13 to be fixed?

14 A. Yeah. If the rules are broken, they
15 got to be fixed. I understand that you have --
16 there has to be a stopgap sometimes while you
17 fix them.

18 Q. Well, rules are what they are. How
19 would they be broken?

20 A. I think what we had in this case is,
21 as I said, we had the underlying principle of
22 form and use that was difficult to reconcile
23 with the language in the Order as it stands.

24 It's created -- it created a bit of
25 a mess, and because we didn't anticipate the

1 Dr. Cryan - Cross - by Mr. Tosi
2 technology the last time we wrote them up, and
3 now we are here to fix it. I think that's the
4 way the system's supposed to work.

5 Q. So what is broken with the rules as
6 they are --

7 A. I think --

8 Q. -- with respect to let's use Carb
9 Countdown as a way as an example?

10 A. The whey exemption is -- offers a
11 big opening for some of this creative
12 formulation, and I guess I understand that the
13 language in 15(B) is not as clear -- is not
14 clearly -- it's not as clear regarding the
15 choice of disposition as a basis for Class I
16 and for some of these modified products -- for
17 accounting for these modified products, it
18 obviously left some holes when we're talking
19 about nonfat milk solids.

20 I think there's some confusion about
21 what the rules mean, and it's better to make
22 them clear.

23 Q. Do you think that the Order should
24 specifically define such terms as infant
25 formula, dietary use, meal replacement,

1 Dr. Cryan - Cross - by Mr. Tosi
2 hermetically sealed, more than what they
3 currently do, what the Orders currently do?

4 A. Well, we don't -- we don't have a
5 position on that.

6 Q. Should substitution be a criteria
7 that the Department should consider when
8 determining whether or not something should or
9 should not be a fluid milk product? I'll let
10 you define substitution in whatever way you
11 feel is appropriate to the issue at hand.

12 A. I think substitution is more of an
13 underlying issue in helping to define the
14 rules, and that certainly on a case-by-case
15 basis, it's often the unwielding. It would be
16 very difficult to use that as a basis for
17 class -- for qualifying and classifying
18 products on a product-by-product basis.

19 So while I do think that
20 substitution is very important criteria as we
21 define the categories, when we get into too
22 much detail on the product-by-product basis,
23 that can create some -- we can draw things with
24 too fine a brush.

25 Q. I guess in that regard, whether or

1 Dr. Cryan - Cross - by Mr. Tosi
2 not a new product competes with something that
3 we currently understand that's -- or currently
4 defined as a fluid milk product, should that be
5 a criteria the Department should rely upon?

6 A. On a case-by-case basis or in
7 defining the rule in this proceeding?

8 Q. You can feel free to answer both
9 ways.

10 A. I don't think it's appropriate
11 for -- I think defining -- generally defining
12 form and use on the basis of physical
13 composition and beverage, intended use as a
14 beverage, should be the basis for the
15 case-by-case accounting. I think consideration
16 of the substitution is going to be a basis for
17 deciding what the rules are going to be.

18 Again, we think the rules right now
19 are good except for these exceptions that we
20 are asking for based -- they have stood up
21 pretty well, and we are dealing with a
22 substantial hole that's been generated by new
23 technologies, and that's the kind of thing we
24 have to respond to.

25 Q. Should one of the criteria be

1 Dr. Cryan - Cross - by Mr. Tosi
2 whether or not classification in Class I
3 increases -- or, excuse me, yeah, Class I --
4 whether or not it increases producer income,
5 producer revenue? Should that be a criteria?

6 A. I don't -- I don't really see how --
7 that was a criterion established in the program
8 itself. I'm not sure how we can really say
9 that it can be a criteria in defining Class I.

10 I think that's -- I think that it
11 either falls out from the other criteria or it
12 doesn't. I don't think it's an appropriate
13 basis for considering that in this proceeding.

14 Q. You've had a lot of questions
15 regarding how you came to know the
16 classification that's of the various dairy
17 products that you have on Page 16 of your
18 testimony in Appendix B, and on your sources,
19 you say how you came up with these things had
20 to do with product labels and consultation of a
21 couple of different web sites, and USDA.

22 If you were able to contact USDA and
23 get the names of individual products and what
24 classification that they are under, what was
25 your need to rely on these other things like

1 Dr. Cryan - Cross - by Mr. Tosi
2 other sources like product labels, bevnet.com,
3 and peapod.com?

4 A. Well, the objective here was to -- I
5 don't think -- if I call you all and you give
6 me -- tell me what class the product is in, you
7 are not necessarily going to tell me -- I never
8 asked, but I didn't think you were going to
9 tell me -- give me a copy of the label or tell
10 me what the retail price is.

11 So one of the objectives of this
12 table is to show on a protein accounting basis
13 what proportion of the product is milk and to
14 kind of line them up from top to bottom to get
15 some sort of sense that it was kind of an
16 exercise in showing the list -- show the list
17 of people and say, well, where do you think the
18 line ought to be?

19 Some people will look at the list
20 and say -- all the way down at the bottom, when
21 we were getting started with this stuff, I
22 had -- I had what I called a Yoo-Hoo test. I
23 would say, "Do you think Yoo-Hoo should be
24 Class I or Class II?" And, basically, you
25 could tell just from that answer to that

1 Dr. Cryan - Cross - by Mr. Tosi
2 question where people were going to fall out on
3 this whole issue.

4 And then, of course, getting the
5 retail price in there and Class I, Class II
6 values, the average Class I, Class II values,
7 all that allows us to make a reasonable
8 comparison of the impact of reclassification --
9 well, the impact of the difference between
10 Class I and Class II, what that has on the
11 retail price. That is what it is, a retail
12 price.

13 Which this isn't a retail price --
14 the difference based on the numbers prices I
15 projected for Class I, II, and IV, for 2005 at
16 the beginning of the year, I expected that the
17 Class I price for raw milk would be
18 16.6 percent higher than the Class II price.

19 If I contrast the reclassification
20 of -- well, 80 'N Sunny would increase to 64
21 ounce package from -- by 2.6 cents, only 9.9
22 percent, so you see the differences in the
23 impact of the -- you see the differences among
24 these products, types of products, and the
25 volumes and the sizes of the products and how

1 Dr. Cryan - Cross - by Mr. Tosi
2 an increase from two to one would affect their
3 retail price, assuming it passed the --

4 Q. I understand what your Appendix B
5 is, the information and what the intent of the
6 information that you are portraying. I'm just
7 getting at your knowledge of how the products
8 that you are saying are currently Class I are
9 Class I; products that you are saying are
10 Class II, how you know those things.

11 If USDA was going to -- all you had
12 to do was call them and say, hey, by the way,
13 what is the classification on Raging Cow, for
14 example, that we would give it to you.

15 A. I'm sorry, I don't understand the
16 question. Why --

17 Q. Well, you are saying that the
18 sources of -- you named products here?

19 A. Yes. I could have --

20 Q. Actually existed --

21 A. I could have asked you for any of it
22 is my understanding. I could have gone and
23 asked one by one, I think, and gotten -- I
24 don't remember. I mean, it's been a while.

25 Q. Right.

1 Dr. Cryan - Cross - by Mr. Tosi

2 A. I -- you know, I've asked -- I've
3 talked to a lot of people about a
4 classification price, but it's generally been
5 consistent. It's been very consistent when I
6 had a product by the content suggested itself
7 to be a Class II product, it was a Class II
8 product.

9 It was only a handful of products
10 that were on the line when I checked, and
11 almost always there was consistency in that.
12 They were always -- so I didn't check all of
13 them because --

14 Q. I was asking you in furtherance to
15 the previous questions that Mr. Vetne was
16 asking you and concern about the potential
17 release of information the Department
18 considered to be proprietary --

19 A. Okay.

20 Q. -- and a confidential matter between
21 the Department and the manufacturer of a
22 product.

23 A. Okay.

24 Q. So I just -- it just struck me as
25 curious that why would you need to consult

1 Dr. Cryan - Cross - by Mr. Tosi
2 product labeling, beynet.com, and peapod.com if
3 you could have called us? Your testimony
4 suggested that people at the Department told
5 you what the classifications were of some of
6 these products.

7 A. Well, I don't remember. I mean, I
8 probably -- it might have been -- okay. Let's
9 see.

10 I had most of the things -- I had
11 these compositions laid out, and it might have
12 been, you know, translated to hypotheticals. I
13 don't know. I'm sorry, I'm not sure what --

14 Q. That's all right. Just leave it at
15 that.

16 If we adopt the proposal, and if it
17 turns out that the adoption of your proposal
18 would cause certain products that are currently
19 classified as something other than Class I,
20 something lower than Class I, to the extent
21 that it would result in them meeting the fluid
22 milk product definition, how would you suggest
23 that the Secretary give notice to folks that
24 the product that they are currently producing
25 is no longer, for example, Class II, and that

1 Dr. Cryan - Cross - by Mr. Tosi
2 as a result of these changes that we're
3 considering, their product is now a Class I
4 milk product and would be priced accordingly?

5 A. I guess I wouldn't -- I wouldn't
6 suggest a way to do it. I mean, I know that
7 when changes are made in order form, the Market
8 Administrators kind of did a campaign to inform
9 all handlers what the changes are and how they
10 are going to be affected.

11 They brought staff out to the plants
12 to explain things and made sure there were no
13 misunderstandings. I assume you would take
14 some approach like that, but I wouldn't presume
15 to tell you how to go about doing that.

16 Q. For example, would you think that
17 giving the industry 60 days' notice would be
18 reasonable? 90 days? Six months, 12 months?

19 A. I suppose whatever is normal for the
20 implementation of an order memo. I don't know
21 why this would be different, again, I'm not --
22 since I'm not aware of any products that would
23 be affected by this.

24 Q. Okay. Antoinette, my colleague,
25 would like to ask you a few questions. Thank

1 Dr. Cryan - Cross - by Ms. Carter
2 you, I appreciate your answers.

3 A. You're welcome.

4 -----

5 CROSS-EXAMINATION

6 BY MS. CARTER:

7 Q. Antoinette Carter, USDA. Good
8 afternoon, Roger.

9 A. Good afternoon, Antoinette.

10 Q. I have a few questions regarding
11 Appendix B. If you could just kind of walk
12 through that with me.

13 You mentioned some projections for
14 the Class I, II, and IV prices for 2005.

15 A. Right.

16 Q. Are those annual projections or --

17 A. Those were projections as of the
18 beginning of the year for the class prices for
19 Class I, II, and IV. The only reason I had
20 four in there for the products that are over
21 100 percent -- over 100 percent milk
22 equivalent, I calculated out the value based on
23 for the Class I products.

24 For the Class II products, I
25 calculated the value total milk equivalent at

1 Dr. Cryan - Cross - by Ms. Carter

2 Class II, and for the ones that are Class I, I
3 calculated up to 100 percent in Class I, and
4 then the balance of Class IV is fortification.

5 Q. Could you run through those
6 projections in terms of those prices. I think
7 you mentioned them real briefly earlier.

8 A. Well, I made projections at the
9 beginning of the year. I presume the table
10 could be changed, but the beginning of the year
11 I put this table together, not when I first --
12 when I first put this version of the table
13 together, I had projected Class I, II, and IV
14 prices for the calendar year, but I don't have
15 those with me.

16 They were roughly what the futures
17 markets were predicting first week or two of
18 January. That's when I put the table together.
19 There may be some differences based on later
20 projections.

21 Q. If you could, could you walk through
22 the raw milk value, Class I, Class II, and the
23 difference in how you calculated percentage for
24 the retail.

25 A. Sure. For example, take the

1 Dr. Cryan - Cross - by Ms. Carter
2 simplest example, italicized and highlighted,
3 the line that says "producer milk and producer
4 price." I took the projected Class I and
5 Class II prices that was projected for the year
6 and scaled those down to a gallon, 128 ounces,
7 and that gave us \$1.32 and \$1.10 per gallon as
8 the raw milk prices in Class I and Class II.

9 The difference between those two is
10 22 cents per gallon, and for retail price, I
11 just went ahead and put the Class I value. The
12 difference from going from one to two is
13 16 percent (check).

14 To take a related example, the whole
15 milk one below that is also based on the gallon
16 and protein-basis, I worked that to 98 percent
17 of a gallon based on the compositional
18 information I had from the USDA -- the ARS
19 nutritional database, the protein test was
20 98 percent of the protein test for a gallon of
21 producer milk.

22 The retail price I found on
23 peapod.com, which is the Giant delivery on-line
24 shopping groceries -- I'm sorry, peapod.com is
25 on-line grocery retailer run by Giant in the

1 Dr. Cryan - Cross - by Ms. Carter

2 Washington area and a few other cities. The
3 retail price they were offering through that
4 site for whole milk was \$3.99, which was about
5 the time -- which was about the same as the
6 store price.

7 A gallon of 98 percent milk at the
8 Class I price I had projected was \$1.26,
9 Class II was \$1.04. The difference one for the
10 other was 21.6 cents, and that difference was
11 equal to 4. -- 5.4 percent of the retail price
12 of \$3.99. So that in all these cases, the
13 objective is to show the difference in the raw
14 milk cost between Class I and Class II as a
15 percentage of the retail price.

16 So that we could get a better sense
17 of what the real impact is when you raise the
18 raw milk cost in some study that I've seen, I
19 believe will be presented later this week,
20 there are comparisons of -- comparisons of two
21 different products, and the impact based on
22 certain demand elasticities, elasticities of
23 demand that don't really take into account the
24 fact that certain products have a much higher
25 share of the retail price in the raw milk than

1 Dr. Cryan - Cross - by Ms. Carter

2 others do.

3 If the raw milk value is a small
4 share of the retail value, then the increase in
5 that one particular raw product cost is not
6 going to have -- if that is increased by one
7 percent, retail price of the product drive is
8 not going to go up by one percent, it's going
9 to go up by some smaller share based on its
10 proportion with the retail price.

11 Q. As part of your proposal, I think
12 you have referred to it as in switching from a
13 6.5 nonfat milk solids standard to a protein
14 equivalent standard, that you're really sort of
15 providing a better accounting method.

16 But in addition to that, as part of
17 your proposal, you are also requesting that
18 additional milk-derived ingredients be included
19 in calculating that standard?

20 A. Yes, that's a change.

21 Q. Is it your -- if your proposal is
22 adopted, do you suggest that those milk-derived
23 ingredients or dairy ingredients be codified
24 and be a part of the code?

25 A. Do you mean do I suggest they be

1 Dr. Cryan - Cross - by Ms. Carter

2 listed?

3 Q. Right.

4 A. The way you list the other products
5 in the Class I category?

6 Q. Yes.

7 A. I don't see why not to say products
8 such as these would but not limited to that
9 kind of thing, sure.

10 Q. In your opinion, what is the
11 justification for including these milk-derived
12 ingredients in the calculation of a protein
13 equivalent standard?

14 A. I think the larger issue is what is
15 the justification for excluding them? I don't
16 see the justification for excluding them. I --
17 there was a processing technology, who is right
18 or wrong?

19 I'm not sure why they made a
20 specific decision to exclude, for example,
21 sodium caseinate at one time. If it's going to
22 be used in a beverage, then why not include it?
23 If it's not suitable for beverage use, why
24 worry about excluding it?

25 I would say that really the better

1 Dr. Cryan - Cross - by Ms. Carter
2 question is what the justification is for
3 excluding it. If we include them, then we are
4 in a better position with respect to advances
5 in technology. If we think that they are not
6 satisfactory -- if they are satisfactory
7 products for use in dairy beverages, then we
8 should include them now because they should be
9 in there now, and if they are not satisfactory,
10 then we should put them in there for
11 prospective reasons.

12 Q. If adopted and these milk-derived
13 ingredients are included, do you foresee any
14 additional reporting requirements that would be
15 placed on handlers?

16 A. I guess -- I suppose ingredients
17 used for fortification or reconstitution would
18 probably have to include specifications of
19 protein content. If -- there shouldn't be any
20 changes for use of nonfat dry milk.

21 Any ingredients that don't change
22 the portions of protein to nonfat solids from
23 the milk, I don't see the reason to change the
24 accounting for the ingredients that are protein
25 concentrated or protein dilute, whey.

1 Dr. Cryan - Cross - by Ms. Carter

2 For whey protein concentrates or
3 whey protein dilute, anything that has -- any
4 dairy ingredient that has some sort of unusual
5 proportions of protein to nonfat solids, there
6 would probably need to be some accounting if
7 the product goes into Class I utilization. At
8 least for qualification.

9 So there would -- there may have to
10 be some additional reporting of protein tests
11 for ingredients.

12 Q. In your opinion, do you think these
13 additional reporting requirements would be
14 minimum or place a significant burden in terms
15 of reporting on handlers?

16 A. You know, added on to the -- added
17 on to the requirements of audit, I don't see
18 what -- that it would be a substantial burden.
19 I think when you use an ingredient, you know
20 what the composition is. The formulation is
21 based on the -- what the ingredient is.

22 So if you are keeping records,
23 usually those records should include the
24 accounting of what the ingredient is and access
25 to the specs, so I don't know that that should

1 Dr. Cryan - Cross - by Ms. Carter

2 really be a substantially great burden.

3 Q. So your testimony is that that
4 information should already be available to the
5 handlers and that they would just be reporting
6 it now or be required to report that as part of
7 the report to utilization?

8 A. Yes. There might be some slight --
9 for most of them, I don't imagine there would
10 be additional recordkeeping, but for some there
11 might be some if they are not keeping track of
12 individual ingredients for each batch.

13 But I think that that's a standard
14 practice. Of course -- well, okay.

15 Q. On Page 10 of your statement, it's
16 the second full paragraph, you state that on
17 your request that the decision from this
18 hearing makes such a definition of whey
19 explicit to avoid impacts from future
20 alternative interpretations by FDA.

21 Could you explain what you mean by
22 that statement.

23 A. FDA does make changes from time to
24 time in how they define things, as we all know.
25 Their purposes are not always the same as

1 Dr. Cryan - Cross - by Mr. Wilson
2 purposes of the Federal Order in defining
3 products.

4 So I think it would be reasonable to
5 recognize this -- essentially the convenience
6 of using the current definition, but to
7 incorporate it independently of the FDA
8 regulations so it's clear for purposes of this
9 regulation that the objective is to provide a
10 pricing exemption only for whey that's been
11 derived from the process of coagulation of the
12 cheese.

13 MS. CARTER: Thank you.
14 That's all I have.

15 THE WITNESS: Thank you.

16 -----

17 CROSS-EXAMINATION

18 BY MR. WILSON:

19 Q. Good afternoon, Roger. Todd Wilson,
20 U. S. Department of Agriculture.

21 A. Nice to see you.

22 Q. Again, I would like to ask a couple
23 of questions or a few questions that I also
24 asked Mr. Hollon.

25 In the fluid milk product definition

1 Dr. Cryan - Cross - by Mr. Wilson
2 that you identified in your testimony, there is
3 a description of what a concentrated product is
4 as used in this part.

5 As that relates to total solids, do
6 you have an opinion whether or not that
7 definition is outdated as the solids nonfat
8 definition that is in your current proposal,
9 you are modifying that to now look at protein?

10 A. I'm sorry, which definition? The
11 25.5 percent?

12 Q. Yes.

13 A. Per concentrated milk?

14 Q. Yes.

15 A. I always assumed that those
16 percentages were based somehow on, you know,
17 the functional ability -- the viscosity of the
18 milk product. That there was some assumption
19 if you had over 25.5 percent milk solids, it
20 was not drinkable. If you had over 50 percent,
21 you couldn't really pump it.

22 But I don't know -- I don't know --
23 that's just my guess, and I shouldn't even say
24 that because it's just a guess, but I'm not
25 sure what the basis for that would be.

1 Dr. Cryan - Cross - by Mr. Wilson

2 Q. Let me ask it a different way.

3 The definition of the concentrated
4 product in that definition is anything between
5 25.5 and 50 percent total solids, so as the
6 language is written, if it's less than 25.5
7 percent total solids, it's not a fluid milk
8 product?

9 A. If it's less than 25.5 percent it's
10 not a fluid milk product; is that what you are
11 saying?

12 Q. Correct.

13 A. So there's a gap between -- I'm
14 sorry, I don't understand.

15 Q. If a product has 26 percent total
16 solids, it's a concentrated product.

17 A. Okay.

18 Q. If the product has 15 percent total
19 solids, it's not a concentrated product.

20 A. Okay.

21 Q. And thus not a fluid milk product in
22 this definition possibly, what is your opinion
23 of that?

24 A. I am not aware of that. I do
25 think -- it's important that definitions about

1 Dr. Cryan - Cross - by Mr. Wilson

2 and don't leave gaps so that you know how to
3 treat any product of any composition.

4 That's been an issue for I guess in
5 some cases here, and I know it's been an issue
6 for the simple reporting at NAS, and these are
7 the kinds of things that should be addressed.

8 If there are gaps between products
9 where you have gaps where product falls into
10 some category that nobody knows what they are
11 or the Class II catch-all without being
12 intended to, I guess we should fill the gaps.

13 Q. The composition standards that
14 you've identified that you are modifying the
15 2.25 percent protein as product is
16 concentrated, sometimes it leaves the point of
17 processing and then is used to -- when it gets
18 to the consumer, the consumer then modifies it
19 through another process at the consumer level.

20 Would you have -- would you offer
21 some insight to at what time do we apply those
22 composition standards? Is it at the time when
23 the product is made at the facility or is it at
24 the intended use to the consumer?

25 A. I don't think we would propose to

1 Dr. Cryan - Cross - by Mr. Wilson
2 start charging Class I for, you know, consumer
3 practice of nonfat dry milk. I think that's --
4 I think we should, unless there's some issue
5 that hasn't been raised -- unless there's some
6 issue I'm not aware of -- I think we probably
7 should stick with the way we've been doing it.
8 And there may be an issue I'm not aware of.
9 There are some of those.

10 Q. I'm thinking of a product that might
11 be in it's concentrated form, and when it
12 leaves the facility, it's packaged in a unique
13 container that is specific to a machine that
14 only takes that particular container, and then
15 is possibly rehydrated, reconstituted at the
16 consumer level with water at that -- at the
17 consumer level.

18 A. Like a soda dispenser?

19 Q. Yes. Or even a milk dispenser or --

20 A. It's the same principal. There's a
21 concentrate that's --

22 Q. Exactly.

23 A. Okay. Well, I guess I don't have
24 any say about that. I don't -- I don't know
25 enough about it.

1 Dr. Cryan - Cross - by Mr. Wilson

2 Q. When you identify the whey and the
3 whey products, whey solids in your definition,
4 are you aware of any products that currently
5 combine whey solids with, for instance, MPC
6 solids or flavoring solids and then market that
7 as a special blend and how would you -- would
8 you count only those MPC solids, for instance,
9 in the up-charge in your proposal?

10 A. Are you talking about some sold as a
11 liquid or some sold as a powder?

12 Q. Dry powder.

13 A. I wouldn't propose to up-charge
14 those if they are sold to consumers as a dry
15 mix, I don't know -- I don't know that I would
16 recommend that we up-charge that. That would
17 be a change from the current procedure; isn't
18 that right?

19 Q. If MPC is dried at a facility from
20 fresh milk and whey is dried at a facility from
21 coagulated cheese production and those two are
22 combined into one blended powder that is then
23 reprocessed into a fluid milk beverage that it
24 meets all the definitions in your proposal, so
25 we have --

1 Dr. Cryan - Cross - by Mr. Wilson

2 A. We are not talking about the
3 consumer buying the dry mix, you are talking
4 about --

5 Q. A processing facility.

6 A. -- a dry mix being sent to another
7 plant and being reconstituted?

8 Q. Correct.

9 A. I suppose it would -- I suppose if
10 there's -- if the facility is processing over
11 150,000 pounds, they would become regulated as
12 a plant. If it's a cafeteria that's doing, you
13 know, 3,000 pounds a month, there would be
14 nothing to do on that basis.

15 Q. In your proposal you are exempting
16 whey and whey solids from the up-charge portion
17 of your proposal. Would you also exclude the
18 whey and whey solids of that blended mixed
19 product, powder that is, from the up-charge
20 also?

21 A. If you are calling it a Class I --
22 if you are -- if there's -- I mean, it's --

23 Q. Let me rephrase, please.

24 A. Okay.

25 Q. If you have nonfat dry milk and you

1 Dr. Cryan - Cross - by Mr. Wilson
2 combined it with whey powder to make it a
3 blended specialty powder and there's a lot
4 of -- I believe there's a lot of specialty
5 powders out on the market that processors can
6 utilize -- and they take this product and they
7 put it into 2 percent milk to fortify their
8 2 percent milk --

9 A. Okay.

10 Q. -- would you up-charge only the
11 nonfat dry milk or would you up-charge the
12 nonfat dry milk in the whey solids that are
13 part of that special blend?

14 A. You mean because of the volume added
15 to -- because of the fortification?

16 Q. Because of the proposal of exempting
17 whey solids.

18 A. I'm not sure I -- if you are using
19 it to fortify milk; correct?

20 Q. Yes.

21 A. And you are putting this whey powder
22 MPC blend into the -- into milk for
23 fortification?

24 Q. Correct.

25 A. And you are talking about the

1 Dr. Cryan - Cross - by Mr. Wilson

2 up-charge here. You are only talking about
3 that small volume that increases --

4 Q. Right. Correct.

5 A. That's a pretty fine point. I -- I
6 will leave it to you. Pretty small point on a
7 small volume.

8 Q. Well, it might be a small volume on
9 2 percent milk, but what if you were to take
10 the same powder, put water back in and
11 reconstitute and make a fluid milk product 2.25
12 percent protein?

13 A. I think the key there is to treat
14 the whey as if it was sugar or dirt, or
15 whatever else they put in some of the stuff,
16 and then there's not really a real question
17 after that.

18 You know how to treat starch and
19 chocolate and sugar and stuff like that, so I
20 would treat it the same way. I don't see why
21 you would treat it any differently.

22 Once you've established that you are
23 qualifying the product as a Class I product,
24 that any whey ingredient added to the product
25 is -- should really be treated as if it was a

1 Dr. Cryan - Cross - by Mr. Wilson

2 nondairy ingredient.

3 Probably most of the questions about
4 that kind of thing just fall out from that and
5 most of the answers just fall out from that.

6 Q. On Page 6 of your testimony, you
7 made reference to a protein equivalent. Are
8 you talking about a milk equivalent based on
9 protein in that context?

10 A. Yes. I believe so. Yes. I say the
11 protein equivalent accounting system.

12 Q. I don't know. I have to look at the
13 document. The protein equivalent accounting
14 system paragraph.

15 A. By that I mean counting these
16 modified fluid milk products, that is the skim
17 solid modified fluid milk products, on the
18 basis of the milk equivalent on the protein
19 basis.

20 And I would one more time, or more
21 than one more time, emphasize again how similar
22 the argument for skim and butterfat is -- skim
23 and butterfat and reclassifying skim and
24 low-fat milk into the Class I in the '60s --
25 how similar that is to what the situation we

1 Dr. Cryan - Cross - by Mr. Wilson
2 are looking at now.

3 They are so close that you have
4 to -- if you believe -- if you believe the
5 logic from 1968, you have to believe the logic
6 from 2005 because it's the identical argument.

7 Q. On Page 8 of your testimony, you
8 have some ratios. One of them is the average
9 test, I believe protein test, versus the
10 average nonfat solids test, and then another
11 one, the middle of the page, is protein nonfat
12 solids, also.

13 When we're looking at those ratios,
14 the top one is impacted by butterfat; would you
15 agree?

16 A. The ratio between protein and nonfat
17 solids is impacted by butterfat or the absolute
18 numbers of protein and nonfat solids?

19 Q. I believe the absolute numbers.

20 A. Yes, the absolute numbers are
21 affected. The ratio between the two should
22 not.

23 Q. The middle column or the middle
24 ratio is not. It's on the skim milk portion
25 basis, 3.1 percent protein and skim milk is

1 Dr. Cryan - Cross - by Mr. Wilson

2 what the pricing formulas are based on?

3 A. Right.

4 Q. When you go to Page 9, the second
5 paragraph, the very last sentence, protein to
6 other solids?

7 A. Yes.

8 Q. Okay.

9 A. I'm sorry?

10 Q. You referenced other solids in that?

11 A. Protein -- well, the -- I'm
12 changing -- okay. Because I'm not referring to
13 any specific number there, that still follows
14 logically, but I couldn't understand why it
15 would be more consistent to talk about total
16 nonfat solids.

17 But either way, you can change that
18 if you want in either case, because I'm not
19 talking about specific numbers, the logic still
20 follows. Consistent protein to other solids
21 ratio is the same as consistent -- consistent
22 protein to other solids ratio is the same as
23 consistent protein to nonfat solids ratio.

24 Q. You revert back a little bit to whey
25 and whey products in your exclusion.

1 Dr. Cryan - Cross - by Mr. Wilson

2 If I understand it correctly, in
3 your proposal, if you were to take a product
4 and add it to a whey solid, the casein protein,
5 would that then be a fluid milk product?

6 A. I'm sorry, I don't understand your
7 question. To take -- if it was added to a
8 casein and whey proteins?

9 Q. Let me rephrase. I may have stated
10 it wrong.

11 If in fractionization you were able
12 to fractionate out the proteins from the
13 lactose, if you would take that casein protein
14 and replace it with whey --

15 A. Whey produced from the cheese-making
16 process?

17 Q. Yes. So you end up having a term we
18 call permeate, it's the portion of the casein
19 and is removed?

20 A. Right. So adding --

21 Q. If you combine that with whey
22 protein, you are just replacing protein;
23 correct? Whey protein from coagulated cheese
24 process with milk protein?

25 A. In what product?

1 Dr. Cryan - Cross - by Mr. Wilson

2 Q. In a fluid product, in a beverage.

3 A. Okay.

4 Q. In a formulated product.

5 A. So you have a product where you have
6 whey protein, and you separate it from lactose
7 and recombining it with lactose to make a fluid
8 milk product, that's the hypothetical?

9 Q. That's correct.

10 A. Okay.

11 Q. Is it a fluid milk product?

12 A. Well, if it's over 2. -- according
13 to my proposal -- according to National Milk's
14 proposal, if it's over 2.25 percent protein, it
15 is a fluid milk product, but if all the protein
16 is whey, then it's not priced, so the volume is
17 equivalent to zero.

18 Q. Do you know if whey protein solids
19 can be manufactured through anything but the
20 cheese-making process?

21 A. It's my presumption that you can
22 separate the same proteins in other ways, and
23 if you cannot now, I'm sure you will at some
24 point.

25 But, again, this proposal for the

1 Dr. Cryan - Cross - by Mr. Wilson
2 treatment of whey depends specifically on the
3 whey being derived from the cheese-making
4 process, which is why I suggested that that
5 definition be enshrined in the language.

6 Q. If you were to look at a whey
7 powder, will you be able to tell the difference
8 between that whey made from the cheese process
9 and possibly in the future a whey powder made
10 from another process without ever going through
11 the cheese process?

12 A. Well, I think there's -- I guess
13 there's a lot of situations where you can't
14 necessarily tell from your finished product as
15 to whether the product has one component or
16 another. So you really have to depend on the
17 accounting at the plant and that's -- that
18 would probably be the case there, too.

19 I don't know whether there's a way
20 to separate it out to find it, you know, in the
21 lab or not, so -- but I'm sure when you look at
22 the whole system, there are ways to address it.

23 Q. There was a previous question to
24 Mr. Hollon, I believe Mr. Vetne posed it, that
25 talked about currently there's some processes

1 Dr. Cryan - Cross - by Mr. Wilson
2 whereby used to produce, a form of used to
3 produce, is accounted for for Class I products.
4 For example, flavored milk might be one case.

5 We don't account for the entire
6 volume of what is in the container for flavored
7 milk, we factor out the flavorings and things.
8 Do you see any advantages in your proposals
9 that might lead to a Class I used to produce
10 category?

11 A. You think a consistent protein
12 accounting is only -- if you have a consistent
13 protein accounting, the disposition in used to
14 produce are identical in respect to those
15 nonstandardized products.

16 In fact, I can't think of a way that
17 they wouldn't be identical. If you are
18 doing -- maybe I am missing something, but it
19 certainly brings them closer together. Using
20 consistent, you know, protein-based milk
21 equivalent accounting for these nonstandardized
22 products does get to be relatively close to
23 establishing used to produce for these category
24 products.

25 Of course, used to produce is

1 Dr. Cryan - Cross - by Mr. Wilson

2 another way to address these things. But,
3 again, you have to establish the basis for
4 defining the volume of the used to produce
5 since used to produce by itself still leaves
6 some questions, some holes, because you can
7 have milk -- you can have a volume of milk used
8 to produce several things and was told used to
9 produce would be some volume of the original
10 volume of milk.

11 If you fractionate and you use all
12 the lactose to do one thing and all the casein
13 to do another thing and all the whey to do
14 something else -- the whey fractionated
15 proteins that would be in whey -- to do
16 something else, and you account for each one of
17 the volumes on the basis of milk used to
18 produce the product, you could use 100 pounds
19 of milk, but according to accounting, you used
20 200 pounds of milk to produce all these
21 products.

22 So there should be some consistent
23 accounting approach, accounting basis for skim
24 solids. A total protein accounting basis for
25 skim solids is the best way to bring all these

1 Dr. Cryan - Cross - by Mr. Wilson
2 things in line with one another. Once you do
3 that, it hardly matters whether you are doing
4 it on the basis of disposition or used to
5 produce.

6 Q. Basically getting back to 100
7 pounds?

8 A. Yes. That's what I think off the
9 top of my head, but I'm not sure. I think I
10 have that right. You better double-check that
11 before we put it in the regulation.

12 Q. One last question. Also including
13 in the product definition as we currently have
14 it and you have put in your testimony, I would
15 like to discuss maybe another product or
16 another composition standard, the nine percent
17 butterfat standard.

18 If a product is manufactured that
19 has greater than nine percent that's used as an
20 energy drink or, you know, some kind of other
21 drink, do you think that should be a fluid milk
22 product?

23 A. It has more than nine percent?

24 Q. And can be used as a beverage.

25 A. Well, nine percent butterfat is not

1 Dr. Cryan - Cross - by Mr. Yonkers

2 Q. What Class I differential did you
3 assume when you calculated that? I think you
4 answered her about how you got your milk price
5 forecast for 2005, but you had to assume some
6 Class I differential.

7 A. I don't know if I used -- there's a
8 weighted average for the country about 2.58. I
9 don't know if I used that or not. I'm not
10 sure. I would have to do the calculations to
11 double-check, go back with the spreadsheet.

12 Q. When you called that the raw milk
13 value, did you include over-order premiums?

14 A. I doubt it.

15 Q. So if you had -- we only have
16 published over-order premiums on Class I, I've
17 never seen any on Class II, that would increase
18 that difference; wouldn't it?

19 A. There are premiums on Class II in a
20 lot of markets, but they are not as large as
21 they are in Class I. So it would increase the
22 difference.

23 Q. Thank you.

24 A. That's assuming that they are
25 treated the same way. I mean, that's assuming

1

2 that these Class II beverage uses don't have
3 any demands on suppliers that are over and
4 above normal Class II supplier requirements,
5 and that there's no special premium for these
6 products compared to any other Class II
7 products. But it's probably a reasonable
8 assumption.

9

MR. YONKERS: Thank you.

10

JUDGE DAVENPORT: Given the
11 hour, this appears to be a good time to recess
12 for the evening. The starting time in the
13 morning is eight o'clock; is that still okay?

14

MR. BESHORE: Eight o'clock.
15 Are we concluded? Is Dr. Cryan concluded?

16

JUDGE DAVENPORT: Let's ask if
17 there are any additional questions in the
18 morning, and then if not, then he will stand
19 excused at that time.

20

MR. YALE: Could we in the
21 morning have a list of who else is going to be
22 testifying?

23

JUDGE DAVENPORT: I think
24 that's probably a good thing, and also a
25 proposed schedule for the morning, and also

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identifying any people that have specific needs as they appear. I want to assure you that I will make sure that everybody has an opportunity to be heard and heard in a reasonable fashion.

MR. YONKERS: Can we do that the first thing in the morning before eight, is come down and --

JUDGE DAVENPORT: We can do that at eight.

MR. YONKERS: On the record or off is my question?

JUDGE DAVENPORT: You know, if you want to come up, if you want to meet informally prior to eight, I have no objection to you all doing that.

(Whereupon, the above-entitled matter was adjourned at 5:36 p.m., this date.)

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C E R T I F I C A T E

I hereby certify that the
proceedings and evidence are contained
fully and accurately in the
stenographic notes taken by me on the
hearing of the within cause and that
this is a correct transcript of the
same.
