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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1000

[Doc. No. AMS–DA–09–0062; AO–14–A73, et al.; DA–03–10]

Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This final decision maintains the current fluid milk product definition's compositional standard of 6.5 percent nonfat milk solids criterion and incorporates an equivalent 2.25 percent true milk protein criterion for determining if a product meets the compositional standard. The decision also determines how milk and milk-derived ingredients should be priced under all Federal milk marketing orders when used in products meeting the fluid milk product definition. The decision provides exemptions for drinkable yogurt products containing at least 20 percent yogurt (by weight), kefir, and products intended to be meal replacements from the fluid milk product definition. The orders as amended are subject to producer approval by referendum before they can be implemented.

FOR FURTHER INFORMATION CONTACT: Henry H. Schaefer, Economist, USDA/AMS/Dairy Programs, Upper Midwest Milk Market Administrators Office, Suite 200, 1600 West 82nd Street, Minneapolis, Minnesota 55431–1420, (952) 831–5292, e-mail address: *hschaefer@fmma30.com*; or William Francis, Associate Deputy Administrator, USDA/AMS/Dairy Programs, Order Formulation and Enforcement, Stop 0231–Room 2971–S, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 720–6274, e-mail address: *william.francis@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This final decision maintains the current fluid milk product definition's compositional standard of 6.5 percent nonfat milk solids and incorporates an equivalent 2.25 percent true milk protein criterion for determining if a product meets the compositional standard. The decision also determines how milk and milk-derived ingredients should be priced under all Federal milk marketing orders when used in products meeting the fluid milk product definition. The decision exempts drinkable yogurt products containing at least 20 percent yogurt (by weight), kefir, infant formulas, dietary products (meal replacements) and other products that may contain milk-derived ingredients from the fluid milk product definition.

This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866. The proposed amendments to the rules herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. The Agricultural Marketing Agreement Act of 1937 (Act), as amended (7 U.S.C. 604–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is a habitant, or has its principal place of business, has jurisdiction in equity to review the USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

For the purposes of determining which dairy farms are "small businesses," the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

For the month of June 2005, the month the hearing was held, 52,425 dairy farmers were pooled on the Federal order system. Of the total, 49,160, or 94 percent were considered small businesses. During the same month, 1,530 plants were regulated by or reported their milk receipts to their respective Market Administrator. Of the total, 847, or 55 percent were considered small businesses.

The fluid milk product definition sets out the criteria for determining if the use of producer milk and milk-derived ingredients in such products should be priced at the Class I price. The established criteria for the classification of producer milk are applied in an identical fashion to both large and small businesses and will not have any different impact on those businesses producing fluid milk products thus assuring that similarly situated handlers have the same minimum price as required by Section 608(c)5 of the Act. Therefore, the amendments will not have a significant economic impact on a substantial number of small entities. The impact of the proposed amendments on large and small entities would be negligible. In fact, the amendment proposing to change the

classification of kefir and drinkable yogurt is estimated to affect blend prices by no more than $ 0.0026 per cwt based on record evidence.

The Agricultural Marketing Service is committed to complying with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements are necessary.

This notice does not require additional information collection that needs clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. The forms require only a minimal amount of information that can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Prior Documents in This Proceeding

Notice of Hearing: Issued April 6, 2005; published April 12, 2005 (70 FR 19012).

Recommended Decision: Issued May 12, 2006; published May 17, 2006 (71 FR 28590).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this final decision with respect to the proposed amendments to the marketing agreements and the orders regulating the handling of milk in the Northeast and other marketing areas. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in all Federal milk marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Pittsburgh, Pennsylvania, on June 20–23, 2005, pursuant to a notice of hearing issued April 6, 2005 and published April 12, 2005 (70 FR 19012); and a recommended decision issued May 12, 2006 and published May 17, 2006 (71 FR 28590).

The material issues on the record of the hearing relate to:

1. Amending the fluid milk product definition.

Findings and Conclusions

This final decision maintains the current fluid milk product definition's compositional standard of 6.5 percent nonfat milk solids and incorporates an equivalent 2.25 percent true milk protein criterion for determining whether a product meets the compositional standard. The decision also determines how milk and milk-derived ingredients should be priced under all orders when used in products meeting the fluid milk product definition. The decision exempts drinkable yogurt products containing at least 20 percent yogurt (by weight), kefir, infant formulas, dietary products (meal replacements) and other products that may contain milk-derived ingredients from the fluid milk product definition.

All Federal milk orders currently state that "fluid milk product means any milk products in fluid or frozen form containing less than 9 percent butterfat that are intended to be used as beverages." The fluid milk product definition also contains a non-definitive list of dairy products that are named fluid milk products. In addition to the compositional butterfat standard fluid milk products shall not include, among other products, "* * * any product that contains by weight less than 6.5 percent nonfat milk solids * * *" Dairy products that do not fall within these limits are not considered fluid milk products and the milk used to produce these products is classified in Class II, Class III or Class IV, depending on the form or purpose for which the products are to be used.

Eleven proposals were published in the hearing notice for this proceeding. Proposals 1, 3, 4 and 6 were abandoned at the hearing by their proponents in support of other noticed proposals. No further reference to these proposals will be made.

A proposal published in the hearing notice as Proposal 2, offered by Dairy Farmers of America, Inc. (DFA), seeks to amend the fluid milk product definition to include any dairy ingredient, including whey, when calculating the milk contained in a product on a protein-equivalent or nonfat solids equivalent basis. DFA is a dairy farmer-member owned cooperative and at the time of the hearing had 12,800 member farms located in 49 states whose members' milk is pooled throughout the Federal order system.

H.P. Hood LLC (H.P. Hood) owns and operates milk processing and manufacturing plants in the Eastern and Midwest United States and is the proponent of a proposal published in the hearing notice as Proposal 5 that was modified at the hearing. As modified, Proposal 5 seeks to amend the fluid milk product definition to include any product that, based upon substantial evidence as determined by the Department, directly competes with other fluid milk products and that the Department must make a written determination before any product can be classified as a fluid milk product.

A proposal published in the hearing notice as Proposal 7 was offered by the National Milk Producers Federation (NMPF). At the time of the hearing NMPF consisted of 33 dairy-farmer member cooperatives that represented more than 75 percent of U.S. dairy farmers. Proposal 7 seeks to amend the fluid milk product definition by removing the reference "6.5 percent nonfat solids standard and whey," and adopting a 2.25 percent true milk protein criterion. During the hearing, DFA offered a modification to Proposal 7 by seeking to authorize the Department to make an interim classification determination for new products that result from new technology. The Department would then convene a hearing to address the use of the new technology in classification decisions and make a final classification determination for the new product within one year.

Proposal 8 seeks to amend the fluid milk product definition by excluding yogurt-containing beverages from the fluid milk product definition. This proposal was offered by The Dannon Company, Inc. (Dannon), a wholly owned subsidiary of The Danone Group that produces yogurt and fresh dairy products in 40 countries, including the United States.

Proposal 9 also seeks to amend the fluid milk product definition by excluding drinkable food products with

no more than 2.2 percent skim milk protein provided the product contains at least 20 percent yogurt (nonfat yogurt, lowfat yogurt or yogurt) by weight from the fluid milk product definition. Proposal 9 was offered by General Mills, Inc. (General Mills), a food manufacturer that markets such products as Yoplait yogurt and yogurt-containing products in over 100 countries, including the United States.

A proposal published in the hearing notice as Proposal 10 was offered by the Novartis Nutrition Corporation (Novartis). Novartis develops and manufactures a variety of products, including milk-based products, designed to meet specific nutritional needs. Proposal 10 seeks to amend the fluid milk product definition by excluding formulas prepared for dietary use by removing the words "(meal replacement) that are packaged in hermetically-sealed containers." The proposal would remove the 6.5 percent nonfat milk solids standard.

A proposal published in the hearing notice as Proposal 11 seeks to amend the fluid milk product definition by excluding health care beverages distributed to the health care industry. Proposal 11 was offered by Hormel Foods, LLC (Hormel), a wholly owned subsidiary of Hormel Foods Corporation and manufacturer of a variety of food products primarily for the health care industry.

A witness appearing on behalf of NMPF testified in support of Proposal 7. The witness testified that Proposal 7 would close loopholes in the current fluid milk product definition that have allowed products developed as a result of new technology to avoid classification as fluid milk products. The witness said that the 6.5 percent nonfat solids standard should be eliminated and replaced with a 2.25 percent protein standard that would also include whey proteins in determining if the product meets the protein standard. The witness stressed that whey proteins should be specifically defined as whey proteins that are a by-product of the cheese making process. The witness was of the opinion that adoption of Proposal 7 would not alter the classification of any product currently being marketed.

The NMPF witness stressed that Federal order regulations have always adapted to marketing conditions and that the current fluid milk product definition should be amended to reflect changes in market conditions brought about by changes in technology. The witness testified that technology has evolved such that milk can now be separated into numerous components that can be recombined to create a vast number of new milk products. The witness argued that new technology has enabled manufacturers to manipulate milk components, such as removing lactose or substituting whey for other milk solids, to create new products that contain less than 6.5 percent nonfat milk solids. This enables manufacturers of the new products to avoid classification of the new product as a fluid milk product even though the form and use does not differ from what is currently considered a fluid milk product.

The NMPF witness testified that Carb Countdown®, a product manufactured by the H.P. Hood Company, contains whey and has a reduced lactose content that results in its composition being below the 6.5 percent nonfat milk solids standard. According to the witness, two market research studies suggest that the product is similar in form and use to traditional fluid milk. Relying upon a market study conducted by IRI, a market research firm, the witness related that 98.4 percent of Carb Countdown® sales are purchased as a substitute for fluid milk while only 1 percent of its sales are represented as an expansion of the fluid milk market.

The NMPF witness was of the opinion that classifying a product on the basis of protein is appropriate because protein is the highest valued skim component in the marketplace. The witness testified that a 2.25 percent protein standard is the appropriate equivalent of the current 6.5 percent nonfat milk solids standard. The witness asserted that protein has the most value to producers, processors and consumers because it contributes nutrition, flavor and texture to milk. While the witness was of the opinion that all dairy-derived ingredients should be used in computing the true protein standard of a product, the witness did not believe whey and whey product ingredients should be priced at the Class I price. The witness maintained that the use of whey and whey products should not exclude a product from the fluid milk product definition because manufacturers are using whey in their new products to avoid a fluid milk product classification. The witness also noted that instead of relying upon the Food and Drug Administration (FDA) standard, the Department should provide its own definition of whey.

A post-hearing brief submitted on behalf of NMPF reiterated the positions testified to at the hearing. The brief asserted that adoption of a milk protein standard would close regulatory loopholes that prevent products developed as a result of new technology from avoiding classification as a fluid milk product. According to the brief, adoption of a true protein standard merely changes the way milk proteins are accounted for and would not change the classification of any product. However, these changes would capture those products currently formulated to avoid being classified as fluid milk products.

Comments and exceptions to the Recommended Decision filed by NMPF supported the proposed adoption of the 2.25 percent milk protein standard, the inclusion of all nonfat milk ingredients in determining a product's composition, and the Class I pricing of milk protein concentrates (MPCs) used in fluid milk products. NMPF strongly opposed exemption of casein and caseinates used in fluid milk products from Class I pricing. They view such exemptions as differential treatment that could cause market disorder and provide incentives for manufacturers to use these un-priced ingredients in their fluid milk products. NMPF was of the opinion that casein and caseinates are not substantially different than MPCs to justify a different pricing treatment when used in fluid milk products. However, NMPF maintained that only whey resulting from the production of cheese should be exempted from Class I pricing when used as an ingredient in fluid milk products.

NMPF comments and exceptions asserted that manufacturers have historically relied on the quantitative composition standards contained in the fluid milk product definition when making decisions regarding new product development. NMPF expressed opposition to the proposed reference to "form and intended use" in the fluid milk product definition because, in NMPF's opinion, it could cause manufacturers to decrease their use of dairy ingredients in order to prevent a product from being classified and priced as a fluid milk product. NMPF urged abandoning the "form and intended use" standard and relying solely on the protein and nonfat solids compositional standards in making classification decisions.

A witness from DFA, appearing on behalf of DFA and Dairylea Cooperative, Inc., (DLC), testified in support of NMPF's Proposal 7 and Proposal 2. DLC is a dairy farmer-member owned cooperative with 2,400 member farms located in 7 states at the time of the hearing.

The DFA/DLC witness was of the opinion that the purpose of the hearing was to refine the fluid milk product definition to reflect current market conditions brought about by technological innovations to ensure that

dairy farmers are equitably paid for their milk. The witness testified that dairy processing technology, such as ultra filtration and milk component fractionalization, has enabled new products to be developed that were not foreseen when the current classification definition was last considered.

The DFA/DLC witness testified that the current fluid milk product definition does not recognize the value of dairy proteins in the development of new products and therefore does not classify and subsequently price these new products appropriately. The witness claimed that manufacturers formulate their products to contain less than 6.5 percent total nonfat milk solids to avoid a Class I use of milk classification even though these products compete directly with and are substitutes for fluid milk.

The DFA/DLC witness was of the opinion that the form and use of a product should be the primary factor in determining product classification. The witness said that secondary criteria used to make classification determinations should include such factors as product composition, a specific but not exclusive list of included and excluded dairy products, product substitutability and enhancement of producer revenue. The witness argued that eliminating the current total nonfat milk solids standard and replacing it with an equivalent milk protein standard would better reflect the demand for dairy proteins in the marketplace.

The DFA/DLC witness offered a modification to Proposal 7 that the witness said would provide the Department with latitude for classifying future products that are a result of new technology. The witness explained that the modification would allow the Department to make an interim classification decision for a new product and then have up to one year to hold a public hearing to determine the appropriate permanent classification.

The DFA/DLC witness also testified in support of Proposal 2. The witness said that its adoption would recognize the importance of dairy proteins in the marketplace by including all dairy protein sources, including whey and whey products, in computing the product's protein content. However, said the witness, while whey and whey products would be used in classification determinations, those ingredients should not be priced as Class I.

A post-hearing brief submitted on behalf of DFA/DLC reiterated support for adopting a protein standard. The brief reiterated the claim that new technology has enabled some products that contain less than 6.5 percent nonfat milk solids to be classified at a lower use-value than competitors in the market. The brief maintained that adoption of a protein standard would more adequately identify products that should be classified as fluid milk products in light of new fractionation technology.

A witness appearing on behalf of O–AT–KA Milk Products Cooperative, Inc. (O–AT–KA) testified in support of Proposals 2 and 7. O–AT–KA, at the time of the hearing, was a cooperative owned by the dairy farmer-members of Upstate Farms Cooperative, Inc., Niagara Milk Cooperative, Inc., and Dairylea Cooperative, Inc. The witness was of the opinion that the development of new technology necessitates a change to the fluid milk product definition. However, the witness cautioned that changes should not capture all beverages which contain milk solids as fluid milk products because not all milk-containing beverages compete with fluid milk.

The O–AT–KA witness asserted that Proposal 7 should not be thought of as a fundamental change to the current standard; rather that the proposed true protein standard of 2.25 percent is an equivalent to the current 6.5 percent nonfat milk solids standard and should be considered as a needed clarification brought about by technological advances in milk processing. According to the witness, the proposed 2.25 percent standard recognizes protein as a highly valued ingredient in milk products and those products with less than 2.25 percent protein would remain exempt from fluid milk product classification. The witness also advocated the adoption of Proposal 2 that would include whey and whey products in the computation of the protein percentage of the product but would not price the whey ingredients at Class I prices.

A post-hearing brief, submitted on behalf of O–AT–KA, reiterated support for Proposal 7. The brief claimed that the adoption of the protein standard would increase the use of dairy ingredients in beverages which are not "in the competitive sphere of the traditional milk beverages," thus increasing producer revenue. The brief also supported DFA/DLC's modification to Proposal 7 giving the Department authority to make an interim classification decision if a new product is a result of new technology.

Comments and exceptions to the Recommended Decision submitted on behalf of DFA, DLC, O–AT–KA and Upstate Farms Cooperative Inc., hereinafter referred to as "DFA, *et al.*", supported the recommendation incorporating a 2.25 percent true protein standard as a proposal in the Recommended Decision and that inclusion of all milk derived ingredients when computing the 6.5 percent nonfat solids or 2.25 percent true protein criterion. The DFA, *et al.,* comments also endorsed the comments and exceptions submitted on behalf of NMPF.

DFA, *et al.,* expressed opposition to exempting casein and caseinates from Class I pricing when used in fluid milk products. The comments argued that all proteins in a fluid milk product should be priced the same—at the Class I price. DFA, *et al.,* also abandoned their position taken at the hearing to not price whey derived from cheese making at the Class I price when used in fluid milk products. DFA, *et al.,* was of the opinion that providing exemption for ingredients will only serve to encourage manufacturers to use price-exempted ingredients to formulate a finished product that would be compositionally identical to fluid milk.

DFA, *et al.,* took exception to relying on form and intended use as the final determinate in classifying fluid milk products. DFA, *et al.,* argued that manufacturers rely on the compositional criteria contained in the fluid milk product definition to decide how to formulate a new product, assess how their new product would be classified, and ultimately determine their raw milk ingredient costs. Their exceptions asserted if form and intended use criteria supersedes compositional standards, manufacturers would develop fewer dairy based products because of the perceived uncertainty in how that product's ingredients could be classified and priced. DFA, *et al.,* argued that the 2.25 percent protein standard should be the ultimate determinate of a fluid milk product and, if such compositional standard becomes inadequate, a hearing could be held to establish updated compositional standards.

A post-hearing brief submitted on behalf of Select Milk Producers, Inc. (Select) and Continental Dairy Products (Continental) expressed support for adoption of a protein standard as a component of the fluid milk product definition. According to the brief, Select and Continental are dairy-farmer owned cooperatives that market milk on various Federal orders. The brief argued that adoption of a protein standard is a needed change to reflect changed marketing conditions brought about by new manufacturing technology without fundamentally altering current regulations. The brief stressed that milk proteins are valuable ingredients in drinkable products in the market and

that classification and pricing determinations should be reflective of this.

Comments to the Recommended Decision filed on behalf of Select and Continental specifically supported the proposed adoption of a 2.25 percent true protein standard to the fluid milk product definition and pricing of MPCs used in fluid milk products at the Class I price. Select and Continental also endorsed the comments and exceptions filed by NMPF.

Select and Continental's exceptions asserted that as a result of new milk-processing technology, there is no barrier to using casein as a substitute ingredient for MPCs. In this regard, Select and Continental took exception to exempting casein and caseinates from Class I pricing because it would serve to provide an incentive to manufacturers to use them as a substitute for MPCs to avoid Class I regulation. The brief said relying on form and intended use to override compositional standards in making classification determinations would add needless ambiguity and subjectivity.

A witness appearing on behalf of H.P. Hood testified in opposition to any changes to the fluid milk product definition. The witness was of the opinion that the fluid milk product definition should not be amended in a manner that would classify more dairy products as fluid milk products unless data is provided which would conclude that such products compete directly with fluid milk and such amendments would enhance producer revenue.

The H.P. Hood witness asserted that if Proposal 7 was adopted and resulted in the reclassification of some products as fluid milk products, the change would only affect a small number of products and the enhancement of producer revenue would be minimal. If ingredient substitution for milk occurred as a result of adopting other proposals, the witness said, producer revenue could actually decrease. The witness was of the opinion that adoption of proposals that broaden the fluid milk product definition would stifle product innovation and discourage the use of dairy-derived ingredients because of the resulting increased costs to the manufacturer. These results, the witness said, should not be encouraged by the Federal milk order program.

A post-hearing brief submitted on behalf of H.P. Hood reiterated opposition to Proposal 7. The brief maintained that no disorderly marketing conditions exist to warrant a change to the fluid milk product definition and that proponents of the protein standard failed to meet the burden of proof required by the AMAA to make a regulatory change. The H.P. Hood brief reviewed many factors used by the Department in previous classification decisions to determine the proper classification of Class I products. The list included, but was not limited to, demand elasticities, enhancement of producer revenue, and product competition. The brief stated that proponents failed to provide adequate data addressing these factors or prove that disorderly marketing conditions exist to warrant a change, and urged the Department to terminate the proceeding.

Comments and exceptions filed by H.P. Hood took exception to the Recommended Decision's proposed adoption of a 2.25 percent protein standard and its reliance on form and intended use as a primary factor in making classification determinations. H.P. Hood reiterated its opinion that the proponents of the protein standard did not provide adequate justification for its adoption. Furthermore, H.P. Hood was of the opinion that it is not proper to make regulatory changes as preventive measures to possible disorderly marketing conditions and is a major deviation from historical milk order policy. The exceptions stressed that it is only proper to react to marketing conditions once they occur. In their exceptions, H.P. Hood also presented a list of questions regarding the application of how a product's form and intended use would be determined by the Department. H.P. Hood claimed that relying on form and intended use would be extremely burdensome and serve to inhibit new product development.

A witness appearing on behalf of Leprino Foods Company (Leprino) testified in opposition to the adoption of the 2.25 percent protein standard contained in Proposal 7. According to the witness, Leprino operates nine plants in the United States that manufacture mozzarella cheese and whey products. The witness was of the opinion that a protein standard would reclassify products such as sport and protein drinks and yogurt smoothie products (formulated with ingredients such as whey and whey products) as fluid milk products. The witness stressed that broadening the fluid milk product definition to account for all dairy derived ingredients could lessen the demand for such ingredients. The witness speculated that manufacturers may seek out other less costly non-dairy ingredient substitutes which would result in decreased producer revenue.

Exceptions to the Recommended Decision filed by Leprino expressed opposition to the adoption of a 2.25 true protein standard in the fluid milk product definition. Leprino argued that this standard should not be adopted unless it is modified to specifically exclude beverages that do not resemble or compete with fluid milk. Leprino was of the opinion, that without such exclusion, to classify products based on form and intended use could cause many non-traditional products, such as sport and nutritional beverages, to be classified as fluid milk products. The end result, argued Leprino, would be a lowered demand for dairy ingredients that may offset any revenue gains to producers by including additional products as fluid milk products.

A witness appearing on behalf of Dannon Company, Inc. (Dannon) testified in opposition to Proposals 2 and 7. Dannon is a wholly owned subsidiary of the Dannon Group that produces yogurt and fresh dairy products in 40 countries, including the United States. The witness was opposed to the adoption of a protein standard and to the inclusion of whey when calculating the nonfat milk solids content of a product because, the witness said, it was not the original intent of the fluid milk product definition to include these milk-derived ingredients. The witness believed that adoption of a protein standard would cause more products to be classified as fluid milk products even though they do not compete with fluid milk. The witness argued that protein is not a major component of fluid milk products and therefore using a protein standard would not be appropriate for making classification determinations. The witness speculated that if a protein standard was adopted, it could stifle product innovation or cause food processors to use non-dairy ingredients in their food products. The witness said that if whey proteins are included, manufacturers may look for less expensive non-dairy ingredients to be used as a viable substitute.

A post-hearing brief submitted on behalf of Dannon reiterated their opposition to the adoption of a protein standard claiming that adequate justification for such a change was not given by proponents at the hearing and that the mere ability to test for milk proteins does not justify its adoption.

A post-hearing brief submitted on behalf of the National Yogurt Association (NYA) expressed opposition to Proposal 7. According to the brief, NYA is a trade association representing manufacturers of live and active culture yogurt products and suppliers of the yogurt industry. The brief claimed that proponent testimony was inconsistent regarding the proposals' impact on product classification and stated that if

the 2.25 percent protein standard was adopted, at least one yogurt-containing product would be reclassified as a fluid milk product.

The NYA brief also asserted that proponents did not provide a clear picture of how Proposal 7 would be implemented. Specifically, the brief noted that the following were not addressed: (1) How wet and dry whey would be handled; (2) how whey from cheese production would be differentiated from whey from casein production; and (3) how products that meet the proposed 2.25 percent true protein standard and contain whey and other proteins would be classified and priced. The NYA brief speculated that including whey in the protein calculation would lead to more products being classified as fluid milk products and cause manufacturers to seek out less costly non-dairy ingredients. The potential loss to producer revenue by substitution with non-dairy ingredients, concluded the brief, is not supported by the record.

A post-hearing brief submitted on behalf of the National Cheese Institute (NCI) expressed opposition to Proposal 7 and claimed that its adoption would suppress the use of dairy-derived ingredients, particularly whey proteins. According to the brief, NCI is a trade association representing processors, manufacturers, marketers, and distributors of cheese and related products. NCI claimed that proponents of Proposal 7 did not identify any specific marketplace disorder that would be corrected by the adoption of a protein standard or list any product that would be reclassified if the fluid milk product definition were amended. The brief reviewed previous rulemaking decisions where proposals were denied because proponents failed to demonstrate that disorderly marketing conditions were present.

The NCI brief stressed that use of dairy-derived ingredients in a product should not automatically qualify a product as a competitor of fluid milk or that their classification in a lower-valued use negatively affects producer revenue. The brief further maintained that proponents did not adequately address why whey proteins should be included in determining if the product met the proposed protein standard for a fluid milk product and why whey should be priced at the Class I price. The brief concluded that whey should be excluded from the fluid milk product definition because its inclusion would lead to products being classified as fluid milk products even when they do not compete with fluid milk.

A post-hearing brief submitted on behalf of Sorrento Lactalis, Inc. (Sorrento) objected to the adoption of a protein standard. According to the brief, Sorrento is a manufacturer that operates five cheese plants throughout the United States. The brief stated that adoption of a milk protein standard as part of the fluid milk product definition would reduce the demand for dairy ingredients, especially whey proteins, which in turn would result in increased costs to manufacturers and reduced producer revenue.

A witness testifying on behalf of H.P. Hood was of the opinion that if the Department found that changing the fluid milk product definition was warranted, adoption of a modified Proposal 5 would be appropriate. The witness said that adoption of Proposal 5 would provide the Department with standards to determine if a dairy product with less than 6.5 percent nonfat milk solids competes with and displaces fluid milk sales, which would justify classification of the product as a fluid milk product. The witness also noted that if Proposal 5 was adopted, a new product with less than 6.5 percent nonfat milk solids and route distribution in a Federal milk marketing area of less than 3 million pounds would be exempted from classification as a fluid milk product. This distribution criteria, the witness explained, would allow manufacturers to test market a new product with the assurance that it would not be classified as a fluid milk product until the distribution threshold was exceeded.

A witness appearing on behalf of Leprino testified in support of Proposal 5. The witness was of the opinion that fluid milk products should only be those products that meet the FDA standard of identity for milk and cultured buttermilk and products that compete with milk and cultured buttermilk. The witness testified that the fluid milk product definition is currently too broad and as a result, has lessened the demand for dairy ingredients in new non-traditional dairy products because of the possibility of being classified as a fluid milk product. The witness argued that many of these new products do not compete for sales with fluid milk and their use of dairy-derived ingredients should not qualify them to be defined as a fluid milk product.

The Leprino witness explained that advances in technology have allowed the creation of dairy-derived ingredients through milk fractionation. According to the witness, dairy manufacturers are avoiding investing in some product innovation because of the regulatory burden and increased costs that are associated with manufacturing a fluid milk product.

A witness testifying on behalf of DFA/DLC was opposed to the adoption of Proposal 5. The witness said that Proposal 5 would place an undue burden on the Department in making classification determinations and would also extend Class II classification to more products, neither of which the witness supported. The post-hearing brief submitted by DFA/DLC reiterated their opposition.

A witness appearing on behalf of Bravo! Foods International Corporation; Lifeway Foods, Inc.; PepsiCo; Starbucks Corporation; and Unilever United States, Inc.; testified in opposition to all proposals that would reduce or eliminate the 6.5 percent minimum nonfat milk solids standard, adopt a protein standard, or include whey in determining the nonfat milk solids content of a product. Hereinafter, these companies are referred to collectively as "Bravo!, *et al.*"

A post-hearing brief submitted on behalf of Bravo!, *et al.,* urged the termination of the proceeding except for the portion addressing the exemption of yogurt and kefir products from the fluid milk product definition. Bravo!, *et al.,* asserted that the hearing record does not support adoption of a protein standard. The brief stated that decisions to amend Federal order provisions are not made without clear evidence of disorderly market conditions, the potential shortage of milk for fluid use, or lowering of producer revenue. The brief also discussed letters sent to the Department by producers and manufacturers which urged that a hearing be postponed because more analysis and market data was needed to justify amending the current fluid milk product definition. Bravo!, *et al.,* argued that the hearing was held prematurely, without allowing for adequate study and market data research on the proposals that are under consideration. According to the brief, more time was needed to accurately determine the impact of new milk products on the marketplace.

The Bravo!, *et al.,* brief summarized hearing testimony from previous Department rulemaking decisions in which no changes were recommended due to a lack of evidence to support a regulatory change. According to Bravo!, *et al.,* proponents did not provide evidence of disorder in the marketplace nor did they substantiate their claims that products currently in the market would not be reclassified if a protein standard was adopted. On the basis of such conditions, the brief concluded

that the current fluid milk product definition is adequate.

If the Department did not terminate the proceeding, the Bravo!, *et al.,* brief recommended that the 6.5 percent nonfat milk solids standards remain, that the computation of nonfat milk solids not be made on a milk equivalency basis, and that whey and whey ingredients be excluded from the computation.

Exceptions to the Recommended Decision filed by Bravo!, *et al.,* opposed the proposed adoption of the 2.25 percent protein compositional standard and reiterated that adoption of a protein standard would have a negative effect on dairy product innovation as manufacturers would use lower priced non-dairy proteins as substitutes. Bravo!, *et al.,* asserted that the Department did not give enough consideration to the lowering of producer revenue that could occur due to the predicted ingredient substitution.

Exceptions filed by Bravo!, *et al.,* also opposed the Department's use of form and intended use as one of the factors in making classification determinations. The comments acknowledged that the AMAA authorized the Federal Milk Marketing Order (FMMO) program to rely on form and intended use in making classification determinations. However, Bravo!, *et al.,* asserted that historically the FMMO program applied the form and use criteria by using compositional standards. Bravo!, *et al.,* claimed that by specifically including the form and intended use criteria in the order language the Department could ignore a product's composition and arbitrarily classify products as fluid milk products even though they did not compete with fluid milk. Bravo!, *et al.,* predicted that the specific inclusion of form and intended use in the fluid milk product definition would hamper the development of new products and the use of dairy ingredients because of the uncertainty manufacturers could face in how the milk components of their products would be classified.

A witness appearing on behalf of Fonterra USA, Inc. (Fonterra) testified in opposition to proposals that would include MPCs in determining if the product met the protein standard of the fluid milk product definition. Fonterra at the time of the hearing was a wholly owned subsidiary of Fonterra Co-operative Group Limited, a New Zealand based dairy cooperative owned by 12,000 New Zealand dairy farmers. Fonterra operates plants within the United States that produce, among other things, MPCs. The witness stressed that changes to the fluid milk product definition would increase ingredient costs, discourage manufacturing companies from using dairy ingredients in their products, and force those companies to seek other less costly substitutes such as soy and soy products.

A post-hearing brief submitted on behalf of Fonterra reiterated their objection to changing the nonfat milk solids standard and predicted that adoption of a protein standard would make classification decisions unnecessarily complicated without providing additional benefits to producers. The brief asserted that the hearing record did not contain a sufficient economic analysis on the possible benefits that adopting a protein standard would have on producer revenue or its impact on the dairy industry.

The Fonterra brief speculated that adoption of a milk protein standard would decrease the market price for milk proteins, discourage new product development, and encourage the substitution of producer milk with non-dairy ingredients. The brief noted that the annual growth rate of soy and soy products in nutritional products from 1999 to 2003 was 16.5 percent, while the growth of milk proteins in nutritional products only increased 10.1 percent over the same time period. The brief predicted that if protein prices rise as a result of the adoption of a milk protein standard, the growth of soy proteins will likely increase because they could be substituted for more costly milk proteins.

The Fonterra brief also stated that the hearing record does not reveal disorder in the market by the application of the current fluid milk product definition and therefore concluded that amending the fluid milk product definition is not justified. The Fonterra brief argued that proponents did not provide adequate reasoning for including whey proteins in determining if a product met the protein standard but not pricing whey proteins the same as other milk proteins. Furthermore, the brief stated that proponents did not propose a method for differentiating between whey proteins resulting from cheese production and whey proteins from other sources.

Comments filed on behalf of Fonterra took exception to the Recommended Decision's proposed adoption of a 2.25 percent true milk protein compositional standard. Fonterra reiterated that proponents did not meet the burden of proof needed to substantiate the adoption of a protein standard. According to the comments, proponents did not indicate if adoption of the standard would remedy any indications of market disruption or reclassify some products as fluid milk products.

Fonterra's comments reviewed numerous rulemaking proceedings in which, Fonterra concluded, the Department declined to adopt proposed changes to marketing orders because of a lack of evidence that a change would promote orderly marketing conditions. Fonterra argued that the Recommended Decision did not adequately consider evidence asserting that adoption of the milk protein standard would not increase the cost for dairy ingredients, encourage the substitution of lower cost non-dairy ingredients, and ultimately lower producer revenue. Fonterra was of the opinion that before making a Final Decision, further analysis of the proposals was needed to fully evaluate the possible economic impact to producers and manufacturers as a result of adoption of the protein standard.

Fonterra stated that the Department's recommended adoption of an "either/or" use of the protein and nonfat solids standard was not contained in any proposal discussed at the hearing and that the Department did not adequately explain how the use of both a protein and nonfat solids standard would provide for the orderly marketing of milk or increase producer revenue.

The comments filed by Fonterra also argued that the Department uses this rulemaking proceeding to justify a change in policy that the Department previously attempted to adopt without undertaking the formal rulemaking process. Fonterra stated that historical Departmental policy has been to exempt such products as casein, sodium caseinate, lactose, whey, and MPCs from use in the nonfat milk solids calculation of a product. In 2004, Fonterra said, the Department attempted to include MPCs and other previously exempted dairy ingredients in the nonfat solids calculation; however, that administrative decision was overturned by an Administrative Law Judge. Fonterra claimed that proposing to include all milk derived protein ingredients in the calculation of a product's nonfat solids or protein composition is an attempt to change historical policy without adequate analysis or justification.

Fonterra also took exception to having some ingredients included in the calculation of a product's composition but would not be priced in a final product. Fonterra claimed that whey is used in nearly identical products as MPCs and should therefore be priced the same. Fonterra was of the opinion that pricing whey and MPCs differently would violate the United States' World Trade Organization obligations. Fonterra

characterized whey production as primarily domestic, but that most MPCs are imported. Accordingly, they concluded that excluding whey from Class I pricing essentially places an illegal tariff on imported MPCs.

A witness appearing on behalf of the American Beverage Association (ABA) testified in opposition to all proposals seeking to amend the fluid milk product definition. ABA is a trade association that represents beverage producers, distributors, franchise companies, and their supporting industries. The witness was of the opinion that the current fluid milk product definition already properly classifies dairy products and that there is insufficient evidence to warrant any changes. The witness claimed that any change would broaden the fluid milk product definition to include products that contain only small amounts of milk. The witness argued that many new beverage products which contain small amounts of milk or milk ingredients do not compete with fluid milk but do compete with soft drinks, juices and bottled water. The witness asserted that amending the fluid milk product definition to include some dairy ingredients not currently considered would increase manufacturers cost of production, result in stifled innovation of new products and encourage the use of non-dairy ingredients as substitutes for milk-derived ingredients.

A witness appearing on behalf of Ohio Farmers Union (OFU) testified in opposition to any change to the fluid milk product definition. OFU is a nonpartisan, grassroots, general farm organization representing more than 300,000 family farms nationwide according to their web site. The witness testified that the primary purpose of the order program was to provide consumers with a reliable supply of safe and wholesome milk. The witness asserted that MPCs, caseinates, whey proteins, and other similar milk-derived ingredients have functional and nutritional characteristics different than fluid milk. Accounting for those ingredients in the fluid milk product definition, the witness said, would undermine the goal of the order program. The witness stressed that if the fluid milk product definition were amended, consumer confidence in the long established perception of milk as a fresh, pure and wholesome beverage would be diminished and would thus threaten the economic viability of domestic producers.

A witness appearing on behalf of the Milk Industry Foundation (MIF) testified in opposition to amending the fluid milk product definition. According to the witness, MIF is an organization with over 100 member companies that process and market approximately 85 percent of the fluid milk and fluid milk products consumed nationwide. The witness stated that simply because a beverage contains milk or other dairy-derived ingredients does not prove that those products compete with fluid milk or that such competition lowers producer revenue.

The MIF witness asserted that previous Federal milk order rulemaking decisions have required data and analysis to prove that an amendment was warranted. According to the witness, the proponents of proposals for changing the fluid milk product definition did not provide such data and analysis. Along this theme, the witness said that proponents should have provided data such as the market share held by products that do not fall under the current fluid milk product definition but would be included under any proposed change, cross price elasticity of demand analysis of products which meet the existing fluid milk product definition and of products that would be classified as a fluid milk product if any of their proposals were adopted, and an own-price elasticity of demand analysis for products that would be reclassified.

A post-hearing brief submitted on behalf of MIF reiterated their opposition to any changes to the current fluid milk product definition. The brief urged that if the Department does amend the fluid milk product definition, it should exclude all whey-derived protein products in determining if a product meets the fluid milk product definition. The brief stated that MIF has continuously opposed a hearing to consider amending the fluid milk product definition because not enough evidence is available to warrant a change. The brief maintained that proponents did not offer adequate data at the hearing to demonstrate that there is disorder in the marketplace that can be remedied by adoption of a protein standard.

The MIF brief expanded its testimony by citing numerous rulemaking decisions that denied proposals on the basis that adequate evidence was not presented to warrant amendments to order provisions. MIF stressed that the mere existence of beverages containing dairy-derived ingredients is not evidence of marketwide disorder.

Exceptions filed on behalf of International Dairy Foods Association (IDFA) asserted that because evidence doesn't demonstrate a need for change, no changes to the fluid milk product definition should be made. IDFA is a trade organization whose members include MIF, NCI and the International Ice Cream Association (IICA). According to their exceptions, IDFA represents more than 85 percent of the milk, cultured products, cheese and frozen desserts produced and marketed in the United States. IDFA reiterated arguments expressed by MIF at the hearing and in MIF's post-hearing brief. Their exception claimed that the hearing record did not demonstrate that products containing less than 6.5 percent nonfat solids and more than 2.25 percent protein are causing disorderly marketing conditions because they are not currently classified as fluid milk products.

IDFA's comments also opposed the specific inclusion of the form and intended use criteria in the fluid milk product definition and argued that the definition should continue to contain only compositional criteria. IDFA wrote that manufacturers' product development decisions are in part determined by ingredient costs. Subjective criteria such as form and intended use, wrote IDFA, could impede new product development because a manufacturer would be uncertain of ingredient costs until a final product had been classified. IDFA's exceptions opposed the inclusion of whey when computing a product's composition because of inconsistent justification by proponents as to why whey used to produce fluid milk products should not also be priced as Class I. IDFA exceptions stated that the proponents of the protein standard did not demonstrate that disorderly marketing conditions exist in the absence of the protein standard. IDFA exceptions concluded that the adoption of amendments proposed in the Recommended Decision would only serve to lower producer revenue.

Comments filed on behalf of Grande Cheese opposed all the proposed changes to the fluid milk product definition contained in the Recommended Decision. Grande Cheese is a cheese manufacturer located in the State of Wisconsin. Grande Cheese expressed support of the opinions expressed in the exceptions to the Recommended Decision filed by IDFA.

A witness appearing on behalf of the National Family Farm Coalition testified in opposition to all proposals that would amend the fluid milk product definition. The witness testified that MPCs do not meet FDA's Generally Recognized as Safe (GRAS) standards as legal food ingredients. Furthermore, the witness said, MPCs have not been subjected to scientific testing to determine if they are safe for human

consumption and should not be allowed in milk products.

A witness appearing on behalf of Public Citizen testified in opposition to proposals that seek to amend the fluid milk product definition. According to the witness, Public Citizen is a non-profit consumer advocacy organization with approximately 150,000 members. The witness was opposed to any change in the fluid milk product definition that would, in the witness' opinion, encourage the use of MPCs.

Two Pennsylvania dairy farmers testified in opposition to any change to the fluid milk product definition. The producers opposed all proposals that would allow the use of caseinates and MPCs in fluid milk products. They asserted that MPCs are not allowed in the production of standardized cheese and should also not be allowed in the production of fluid milk products.

A post-hearing brief submitted on behalf of the American Dairy Products Institute (ADPI), an association representing manufacturers of dairy products, offered support for amending the fluid milk product definition to include milk beverages that compete directly with fluid milk. However, the brief cautioned against developing a fluid milk product definition that would include non-traditional beverages and smoothie type products (yogurt-containing beverages). The brief recommended that an economic study be conducted to determine the possible impacts of the proposed changes before action is taken to amend the fluid milk product definition.

A post-hearing brief submitted on behalf of General Mills contended that the fluid milk product definition should not be amended because proponents did not provide sufficient evidence or data to justify a change. The brief maintained that the hearing record is not clear on how proposals would be implemented or on the impact to producers, manufacturers, and consumers if the protein standard was adopted. General Mills contended that before a change is made, the Department should conduct an economic analysis to evaluate how protein and dairy products are competing in the marketplace and how the adoption of a protein standard would impact the marketplace. If a protein standard was recommended for adoption, General Mills recommended that whey not be included in the protein calculation, or if whey is included, that a 2.8 percent protein standard be adopted in order to maintain the status quo.

Exceptions to the Recommended Decision filed by General Mills opposed the adoption of the true protein compositional standard. However, General Mills was of the opinion that if the Department continued to support the protein standard, then any whey components should be excluded from determining a final product's protein content. General Mills purported that the inclusion of whey in the protein calculation, even if not priced at Class I, may lead manufacturers to increase their use of non-dairy ingredients as substitutes.

General Mills was also opposed to relying on form and intended use in classification determinations. According to their exceptions, the form and use criteria would cause manufacturers to be less certain of a product's classification which would discourage using dairy ingredients in new products. General Mills noted that if the Department decides to not alter its Recommended Decision then it should clarify in a Final Decision that only products that compete with or are a substitute for fluid milk would be classified as a fluid milk product.

A post-hearing brief submitted on behalf of New York State Dairy Foods, Inc. (NYSDF) opposed amending the fluid milk product definition. According to their brief, NYSDF is a trade association representing dairy product processors, manufacturers, distributors, retailers, and producers in the Northeast United States. The brief argued that products produced with the use of new fractionation technology are a small portion of the milk beverage market. They were of the opinion that such products are still too new to determine their impact on Class I sales and producer revenue. The brief also asserted that the adoption of a protein standard as part of the fluid milk product definition would discourage new product development and would increase costs that would result in reduced sales of dairy-derived ingredients. The brief urged that the proceeding be terminated.

Comments and exceptions to the Recommended Decision filed on behalf of Glanbia Foods (Glanbia) opposed the proposed adoption of the true protein compositional standard and the specific inclusion of form and intended use as a factor in classification determinations. Glanbia operates two cheese plants and two whey plants that collectively process nearly 4 billion pounds of milk annually. Glanbia asserted that adoption of a true protein standard would lead to stifled innovation of milk derived ingredients in new products because the manufacturing industry would increase its use of non-dairy ingredients as substitutes. Their exceptions claimed that the hearing record does not contain evidence that adoption of a protein standard would ultimately benefit producers or remedy a market disorder. Glanbia also argued that the Department's reliance on form and intended use in classification determinations would similarly discourage the use of dairy ingredients.

A professor from Cornell University testified regarding a research study conducted by the Cornell Program on Dairy Markets and Policy that focused on the demand elasticity's of various dairy products. The witness did not appear in support of or in opposition to any proposal presented at the hearing. The witness explained that the goal of the study was to ascertain the extent to which product innovation and classification decisions influence producer revenue. The study was designed to evaluate four hypothetical dairy products and test the effect that a range of classification determinations would have on producer revenue. The witness explained the study and concluded that the impact on producer revenue of a new product being reclassified from Class II to Class I was likely to be small, plus-or-minus $0.01 per hundredweight (cwt). However, the witness added, if non-dairy ingredients were substituted as a result of the reclassification, the study predicted that producer revenue would be lowered by $0.22 per cwt. The witness concluded that while the financial returns from product reclassification could be positive, the resulting ingredient substitution, which could take place, would result in a significant negative impact on producer revenue.

The post-hearing brief submitted by NMPF also addressed concerns articulated at the hearing regarding the need for a demand elasticity study to address the issue of product substitution before amending the fluid milk product definition. The brief asserted that a demand elasticity study would not take into account newly emerging products, changing consumer preferences, and product innovations that could change the competitive relationships between products and therefore would not provide any relevant data. The brief also argued that the economic model created by Cornell University and discussed at the hearing contained many incorrect assumptions and thus concluded that the study results were flawed.

The DFA/DLC brief also rebutted opposition to Proposal 7 which called for studies of product usage or demand elasticity's before considering amendments to the fluid milk product definition. The brief asserted the previous amendments to the classification system have been made

without such economic studies and that this proceeding should be handled in the same manner.

A witness appearing on behalf of Bravo! Foods International Corporation, Lifeway Foods, Inc. (the principal makers of kefir in the U.S.), PepsiCo, Starbucks Corporation and Unilever United States, Inc. (Bravo! *et al.*), proposed at the hearing that kefir, as well as yogurt-containing beverages, be exempted from the fluid milk product definition.

A witness appearing on behalf of Dannon testified in support of Proposal 8 that would exclude yogurt containing beverages from the fluid milk product definition. The witness provided a definition of yogurt containing beverages as any beverage containing at least 20 percent yogurt (which is in concert with Proposal 9). The witness argued that yogurt containing beverages are not similar in form and use to fluid milk products and should be excluded from the fluid milk product definition. The witness testified that Dannon currently manufactures yogurt containing products which are classified as both fluid milk products and Class II products. The Dannon witness maintained that regardless of the classification, none of its products compete with fluid milk. According to the witness these products should all be classified as Class II. The witness emphasized that yogurt and yogurt-containing products use unique cultures, ingredients, and production technology that differentiate them from fluid milk product production. Furthermore, the witness said yogurt products' packaging, taste, mouth feel, shelf-life and marketing placement in grocery stores distinguishes them from fluid milk.

The Dannon witness presented market research it had conducted. The witness stated, based on the research, that yogurt-containing beverages are consumed as a food product and not as an alternative to fluid milk. The witness claimed that less than one percent of potential consumers of a Dannon yogurt-containing product consume the product as a substitute for fluid milk. Additionally, the witness noted that Dannon advertises its yogurt-containing products as a substitute for snacks, not fluid milk. The witness concluded from this that yogurt-containing products are different than fluid milk, do not compete with fluid milk in the marketplace and therefore should not be classified the same as a fluid milk product. The witness also testified in opposition to Proposal 9 but only with respect to the inclusion of a protein threshold which Dannon does not consider justified. The witness noted that Dannon does support the proposed 20 percent minimum yogurt content standard that such products should meet as a condition for being exempted from the fluid milk product definition.

A post-hearing brief submitted on behalf of Dannon reiterated its hearing testimony. The brief stated that fluid milk products should only be those products that are closely related to, or compete with, fluid milk for sales. That brief stressed that yogurt-containing beverages are dissimilar to fluid milk beverages and are used as a food replacement, not as a beverage substitute. The brief noted that in 2004, more than 37 percent of Dannon's sales were from products developed within the last 5 years and stressed that classifying all milk drinks with milk-derived ingredients as fluid milk products would result in decreased innovation for developing additional uses for milk.

A witness appearing on behalf of General Mills testified in support of Proposal 9. The witness was of the opinion that USDA should classify products primarily on the basis of form and use. The witness asserted that drinkable yogurt products, while containing milk ingredients, are food products and do not compete with fluid milk. The witness explained that drinkable yogurt products were created to meet a change in consumer preferences for convenience and portability. The witness presented market research conducted by Yoplait demonstrating that consumers view drinkable yogurt products as alternatives to traditionally packaged yogurt and other nutritional snacks, not fluid milk. The witness asserted that 80 percent of Yoplait drinkable yogurt smoothie consumers would substitute another yogurt product for the smoothie.

The General Mills witness supported the current classification system contending that its modification raises a host of issues and questions. However, if USDA determined that a change to the fluid milk product definition is appropriate, the witness urged adoption of Proposal 9 to exclude drinkable yogurt products that contain at least 20 percent yogurt by weight and no more than 2.2 percent skim milk protein from the fluid milk product definition. According to the witness, including drinkable yogurt products in the fluid milk product definition would increase costs to manufacturers that would stifle innovation and result in a shift towards using non-dairy ingredients. The witness said manufacturers would choose to reformulate products using less milk and milk proteins resulting in reduced dairy producer income.

A post-hearing brief submitted on behalf of General Mills maintained that ample evidence regarding the fundamental differences of fluid milk and yogurt containing beverages was presented at the hearing to justify exempting yogurt containing products with more than 20 percent yogurt from classification as a fluid milk product. Comments and exceptions to the Recommended Decision filed on behalf of General Mills reiterated this view.

Two witnesses appearing on behalf of the National Yogurt Association (NYA) testified in support of proposals that would exempt yogurt containing products from the fluid milk product definition. NYA is a national trade association representing the producers of yogurt products and their suppliers. The witnesses testified that previous regulatory decisions made by USDA emphasized that products classified as fluid milk products should be intended to be consumed as beverages and compete with fluid milk. The witnesses expressed disagreement with a classification decision published in the early 1990's that classified drinkable yogurt products as fluid milk products. The witnesses were of the opinion that in both form and use, yogurt and drinkable yogurt products compete with other food products, not fluid milk, and should be classified as Class II products. The witnesses explained that yogurt products are produced and shipped nationally by a few manufacturers, have a shelf-life averaging 30–60 days, have a texture and taste distinctly different than fluid milk and are positioned in retail stores separate from fluid milk. The witnesses noted that yogurt-containing beverages were developed as a substitute for spoonable yogurt products, not fluid milk.

The NYA witnesses were of the opinion that the increase in producer revenue resulting from currently classifying drinkable yogurt products as fluid milk products isn't and would not overcome the decrease in revenue due to the loss of sales from an increase in the price of drinkable yogurt products.

A post-hearing brief submitted on behalf of NYA reiterated support for excluding all products containing at least 20 percent yogurt provided that the yogurt meets the standard of identity for yogurt. According to the brief, the 20 percent content requirement would ensure that only products whose characterizing ingredient is yogurt would be excluded from the fluid milk product definition. The brief also indicated that if USDA determines not to exclude yogurt containing products,

then NYA strongly opposes any change to the current fluid milk product definition.

The NYA brief argued that consumer surveys and marketplace data provided by Dannon and General Mills that explained how yogurt-containing products are fundamentally different from fluid milk were not contradicted at the hearing. The brief also noted that while Dairy Farmers of America (DFA) and National Milk Producers Federation (NMPF) testified that consumers are buying low-carbohydrate milk instead of fluid milk, they did not offer similar evidence for yogurt-containing products.

Comments and exceptions to the Recommended Decision filed on behalf of NYA supported the proposed exemption of drinkable yogurt products from the fluid milk product definition. The NYA comments reiterated arguments it made at the hearing and in its post-hearing brief, and asserted that the hearing record contains no evidence to support that drinkable yogurt products are similar to fluid milk.

A witness appearing on behalf of Bravo!, *et al.,* testified in support of amendments that would exempt yogurt containing products and kefir from the fluid milk product definition. The witness argued that both products are compositionally different than fluid milk and do not compete for sales with fluid milk. Furthermore, the witness noted that drinkable yogurt and kefir products are one of the fastest growing segments in the dairy industry, providing a large opportunity for the expanded use of dairy-derived ingredients which should not be hampered by the additional costs of such ingredients being priced at Class I.

Comments and exceptions filed on behalf of Bravo!, *et al.* and by Lifeway Foods, separately expressed support for the Recommended Decision's proposed exemption of kefir, and drinkable yogurt products that contain at least 20 percent yogurt.

A witness appearing on behalf of Leprino Foods Company (Leprino) testified that if USDA recommended amending the fluid milk product definition, then Leprino supported the adoption of Proposal 9 to exclude products containing at least 20 percent or more yogurt by weight from the fluid milk product definition. According to the witness, Leprino operates nine plants in the United States that manufacture mozzarella cheese and whey products. The witness also was of the opinion that yogurt containing products do not compete with fluid milk and should be classified as Class II products. The witness stressed that if these products are not excluded from the fluid milk product definition, then Leprino strongly opposed the adoption of a protein standard to be part of the fluid milk product definition.

Comments and exceptions filed on behalf of Leprino supported the Recommended Decision's proposed exclusion of yogurt containing beverages and kefir from the fluid milk product definition.

Comments filed by Fonterra USA, Inc. (Fonterra) supported the Department's recommendation that yogurt containing beverages should be exempted from the fluid milk product definition but took exception to the yogurt content in beverages containing less that 20 percent yogurt (*i.e.* Class I) not being subject to an "upcharge", as are other milk ingredients. Fonterra is a wholly owned subsidiary of Fonterra Co-operative Group Limited, a New Zealand based dairy cooperative owned by 12,000 New Zealand dairy farmers.

The witness appearing on behalf of NMPF testified in opposition to exempting yogurt-containing beverages from the fluid milk product definition. The witness was of the opinion that these products are similar in form and use to other flavored fluid milk products and should be considered a substitute for fluid milk. In its post-hearing brief, NMPF maintained its opposition to proposals that would exclude drinkable yogurt products from the fluid milk product definition.

Comments and exceptions filed by NMPF in response to the Recommended Decision opposed the exemption of kefir and yogurt containing beverages from the fluid milk product definition arguing that an exemption is inconsistent with the principle of form and intended use. NMPF reiterated arguments made at the hearing and in its post-hearing brief that kefir and yogurt containing beverages are almost identical in form to fluid milk and are used as beverages. NMPF purported that data presented at the hearing by yogurt manufacturers demonstrating that yogurt containing beverages did not compete with fluid milk was misleading and the exemption would be difficult to enforce. NMPF stated that because kefir has no standard of identity (as does yogurt, for example) manufacturers could name an array of products as kefir to avoid classification as fluid milk products. NMPF also said the standard of identity for yogurt was too broad and its identity standard is currently under review by the FDA. NMPF claimed that exempting yogurt containing beverages from the fluid milk product definition could create an enormous regulatory loophole that could be exploited to avoid classification of new products as fluid milk products.

The witness appearing on behalf of Dairy Farmers of America and Dairylea Cooperative Inc. (DFA/DLC) also testified in opposition to the adoption of Proposals 8 and 9. The witness stated that adoption of these proposals would allow more products to be classified as Class II products even though they compete with fluid milk for sales. A post-hearing brief filed by DFA/DLC further claimed that the growth of drinkable yogurt products in the marketplace has not been impeded by previous classification decisions and that such products should not be excluded from the fluid milk product definition because some hearing participants claimed it would harm the innovation of new dairy products.

In its comments to the Recommended Decision, Select Milk Producers, Inc. (Select)/Continental Dairy Products (Continental) opposed the exemption of kefir or drinkable yogurt beverages that contained 20 percent or more yogurt from the fluid milk product definition. According to their brief Select and Continental are dairy-farmer owned cooperatives that market milk on various Federal orders.

The witness appearing on behalf of Leprino testified in support of Proposal 10. The witness testified that only products that compete with fluid milk should be classified as fluid milk products, therefore meal replacements and nutritional drinks should remain exempted from the fluid milk product definition. In its exceptions to the Recommended Decision Leprino opposed the inclusion of the term "health care industry" in the meal replacement exemption. Leprino argued that this qualifier could cause a product to hold two different classifications depending on how it is distributed.

A post-hearing brief submitted on behalf of Novartis stated that the Department should exempt special dietary need and nutritional beverages from the fluid milk product definition. The brief explained that Novartis' products are not currently classified as fluid milk products due to their nutritional nature, the level of nonfat milk solids contained in their product, and because their products are only available through foodservice and health care channels. The brief stressed that Novartis' health care products were never intended to compete with traditional fluid milk.

The brief predicted that Novartis' products could possibly become reclassified as fluid milk products if a 2.25 percent protein standard were adopted as a part of the definition. The

brief insisted that if these products are reclassified, it would result in higher costs for patients with special dietary and nutrition needs. The brief urged the Department to exempt nutritional products consumed for special dietary use from the fluid milk product definition if a protein standard was adopted as part of the fluid milk product definition.

A witness appearing on behalf of Hormel testified in support of Proposal 11 seeking to exclude health care beverages from the fluid milk product definition. The witness testified that fluid milk products designed for the health care industry should be exempted because they do not compete with fluid milk for sales. The witness explained that Hormel's distribution is primarily to health care facilities, and they are targeted to a small segment of the population. The witness argued that if products designed for the health care industry were classified as fluid milk products, it would have no effect on producer revenue because the products have extremely limited distribution. The witness explained that many products Hormel manufactures are designed to help counter the effects of malnutrition in adults with a variety of medical conditions and are not marketed nor labeled as fluid milk. Instead, those products are considered to be foods for special dietary use, the witness noted, and should be exempt from the fluid milk product definition.

The Bravo!, *et al.,* witness also testified in support of the continued exemption from the fluid milk product definition for products such as infant formula, meal replacements, products packaged in hermetically sealed containers, snack replacements, high protein drinks, and products that contain alcohol or are formulated for animal use. The witness explained that meal replacements and similar products have historically been exempted from the fluid milk product definition and that their regulatory status should not be changed.

Comments received from Bravo!, *et al.* on the Recommended Decision supported the continued exemption of meal replacements that are sold to the health care industry but offered a slight modification to clarify the intent of the exemption. Bravo!, *et al.,* explained that some products are considered meal replacements and are sold both in retail markets and through health care professionals, health care institutions, and weight management centers. Bravo!, *et al.,* asserted that a literal reading of the Recommended Decision could lead to one product holding two different classifications depending on how it is distributed. Therefore, Bravo!, *et al.,* suggested that the meal replacement exemption be modified to read "* * * (meal replacement) that are intended for use in the health care industry, or products similar in form and intended use sold to retail customers * * *"

The NMPF witness testified in opposition to Proposal 10 arguing that its adoption would eliminate important factors in determining if a product was specially formulated for a specific dietary purpose that would warrant exemption from the fluid milk product definition. The witness was also opposed to Proposal 11 because the proposed language—"nutrient enhanced fortified formulas"—was too broad and would not clearly distinguish such products from traditional fluid milk products.

In its exceptions to the Recommended Decision, NMPF opposed any amendments to the exemption of meal replacements from the fluid milk product definition. NMPF stated that the proposed use of the "health care industry" distribution criteria was vague and open-ended for interpretation on which entities are a part of the "health care industry." NMPF was of the opinion that the current packaging criteria contained in the proposed meal replacement exemption is an appropriate guideline for what products constitute meal replacements.

The DFA/DLC witness testified in opposition to Proposals 10 and 11. The witness was of the opinion that amending the fluid milk product definition to broaden the exemption of products such as infant formulas and meal replacements was not justified because doing so would significantly lower Class I use. This position was reiterated in the DFA/DLC post-hearing brief and exceptions to the Recommended Decision. DFA, *et al.,* argued that no evidence was presented to support the removal of the packaging criteria from the meal replacement exemption. The exceptions asserted that the use of packaging criteria has historically been a way to distinguish products that do not compete with fluid milk because the higher cost of hermetically sealed packaging discouraged manufacturers from using the exemption to circumvent Class I pricing. DFA, *et al.,* also took exception to the proposed exemption of nutritional formulas that are prepared for the health care industry. According to the exceptions, the types of institutions that comprise the "health care industry" are not clearly defined in the decision. DFA, *et al.,* asserted that the meal replacement exemption could cause manufacturers to sell their products to a health care facility for resale in the "normal marketplace" to avoid Class I pricing.

The witness appearing on behalf of O–AT–KA testified that products packaged in hermetically-sealed containers or that are specialized for longer shelf life should remain exempt from fluid milk product classification because those products are used as meal replacements and meal supplements, not as alternatives to milk. The witness said that since the term "meal replacement" is not defined in the current definition, no change in the exemption of hermetically sealed containers should be made. The position was reiterated in their brief.

The Dannon witness testified in opposition to the adoption of Proposal 10 because it would remove the 6.5 percent nonfat milk solids standard of the fluid milk product definition.

Exceptions to the Recommended Decision filed by Fonterra opposed the removal of how a product is packaged in the infant feeding and dietary use exemption, and the proposed distribution to the "health care industry" as a method for exempting meal replacements. Fonterra argued that relying on how a product is distributed could cause the same product to hold two separate classifications. Fonterra offered that if meal replacements are to be exempt from fluid milk product classification, then how a product is distributed should not be a factor in determining whether or not it meets the fluid milk product definition.

Discussion and Findings

This decision provides that the fluid milk product definition for all Federal orders defines fluid milk products by: (1) Continuing to provide a non-exhaustive list of named fluid milk products; (2) Maintaining a set of compositional standards; and (3) Continuing to provide exceptions for products that will be exempted from the definition. This decision maintains the current maximum butterfat limit of less than nine percent for a product to still be considered a fluid milk product. The nonfat solids compositional standards will consist of the current 6.5 percent nonfat milk solids content of a product and a true milk protein standard of 2.25 percent content of a product. The nonfat solids standards will be applied independently of each other. For example, if a product contained 6 percent nonfat solids and 2.30 percent true milk protein and less than 9 percent butterfat the product would be considered a fluid milk product. These standards either 6.5 percent or more nonfat milk solids or 2.25 percent or

more true milk protein, or less than nine percent butterfat, will be the basis for determining if a beverage containing dairy ingredients meets the compositional standards for being defined as a fluid milk product.

The calculation of the percent true protein and the percent nonfat milk solids contained in a product will be performed by measuring the true protein and nonfat milk solids of all dairy-derived ingredients contained in the finished product. All non-fluid dairy-derived ingredients used in a fluid milk product will be classified and priced in the same manner as nonfat dry milk (or condensed) is currently classified and priced when used in a fluid milk product.

The record supports exemption of certain drinkable products made from milk or products containing milk-derived ingredients from the fluid milk product definition. These exemptions include: Drinkable yogurt containing at least 20 percent yogurt by weight and kefir; products especially prepared for infant feeding or dietary use as meal replacements that are packaged in hermetically sealed containers; and other products that may otherwise meet the compositional standards of a fluid milk product but contain no fluid milk products named in the fluid milk product definition.

The primary goal of Federal milk marketing orders is to establish and maintain orderly marketing conditions. This is achieved primarily through the use of classified pricing (pricing milk based on its use) and the marketwide pooling of the proceeds of milk used in a marketing area among all producers. These two tools enable Federal orders to establish minimum prices that handlers must pay for milk based on its ultimate use and return to producers a weighted average or uniform price for their milk.

Through classified pricing and marketwide pooling, Federal orders promote and maintain orderly marketing by equitably pricing milk used in the same class among competing handlers within a marketing area. This does not mean that handlers will necessarily have equal costs since differences in milk tests, procurement costs, and transportation will impact a handler's final raw milk costs. However, it does allow handlers to have the same minimum regulated price for milk used in a particular category of products or class of products for which they compete for sales. The regulated minimum price is the class price for the respective class of use. Thus, it is reasonable and appropriate that milk used in identical or nearly identical products should be placed in the same class of use. This tends to reduce the incidence of disorderly marketing that may arise because of price differences between competing handlers.

Federal milk orders classify producer milk as fluid milk or used to produce a manufactured product. Producer milk classified as Class I consists of those products that are intended to be used as beverages including, but not limited to, whole milk, skim milk, low fat milk, and flavored milk products such as chocolate milk. Producer milk classified as Class II includes milk used in the production of soft or spoonable manufactured products such as sour cream, ice cream, cottage cheese, yogurt, and milk that is used as ingredients in the manufacture of other food products. Producer milk classified as Class III includes milk used in the production of hard cheese products. The Class IV use of producer milk generally consists of milk used in the production of canned milk, dried milk products, and butter.

Federal orders provide a definition for "fluid milk products" to identify the types of products that are intended to be consumed as beverages and to specify that the skim milk and butterfat in these types of milk products should be classified as Class I and priced accordingly. The current fluid milk product definition contained in all Federal milk orders provides a non-exhaustive list of products that are specifically identified as fluid milk products. The definition also specifies certain compositional criteria for fluid milk products—any product containing less than 9 percent butterfat and 6.5 percent or more nonfat milk solids. The definition also specifically exempts from the fluid milk product definition products especially prepared for infant feeding or dietary use (meal replacement) packaged in a hermetically-sealed container, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey.

Numerous witnesses were concerned that the definition of milk as defined by the Food and Drug Administration (FDA) in 21 CFR 131.110 not be changed. A Federal milk marketing order decision cannot change the definition of milk. Some witnesses were of the opinion that the addition of various ingredients to milk would cause the resulting product to not meet the Grade A standard. This decision does amend the definition of a fluid milk product in all milk marketing orders for the purpose of classifying producer milk in accordance with the form in which or the purpose for which it is used as required by section 608(c)(5)(A) of the Agricultural Marketing Agreement Act. Neither this decision nor Federal orders in general determine if milk is Grade A or what ingredients are allowed in milk. Further, Federal orders do not establish standards of identity for milk. Such standards are established by other agencies, such as a state board of health or the FDA.

Testimony given at the hearing and positions taken in post-hearing briefs extensively discussed the importance of form and intended use in determining whether a product should be defined as a fluid milk product. However, comments to the Recommended Decision almost universally favored the use of specific compositional standards rather than form and use as first consideration which was proposed in the Recommended Decision. These comments have merit. Therefore as provided in this decision, compositional criteria will be the primary basis used in determining whether the product is defined as a fluid milk product.

The standards of 6.5 percent or more nonfat milk solids or 2.25 percent or more true milk protein are intended to exclude from the fluid milk product definition those products which contain some milk solids but that are not closely identified with the dairy industry.

The establishment of nonfat milk solids and true milk protein standards for classifying milk products is intended to provide the same classification for products having the same general form and use. Similar products in different classes defeat the purpose of classified pricing and results in unequal costs among handlers. It is not the intent of the Federal order program to bring products that do not resemble nor are marketed as dairy beverages under the fluid milk product definition. As stated earlier, the Act requires the Secretary to classify milk "in accordance with the form in which or the purpose for which it is used." Currently, some products such as re-hydrating fruit flavored sport drinks, bottled teas, carbonated soft drinks, or bottled water may contain some milk-derived ingredients but they do not resemble nor are they marketed as dairy products.

As discussed in the comments to the Recommended Decision, specific compositional standards will give the industry clearer standards from which to determine if a product is or will be defined as a fluid milk product, superseding reliance on form and intended use. When formulating new beverage products, the industry will have specific standards to guide product formulation. The industry will better know how Federal orders will determine the prices of milk ingredients.

Based on record evidence, compositional standards should continue to be relied upon in determining if a product meets the fluid milk product definition. The revised definition provides that a beverage should contain by weight less than 9 percent butterfat and contain 6.5 percent or more nonfat milk solids or 2.25 percent or more true milk protein. The 9 percent butterfat criterion that is currently used as the maximum butterfat content to differentiate between fluid milk products and fluid cream products (a Class II use of milk) is unchanged. The addition of a 2.25 percent true milk protein criterion serves to provide a sufficient basis to distinguish whether a product is a Class I or Class II use of milk.

Several parties filed comments in opposition to the inclusion of the 2.25 percent true milk protein criterion. They argued that its inclusion in the definition is unnecessary and its adoption may cause processors to use non-dairy ingredients to avoid products from being classified as a fluid milk product.

The record of this proceeding clearly supports the addition of a milk protein standard to the fluid milk product definition. The record shows that by removing some of the lactose from milk, a product may be produced that is in all respects (except for the removed lactose) identical to the form and intended use of fluid milk products. However, using only the 6.5 percent nonfat standard results in this product being classified as Class II even though its form and use closely resembles Class I products.

Including all dairy derived ingredients in the computation of a product's nonfat solids and true protein content provides a more complete and comprehensive basis to determine a milk products identity as a fluid milk product. Record evidence reveals criticism that the current fluid milk product definition has not changed to reflect the technological advances in milk processing—especially the fractionation of milk. Such fractionation technology has created the ability to produce dairy-based beverages of almost any composition, some of which are marketed as and directly compete with traditional fluid milk products.

Several witnesses at the hearing addressed specific composition criterion that should be used for determining if a product meets the fluid milk product definition. Proponents of the 2.25 percent true milk protein criterion explained that with the technology to separate the lactose from the protein in milk, protein also should be used in determining if a product should be a fluid milk product because protein is the highest valued nonfat milk solid and because lactose is most often not used in the formulation of manufactured dairy-based beverages. Under current administrative determination of nonfat milk solids, a dairy-based beverage with lactose removed has generally been determined not to be a fluid milk product. Further, milk, in either wet or dry form, that has lactose removed is generalized as "milk protein concentrate (MPC)" and MPC has not been considered a nonfat milk solid. Thus, with lactose removed, a product closely resembling milk in form and intended use may contain less than the current 6.5 percent nonfat milk solids even though the protein content could exceed the protein content of milk.

Other testimony contended that milk protein is not a significant component in fluid milk products and incorporating a milk protein criterion is therefore not appropriate. Contrary to the view that milk protein is not a significant component in fluid milk products, the record of the proceeding reveals that in whole milk, protein is the third most abundant component following lactose and butterfat. In lowfat milk, protein is the second most abundant component.

Even though the record and post hearing briefs contain considerable discussion concerning possible new product development and substitution of nondairy ingredients in fluid milk products, no evidence was presented at the hearing to indicate at what price level or to what degree such substitution would take place. Testimony at the hearing only speculated that processors may use nondairy ingredients if the fluid milk product definition adopted the proposed 2.25 percent true milk protein compositional standard. Opponents also suggested that evidence did not warrant any change to the fluid milk product definition and that there was no evidence that changing the definition would be beneficial to dairy farmers. Proponent witnesses argued that adoption of a 2.25 percent true milk protein compositional standard would not change the classification of products which currently do not meet the fluid milk product definition. Neither proponents nor opponents presented any data to substantiate their claims of benefit or harm to changing the fluid milk product definition.

While the Class I use of milk is priced on the basis of skim milk and butterfat, skim milk and butterfat pricing do not distinguish the components or the level of components that are in the skim fraction. Even if there is a greater level of protein in the skim fraction, there is no greater value that will be assigned to the skim fraction. However, producers may benefit from products being determined as meeting the fluid milk product definition not because of the adoption of the protein standard but because the dairy ingredients in these products are priced as Class I.

The record evidence supports that the true milk protein or nonfat milk solids contained in a finished product should be used to determine if the 2.25 percent true milk protein or the 6.5 percent nonfat solids compositional standard has been met. The composition of the finished product, including all milk-derived ingredients, will provide a clear comparison of the product in question to the products listed and defined in the fluid milk product definition. These ingredients include, but are not limited to, the specific products listed in the fluid milk definition, nonfat dry milk, milk protein concentrate, casein, calcium and sodium caseinate, and whey. Although liquid whey, which is derived from other manufacturing, may meet the compositional standards of a fluid milk product in its natural form, it is not a finished product. The intent is to specifically exclude liquid whey from the fluid milk product definition and account for it only when used as an ingredient in the production of a finished product meeting the fluid milk product definition. The compositional content will be computed by using the pounds of true protein or nonfat milk solids in the finished product. For all other purposes, such as pricing and pooling, the fluid equivalent of all milk ingredients in fluid milk products, including but not limited to nonfat dry milk, milk protein concentrate, casein, calcium and sodium caseinate, and whey, will be used. The addition of a true milk protein criterion will assist in determining those products that should be considered fluid milk products. The inclusion of a true milk protein compositional standard also will assure that products which are comparable to the products listed in the fluid milk product definition are properly classified as Class I.

Federal milk orders have consistently been applied to provide and this decision reaffirms that nonfat dry milk reconstituted to make a fluid milk product or the volume increase caused by the use of nonfat dry milk in the fortification of a fluid milk product should be assessed the Class I value because the integrity of classified pricing is maintained and the reconstituted or fortified product competes with fluid uses of milk products. Accordingly, this decision proposes that other dairy-derived ingredients, such as milk protein

concentrate, casein, calcium and sodium caseinate, and whey, that are used or reconstituted to form a fluid milk product or the volume increase caused by the use of these products to fortify a fluid milk product be priced as Class I for the same reasons. Handlers will be charged the current month's Class I price for the additional Class I volume resulting from the use of these ingredients in fluid milk products contrasted to the receipt of these products assigned to Class IV. This reclassification charge (additional cost) is not a separate charge but is assessed through the increase in the handler's Class I utilization and is assessed (determined) on the volume of reconstituted milk or the volume increase in the modified product, above the level of an unmodified product. This reclassification charge assures equity between competing handlers on raw product cost, assures producers that they will receive the Class I value contribution to a marketing order's blend price for milk marketed as a fluid milk product, and it maintains the integrity of classified pricing.

Based on the record, all milk-derived ingredients, on a fluid equivalent basis, contained in a fluid milk product will be included in the allocation process and the resulting classification and pricing of producer milk. Whey, as used herein is intended to include whey, dry whey, and whey protein concentrates. The fluid equivalent for those products where the relationship between the protein and nonfat milk solids has not been altered will be computed using nonfat solids, while the fluid equivalent for those products where the relationship between the protein and nonfat milk solids has been altered, such as MPCs, will be determined on a true milk protein basis.

The methodology for computing a handler's cost under Federal milk orders remains unchanged. Milk-derived products such as nonfat dry milk, MPC, casein, calcium and sodium caseinates and whey will be used to determine if the quantity of the fluid milk equivalent in the modified fluid milk product is greater than the volume of an unmodified fluid milk product of the same type and butterfat content. The equivalent volume of the modified product, up to the level of the volume of an unmodified product, will be considered Class I utilization and will result in the inherent reclassification charge (additional cost) in the handler's use value from the Class IV price to the Class I price. Any fluid milk equivalent in excess of this equivalent volume will be considered a utilization of other source milk beginning with Class IV and be priced accordingly. The receipt of these milk-derived products used in a fluid milk product will be accounted for on a fluid equivalent basis as Class IV other source receipts.

Comments filed in response to the Recommended Decision, by various parties representing producers, were in favor of including all nonfat dairy solids in the computation of the numerical standards as contained in the Recommended Decision. Their comments reiterated the position presented in their testimony and briefs. Comments filed by opponents of including all nonfat milk solids argued that the inclusion of all nonfat solids is unnecessary because whey and certain other nonfat solids have not traditionally been included in the definition of fluid milk. They also maintain that because no disorderly marketing has occurred, no change is necessary. Opponents assert that the inclusion of all nonfat dairy solids would capture additional products meeting the fluid milk definition and in turn processors would substitute nondairy solids to avoid classification as a fluid milk product.

As record evidence supports and as already discussed in this decision, the inclusion of all milk-derived ingredients in the computation of the nonfat solids on true protein content is appropriate. The use of all milk-derived ingredients used in the manufacturing of the fluid milk product provides a more complete basis for comparing the product to the listed fluid milk products and a clearer indication of the appropriate determination of classification. In addition, considering all milk-derived ingredients places all current and future products on the same set of compositional standards.

Opponents maintain that nondairy products will be substituted to avoid a product being determined to be a fluid milk product. However, opponents did not present evidence as to the relative prices necessary for this substitution to occur. Opponents did not quantify any of their claims that the recommended decision would cause product substitution in the manufacture of dairy based beverages. Nor did they present any examples of dairy ingredient substitution. Therefore, it is virtually impossible to determine if substitution will occur and what the impact, if any, may be. While there are currently several nondairy ingredient options available to formulate products, the advantages of using dairy ingredients, such as their nutrition, physical properties, and taste, have kept dairy ingredients as a competitive choice for use in the manufacture of the many new products currently available.

Manufacturers of milk-based products that are intended to be used for dietary uses (meal replacements) testified that products sold for such dietary use in hermetically-sealed containers and the same product sold in other types of containers receive different regulatory classifications. Some products, such as those intended to be used for infant feeding and dietary needs (meal replacements), are currently considered Class II products if they are hermetically-sealed. However, the same products in a brick-pack or other types of packaging may be considered fluid milk products. The record evidence indicates that these products have a limited distribution and in the case of many of the dietary products, sales are only to health care facilities (such as hospitals and nursing homes). In addition, these products have a very long shelf life. The limited distribution and packaging of these products indicates that they do not directly compete with Class I products. Their intended use can be generalized as replacements for meals by infants, the infirm, and the elderly and not for use as a beverage. These products as used for medical and well-defined healthcare applications are not fluid milk competitors and are not of a scale, as record evidence demonstrates, that would cause a change in marketing conditions for fluid milk products. Accordingly, the term "meal replacement" encompasses both those drinkable dairy products intended to replace meals and categorized products intended for the health care industry, and may include other products of similar intended form and use.

This decision, in the narrow context of a highly specialized and marketed drinkable product sold to the health care industry, continues to find that packaging is a legitimate criterion for considering some meal replacement products as Class II products and others as Class I. When dietary products (meal replacements) are in hermetically sealed containers such packaging confirms that their intended use is a meal replacement. When not so packaged, dietary products (meal replacements) may or may not be used to replace the nutrition of normal meals in the health care industry or possibly to be used in the same manner as fluid milk. The dietary products packaged in other than hermetically sealed containers may or may not have the same form and intended use as those in hermetically sealed containers. It is therefore not reasonable that they should automatically be similarly classified.

Dietary products (meal replacements) should be excluded from the fluid milk product definition and should be considered Class II products if they are packaged in hermetically sealed containers or if it is demonstrated otherwise that the intended use is for specialized health care purposes or medically required meal substitution.

Based on the record, the products in question have been produced to help consumers with various dietary or digestive problems achieve sufficient nutritional intake through a drinkable alternative to solid foods. These products traditionally have added vitamins, minerals, and proteins to achieve a nutritional equivalent to a "typical" meal. In addition, these products are packaged in hermetically sealed containers to maintain a long shelf life for easy handling in nursing homes and hospitals. These products continue to be Class II products. Similar meal replacement products not packaged in hermetically sealed containers (brick packs or gable topped containers) should be considered as Class II products regardless of where they are marketed if they can be shown to be intended for the same specialized dietary use as a product sold in a hermetically sealed container with the same limited use. However, fortified milk products not intended for dietary use (meal replacements) that are available for a more generalized use that would broadly compete with fluid milk will not be exempted from the fluid milk product definition.

Numerous comments and exceptions were filed in response to the Recommended Decision that are in opposition to the elimination of packaging and the addition of "sold to the health care industry" as criteria for excluding milk based dietary use (meal replacement) products from the definition of a fluid milk product. Much of the opposition concerned the definition of "sold to the health care industry" and the application of such a criteria. Several comments suggested that products sold to retail stores might be classified differently than products sold to nursing homes or hospitals. Based on the evidence presented in exceptions, this decision removes the distribution channel reference in the fluid milk product definition to prevent the potential dual classification of a product.

As noted by DFA, *et al.,* in its exceptions to the Recommended Decision, USDA did not receive any proposals to change the classification of supplements for dietary use that contain milk-derived ingredients such as ready-to-drink high protein products. Beverages containing milk-derived ingredients, such as high protein drinks, are typically packaged in hermetically sealed containers and are currently classified as Class II products. Such beverages may include fruit flavored re-hydrating sports drinks, bottled teas, carbonated soft drinks and bottled waters which may contain milk-derived ingredients, usually in the form of whey proteins. Because this final decision provides for primary reliance on compositional standards rather than on intended form and use, products such as these need to be specifically exempted from the fluid milk product definition even if they otherwise meet the definition's compositional standards. Such products are clearly not the same as other named fluid milk products of the definition and are not used in a manner consistent with beverage milk. These products may often be used to supplement nutritional needs, but are not used or considered to be a meal replacement. Such products, packaged in hermetically sealed containers, will be exempted from the fluid milk product definition.

Exceptions to the Recommended Decision assert that expanding exemptions of products from the fluid milk product definition would result in lower producer revenue. The record of this proceeding lacks the data to conclude that exempting certain milk-based or milk containing products, or reclassifying current products from one class to another, will harm producer revenue.

Proposal 5 called for, in part, retaining the 6.5 percent nonfat solids criterion and giving the Department the flexibility to include other dairy-based products that fell below 6.5 percent nonfat solids as fluid milk products. At the hearing, the proposal was modified to require the Department to first make other determinations and to conduct studies before a classification determination is made on whether the product meets the fluid milk product definition.

Specifically, the modified proposal would require the Department to determine if a product competes directly and substantially with Food and Drug Administration defined milk products and also included five other criteria the Department would have to satisfy before a written determination of fluid milk product classification could be issued. The modified proposal further required that more than three million pounds of the product be sold in a marketing area per month before the product would be defined as a fluid milk product even if the product met all of the five criteria.

The multi-criteria features of Proposal 5, as modified, are not consistent with the adopted primary consideration to compositional standards and the requirement to classify milk on the basis of form and intended use as provided for in section 608(c)(5)(A) of the Act and are not adopted. Requiring a comparison of retail prices and advertising, and examination of the substitutability between the new product and already defined fluid milk products does not conform to the primary reliance on compositional standards or form and intended use in determining whether a product meets the fluid milk product definition. No significant improvements to product classification determinations would be achieved. Therefore Proposal 5 is denied.

A modification to Proposal 7 made at the hearing is not adopted. This modification sought to require the Department to hold a hearing to determine the classification of a new product "made by new technology." Such requirement is not necessary for the same reasons in determining that Proposal 5 and all of its modifications are not adopted. The need to incorporate a specific requirement to hold a hearing is not necessary since it is already available.

A number of opponents of proposals seeking to change the fluid milk product definition argued that there must necessarily exist a current problem or the existence of disorderly marketing conditions before amendments to the provisions of Federal milk marketing orders can be made. Based on the evidence, this decision disagrees with such arguments. Actions to preserve the integrity of the regulatory system have historically been taken to avoid problems with the goal of maintaining orderly marketing conditions. Amending the orders to prevent disorderly marketing conditions from arising is reasonable and consistent with ensuring and maintaining orderly conditions and equity among producers and handlers. In light of the changing marketing conditions, it is especially reasonable and appropriate to provide standards that can address both immediate and future needs of a rapidly changing industry brought about by new technology.

Some witnesses testified that even if a product meets the fluid milk product definition, the intended use of that product should be considered for assigning the product to the most appropriate class use. In this regard, if the intended use of the product is a food item that does not compete with traditional fluid milk in the marketplace, the product should be

exempted from the fluid milk product definition. The most notable products of this characteristic are drinkable yogurts that, while drinkable, are not intended to be used as a beverage. The record reveals that some products such as drinkable yogurts are marketed as a food item to supplement or even replace a meal and intended to be used as a quick and easy way to carry a snack. This differentiates their intended use from fluid milk products consumed as beverages. The record indicates that these products are not marketed side-by-side with fluid milk products in retail outlets. Instead, they are positioned alongside other Class II products such as spoonable yogurts in cups. It is reasonable to conclude that drinkable yogurts are yogurt in fluid form and not flavored drinks and are sufficiently different in intended use from other fluid milk products to warrant their exemption from the fluid milk product definition.

A portion of Proposal 9 referred to drinkable yogurt having a protein standard of "* * * no more than 2.2 percent skim milk protein * * *" given that it contained a minimum amount (20 percent) of yogurt. As just discussed above, several witnesses testified to the fact, and the consumer surveys and marketplace data provided by Dannon and General Mills explained how yogurt containing products (*e.g.* drinkable yogurt) are fundamentally different from fluid milk. No protein standard is adopted for drinkable yogurt because the 20 percent yogurt content requirement differentiates these products and assures they are not in competition with fluid milk.

Nevertheless, it is reasonable to establish a minimum level of yogurt that needs to be contained in the finished product to differentiate them from flavored beverages while at the same time identifying the drinkable yogurt as a yogurt product. No record evidence was presented by manufacturers of yogurt-containing beverages to demonstrate that a 20 percent minimum yogurt standard would cause some yogurt beverages to be classified as fluid milk products and others not. Therefore based on record evidence, it is reasonable to estimate that the current yogurt content of these products is above the proposed 20 percent minimum.

Accordingly, drinkable yogurt containing at least 20 percent yogurt by weight should be considered a yogurt product and as such exempt from the fluid milk product definition. The yogurt contained in exempted drinkable yogurt still must meet the yogurt, low-fat yogurt, or fat-free yogurt standard of identity as defined by the FDA (21 CFR 131.200–131.206) and the manufacture of the yogurt mass must be an identifiable and quantifiable step in the formulation process of the drinkable yogurt.

Opponents of excluding drinkable yogurts from the fluid milk product definition stressed that drinkable yogurts should not be excluded because they are beverages and packaged similarly to other fluid milk products. Opponents are of the opinion that drinkable yogurts are fluid milk products because they are comparable to flavored or cultured fluid milk products. Drinkable yogurts do have several characteristics similar to listed fluid milk products—they can be used as a beverage and are similarly packaged. There are, however, other characteristics that differentiate drinkable yogurts from fluid milk products, as the record indicates. These characteristics include, in most cases, a different consistency than the fluid milk products, a significant volume of added yogurt, the addition of fruit and not just flavorings, and live and active cultures supplied by the yogurt.

The differences between listed fluid milk products and drinkable yogurts warrant the exclusion of drinkable yogurts containing at least 20 percent yogurt from being defined as a fluid milk product. Drinkable products with less than 20 percent yogurt will be considered fluid milk products. The milk ingredients (including the yogurt portion) contained in those products with less than 20 percent yogurt will be priced at the Class I price. The Recommended Decision proposed the yogurt portion of these Class I products not be subject to a Class I "upcharge." Fonterra's exceptions objected to the yogurt content not being priced as Class I as would other milk ingredients in the fluid milk product. Since these beverages with less than 20 percent yogurt will be considered a fluid milk product, it is consistent to price the milk ingredients in such products the same as other Class I beverages.

Bravo!, *et al.,* which supported excluding drinkable yogurts from the fluid milk product definition, proposed, as did Lifeway Foods separately at the hearing, to also exclude kefir. The evidence provided to support excluding kefir from the fluid milk product definition identified kefir as a cultured product similar to drinkable yogurt that, like yogurt, contains live and active cultures. While cultured beverages are one of the listed products in the fluid milk product definition, the record shows kefir's several similarities to drinkable yogurts provide a reasonable basis to conclude that the milk used in kefir products should be classified in the same way as milk used in drinkable yogurt products. NMPF argued that kefir should not be exempt because no standard of identity exists to identify what is and is not kefir. While kefir has no standard of identity, cultured milk requirements are described by the U.S. Food and Drug Administration (FDA) (21 CFR 131.112) and kefir is specifically listed as such a product. Therefore, as with drinkable yogurts containing at least 20 percent yogurt by weight, kefir should be exempt from the fluid milk product definition.

Producer groups were concerned about the Recommended Decision's effect on producer income. The exclusion of certain drinkable yogurts and kefir from the fluid milk product definition will have a minimal impact on the resulting uniform prices to producers. According to the record the volume of drinkable yogurt or kefir type beverages was less than one-half of one percent of the packaged fluid milk products distributed in 2004. For 2004, it is estimated that if all of the current drinkable yogurt and kefir beverages had been Class II, the impact on producers, either through the uniform price or producer price differential, would have been a $0.0026 per hundredweight reduction on the more than 103 billion pounds of producer milk pooled on Federal orders.

NMPF argued that the form and use of drinkable yogurt is the same as the products listed in the fluid milk products definition. It could be asserted that drinkable yogurt is a beverage similar to some of the listed fluid milk products and it is made in this form with the intention of people drinking the product. However, the similarity ends there and the record evidence establishes numerous differences which support drinkable yogurt and kefir to not be treated as fluid milk products. As pointed out in the Recommended Decision and by proponents of both Proposals 8 and 9 in their comments, drinkable yogurt is marketed with yogurt and competes with yogurt products in the marketplace and not with fluid milk products. As indicated by a proponent for exempting drinkable yogurt from the fluid milk product definition, it is made by blending yogurt into a liquid. This is significantly different from flavored drinks in which flavoring is added to a fluid milk product. As a practical point, drinkable yogurts do not fulfill the same intended use as fluid milk products in the home or commercially. For example, they are not intended to be added to tea or coffee, or poured on cereals, fruits and

other foods, and to be consumed as a beverage.

NMPF, in their exceptions to the Recommended Decision, pointed out that the FDA may change the standard of identity of yogurt and therefore it is inappropriate to use the current FDA standard of identity as a criterion in determining that drinkable yogurt which contains more than 20 percent yogurt is not a fluid milk product. NMPF exceptions also opposed the exemption of kefir from the fluid milk product definition for many of the same reasons for exempting drinkable yogurt. As NMPF correctly notes, kefir is a cultured fermented beverage. A cultured fermented beverage such as kefir is equally dissimilar to the other listed fluid milk products as these described drinkable yogurts.

After careful review and consideration of the record evidence and the reasons as stated above, this decision concludes that drinkable yogurt containing at least 20 percent yogurt by weight, and kefir should not be defined as fluid milk products. As such, this determination represents the adoption of Proposal 8, the requirement that drinkable yogurt products contain at least 20 percent yogurt by weight to be excluded from the fluid milk product definition as included in Proposal 9, and the proposal of Bravo!, *et al.,* as well as Lifeway Foods that kefir be exempt from the fluid milk product definition. Milk used to produce these products will be classified as a Class II use of milk.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Northeast and other marketing orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held; and

(d) All milk and milk products handled by handlers, as defined in the tentative marketing agreements and the orders as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents: A Marketing Agreement regulating the handling of milk, and an Order amending the orders regulating the handling of milk in the Northeast and other marketing areas, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register.**

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referenda be conducted and completed on or before the 30th day from the date this decision is published in the **Federal Register,** in accordance with the procedures for the conduct of referenda [7 CFR 900.300–311], to determine whether the issuance of the orders as amended and hereby proposed to be amended, regulating the handling of milk in the Northeast, Appalachian, Florida, Southeast, Upper Midwest, Central, Mideast, Pacific Northwest, Southwest and Arizona marketing areas is approved or favored by producers, as defined under the terms of the order, as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

The representative period for the conduct of such referenda is hereby determined to be June 2009.

The agents of the Secretary of Agriculture to conduct such referenda are hereby designated to be the respective market administrators of the aforesaid orders.

List of Subjects in 7 CFR Part 1000

Milk marketing orders.

Order Amending the Orders Regulating the Handling of Milk in the Northeast and Other Marketing Areas

This order shall not become effective until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Northeast and other marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to Section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas. The minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The said orders as hereby amended regulate the handling of milk in the same manner as, and are applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held; and

(4) All milk and milk products handled by handlers, as defined in the marketing agreements and the orders as hereby amended, are in the current of interstate commerce in milk or its products.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Northeast and other marketing areas shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

For the reasons set forth in the preamble, 7 CFR part 1000 is proposed to be amended as follows:

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

1. The authority citation for 7 CFR Part 1000 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

2. In § 1000.15 paragraphs (a) and (b)(1) are revised to read as follows:

§ 1000.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, *fluid milk product* shall mean any milk products in fluid or frozen form that are intended to be used as beverages containing less than 9 percent butterfat and 6.5 percent or more nonfat solids or 2.25 percent or more true milk protein. Sources of such nonfat solids/protein include but are not limited to: Casein, whey protein concentrate, milk protein concentrate, dry whey, caseinates, lactose, and any similar dairy derived ingredient. Such products include, but are not limited to: Milk, fat-free milk, lowfat milk, light milk, reduced fat milk, milk drinks, eggnog and cultured buttermilk, including any such beverage products that are flavored, cultured, modified with added or reduced nonfat solids, sterilized, concentrated, or reconstituted. As used in this part, the term concentrated milk means milk that contains not less than 25.5 percent, and not more than 50 percent, total milk solids.

(b) * * *

(1) Any product that contains less than 6.5 percent nonfat milk solids or contains less than 2.25 percent true milk protein; whey; plain or sweetened evaporated milk/skim milk; sweetened condensed milk/skim milk; yogurt containing beverages with 20 or more percent yogurt by weight and kefir; products especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers; and products that meet the compositional standards specified in paragraph (a) of this section but contain no fluid milk products included in paragraph (a) of this section.

* * * * *

3. In § 1000.40 paragraphs (b)(2)(iii) and (b)(2)(vi) are revised to read as follows:

§ 1000.40 Classes of utilization.

* * * * *

(b) * * *

(2) * * *

(iii) Aerated cream, frozen cream, sour cream, sour half-and-half, sour cream mixtures containing nonmilk items; yogurt, including yogurt containing beverages with 20 percent or more yogurt by weight and kefir, and any other semi-solid product resembling a Class II product;

* * * * *

(vi) Products especially prepared for infant feeding or dietary use (meal replacements) that are packaged in hermetically sealed containers and products that meet the compositional standards of § 1000.15(a) but contain no fluid milk products included in § 1000.15(a);

* * * * *

4. In § 1000.43 paragraph (c) is revised to read as follows:

§ 1000.43 General classification rules.

* * * * *

(c) If any of the water but none of the nonfat solids contained in the milk from which a product is made is removed before the product is utilized or disposed of by the handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids. If any of the nonfat solids contained in the milk from which a product is made are removed before the product is utilized or disposed of by the handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water and nonfat solids originally associated with such solids determined on a protein equivalent basis.

* * * * *

Note: The following will not appear in the Code of Federal Regulations.

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof, as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of § _____ to _____ [1] all inclusive, of the order regulating the handling of milk in the _____ [2] marketing area (7 CFR part _____ [3]); and

II. The following provisions:

§ _____ [4] Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of _____ [5], _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy

[1] First and last section of order.

[2] Name of order.

[3] Appropriate part number.

[4] Next consecutive section number.

[5] Appropriate representative period for the order.

Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) _____

(Title) _____

(Address) _____

(Seal)

Attest _____

Dated: May 21, 2010.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. 2010–12771 Filed 6–11–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE307; Notice No. 23–10–01–SC]

Special Conditions: AeroMech, Incorporated; Hawker Beechcraft Corporation, Model B200 and Other Aircraft Listed in Table 1, Approved Model List (AML); Installation of MD835 Lithium Ion Battery

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the AeroMech, Incorporated; Hawker Beechcraft Corporation, model B200 and other part 23 aircraft listed on the AML. These airplanes as modified by AeroMech, Incorporated will have a novel or unusual design feature(s) associated with installation of the Mid-Continent Instruments MD835 Lithium Ion (Li-ion) battery. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: We must receive your comments by July 14, 2010.

ADDRESSES: Mail two copies of your comments to: Federal Aviation Administration, Regional Counsel, ACE–7, 901 Locust, Room 506, Kansas City, Missouri 64106. You may deliver two copies to the Small Airplane Directorate at the above address. Mark your comments: Docket No. CE307. You may inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: James Brady, Regulations and Policy Branch, ACE–111, Federal Aviation Administration, Small Airplane Directorate, Aircraft Certification Service, 901 Locust, Kansas City, MO 64106; telephone (816) 329–4132; facsimile (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested persons to submit written data, views, or arguments as they desire. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You may inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On September 18, 2009, AeroMech, Incorporated applied for a supplemental type certificate AML for installation of the Mid-Continent Instruments MD835 Li-ion battery in the Hawker Beechcraft Corporation, B200 and other aircraft listed on the AML. The AML covers part 23 aircraft that currently use the PS–835 lead-acid emergency battery.

The current regulatory requirements for part 23 airplanes do not contain adequate requirements for the application of Li-ion batteries in airborne applications. AeroMech, Incorporated proposes to replace an existing L–3 Communications PS–835 lead-acid emergency battery with a Mid-Continent Instruments MD835 Li-ion battery on part 23 aircraft currently equipped with the PS–835 battery. This type of battery possesses certain failure, operational, and maintenance characteristics that differ significantly from that of the nickel cadmium (Ni-Cd) and lead-acid rechargeable batteries currently approved in other normal, utility, acrobatic, and commuter category airplanes.

Type Certification Basis

Under the provisions of § 21.101, AeroMech, Incorporated must show that the Hawker Beechcraft Corporation B200 and other aircraft listed on the AML continue to meet the applicable provisions of the regulations incorporated by reference in the type certificate of each model listed and the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The certification basis for each model qualified for this modification is detailed below.

TABLE 1—APPROVED MODEL LIST

Aircraft make	Aircraft model	TCDS	Certification basis for alteration
Aero Vodochody	Ae 270	A58CE Rev 3	14 CFR part 23 amdt 23–59, except for 14 CFR 23.1308.
Cessna	441	A28CE	14 CFR part 23 amdt 23–59, except for 14 CFR 23.1308.