

NORTHEAST DAIRY COMPACT COMMISSION

7 CFR Chapter XIII

Compact Over-Order Price Regulation

AGENCY: Northeast Dairy Compact Commission.

ACTION: Final rule.

SUMMARY: This rule establishes a compact over-order price regulation ("price regulation") for all Class I, fluid milk route distributions in the territorial region of the six New England states, in the combined, Federal Milk Market Order #1 and compact over-order, amount of \$16.94 (Zone 1). The price regulation is established for a six-month duration. The Northeast Dairy Compact Commission ("Compact Commission") establishes this price regulation based on its findings that it is necessary to assure the viability of dairy farming in New England and to assure the region's consumers of a continued, adequate, local supply of fresh and wholesome milk, reasonably priced, and that it is otherwise in the public interest. The Compact Commission also establishes the price regulation based on the finding that the regulation has been approved by producer referendum pursuant to Article V, section 13 of the Northeast Interstate Dairy Compact. Certification of notice of approval by referendum is published separately in this **Federal Register**.

The price regulation applies to all route dispositions of Class I fluid milk in the territorial region of the six New England states by compact "pool plants", or fluid processing plants located in New England, and by compact "partially regulated plants", or fluid processing plants located outside New England with such route dispositions in the region. The specific amount of the compact over-order price will be announced each month in coordination with the established procedure for price announcement by the Market Order #1 Administrator.

The price regulation provides for a reimbursement to the Women, Infants and Children Special Supplement Nutrition Program under the United States Child Nutrition Act of 1966. (WIC Program). The reimbursement is in the entire amount of the compact over-order price, or the difference between \$16.94 and the Market Order #1 price (Zone 1) as announced monthly, for all milk purchases made by each of the six State WIC programs.

The Compact Commission will monitor production levels regionally and nationally to determine whether

action is necessary to assure compliance with the provisions of 7 U.S.C. 7256(5), relating to compensation of the Commodity Credit Corporation (CCC). Finally, the price regulation establishes an administrative assessment of 3.2 cents per hundredweight of milk on all route dispositions of Class I, fluid milk in the territorial region of the six New England states.

EFFECTIVE DATE: July 1, 1997.

ADDRESSES: Northeast Dairy Compact Commission, 43 State Street, P.O. Box 1058, Montpelier, VT 05601.

FOR FURTHER INFORMATION CONTACT: Daniel Smith, Executive Director, Northeast Dairy Compact Commission at the above address or by telephone at (802) 229-1941 or by facsimile at (802) 229-2028.

SUPPLEMENTARY INFORMATION:

Background

The Compact Commission was established under authority of the Northeast Interstate Dairy Compact ("Compact"). The Compact was enacted into law by each of the six participating New England states as follows: Connecticut—Pub. L. 93-320; Maine—Pub. L. 89-437, as amended, Pub. L. 93-274; Massachusetts—Pub. L. 93-370; New Hampshire—Pub. L. 93-336; Rhode Island—Pub. L. 93-106; Vermont—Pub. L. 89-95, as amended, 93-57. Consistent with Article I, Section 10 of the United States Constitution, Congress consented to the Compact in Pub. L. 104-127 (FAIR ACT), Section 147, codified at 7 U.S.C. § 7256. Subsequently, the United States Secretary of Agriculture, pursuant to 7 U.S.C. § 7256(1), authorized implementation of the Compact.

Section 8 of the Compact empowers the Compact Commission to engage in a broad range of activities designed to "promote regulatory uniformity, simplicity and interstate cooperation." For example, the Compact authorizes the Compact Commission to engage in a range of inquiries into the existing milk programs of both the participating states and the federal milk marketing system, to make recommendations to participating states, and to work to improve industry relations as a whole. See Compact, Art. IV, Section 8.

In addition to the powers conferred by Section 8, the Compact also authorizes the Compact Commission to consider adopting a compact over-order price regulation. See Compact, Art. IV, Section 9. A "compact over-order price" is defined as:

A minimum price required to be paid to producers for Class I milk established by the Commission in regulations adopted pursuant

to sections nine and ten of this compact, which is above the price established in federal marketing orders or by state farm price regulation in the regulated area. Such price may apply throughout the region or in any part or parts thereof as defined in the regulations of the commission.

See Compact, Art. II, Section 2(8).

The regulated price established by the Compact Commission is actually an incremental amount above, or "over-order" (Federal Milk Market Order) the minimum price for the same milk established by Federal Milk Market Order #1. Price regulation provides for payment of a uniform, "over-order" price, out of the proceeds of the price regulation, to dairy farmers making up the New England milkshed, regardless of the utilization of their milk. Such price regulation also establishes the minimum procurement price to be paid by fluid milk processors for milk that is ultimately utilized for fluid milk consumption in the New England region. See Compact, Art. IV, Section 9 ("The Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area.")

Section 11 of the Compact delineates the administrative procedure the Compact Commission must follow in deciding whether to promulgate a price regulation:

Before promulgation of any regulations establishing a compact over-order price or commission marketing order, including any provision with respect to milk supply under subsection 9(f), or amendment thereof, as provided in Article IV, the commission shall conduct an informal rulemaking proceeding to provide interested persons with an opportunity to present data and views. Such rulemaking proceeding shall be governed by section four of the Federal Administrative Procedures Act, as amended (5 U.S.C. § 553). In addition, the commission shall, to the extent practicable, publish notice of rulemaking proceedings in the official register of each participating state. Before the initial adoption of regulations establishing a compact over-order price or a commission marketing order and thereafter before any amendment with regard to prices or assessments, the commission shall hold a public meeting. The Commission may commence a rulemaking proceeding on its own initiative or may in its sole discretion act upon the petition of any person including individual milk producers, any organization of milk producers or handlers, general farm organizations, consumer or public interest groups, and local, state or federal officials.

Pursuant to Section 11 of the Compact, the Compact Commission issued a Notice of Hearing on December 13, 1996,¹ and held public hearings on

¹ 61 FR 65604 (December 13, 1996).

December 17 and 19, 1996. The Notice also invited the public to submit written comments through January 2, 1997. Following the close of this comment period, the Commission met on January 16, 1997 and established three working groups to consider the testimony and data submitted. The Commission issued a Notice of Additional Comment Period on March 14, 1997.² This comment period closed on March 31, 1997; the reply comment period closed April 9, 1997.

Based on the testimony and comment received, the Compact Commission issued a Proposed Rule on April 28, 1997 to adopt price regulation.³ As part of the proposed rule, the Commission published for comment technical regulations to be codified at 7 CFR 1300, *et seq.* Minor corrections to the proposed rule were published on May 8, 1997,⁴ to provide clarification and correct errors.

In response to the Proposed Rule issued April 28, 1997, the Compact Commission received additional comment to which it responds below. The Commission also summarizes the findings regarding adoption of the price regulation which were set forth in the Proposed Rule, and provides further discussion of its conclusions. For the reasons stated in the discussion of the Proposed Rule, 62 FR 23032–62, and for the reasons stated in this Final Rule, the Commission hereby adopts the Final Rule.

I. Comments Received in Response to the Proposed Rule and Commission's Response

Comments received by the Commission's published deadline of May 12, 1997 were duly considered by the Commission. The Commission met on May 14, 1997 to consider and act on the comment received. Public notice of this meeting was published on May 7th in the **Federal Register**.⁵

Summary and Analysis of Comments

Nineteen comments were received during the comment period. Eight comments were received from dairy farmers, seven of whom expressed support for the proposed rule. The remaining farmer suggested an alternative approach to price regulation. Four comments were received from officials of dairy cooperatives. Three of these comments expressed support for the proposed rule, with recommendations for some modification

of the technical provisions proposed for codification in the **Federal Register**. The remaining comment did not express an opinion on the regulation, but raised some questions about the technical provisions. One commenter, author of one of the studies cited in the proposed rule, provided some clarification about that study. One commenter, the Director of a State WIC Program, proposed some minor modification to the joint proposal presented by the six New England State WIC Directors adopted and incorporated into the Proposed Rule. One commenter, a private attorney, expressed strong reservations about certain aspects of the Proposed Rule. One commenter, the President of a Vermont bank, expressed concern about the sufficiency of the proposed administrative assessment. One commenter, Manager of Public Affairs for the Northeast Farm Credit Associations, expressed support for the proposed rule. One commenter, representing a fluid milk processor, sought an exemption from operation of the price regulation for a certain class of such processors. The final commenter suggested an additional rationale for the cost of production study recommended in the proposed rule.

Dairy Farmer Comment and Reply

Seven of the eight dairy farmers submitting comment expressed general support for the proposed rule, and indicated that New England dairy farming is in severe distress. Most of the commenters indicated that the price they received for their milk does not cover their costs of production. Following is a representative statement of the comment received:

How do we make farming attractive to our children, when all they see is our struggle to make ends meet, and the constant stress these times put us through. How do we plan for a retirement if we have to borrow more money that eventually eats up our equity in the farm?⁶

The one farmer who did not express support for the approach of the Proposed Rule indicated that the proposed price regulation would not be sufficient to show improved financial performance of farming operations, because the likely price increase will still not be sufficient to provide for costs of production.⁷ She indicated that financial losses and attrition would continue, only at a slower rate. In response, the Commission notes that the level of price adopted reflects the dual scrutiny of the inquiry into the price needed to assure an adequate supply of milk along that with assessing costs of

production. The price level adopted also reflects a balancing of the numerous elements comprising the "public interest" in price regulation. It is also noted that the establishment of a "flat", combined federal Market Order and Compact Over-order Price Regulation is designed to improve economic performance through price stabilization as well as income enhancement. The Commission nonetheless recognizes the on-going need to monitor the impact of price regulation to determine if it is achieving the desired goal with respect to improvement of dairy farm viability.

The commenter indicated an apparent, personal, willingness to cut production so as to provide only for the Class I market subject to regulation under the Compact, with the remainder of any production to receive the price for milk utilized for manufactured products. Assuming the commenter is proposing something more than a personal option as a general alternative for implementation of price regulation, the Commission responds that such an approach is beyond the Commission's authority. The Commission has no authority over the pricing of milk utilized for manufactured purposes. See 7 U.S.C. § 7256(2). The commenter's approach is therefore not a workable alternative. The Commission does note the commenter's further suggestion of the need to monitor production levels in response to price regulation. A mechanism for tracking production levels is included in the Final Rule.

Comment on the WIC Proposal and Reply

One of the State WIC Program Directors submitted comment providing minor modification of the joint proposal for the WIC Program reimbursement adopted as part of the Proposed Rule. In view of the importance of the WIC Program to the overall context of price regulation, the joint proposal is again incorporated in full text, including the minor modifications provided by the commenter.⁸

About the WIC Program

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is a unique health and nutrition program serving women and children with—or at risk of developing—nutrition-related health problems. WIC provides access to healthcare, free nutritious food, and nutrition information to help keep low to moderate income pregnant women,

² 62 FR 12252 (March 14, 1997).

³ 62 FR 23032 (April 28, 1997).

⁴ 62 FR 25140 (May 8, 1997).

⁵ 62 FR 24849 (May 7, 1997).

⁶ Roy and Brenda Patterson, May 9, 1997.

⁷ Rosemarie A. Jeleniewski, May 1, 1997.

⁸ Typographical corrections submitted by Sally Beach have also been incorporated.

infants and children under five healthy and strong.

WIC provides a monthly "prescription" for nutritious foods tailored to supplement the individual dietary needs of each participant. Foods include milk, cheese, eggs, cereal, fruit juice and peanut butter. Included foods are specifically chosen to provide high levels of protein, iron, calcium, and Vitamins A and C—nutrients that have been scientifically shown to be lacking or needed in extra amounts in the diets of the WIC-eligible population. These five nutrients—plus calories and other essential nutrients provided by the WIC food prescription—are critical for good health during periods of growth and development. Milk and other dairy products play a large and important role in every participant's food package. WIC also distributes coupons for fresh produce—redeemable at local farmers' markets—in conjunction with State Departments of Agriculture.

WIC is a prevention program designed to influence lifetime nutrition and health behaviors. Ongoing nutrition education—the centerpiece of WIC—is designed to ensure that program participants continue to make healthy choices at the grocery store even when they are no longer eligible.

WIC Works

WIC is widely acknowledged to be effective in the prevention of immediate health problems and in the improvement of long-term health outcomes. More than 70 evaluation studies have demonstrated the effectiveness of WIC and documented medical, health and nutrition successes for women, infants, and children: WIC also saves money. Studies have also shown that WIC is cost effective. Every WIC dollar spent on pregnant women produces \$1.92 to \$4.21 in Medicaid savings for newborns and their mothers.

How WIC Works

The WIC Program is a Federally funded program carried out according to provisions of the Federal Child Nutrition Act. The Program is funded through the Food and Consumer Service of the United States Department of Agriculture (USDA).

The Program is administered on the local level by State WIC Programs in the Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and the Vermont State Departments of Public Health (the States). State funds are also provided in Massachusetts. Participants are issued WIC checks or vouchers at local agencies for WIC authorized foods. The checks or vouchers—which do not have a predetermined value—are

redeemed at authorized retail stores at current store prices in accordance with posted prices. Prepayment edits are performed on each check to ensure that specific food purchasing, pricing and payment requirements are met.

The average number of women and children provided WIC benefits and services in August, 1996 in the New England States was 212,760. Individual State WIC participation was: Connecticut 47,673, Massachusetts 99,643; Maine 20,243; New Hampshire 14,700; Rhode Island 17,360; and Vermont 13,141 (Final August, 1997 FSC 298 Reports). These numbers do not include infants also served by the WIC Program.

WIC is not an entitlement program. The number of participants that WIC is able to serve at any time is dependent upon availability of funds from Federal and State sources, and the costs of WIC food items. The national appropriation for WIC is capped by Congress. The amount of USDA funding each State receives is determined through complex formulae taking into account such factors as the number of people served and the funding level of the previous year. The grant level and food costs determine the number of people who can be serviced—not the number of people in need.

Since the amount of funds is fixed, any increase in the price of WIC foods has the effect of reducing the number of women and children the available grant dollars can serve.

USDA estimated that there are 9.4 million women, infants, and children in the U.S. who meet WIC's income eligibility guidelines (185% of the Federal poverty level). The national WIC fiscal year 1997 Federal appropriation is approximately \$4 billion. This sum would serve only about 5.5 million at full retail prices, about 60% of the eligible persons.

All the States have instituted measures to stretch food funds to the maximum, including restrictions on container size, brands and product price, requiring store or least expensive brands, competitive store selection procedures, and manufacturers' rebates on infant formula and infant cereal. Nationally, these measures have brought over \$1 billion in savings, which are then used to provide services to an additional 1.9 million needy mothers and children. In New England, over 75,000 women and children receive WIC services as a direct result of these cost savings measures, the most significant of which are the result of cooperative projects of State WIC directors working together on an interstate basis.

Still, more than 20% of eligible women and children remain unserved. WIC's current funding is estimated to be \$100 million short for this year, with several States reducing caseloads. Funding prospects for next year are not any better, and State WIC programs in New England are not eligible to receive funding to offset the impact of an Over-order Price Regulation.

As such, it is imperative that WIC's funds be held harmless from adverse impact due to price regulation.

The WIC Program and the Milk Over-Order Price Regulation

New England State WIC Programs recognize the important role that farms and farmers play in New England, including ensuring an ongoing supply of fresh milk at competitive prices, keeping important industry—and jobs—in our area, and providing open space that increases quality of life for all New England residents. The New England WIC Programs also understand the need for dairy farmers' relief.

WIC is a major purchaser of locally produced dairy products in the New England region. Because WIC recognizes the importance of dairy products at critical times of child development and therefore must continue its milk purchases, the Program must be concerned with the fact that food cost increases have a direct, inverse effect on the number of participants WIC is able to serve. An increase in milk prices is of particular concern because of the large quantity of milk WIC purchases each month.

Milk purchases are some 35% of WIC food dollars spent by participants. The number of quarts of Class 1 fluid milk purchased by WIC participants in New England in August 1996 was 3,779,015, which represents approximately 3.7% of the total amount sold by New England producers in the Region. WIC Class 1 fluid milk purchases in quarts by State were: Connecticut 1,100,000; Massachusetts 1,481,163; Maine 457,852; New Hampshire 230,000; Rhode Island 300,000; and Vermont 210,000.

Given current WIC participation levels, a 1 cent per quart wholesale price increase in Class 1 Fluid milk reflected at the retail level would translate into an increase in monthly WIC program expenditures of \$37,790 for New England as a whole. This increase would necessitate a decrease in monthly program funded participation of 1,260. A 5 cent per quart milk retail price increase would result in an increase in monthly WIC expenditures

of \$189,950 and a participation decrease of 6,302.

In order to maintain services to eligible persons, without compromising the nutritional health effectiveness of its food benefits if food costs rise, WIC managers must achieve offsets to increased food benefit expenditures and use those offsets to serve a significant portion of the eligible women and children in need. Further, if the States in New England must reduce or limit participation levels due to higher Class 1 fluid milk costs, there will be a negative impact on Federal WIC funding to the New England Region—and on the amount of milk purchased.

As important, low income women and children who WIC is not able to serve because of increased food costs will not receive the essential medical, health and nutritional benefits of WIC participation. It is critical, then, that the intended benefits to the regional economy and the continuation of dairy farming in New England not accrue at the cost of a significant risk to maternal and child health stemming from Regulation-related costs to WIC.

Retail Price Impact of Price Regulation

The Northeast Interstate Dairy Compact enables participating States collectively to regulate the New England farm price for Class 1 fluid milk, thereby enhancing and stabilizing dairy farmer income. This Regulation may have the effect of increasing the price paid for Class 1 fluid milk by WIC participants at retail stores, if the regulated farm price increase translates directly into an increase at the retail level. Other goals are to stabilize processor and retailer costs and consumer prices.

Concomitantly, the findings of Hansen, *et al*⁹ with regard to the variability of milk farm prices and asymmetric price transmission are the basis for the theory that an Over-order Price Regulation on Class 1 fluid milk which brings about stable farm prices for Class 1 fluid milk will result in price stability—and potential price decreases—in Class 1 milk at the retail level for consumers over a period of time. Testing this concept, presented by US Senator Patrick Leahy of Vermont in public comment before the Northeast Dairy Compact Commission, would appear viable with regard to the impact of a price regulation on consumer milk prices.

Demonstration Period and Continuing Assessment of Impact

The New England State WIC Programs understand that the Compact is considering an Over-order Price Regulation on Class 1 fluid milk for a specific period of time. The State Directors believe it appropriate that any initial price regulation be in effect for a limited period, such as six months. A potential outcome of such a demonstration could provide evidence which supports that milk farm price stability due to a price regulation will result in price stability, and perhaps decreases and related savings, on Class 1 fluid milk purchases by consumers—including WIC participants—over time.

To measure and document the impact of a price regulation, the Commission will need to develop systems and methodologies to gather, track and analyze Class 1 fluid milk retail price data in order to accurately assess and evaluate any regulation-related adverse or beneficial impact on costs to consumers and WIC, and to make related adjustments to assure that the public interest is served and consumers and the WIC Program and its participants are protected.

Such an analytical framework should include information which is appropriate to milk purchasing and pricing at both the New England Regional and individual State levels—including each State's WIC programs—comprising representative samples of market areas and retail store types, proportion of sales by package size (quarts, half gallons and gallons), and the degrees to which retail price fluctuations differ for package sizes in relation to each other, since data reflect WIC operations and purchasing patterns in each State. WIC participants often purchase 2 half gallon containers, and the majority do not have ready access to supermarkets, especially for frequent purchase of a perishable product such as milk.

As important, analysis should include development of a baseline by which changes over time will be measured, as well as evaluation of the relationship between changes in the price regulation and Class 1 fluid milk prices at retail levels over time and the cost impact to WIC. WIC does not specify the fat content of milk purchased. Tracking and measuring product differentials based on fat content, therefore, is not necessary to any WIC cost impact methodology.

Post Demonstration Reimbursement System

Given such analysis and evaluation and sufficient evidence, Commission reimbursement to WIC could be then based upon the over-order price regulation and—specifically, on the amount of any portion of the retail cost for Class 1 fluid milk to WIC attributable to the regulation which would encompass and respond to individual state WIC programs.

Demonstration Period Reimbursement System

State WIC Programs recognize, however, that the theory and data which may justify the adoption of a demonstration period regulation does not provide demonstrated, proven assurance that there would be no cost increase to WIC on its Class 1 fluid milk purchases. Notwithstanding any public interest or other justification for a regulation, in the absence of such current evidence that a regulation would be either cost neutral or beneficial to WIC's present year funding, the Commission should provide a way to protect and hold harmless the WIC Program—and its participants—in the New England States from potential increases in the Class 1 fluid milk retail price during a period of a demonstration over-order price regulation, for at least the period of any demonstration regulation. It is clearly a part of the public interest under any regulation to protect WIC's limited funds and the full number of women and children WIC would otherwise serve. Price regulation must not leave women's and children's health and nutritional status at risk because appropriated WIC funds were diverted to pay higher milk prices, rather than remaining with the WIC Program to provide benefits to participants.

Given that State WIC Programs have a September 30th fiscal year end, the Compact Commission can not make the Program whole after the fact. Further, WIC must operate in a funding "limbo" between October and January when its State Program grants are announced. Uncertainty regarding the potential effect of price regulation, or reimbursements to states made by the Compact Commission at a later date, would force State WIC managers to lower first quarter participation levels.

As such, the State WIC Programs in New England propose a method by which the WIC Program will be held harmless from any impact related to a demonstration of a compact over-order price regulation for Class 1 fluid milk. The Commission would reimburse each

⁹Hahn, *et al*, "Determinants of the Farm-to Retail Milk Price Spread", Agriculture Information Bulletin #693, March 1994.

respective State WIC Program. The amount of reimbursement would be based on (1) the quantities of milk purchased with WIC checks and (2) the amount of any compact over-order price regulation.

This would allow the Commission to implement a Compact demonstration regulation, providing essential relief to dairy farmers, and WIC could continue to serve the maximum number of participants in each State allowed by the grants during price regulation demonstration. This would also allow the Commission a period of time to develop a more finely attuned analysis of the impact of the regulation, and to develop methods to most accurately ascertain any cost to WIC and the most appropriate reimbursement levels.

The principles of the interim mechanism proposed by the State Directors are:

1. The Commission should establish a Reserve Account, to assure that funds are on hand for timely reimbursement by the Commission to the States. This account will be funded from the Compact Over-order price regulation based on the recent percentage of total milk sold in New England purchased by WIC participants and the amount of the Over-order price regulation.

2. Any Commission Over-order Price Regulation in a given month will result in a cent for cent reimbursement for Class 1 fluid milk paid for by each State WIC Program in that month. The amount of reimbursement will be based on the quantities of milk actually paid for by each WIC State Program. Funds in the Reserve Account will only be drawn by individual States in proportion to the price regulation. Unused funds would return to the Commission.

3. Each State WIC Program will invoice the Commission on a monthly basis for reimbursement due. When the refund amounts are small, individual States may elect to bill up to 3 months in one invoice to avoid unnecessary administrative costs for both parties.

Formal Agreement

Implementation will take place under the terms and conditions of a formal agreement between the Commission and the States, entered into by the State WIC Programs acting as a single entity. Such an agreement must contain the above provisions for interim reimbursement determination and procedures, continuing assessment of impact, how the parties will change to any post demonstration reimbursement system, conditions for mutual agreement for modifications to the agreement, term of the agreement and conditions for mutual or either party termination prior to expiration of the agreement.

The above proposal by the State WIC Programs in New England and any subsequent agreement are subject to

approval by the Food and Consumer Service of the USDA. The State WIC Programs will collaborate with the Compact Commission and USDA Food and Consumer Service to develop and implement agreement provisions and operating procedures for any reimbursement system which meet the requirements of Compact legislation and Federal WIC guidance, rules and regulations.

Comment on the Technical Provisions and Reply

Two commenters¹⁰ indicated that the definition of "Producer" under proposed 7 CFR § 1301.11 required clarification. Specifically, the commenters sought clarification of the definition's requirement that a producer's milk "* * * must move to a pool plant during the current month and must have been moved to a pool plant for (5) months subsequent to July of the preceding calendar year. * * *" They indicated the provision is not clear as to the minimum number of shipments each month that would satisfy the requirement. They also indicated that requiring shipments for every day of each month would be overly restrictive and cause market distortion. They propose instead reliance upon the requirement that shipments occur during a representative period for the subject months.

The Commission agrees with the commenters. Such representative time periods appear elsewhere in the regulation as well as in the regulatory pattern of the underlying federal Market Order. Accordingly, the movement of milk required under 7 CFR 1301.11 shall be required for at least one half of the days of each applicable month called for by the section. The section has been amended to conform to this change.

One commenter¹¹ inquired with respect to the relative treatment of diverted milk by cooperative handlers and handlers operating pool plants. This comment revealed the need for correction of a clerical error to ensure uniform treatment. Accordingly, the reference in 7 CFR 1301.23(b) to a "partially regulated pool plant" is corrected to read "plant other than a pool plant".

The same commenter inquired specifically whether a cooperative is considered a producer in its receipt of the proceeds of the price regulation. In response, the Commission responds in the affirmative. The same commenter

inquired specifically with regard to a cooperative's responsibility to collect the Over-order obligation and the administrative assessment from the cooperative's Class I customers. In response, the Commission notes that cooperatives have no such responsibility.

This commenter also indicated general concern with regard to how the technical provisions would be administered in practice, given the lack of a narrative description in the Proposed Rule. The Commission indicates that the technical provisions are drawn in principle part from the underlying Market Order #1, and uniformity in substance as well as text was established to the degree possible. The Commission also notes that the Market Order #1 Administrator will be providing for the substantial administration of the Compact price regulation, to ensure uniformity and consistency between operation of the underlying Market Order and the Compact Over-order price regulation.

The commenter also inquired with regard to the impact of price regulation on New York's voluntary handling and premium structure. In response, the Commission notes the Compact has no regulatory authority over such payments, and that they are subject only to response of the marketplace.

Two commenters¹² sought specific clarification with regard to payments to those producers supplying pool plants and those producers supplying partially regulated pool plants. In response, the Commission observes that the commenters correctly noted that producers supplying pool plants will receive payment of the pool price, regardless of farm location, for all milk supplied to the pool plant. Producers supplying partially regulated pool plants will receive payment of a prorated amount of the pool price, based on the plant's dispositions of fluid milk sales in New England.

These commenters also sought clarification with regard to the definition of route dispositions. Specifically, they wished to ensure that milk sold in New England is traced to the original processing plant. In response, the Commission indicates that the commenters have accurately described the treatment of all such milk under the regulations. See 7 CFR 1304.4(ii).

One commenter¹³ indicated the filing date for reports of receipts and utilization under 7 CFR 1303.1 is earlier than the similar report date for the

¹⁰ Berthiaume, May 9, 1997 (Also on behalf of Sally Beach); Wellington, May 12, 1997.

¹¹ Gallagher, May 12, 1997.

¹² Berthiaume and Beach, May 12, 1997.

¹³ Wellington, May 12, 1997.

Federal Market Order, and will be difficult for handlers to meet. In response, the Commission notes that the date was specifically selected to ensure sufficient time for the Market Order Administrator to conduct the dual, coordinated calculations required by the Compact price regulation and the Federal Milk Market Order and all subsequent, coordinated, reports and price announcements. This coordinated process is necessary to ensure that payments to farmers can be made according to the same schedule as under the Federal Market Order.

Three commenters¹⁴ indicated that 7 CFR 1308.1, relating to the Administrative Assessment, suggests that the assessment is due on milk marketed by cooperatives for non-Class I purposes, or beyond the scope of this price regulation. The Commission agrees the section requires clarification to remove such an ambiguity. The applicable provision, 7 CFR 1308.1(b) has been so modified.

One commenter¹⁵ indicated the assessment incorrectly denotes the intended amount because of a typographical error. The Commission also agrees with this comment. The correct amount is 3.2 cents per cwt. The applicable provision, 7 CFR 1308.1(b) has been so modified.

One commenter¹⁶ expressed concern that the amount of the proposed administrative assessment is not sufficient to allow the Commission to recoup all of the costs incurred during 1996-97 associated with administration of the price regulation. The Commission responds by accepting the comment with the intent to examine further the proper calculation of the "assessment for the specific purpose" of administration of price regulation, within the meaning of Compact Article VII, section 18(b).

One commenter¹⁷ indicated that fluid processing companies providing over-order prices "both at the blend and Class I constantly throughout the year, not for example when milk is in short supply or when it is a means to solicit more farmers" should be exempt from price regulation. The Commission appreciates the concern of the commenter. The Commission responds by noting that the price regulation is designed to mirror operation of the Market Order in substantial form to the degree possible. An exemption from regulation based on payment of market-

based premiums is not recognized under the Federal Market Order System. Accordingly, to provide such an exemption would disrupt the complimentary function of the Compact and underlying Market Order.

General Comment and Reply

One private commenter expressed concern with reliance on cost of production analysis as a basis of price regulation.¹⁸ According to this commenter, existing milk prices already have a "close relationship" with production costs. The commenter cited analysis in an accompanying article¹⁹ which indicates that costs of production increase when milk prices rise and decline when milk prices fall, based on business decisions made by farmers in response to changing milk prices. The commenter indicated that reliance on cost of production calculations as the basis for price regulation is made further suspect given that cash operating costs "by every measure" are significantly below milk prices, and it is only when non-cash costs are factored in that milk prices emerge as lower than operating costs. Taking his concerns together, according to the commenter, price regulation premised on a higher calculation of costs of production will serve only "to produce a one-way price ratchet, never again allowing significant reductions in cost of production as occurred in the past." The commenter concludes by warning that "[t]his illustrates the danger of looking beyond the sufficiency of the volume of milk available to the market in making any judgment concerning whether the price to produce such milk is adequate."

In response, the Commission notes first that the Compact explicitly requires the Compact Commission to make an express finding with regard to "what level of prices will assure that producers

receive a price sufficient to cover their costs of production" as the basis of any price regulation. Compact Art. V Section 13. The same finding requires inquiry into the level of price sufficient to "elicit an adequate supply of milk" for the region, or an analysis along the lines suggested by the commenter. The inquiry required by the Compact, however, is a dual one of these two issues, rather than the single analysis presented by the commenter.

The Commission agrees with the commenter that proper accounting for cash and non-cash costs creates complexity for the accurate determination of whether farm prices are covering costs of production. The Proposed Rule noted this complexity, yet indicated that the diversity of methodology does not compromise the quality of the extensive data presented or the conclusion that such costs are not being covered by pay prices. The Compact Commission also found in the Proposed Rule, and consistent with the commenter's assertion, that costs of production move in relation to prices.²⁰ It is for both these reasons that the Commission identified that there exists a range of cost of production rather than a single, precise amount. Again, however, the record nonetheless strongly supports the Commission's conclusion that costs of production, however calculated, are not being covered by pay prices and that this is a primary cause of the loss of dairy farms in New England which must be addressed.

In further response to the commenter, the Commission notes that the failure of milk prices to cover costs of production is only one factor relied upon by the Compact Commission in conducting the inquiry mandated by the first finding into the farm-based need to establish price regulation. Responses to the persistent, adverse impact of price volatility and to the failure of milk prices to account for inflation over time are also bases for the stated amount of price regulation.

This same commenter suggests the Commission should utilize its authority under Section 8 of the Compact to explore ways to enhance producer income by means other than price

²⁰ In making this determination, the Commission cited the comment of DeGeus: In good years, we find that the cost of production tends to rise with the price of milk. With the extra cash farmers replace worn out equipment and make repairs that may have been delayed for years. When the price of milk drops below cost, they consume some of the equity in their farms to meet family living expenses and cash flow demands. De Geus, 1/2/97 Written Comment at 75.

¹⁸ Vetne, May 9, 1997.

¹⁹ Mark Stephenson, "The Problem of Declining Milk Prices and The Economic Consequences of a Geographically Isolated Solution" (Undated) The commenter cites to another article by the same author, "The Problem of Using Cost of Production as a Basic Formula Price", (Undated) submitted with his testimony on December 19, 1996. This latter article presents a similar argument with regard to prices and costs of production.

The Compact Commission notes that the article titled "The Problem of Declining Milk Prices and The Economic Consequences of a Geographically Isolated Solution" expresses concern with price regulation in a single-state format. The author's stated concern, however, is mitigated by an express reference to the Northeast Interstate Dairy Compact:

It is my understanding that several other states in the Northeast are currently considering legislation of higher prices. Although I favor the efficiency of unrestricted markets, uniformly adopted price increases would not be as disruptive to orderly milk movements and manufacturing patterns as geographically isolated augmentations. (At 16)

¹⁴ Berthiaume, Beach, and Wellington, May 12, 1997.

¹⁵ Berthiaume and Beach, May 12, 1997.

¹⁶ Perine, May 12, 1997.

¹⁷ Flint, May 12, 1997.

regulation.²¹ This comment is beyond the scope of the Proposed Rule.²²

The same commenter expressed reservation about the Compact Commission's legal authority to regulate the price of milk which is marketed in the New England region but produced outside the region, other than by assessment of so-called "compensatory payments" on such milk. See 7 U.S.C. 7256(7).

The Commission responds by identifying its authority to regulate the price of milk marketed in New England but produced outside the region, which is derived from the basic definitional and operational provisions of the Compact. This authority is not limited to the imposition of compensatory payments. Rather, the Commission is authorized further to regulate such milk by the establishment of a "pool" of the proceeds of price regulation on such milk. This pool is used further as the basis for payment back to producers supplying the milk.

Section 9(d) of the Compact authorizes the Commission:

[T]o establish the minimum price for milk to be paid by pool plants, *partially regulated plants* and all other handlers receiving milk from producers located in a regulated area. (Emphasis supplied.)

Compact, Article IV, Section 9(d). "Partially regulated plants" are defined as those milk plants

Not located in a regulated area but having Class I distribution within such area, or receipts from producers located in such area.

Compact Art. II, Section 2(7). Compact Section 10(7) authorizes the Commission to adopt

Provisions specially governing the pricing and pooling of milk handled by partially regulated plants. (Emphasis supplied.)

Compact Art. IV, Section 10(7). The Compact accounts for the establishment of this pooling mechanism for partially regulated plants because such regulatory authority is critical to the uniform and equitable administration of the Compact with regard to milk processors and dairy farmers located both inside and beyond the Compact region.

One commenter²³ expressed the need to complete rather than initiate the cost of production study cited in the

²¹ Article IV, Section 8 of the Compact establishes Commission "Powers to Promote Regulatory Uniformity, Simplicity, and Interstate Cooperation".

²² The commenter stated that Connecticut regulations fail to conform to Interstate Milk Shippers (IMS) standards. The Commission notes that Connecticut has been accepted by IMS and, in addition, Connecticut's legislature has adopted the Federal Pasteurized Milk Ordinance (PMO) regulations.

²³ Gillmeister, May 12, 1997.

Proposed Rule by the date of expiration of the price regulation established by this Final rule. See 62 FR 23034 (Monday, April 28, 1997). As per the comment in the record by the same author the existence of differing costs of production in the region and the potential for resulting disbursements to producers accordingly is cited as the basis for the suggested need to complete the study in the described timeframe.²⁴

In response, the Commission reaffirms its understanding of the need to conduct a cost of production study as part of the process of determining the potential benefits and other impacts of price regulation. The Commission will initiate the procedure for conducting the study with adoption of the Final Rule, with the goal of its completion by the date of expiration of the price regulation.

II. Summary and Further Explanation of Findings Regarding Adoption of Over-Order Price

Section 12(a) of the Compact directs the Commission to make four findings of fact before an over-order price regulation can become effective. Specifically, the Commission shall make findings of fact with respect to:

(1) Whether the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.

(2) What level of prices will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.²⁵

(3) Whether the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

(4) Whether the terms of the proposed regional order or amendment are approved by producers as provided in section thirteen.

Compact, Art. V. Section 12.

The Commission's findings of fact regarding the first three topics are set forth in the Proposed Rule and reaffirmed and further discussed here. As in the Proposed Rule, the second finding required by the Compact (the level of prices needed to assure a sufficient price to producers and an adequate supply of milk) is discussed first. The Commission finds that a price of \$16.94/cwt is needed to achieve these dual goals. As in the Proposed Rule, the first finding required by the Compact (whether the public interest will be

²⁴ A similar concern was raised by Rosenfeld,—Hearing transcript, December 19, 1996.

²⁵ The Commission limited its assessment to issues relating to the fluid milk market, given the limitations on its authority to regulate the price of milk used for manufacturing purposes. See Compact, Section 9(a); see also 7 U.S.C. 7256(2).

served by the establishment of minimum milk prices) is discussed next. The Commission finds that the public interest will be served by establishment of an over-order price of \$16.94/cwt. With respect to both of these findings, the Commission's inquiry has been guided by Section 9(e) of the Compact, which sets forth several factors which the Commission must consider in determining the amount of an over-order price, should it decide to adopt a price regulation:

In determining the price, the commission shall consider the balance between production and consumption of milk and milk products in the regulated area, the costs of production, including, but not limited to the price of feed, the cost of labor including the reasonable value of the producer's own labor and management, machinery expense, and interest expense, the prevailing price for milk outside the regulated area, the purchasing power of the public and the price necessary to yield a reasonable return to the producer and the distributor.

As in the Proposed Rule, the third finding required by the Compact is then discussed; the Commission concludes that the major provisions of this order, other than those fixing minimum milk prices, are in the public interest and reasonably designed to achieve the purposes of the order.

In this Final Rule, the Commission makes the fourth finding, premised on the approval of the price regulation by producer referendum pursuant to Article IV, Section 12 of the Compact. Certification of this finding is published separately in this **Federal Register**.

A. What Level of Prices Will Assure That Producers Receive a Price Sufficient to Cover Their Costs of Production and Elicit an Adequate Local Supply of Milk

With regard to the second finding required by the Compact, the Compact Commission sought comment on a wide range of issues. The Commission's deliberations regarding costs of production and the adequacy of farmer pay prices focused on three areas of concern:

(1) The failure, over an extended period of time, of farmer pay prices to adequately cover the costs of production ("price insufficiency").

(2) Wide swings in farmer pay prices cause farm financial stress and make it difficult for farmers to plan financially ("price instability").

(3) The failure of farmer pay prices to keep up with inflation.

Failure of Farmer Pay Prices to Cover Costs of Production

With regard to the first topic addressed by the Commission in its

Proposed Rule (whether prices are sufficient to cover the cost of production), the Commission's inquiry was guided by Section 9(e) of the Compact, which directs the Commission to consider cash costs of production, including feed, machinery expense, labor, and interest, as well as the non-cash costs of value for the farmer's own labor and a reasonable return on the farmer's investment. 62 FR 23033. Although the Commission found that estimates regarding costs of production vary, *id.*, the Commission concluded that the total costs of production exceed prices paid to farmers, regardless of the measure of costs of production, *id.* at 23034.

In addition to this overall conclusion, the Commission considered various specific components of cash and non-cash costs. The Commission found that feed costs can account for as much as 50 percent of a farmer's cost of production. 62 FR 23034. Farmers indicated that feed costs had risen beyond their means. *id.* at 23035–36. In 1996, in particular, feed costs increased by some 29 percent. *id.* at 23034.²⁶ The Commission concludes that feed costs are a major factor in the failure of farmer pay prices to cover costs of production.

Machinery expense as a factor in the cost of production arises primarily in the context of depreciation; that is, depreciation must be covered by replacing old and worn out equipment. Farmers indicated that pay prices are too low to permit them to make these investments. 62 FR 23034, 23036–37.²⁷ The ability of farmers to pay machinery expenses is further diminished by price instability because farmers are unable to invest (e.g., in new machinery or in upgrading their facilities), given the wide fluctuations in the price of milk. 62 FR 23035. The Commission concludes that this inability to reinvest threatens the continued viability of the New England dairy industry and the local milk supply for inhabitants.

Section 9(e) also directs the Commission to consider interest and labor costs in assessing the sufficiency of farmer pay prices. As stated above, the Commission concluded that regardless of how the separate components of costs of production are measured, pay prices are inadequate to

cover them. Moreover, comments submitted for the record indicate that both interest and non-family labor expenses constitute a significant proportion of costs of production: from \$0.50 to \$1.18 per hundredweight for interest expenses, and \$1.08 to \$1.92 per hundredweight for labor expenses.²⁸

Section 9(e) also directs the Commission to consider certain non-cash costs, including a reasonable value for the farmer's own labor and a reasonable return on the farmer's investment. In considering whether pay prices provide a reasonable value for the farmer's labor, the Commission determined that dairy farms in New England are still predominately family operated. 62 FR 23036. The Commission concluded that in light of farmer pay prices, much of this family labor is completely uncompensated, or significantly undercompensated. *id.* at 23036–37. The Commission concludes that this failure to compensate for family labor discourages entry into the dairy industry. See also *id.* at 23035.

As Section 9(e) directs, the Commission also considered whether pay prices provide a reasonable return on the farmer's investment. Several comments were received indicating that a reasonable return ranges between 4% and 5%.²⁹ The Commission determined that, for an extended period of time, pay prices have been insufficient to provide a rate of return on equity that reaches these levels. 62 FR 23034.

In summary, the Commission found that while the studies it considered used different methods for determining costs of production, particularly with respect to non-cash costs, all indicated that over an extended period of time, farmer pay prices have failed to cover the full costs of production, however measured. 62 FR 23040–41. Based on these studies, the Commission concluded that the range of the costs of production for New England is somewhere between \$14.06 and \$16.46. *id.* The Commission further concluded that the costs of production have exceeded the farm pay price by an amount in the range of \$0.46–\$1.90. *id.* at 23041. Accordingly, the Commission finds that pay prices have failed to cover the costs of production.

²⁸ See Wackernagel, which analyzed Agrifax and ELFAC farms over a 3-year period; Maine cost-of-production studies; and Pelsue and ERS-USDA studies submitted by Smith.

²⁹ Robert Smith of the Yankee Farm Credit System suggested a 4% rate of return was reasonable. 62 FR 23033. The Maine cost-of-production studies, which analyze southern New England, used a 5% return on equity. *id.* at 23034. In addition, Michael Sciabarrasi of University of New Hampshire Cooperative Extension Service, suggested that 5% was a minimal rate of return.

Effects of Price Instability

The Commission received a wealth of testimony and comment indicating that wide fluctuations in the price of milk caused farm financial stress and made it difficult for farmers to plan financially. 62 FR 23035. One comment indicated that the price volatility of the last year was triple that experienced in 1981, and much larger than most of the 1980's. *id.* Farmers were reluctant to make long-term investments in their farming operations, and when prices dropped precipitously they were unable to meet their most basic obligations. *id.* The Commission concluded that providing price stability is essential to the continued viability of the dairy industry in New England. *id.*

Failure of Farmer Pay Prices to Keep Up With Inflation

The Commission relied on testimony by both economists and farmers in determining that the failure of farmer pay prices to keep up with inflation is a significant factor contributing to chronic price insufficiency and farm financial stress. 62 FR 23035. The analysis of economist Rick Wackernagel regarding the potential impact of price regulation under the Compact was the most persuasive comment submitted in this regard. *id.*³⁰

Wackernagel analyzed three potential "price trajectories" based on a 1997 economic model developed by the Food and Agriculture Policy Research Institute (FAPRI), modified for conditions in the northeast. *id.* Important trends emerged from this analysis. *id.*

The first price trajectory was the "base" model, or what would happen if the Commission did nothing. The second price trajectory removed much of the price instability factor by holding the Class I price constant. *Id.* The third trajectory raises the Class I price and thereafter increased it by 1/2 the rate of inflation in subsequent years. *Id.*

The results of this last price trajectory, based on Wackernagel's inflation adjustment, revealed a markedly positive impact on net farm income, equity retention, and ultimate farm survivability. The study thereby confirmed the abundant comments of farmers with regard to the continued failure of farmer pay prices to respond to increases in cost attributable to inflation. 62 FR 23035–36.

With regard to the appropriate adjustment to be made, the Commission was persuaded by the reasoning of economists Reenie DeGeus and Bill

³⁰ The Commission is here responding to the comments of Berthiaume and Beach.

²⁶ In addition, a cost-of-production study conducted by Wackernagel and relied upon by the Commission (62 FR 23034) indicated that feed and crop expenses together can account for some 39% of a farmer's cash operating expenses.

²⁷ Economist Reenie DeGeus noted in record testimony that expenditures on machinery and other depreciation expenses tend to rise in the good years and are delayed in the bad years. Reenie DeGeus, WC 75.

Gillmeister, dairy economists for the Vermont and Massachusetts Departments of Agriculture, respectively. They jointly proposed, and the Commission adopted, an over-order price regulation based in part on an inflation adjustment. Using the Class I, Zone 1 price for 1991 as the base year (a year in which prices were markedly low), and adjusting forward using the 1990 Consumer Price Index (CPI) at Boston as the base CPI index, yielded the amount of \$16.94. 62 FR 23041.

The Commission remains mindful of the concern expressed by several commenters that an inflation adjustment not be built in as a permanent, automatic adjustment. 62 FR 23041. These commenters called for continuing evaluation of broader market conditions. The Commission concluded that adoption of a price regulation for limited duration of six months will allow for such an evaluation. *Id.*

After concluding that farmer pay prices have been insufficient to cover costs of production, the Commission considered several other issues relevant to its finding regarding the level of prices needed to assure that producers receive a sufficient price and elicit an adequate supply of local milk.

The Commission first reviewed statistical data and comments regarding prevailing pay prices received by dairy farmers in New England. 62 FR 23037-38. The Commission then considered the balance between production and consumption of fluid milk products, and concluded that while the balance was currently stable, it was "operating in a balance that is under tremendous stress." *Id.* at 23039-40.

The Commission then summarized its analysis of the costs of production. It concluded that "price regulation is necessary to address the chronic pricing problems and to continue the assurance of an adequate, local supply of milk for the region." 62 FR 23040. The Commission further found that an over-order price of \$16.94/cwt serves the goals set forth in the Compact. *Id.* at 23041.

The Commission received written testimony from the President of the Milk Industry Foundation, a trade association representing milk processors.³¹ The testimony suggested that the "economic status of New England dairy farmers is already robust," and cited a study by the Farm Credit Bank of Springfield indicating that the average New England Dairy farmer held assets worth 1.1

million and had an average net worth of \$822,000 in 1993.

In response, the Commission cites a study submitted for the record by the Springfield Farm Credit Services indicating that the average net worth of Agrifax dairy farmers in the Northeast (generally considered to be the larger and more financially stable operations), was \$686,607 in 1995 with some \$448,201 held in real estate and buildings. This net worth calculation is up from an average net worth of \$588,708 in 1991, with nearly 30% of the increase attributable to an increase in the value of land assets held.

These figures reflect the fact that dairy farming is a capital and land intensive enterprise. Moreover, land values in the Northeast frequently reflect urban pressures rather than the value of land as farmland or the amount a farmer could actually pay for the land by farming it.

Most significantly this thin snapshot of net worth belies other data presented to the Commission by the Springfield Farm Credit System:

1. Forty-two percent of the farmers in their survey had negative cash margins in 1995.

2. The average cost of production on these farms averaged \$15.37 per hundredweight while the average price received by farmers was \$13.70 per hundredweight.

3. The number of dairy farms in New England declined by 41% over the past 10 years.

4. The number of cows has declined by 24% and total production has declined by 4%.

5. Land used in farms fell by nearly 600,000 acres.

The same testimony argued that milk production increased by 1.94% in the six state Compact region from 1994 to 1995 and therefore production was adequate to meet local needs. Citation for this data is presented only as "according to USDA data". Data cited above, as submitted by Springfield Farm Credit, however, is directly contrary to the testimony's assertion. Data in the record compiled by New England Agricultural Statistics corroborates the market description of Springfield Farm Credit.³²

The testimony also argues that Blend prices received by farmers in the New England region were occasionally higher in 1986 than the national average and therefore there was nothing "unique" about the condition of the New England dairy industry to justify implementation

of the Compact. In response, the Commission observes the relative competitive, national, position of the New England industry is not significant to the Commission's charge under the Compact. According to the Compact's Statement of Purpose, the Commission is concerned with stability in the region's industry. See Compact Article I, § 1.

The Commission would further note that, as explained in the Proposed Rule, the blend price is only one component of the actual pay price or "mail box" price paid to farmers.³³ Detailed analysis provided by another witness indicated that when processor premiums and other price components of mail box prices are considered, pay prices received by farmers in New England are comparable if not less than most other regions of the country.³⁴

Another commenter³⁵ submitting written testimony indicated, without support, that price regulation would primarily help the larger and generally more financially healthy dairy producers and would help the smaller and financially stressed producers the least. The Commission responds that the study by Professor Wackernagel cited at length in both the Proposed Rule and in this Final Rule analyzed in detail the impact of Compact price enhancement and price stabilization upon two different farm sizes—an 80 cow herd and a 350 cow herd. In contrast to the assertion of the testimony, the financial viability of both farms improved substantially, according to Professor Wackernagel's analysis.

B. Whether the Public Interest Will Be Served by the Establishment of Minimum Milk Prices to Dairy Farmers

With regard to the first finding required by the Compact, the Compact Commission sought comment on a wide range of subjects and issues. Certain of these subjects and issues were drawn from the inquiry mandated by Section 9(e) of the Compact.³⁶

Based on the comment received, the Compact Commission determined that production and consumption of fluid, or beverage milk, in the region are presently in balance, but in a balance of pronounced and unsustainable stress that must be alleviated. 62 FR 23040.

³³ See 62 FR 23037 (Monday, April 28, 1997).

³⁴ See Leon Berthiaume, HT 12/17, WC 319

³⁵ Schnittker, Written Comment, January 2, 1997.

³⁶ The Commission focused specifically on the producer-related inquiry of Section 9(e) in making the second finding required by the Compact (discussed first, in Part A) and then referred to the conclusions there determined in making the first, broader "public interest finding" required by the Compact (discussed second, in Part B).

³¹ Tipton, Additional Written Comment, January 2, 1997.

³² Submitted by William Zweigbaum, Univ. of New Hampshire Cooperative Extension, Additional Written Comment, March 31, 1997.

The Commission concluded that overall milk production was in decline in the New England region and in the portion of New York state which has traditionally been a supplemental part of the New England milkshed. 62 FR 23039-40. The Commission also found that supplies of milk are being transported increasing distances from the region's population centers and associated processing plants. 62 FR 23040. While approximately fifty percent of the milk produced in the New England milkshed is presently utilized in a variety of manufactured dairy products, 62 FR 23039, the Commission concludes that substitution of such milk cannot be relied upon to provide an alternative supply for fluid utilization purposes. In sum, the Compact Commission concluded that the balance of production and consumption in the region depended on at least stabilizing, if not increasing, the present, local supply. 62 FR 23040.

With regard to the Compact's emphasis on the "prevailing price for milk outside the regulated area" and the first "public interest" finding, the Compact Commission determined this data to be relevant with regard to the retail price of milk outside the region, and specifically sought comment on such prices.³⁷ Based on the comments received, the Commission identified the retail prices in two separate markets outside the Compact region, 62 FR 23046-47, and used the data to establish a benchmark for the subsequent comparative analysis it intends to conduct of retail prices in the Compact region and beyond. The Commission will utilize the results of this inquiry to track the impact of price regulation on retail prices in the region, and to compare "the current, relative alignment in prices between the New England and New York regions against the relative alignments once price regulation is in place." 62 FR 23048.

With regard to "the purchasing power of the public," Compact, § 9(e), the Compact Commission has previously determined that this inquiry was relevant to the impact of an over-order price regulation on the consumer market, which itself is "a critical part of the Compact Commission's assessment of the public interest under this finding section." 62 FR 23045. This inquiry focuses "primary concern on the consumer interest because milk is a staple product." *Id.*

Accordingly, the Commission sought and received comment on a range of issues it deemed relevant to this broader

inquiry, including: (1) the elasticity of demand for fluid milk products, (2) the costs of retailing Class I fluid milk in the New England region, (3) the prevailing retail prices for Class I fluid milk inside and outside the region, (4) the costs of retailing fluid milk products, and (5) the potential impact of a flat, combined regulated and Compact over-order price, on the retail market—including the National School Lunch Program and the WIC Program. 62 FR 23045.

The comments received support the Commission's determination that the continuing erosion of the region's milkshed has had a direct—and adverse—impact on retail prices, and hence on the purchasing power of the public, in part because of the increased transportation costs associated with an expanding milkshed. 62 FR 23049. The Commission similarly determined that farm/wholesale price volatility had also likely had an adverse impact on retail prices over time, and that stabilization of the farm/wholesale price through a Compact over-order price regulation, traced through to the endpoint retail market, likely will manifest as a corresponding positive impact on retail prices. 62 FR 23048-49. Accordingly, the foregoing analysis supports the conclusion that the purchasing power of the public likely will be enhanced, rather than diminished, as a result of the stabilizing effects of the over-order price regulation.

With regard to the "price necessary to yield a reasonable rate of return to the distributor," Compact, § 9(e), the Compact Commission has previously determined that "[t]he focus of this inquiry is the determination of a price that ensures a reasonable rate of return," and, more specifically, "whether processing plants are currently covering costs of production," including the distributors' rate of return on capital. 62 FR 23045.

Working from this framework, the Compact Commission sought and received comment on wholesale costs and prices. The data received persuaded the Compact Commission to conclude that processors are in fact covering their margins, including a return on capital of \$0.06 per gallon.³⁸ The Commission

³⁸ The comment received and used for this analysis included a study by R. Aplin, E. Erba, M. Stephenson, "An Analysis of Processing and Distribution Productivity and Costs in 35 Fluid Milk Plants," February 1997, R.B. 97-03, Cornell University, and an extract by the same authors, entitled "Presentation at IDFA Annual Meeting in Dallas, Texas (October 1996). (This extract provides "estimated costs of marketing 2% lowfat milk through supermarkets, New York Metro Area, \$ per gallon, 1995). In comment received on the proposed rule, Professor Aplin indicates that the extract was based on identified costs of the northeast plants that

further determined that "minimization of such persistent fluctuations in price can only serve as a benefit to stability of firm participants in the wholesale market." 62 FR 23048.³⁹ The Compact Commission determines that the benefits of price stabilization in the wholesale market parallel the benefits of price stabilization at the farm level, namely, allowing processors to engage in long-term economic planning and investment, and thereby improve their economic efficiency and performance. *C.f.* 62 FR 23035.

One commenter raised a concern that higher retail prices attributable to price regulation could reduce sales, and thereby harm the profitability of processing operations.⁴⁰ As noted below, however, the Commission found that price regulation was instead likely to have a downward pressure on retail prices. 62 FR 23048-50. Such an impact would result in the opposite effect of that described by the commenter, or result in increased sales and thereby enhanced profitability. Accordingly, the Commission is not persuaded by the aspects of this comment regarding profitability, because the comment rests on a premise that the Commission has previously rejected.

The commenter also expressed concern that increased retail prices in stores on the borders of New England could force sales outside the Compact area and thereby reduce the wholesale sales of those processing plants supplying the Compact area retailers. The Commission's determination that price regulation likely would have the contrary, downward pressure on retail prices responds to this comment, as well.

were part of the broader, overall study group. The Commission also relied upon a study by the Economic Research Service (ERS) of the United States Department of Agriculture, Food Cost Review/AER-729. The Commission found the Aplin et al. study more representative, given its identified inclusion of a significant percentage of northeast plants. Moreover, the ERS study incorporated data drawn from vertically integrated, or combined, processing/retailing facilities. The Compact region only includes one such operation.

³⁹ The Commission received comment from E. Linwood Tipton, President of the Milk Industry Foundation, the national trade organization for fluid milk processors. This Comment expressed opposition to price regulation on the grounds that it is unneeded and would have an adverse impact on consumers. With regard to the impact of price regulation, see the Commission's discussion of the public's purchasing power, *supra*, and its discussion of the likely impact of price regulation on retail prices, *infra*. The Tipton comment does not provide analysis likely to indicate contrary conclusions than those reached by the Commission with regard to the continuing ability of processors to receive a reasonable return under price regulation.

⁴⁰ Marcus, Additional Written Comment, Jan. 2, 1997.

³⁷ Inquiry into the prevailing farm price is also relevant to the second finding. See *infra*.

The ultimate finding required by Section 12 of the Compact—whether “the public interest will be served by the establishment of minimum milk prices to dairy farmers”—necessitates consideration of a broader range of subjects and issues than those reviewed under Section 9(e) of the Compact. Accordingly, the Compact Commission sought comment regarding the potential impact of price regulation on each of the farm, wholesale and retail sub-markets which comprise the overall market for fluid milk. 62 FR 23042. These inquiries were broken down further into the individual components of these respective sub-markets, including some of the components specifically listed in Section 9(e) of the Compact, as discussed above. This broad-ranging inquiry, focusing on all phases of the fluid milk market, allowed the Commission to gather substantial data and make an informed determination that an over-order price regulation would be in the public interest, overall and with regard to its specific impact on each of the three discrete sub-markets—farm, wholesale and retail. 62 FR 23048–50.

Farm Sub-market—The Compact Commission previously conducted a comprehensive analysis of the likely impact of price regulation on the farm sub-market under the separate finding inquiry required by Section 9(e) of the Compact. See Section II A *supra*; 62 FR 23033–38, 23040–41. This determination was then taken into account as part of the first finding required by the Commission (whether the public interest would be served by establishment of minimum milk prices).

Wholesale Sub-market—The Commission assessed the impact of price regulation on the wholesale market by considering the issue of rate of return to processors, as discussed above, 62 FR 23045, and by assessing whether price regulation would result in market distortion with regard to wholesale price, and thereby contravene the public interest. 62 FR 23048. In assessing the concern with market distortion, the Commission carefully reviewed present patterns of supply for the region’s wholesale needs. The Commission determined that the wholesale market presently is supplied almost totally in the form of raw, bulk product transported from areas of concentration of dairy farms in the rural part of the region to the fluid processing plants located in close proximity to the region’s cities. 62 FR 23045. The Commission also determined that the marginal, remainder of the wholesale market is supplied by finished, packaged milk transported from

processing plants located some distance away from the region’s cities. *Id.*

With regard to the primary bulk supply component of the wholesale market, the Compact Commission determined that there was unlikely to be market distortion caused by price regulation that could adversely affect the wholesale price. According to the comment received, present patterns of raw product supply between processors and independent farmers or cooperative organizations of farmers are relatively stable and are unlikely to be affected by a regulated price increase in the amount and for the duration established by the price regulation. 62 FR 23048.

The Compact Commission also concluded that price regulation was unlikely to cause market distortion with regard to the secondary packaged product component of the market. The concern here is whether price regulation can be administered uniformly with regard to raw product and, as identified and addressed in the Proposed Rule, packaged milk supplies. If a significant portion of the packaged milk supplies is left unregulated, this might distort the market by creating a competitive advantage for such packaged products, encouraging their substitution as a source of wholesale supply. 62 FR 23048. Given that packaged milk as wholesale supply is more expensive than raw product supply, such substitution resulting from market distortion would increase retail prices and be contrary to the public interest.⁴¹

As discussed in the third finding section (whether the non-price provisions of the regulation established by this rule are in the public interest) the Commission concludes that raw product and packaged product supplies can be regulated uniformly. This uniform regulation will prevent market distortion, including indirect impact on price. Additionally, as both the Commission and commenters have noted, the limited six-month duration of the initial price regulation will minimize the potential for market distortion. 62 FR 23048. Accordingly, the Compact Commission determines that distortion of the relative patterns of supply is not likely to occur, and therefore unlikely to have any adverse impact on price contrary to the public interest.

⁴¹ The president of a Connecticut fluid milk processing firm raised a concern about the stimulus of such distorted substitution in the market with regard to the potential for loss of market share by this firm. Marcus, December 19, 1996 Hearing Transcript at 81, *et seq.*; Additional Written Comment, January 2, 1997. This non-price concern is addressed under the third finding analysis, *infra*.

Retail Sub-market—With regard to the retail market, as noted above, the Compact Commission concluded that price regulation, overall was likely to have a positive impact, and thereby to be distinctly in the public interest. 62 FR 23048. The Commission concluded that stabilizing the milk supply and removing variability in the federally regulated, farm/wholesale, pricing structure would likely combine to have a positive, downward impact on retail prices. 62 FR 23048–50.

In reaching this conclusion, the Commission declined to adopt the directly contrary assertions submitted by some commenters.⁴² 62 FR 23049. These commenters indicated their opinion that retail prices would reflect a direct “pass-through” of any increase in wholesale cost attributable to compact over-order price regulation. The commenters described quite dramatic increases in retail prices likely to occur if price regulation is imposed.

The commenters presented only a simple arithmetic calculation of the impact on retail prices which could occur if the entire amount of the projected difference in wholesale cost attributable to compact price regulation were passed through. No explanation was provided for the underlying assumption that there would be, necessarily, such a direct pass through of the price increase. The Commission declined to adopt this approach in view of the lack of explanation, and given that it is directly contrary to the developed literature on this issue. As included in the record, and which suggests a contrary conclusion.⁴³ As the Commission determined in its Proposed Rule, price stabilization eliminates the need for retailers to retain significant margins in order to protect against the uncertainty in wholesale costs that exists when prices are volatile. 62 FR 23049 (citing Hahn, *et al.*). Because retailers will not have to engage in this “risk response” pricing strategy to

⁴² Rosenberg, December 19, 1996 Hearing Transcript at 181, *et seq.*; Schmitker, Additional Comment, January 2, 1997; Tipton, Additional Comment, January 2, 1997.

⁴³ Brorsen, Chavas, Grant and Schnake, “Marketing Margins and Price Uncertainty: The Case of the U.S. Wheat Market,” *Amer. J. Agr. Econ.*, (August, 1985) 521–527. The analysis is confirmed with regard to market conduct and performance in the beef industry. Holt, “Risk Response in the Beef Marketing Channel: A Multivariate Generalized ARCH-M Approach”, *Amer. J. Agr. Econ.* (August, 1993) 559–571. See also Hansen, Hahn, and Weimar, “Determinants of the Farm-to-Retail Milk Price Spread”, *Agriculture Information Bulletin Number 693* (March 1994). See also Kinnucan and Foraker, “Asymmetry in Farm-Retail Price Transmission for Major Dairy Products”, *Amer. J. Ag. Econ.*, 285–292 (May, 1987). As noted in the text, each of these articles are contained in the record.

ensure cost recovery, the Commission disagrees with the commenters' conclusory remarks regarding the impact of price regulation on retail prices.

The Compact Commission made its determination about the potential, positive impact of price regulation with essential regard to the broad, consumer-based market. The Commission similarly concludes that price regulation will not have a negative impact on government supplemental nutrition programs such as the National School Lunch Program. The Commission makes this further determination based on its assessment that the pricing patterns of such programs are premised on essentially the competitive patterns of the broader, consumer-based market. 62 FR 23050. According to a General Accounting Office description of the program, which the Commission discussed in its Proposed Rule:

The National School Lunch Act of 1946 (P.L. 79-396) and the Child Nutrition Act of 1966 (P.L. 89-642) authorize USDA to reimburse state and local school authorities—under grant agreements—for some or all of the costs of these programs. Reimbursements are based on either the number of meals served or the number of half pints served. The schools use these funds, as well as state and local funds and moneys collected from students, to purchase food, including milk, for these programs. These purchases are made through either sealed bid or negotiated procurements. USDA's regulations require that these procurements be conducted in a manner that provides for the maximum amount of open and free competition.⁴⁴

The Commission did determine that pricing and reimbursement patterns for one government supplemental nutrition program, the WIC Program, are not configured according to the same pattern as the broader consumer-based retail market. 62 FR 23050. Accordingly, the Commission exempted the WIC program from operation of the price regulation. *Id.* at 23050-53.

The Compact Commission also determined that price regulation was not likely to have an adverse impact on the retailers, themselves. In similar manner as with its assessment of the wholesale market, the Commission reviewed retail costs and prices to determine if retailers are covering costs, including return on capital, under

⁴⁴ GAO Report 13-239877 at 2 (October 16, 1992), submitted by Jeffords as Additional Reply Comment, April 9, 1997; see also 62 FR 23050.

The Commission further notes that the purchasing patterns of other institutional buyers such as the military and hospitals, as described in the GAO study similarly mirror the broader, competitive market. The Commission concludes that these institutional buyers will also benefit from the impact of price regulation on the competitive market.

present market conditions. 62 FR 23045, 23046-48. The Commission concluded that such margins are presently being covered. *Id.* at 23048.⁴⁵ The Commission further concludes that price regulation will not adversely affect the ability of retail outlets to continue to cover their margins.

C. Whether the Major Provisions of the Order, Other Than Those Fixing Minimum Prices, Are Reasonably Designed To Achieve the Purposes of the Order

The third Compact finding required the Compact Commission to determine whether the non-price provisions of the proposed rule would also be in the public interest, and the Commission so found. The Commission's assessment here focused on two issues: The analysis under this finding centered on the technical provisions the Commission proposed to codify in 7 CFR parts 1300, 1301, and 1303-1307. These provisions establish the procedures for the assessment of price regulation, collection from processors and disbursement to farmers.

The Compact Commission determined these provisions would ensure uniform and equitable administration of the price regulation. 62 FR 23054. The provisions are patterned closely upon the underlying federal Milk Market Order #1, and are designed to work in complement with the Market Order. Moreover, the regulation will be administered with the direct, technical assistance of the Market Order #1 Administrator, which provides further assurance of its proper administration.

In response to the Compact Commission's original Subjects and Issues Notice of Comment,⁴⁶ one commenter correctly noted that some packaged milk subject to price regulation is marketed by plants outside

⁴⁵ The comment received and used for the cost analysis relied upon the study by Aplin et al., "An Analysis of Processing and Distribution Productivity and Costs in 35 Fluid Milk Plants", February 1997, R.B. 97-03, Cornell University and the extract by the same authors, entitled "Presentation at IDFA Annual Meeting in Dallas, Texas (October 1996). (This extract provides "estimated costs of marketing 2% lowfat milk through supermarkets, New York Metro Area, \$ per gallon, 1995). In comment received on the proposed rule, Professor Aplin indicates that the represented supermarket costs were representative of New England supermarkets, as well.

The Commission also relied on the study in Food Cost Review/AER-729. For the reasons identified in Footnote 38, the Commission determined the Aplin et al. study to be more representative of costs than the ERS study.

The Commission notes that these studies focus on supermarket costs. Supermarkets represent the primary retail outlet for fluid milk in the marketplace.

⁴⁶ 61 FR 65604 (December 13, 1996).

of the underlying regulatory supervision of the Market Order #1 Administrator. 62 FR 23048. This commenter expressed concern that such milk could not be properly regulated without the assistance of those Market Order Administrators having regulatory supervision of the milk. The Commission determines that these milk sales are in fact reported by the other, applicable, Market Order Administrators to the Market Order #1 Administrator, so that the Market Order #1 Administrator can in fact audit such sales.

The commenter also expressed concern that some milk is marketed in the New England region in a manner so as to be completely unreported. The Compact Commission determined, however, that technical provisions could be administered so as to ensure that all packaged milk marketed in the Compact region is properly reported by joint operation of the federal Market Order and Compact Commission regulatory processes.

The commenter also expressed concern about the appropriate distribution pattern of the proceeds of the price regulation between those producers supplying Compact "pool plants" and those supplying Compact "partially regulated pool plants." In response, the Compact Commission determined that a distinction was properly made based on the geographic location of the plants and their relative provision of supply of fluid milk for the Compact region. 62 FR 23055. "Pool plants", or those located in the Compact region, provide the primary supply of fluid milk for the region. *Id.* "Partially regulated plants" or those outside the region, provide primary supply to those regions where they are located, and only secondary supply to the Compact region. *Id.* Accordingly, the producers providing milk to pool plants properly share fully in the overall, pooled, proceeds of sales in the Compact region, whereas producers supplying partially regulated plants share only pro rata in the benefit attributable to the sales in the Compact region by those plants.

The Commission also considered the provisions relating to the generation of additional supplies of milk as required by Section 9(f) of the Compact⁴⁷ and potential CCC purchase under 7 U.S.C. § 7256(5).⁴⁸ 62 FR 23053-54. The

⁴⁷ "When establishing a compact over order price, the commission shall take such action as necessary and feasible to ensure that the over-order price does not create an incentive for producers to generate additional supplies of milk." Compact, § 9(f).

⁴⁸ "Before the end of each fiscal year, that a Compact price regulation is in effect, the Northeast

Commission determined that neither additional supplies nor surplus production contemplated by these statutory provisions was likely to result from price regulation. *Id.* The Commission did establish a tracking procedure to monitor production, so as to allow appropriate action should an unanticipated change in production patterns occur. 62 FR 23054.⁴⁹

Finally, in each of its findings, and overall, the Commission noted the significance of its establishment of a price regulation limited to six months. This limited duration at once allows price regulation to be implemented based on the perceived need while limiting, by definition, the potential impact of any unforeseen, adverse impacts. The Commission also identified a series of tracking mechanisms, designed to assess and measure the impact of price regulation on all sectors of the marketplace, from farm to retail outlet.

III. Required Findings of Fact

Pursuant to Compact Art. V. Section 12, the Compact Commission Hereby Finds:

(1) That the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.

(2) That, for purposes of this initial regulation, a level of price in the amount of \$16.94 will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.

(3) That the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

(4) That the terms of the proposed price regulation were approved by producers by referendum.

IV. List of Subjects in 7 CFR Parts 1300, 1301, 1303-1307

Milk.

Interstate Dairy Compact Commission shall compensate the Commodity Credit Corporation for the cost of any purchases of milk and milk products by the Corporation that result from the projected rate of increase in milk production for the fiscal year within the Compact region in excess of the projected national average rate of the increase in milk production, as determined by the Secretary [of Agriculture].” 7 U.S.C. § 7256(5).

⁴⁹ The Commission notes that the triggering amount identified in the Proposed Rule requires clarification. The Commission will monitor production to determine whether regional production has increased at a rate within or exceeding 0.25 percent of the national rate of increased production.

V. Codification in Code of Federal Regulation

For the reasons set forth in the preamble, the Commission establishes in title 7 of the Code of Federal Regulations a new chapter XIII to read as follows:

Chapter XIII—Northeast Dairy Compact Commission

Part

- 1300 Over-order price regulations.
- 1301 Definitions.
- 1303 Handlers reports.
- 1304 Classification of milk.
- 1305 Class price.
- 1306 Compact over-order producer price.
- 1307 Payments for milk.
- 1308 Administrative assessment.

PART 1300—OVER-ORDER PRICE REGULATIONS

Sec.

- 1300.1 Compact Commission.
- 1300.2 Continuity and separability of provisions.
- 1300.3 Handler responsibility for records and facilities.
- 1300.4 Termination of obligation.

Authority: 7 U.S.C. 7256.

§ 1300.1 Compact Commission.

(a) *Designation.* The agency for the administration of the Pricing Regulation shall be the compact commission.

(b) *Powers.* The compact commission shall have the following powers:

Administer the pricing regulation in accordance with its terms and provisions;

(2) Make rules and regulations to effectuate the terms and provisions of the pricing regulation;

(3) Receive and investigate complaints of violations;

(4) Recommend amendments.

(c) *Duties:* The compact commission shall perform all the duties necessary to administer the terms and provisions of the pricing regulation, including, but not limited to the following:

(1) Employ and fix the compensation of persons necessary to enable them to exercise their powers and perform their duties;

(2) Pay out of funds provided by the administrative assessment all expenses necessarily incurred in the maintenance and functioning of their office and in the performance of their duties;

(3) Keep records which will clearly reflect the transactions provided for in the pricing regulation;

(4) Announce publicly at its discretion, by such means as it deems appropriate, the name of any handler who, after the date upon which he is required to perform such act, has not:

(i) Made reports required by the pricing regulation;

(ii) Made payments required by the pricing regulation; or

(iii) Made available records and facilities as required pursuant to § 1300.3;

(5) Prescribe reports required of each handler under the pricing regulation. Verify such reports and the payments required by the pricing regulation by examining records (including such papers as copies of income tax reports, fiscal and product accounts, correspondence, contracts, documents or memoranda,) of the handler, and the records of any other person that are relevant to the handler's obligation under the pricing regulation, by examining such handler's milk handling facilities; and by such other investigation as the compact commission deems necessary for the purpose of ascertaining the correctness of any report or any obligation under the pricing regulation. Reclassify fluid milk product received by any handler if such examination and investigation discloses that the original classification was incorrect;

(6) Furnish each regulated handler a written statement of such handler's accounts with the compact commission promptly each month. Furnish a corrected statement to such handler if verification discloses that the original statement was incorrect; and

(7) Prepare and disseminate publicly for the benefit of producers, handlers, and consumers such statistics and other information covering operation of the pricing regulation and facts relevant to the provisions thereof (or proposed provisions) as do not reveal confidential information.

§ 1300.2 Continuity and separability of provisions.

(a) *Effective time.* The provisions of this pricing regulation or any amendment to the pricing regulation shall become effective at such time as the compact commission may declare and shall continue in force until suspended or terminated.

(b) *Suspension or termination.* The compact commission shall suspend or terminate any or all of the provisions of the pricing regulation whenever they find that such provision(s) obstructs or does not tend to effectuate the declared policy of the compact. The pricing regulation shall terminate whenever the provisions of the compact authorizing it cease to be in effect.

(c) *Continuing obligations.* If upon the suspension or termination of any or all of the provisions of the pricing regulation there are any obligations arising under the pricing regulation, the final accrual or ascertainment of which

requires acts by any handler, by the compact commission, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspensions or termination.

§ 1300.3 Handler responsibility for records and facilities.

Each handler shall maintain and retain records of his operations and make such records and his facilities available to the compact commission. If adequate records of a handler, or of any other person, that are relevant to the obligation of such handler are not maintained and made available, any fluid milk product required to be reported by such handler for which adequate records are not available shall not be considered accounted for or established as used in a class other than the highest price class.

(a) *Records to be maintained.* (1) Each handler shall maintain records of his operations (including, but not limited to, records of purchases, sales, processing, packaging and disposition) as are necessary to verify whether such handler has any obligation under the pricing regulation and if so, the amount of such obligation. Such records shall be such as to establish for each plant or other receiving point for each month:

(i) The quantities of fluid milk product contained in, or represented by, products received in any form, including inventories on hand at the beginning of the month, according to form, time and source of each receipt;

(ii) The utilization of all fluid milk product showing the respective quantities of such fluid milk product in each form disposed of or on hand at the end of the month; and

(iii) Payments to producers, dairy farmers and cooperative associations, including the amount and nature of any deductions and the disbursement of money so deducted.

(2) Each handler shall keep such other specific records as the compact commission deems necessary to verify or establish such handler's obligation under the pricing regulation.

(b) *Availability of records and facilities.*

Each handler shall make available all records pertaining to such handler's operation and all facilities the compact commission finds are necessary to verify the information required to be reported by the pricing regulation and/or to ascertain such handler's reporting, monetary or other obligation under the pricing regulation. Each handler shall permit the compact commission to observe plant operations and equipment and make available to the compact

commission such facilities as are necessary to carry out their duties.

(c) *Retention of records.*

All records required under the pricing regulation to be made available to the compact commission shall be retained by the handler for a period of three years to begin at the end of the month to which such records pertain. If, within such a three year period, the compact commission notifies the handler in writing that the retention of such records, or of specified records, is necessary in connection with a proceeding or court action specified in such notice, the handler shall retain such records, or specified records, until further written notification from the compact commission. The compact commission shall give further written notification to the handler promptly upon the termination of the litigation or when the records are no longer necessary in connection therewith.

§ 1300.4 Termination of obligation.

The provision of this section shall apply to any obligation under the pricing regulation for the payment of money:

(a) Except as provided in paragraphs (b) and (c) of this section, the obligation of any handler to pay money required to be paid under the terms of the pricing regulation shall terminate two years after the last day of the month during which the compact commission receives the handler's report of receipts and utilization on which such obligation is based, unless within such a two year period, the compact commission notifies the handler in writing that such money is due and payable. Service of such written notice shall be complete upon mailing to the handler's last known address and it shall contain but need not be limited to the following information:

The amount of the obligation;

(2) The month(s) on which such obligation is based; and

(3) If the obligation is payable to one or more producers or to a cooperative association, the name of such producer(s) or such cooperative association, or if the obligation is payable to the compact commission, the account for which it is to be paid;

(b) If a handler fails or refuses, with respect to any obligation under the pricing regulation, to make available to the compact commission all records required by the pricing regulation to be made available, the compact

commission may notify the handler in writing, within the two year period provided for in paragraph (a) of this section, of such failure or refusal. If the compact commission so notifies a

handler, the said two year period with respect to such obligation shall not begin to run until the first day of the month following the month during which all such records pertaining to such obligation are made available to the compact commission;

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under the pricing regulation to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed; and

(d) Unless the handler files a petition to the compact commission to commence litigation within the applicable two year period indicated below, the obligation of the compact commission:

(1) To pay a handler any money which such handler claims to be due him under the terms of the pricing regulation shall terminate two years after the end of the month during which the fluid milk product involved in the claim were received; or

(2) To refund any payment made by a handler (including a deduction or offset by the compact commission) shall terminate two years after the end of the month during which payment was made by the handler.

PART 1301—DEFINITIONS

Sec.

1301.1 Compact.

1301.2 Commission.

1301.3 Northeast Dairy Compact Regulated Area.

1301.4 Plant.

1301.5 Pool plant.

1301.6 Partially regulated plant.

1301.7 Non pool plant.

1301.8 Milk.

1301.9 Handler.

1301.10 Producer-handler.

1301.11 Producer.

1301.12 Producer milk.

1301.13 Exempt milk.

1301.14 Fluid milk product.

1301.15 Fluid cream product.

1301.16 Filled milk.

1301.17 Cooperative association.

1301.18 Person.

1301.19 Route disposition.

1301.20 Distributing plant.

1301.21 Supply plant.

1301.22 State dairy regulation.

1301.23 Diverted milk.

Authority: 7 U.S.C. 7256.

§ 1301.1 Compact.

Compact means the Northeast Dairy Compact as approved by section 147 of the Federal Agriculture Improvement

and Reform Act (Fair Act), Pub. L. 104-127.

§ 1301.2 Commission.

Commission means the commission established by the Northeast Dairy Compact.

§ 1301.3 Northeast Dairy Compact Regulated Area.

Northeast Dairy Compact Regulated Area hereinafter called the *Regulated Area* means all territory within the boundaries of the states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. All waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by any governmental installation, institution, or other similar establishment.

§ 1301.4 Plant.

Plant means the land and buildings, together with their surroundings, facilities and equipment, whether owned or operated by one or more persons, constituting a single operating unit or establishment for the receiving, processing or packaging of milk or milk products. The term plant shall not include:

(a) Distribution points (separate premises used primarily for the transfer to vehicles of packaged fluid milk products moved there from processing and packaging plants); or

(b) Bulk reload points (separate premises used for the purpose of transferring bulk milk from one tank truck to another tank truck while en route from dairy farmers' farms to a plant). If stationary storage tanks are used for transferring milk at the premises, the operator of the facility shall make an advance written request to the compact commission that the facility be treated as a reload point; otherwise it shall be a plant. The cooling of milk, collection or testing of samples, and washing and sanitizing of tank trucks at the premises shall not disqualify it as a bulk reload point.

§ 1301.5 Pool Plant.

Pool Plant means any milk plant located in the regulated area.

§ 1301.6 Partially Regulated Plant.

Partially Regulated Plant means a milk plant not located in the regulated area but having Class I distribution in the regulated area, or receipts from producers located in the regulated area.

§ 1301.7 Non Pool Plant.

Non Pool Plant means any milk plant that is not a pool plant pursuant to section 1301.5 and not a partially

regulated plant pursuant to section 1301.6.

§ 1301.8 Milk.

Milk means the lacteal secretion of cows and includes all skim, butterfat, or other constituents obtained from separation or any other process and as defined pursuant to prevailing standards of identity.

§ 1301.9 Handler.

Handler means:

(a) Any person, except a producer-handler, who operates a pool plant;

(b) Any person who operates a partially regulated plant;

(c) Any person who operates any other plant, or a pool bulk tank unit as defined under the Federal order, from which fluid milk products are disposed of, directly or indirectly, in the regulated area;

(d) Any cooperative association with respect to the milk that is moved from farms in tank trucks operated by, or under contract to, the association to pool plants or as diverted milk to non pool plants for the account of, and at the direction of, the association. The association shall be considered as the handler who received the milk from the dairy farmers. However, the cooperative association shall not be the handler with respect to the milk moved from any farm if the association and the operator of the pool plant to which milk from such farm is moved both submit a request in writing, on or before the due date for filing the monthly reports of receipts and utilization, that the operator of the pool plant be considered as the handler who received the milk from the dairy farmer, and the pool plant operator's request states that the pool plant operator is purchasing the milk from such farm on the basis of the farm bulk tank measurement readings and the butterfat tests of samples of the milk taken from the farm bulk tank; or

(e) Any person who does not operate a plant but who engages in the business of receiving fluid milk products for resale and distributes to retail or wholesale outlets packaged fluid milk products received from any plant described in paragraph (a), (b) or (c) of this section.

§ 1301.10 Producer-handler.

Producer-handler means any person who, during the month is both a dairy farmer and a handler and who meets all of the following conditions:

(a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce

milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

(b) The person's own route disposition constitutes the majority of the route disposition from the plant.

(c) The producer-handler receives no fluid milk products except from such handler's own production and from pool handlers, either by transfer or diversion.

§ 1301.11 Producer.

Producer means:

(a) A dairy farmer who produces milk in the regulated area that is moved to a pool plant or a partially regulated plant, having Class I distribution in the regulated area;

(b) A dairy farmer who produces milk outside of the regulated area that is moved to a pool plant; *provided* that on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during December 1996, all of that milk was physically moved to a pool plant in the regulated.

Or: to be considered a qualified producer, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the current month and for five (5) months subsequent to July of the preceding calendar year, all of that milk must have moved to a pool plant;

(c) A dairy farmer who produces milk outside of the regulated area that is moved to a partially regulated plant and allocated to Class I pursuant to Section 1304.5. However, the term shall not include:

(1) A producer handler;

(2) A dairy farmer who is a local or state government that has non-producer status for the month under section § 1301.13(c);

(3) A dairy farmer who is a governmental agency that is operating a plant from which there is route disposition in the regulated area;

(4) Dairy farmer milk received at a pool plant or a partially regulated plant which is rejected and segregated in the handler's normal operations for receiving milk and which receipts are accepted and disposed of by the handler as salvaged product rather than milk.

§ 1301.12 Producer milk.

Producer milk means milk that the handler has received from producers. The quantity of milk received by a handler from producers shall include any milk of a producer that was not received at any plant but which the handler or an agent of the handler has accepted, measured, sampled, and transferred from the producer's farm tank into a tank truck during the month.

Such milk shall be considered as having been received at the pool plant at which other milk from the same farm of that producer is received by the handler during the month, except that in the case of a cooperative association in its capacity as a handler under § 1301.9(d), the milk shall be considered as having been received at a plant in the zone location of the pool plant, or pool plants within the same zone, to which the greatest aggregate quantity of the milk of the cooperative association in such capacity was moved during the current month or the most recent month.

§ 1301.13 Exempt milk.

Exempt milk means:

(a) Fluid milk products received at a pool plant in bulk from a non pool plant to be processed and packaged, for which an equivalent quantity of package fluid milk products is returned to the operator of the non pool plant during the same month, if the receipt of bulk fluid milk products and return of packaged fluid milk products occur during an interval in which the facilities of the non pool plant at which the fluid milk products are usually processed and packaged are temporarily unusable because of fire, flood, storm or similar extraordinary circumstances completely beyond the non pool plant operator's control;

(b) Packaged fluid milk products received at a pool plant from a non pool plant in return for an equivalent quantity of bulk fluid milk products moved from a pool plant for processing and packaging during the same month, if the movement of bulk fluid milk products and receipt of package fluid milk products occur during an interval in which the facilities of the pool plant at which the fluid milk products are usually processed and packaged are temporarily unusable because of fire, flood, storm, or similar extraordinary circumstances completely beyond the pool plant operator's control;

(c) Milk received at a pool plant in bulk from the dairy farmer who produced it, to the extent of the quantity of any packaged fluid milk products returned to the dairy farmer, if:

(1) The dairy farmer is a State or local government that is not engaged in the route disposition of any of the returned products, and

(2) The dairy farmer has by written notice to the compact commission and the receiving handler, elected non-producer status for a period of not less than 12 months beginning with the month in which the election was made and continuing for each subsequent month until canceled in writing, and the

election is in effect for the current month.

(d) All fluid milk product disposed outside of the regulated area.

§ 1301.14 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than nine percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, low fat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, culture, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

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

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

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

§ 1301.15 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing nine percent or more butterfat, with or without the addition of other ingredients.

§ 1301.16 Filled milk.

Filled milk means any combination of nonmilk fat (or oil) with skimmed milk (whether fresh, cultured, reconstituted, or modified by the addition of nonfat milk solids), with or without milk fat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product, and contains less than six percent nonmilk fat (or oil).

§ 1301.17 Cooperative association.

Cooperative association means any cooperative marketing association of producers which the Secretary of Agriculture of the United States determines:

(a) To be qualified under the provisions of the Act of Congress of

February 18, 1922, known as the "Capper-Volstead Act";

(b) To have full authority in the sale of milk of its members; and

(c) To be engaged in making collective sales of, or marketing milk or its products for its members.

§ 1301.18 Person.

Person means any individual, partnership, corporation, association, or other business unit.

§ 1301.19 Route disposition.

Route disposition means distribution of Class I milk by a handler to retail or wholesale outlets, which include vending machines but do not include plants or distribution points. The route disposition of a handler shall be attributed to the processing and packaging plant from which the Class I milk is moved to retail or wholesale outlets without intermediate movement to another processing and packaging plant.

§ 1301.20 Distributing plant.

Distributing plant means a processing and packaging plant.

§ 1301.21 Supply plant.

Supply plant means a plant at which facilities are maintained and used for washing and sanitizing cans and to which milk is moved from dairy farmers' farms in cans and is there accepted, weighed or measured, sampled, and cooled, or it is a plant to which milk is moved from dairy farmers' farms in tank trucks.

§ 1301.22 State dairy regulation.

State dairy regulation means any state regulation of dairy prices, and associated assessments, whether by statute, marketing order or otherwise.

§ 1301.23 Diverted milk.

Diverted milk means milk, other than that excluded under § 1301.11 from being considered as received from a producer, that meets the conditions set forth in paragraph (a) or (b) of this section and is not excluded from diverted milk under paragraph (c) of this section.

(a) Milk that a handler in its capacity as the operator of a pool plant reports as having been moved from a dairy farmer's farm to the pool plant, but which the handler caused to be moved from the farm to another plant, if the handler specifically reports such movement to the other plant as a movement of diverted milk, and the conditions of paragraph (a) (1) or (2) of this section have been met. Milk that is diverted milk under this paragraph shall be considered to have been received at

the pool plant from which it was diverted.

(1) During any two (2) months subsequent to July of the preceding calendar year, or during the current month, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the month, all of the milk that the handler caused to be moved from that farm was physically received as producer milk at the handler's pool plant or at another of the handler's pool plants that is not longer operated as a plant.

(2) During the current month and not more than five (5) other months subsequent to July of the preceding calendar year, milk from the dairy farmer's farm was received at or diverted from the handler's pool plant as producer milk, and during the current month all of the milk from that farm that the handler reported as diverted milk was moved from the farm in a tank truck in which it was intermingled with milk from other farms, the milk from a majority of which farms was diverted from the same pool plant in accordance with the preceding provisions of this paragraph.

(b) Milk that a cooperative association in its capacity as a handler under § 1301.9 (d) caused to be moved from a dairy farmer's farm to a plant other than a pool plant if the association specifically reports the movement to such plant as a movement of diverted milk, and the conditions of paragraph (b) (1) or (2) or this section have been met. Milk that is diverted under this paragraph shall be considered to have been received by the cooperative association in its capacity as a handler under § 1301.9 (d).

(1) During any two (2) months subsequent to July of the preceding calendar year, or during the current month, on more than half of the days on which the cooperative association in its capacity as a handler under § 1301.9 (d) caused milk to be moved from the farm as producer milk during the month, all of the milk that the association caused to be moved from the farm was physically received at a pool plant.

(2) During the current month and not more than five (5) other months subsequent to July of the preceding calendar year, the cooperative association in its capacity as a handler under § 1301.9(d) caused milk to be moved from the dairy farmer's farm as producer milk, and during the current month all of the milk from that farm that the cooperative association in its capacity as a handler under § 1301.9(d) reported as diverted milk was moved from the farm in a tank truck in which

it was intermingled with milk from other farms, the milk from a majority of which farms was diverted by the association in accordance with the preceding provisions of this paragraph.

(c) Milk moved, as described in paragraphs (a) and (b) of this section, from dairy farmer's farms to partially regulated plants in excess of 35 percent in the months of September through November and 45 percent in other months, of the total quantity of producer milk received (including diversions) by the handler during the month shall not be diverted milk. Such milk, and any other milk reported as diverted milk that fails to meet the requirements set forth in this section, shall be considered as having been moved directly from the dairy farmers' farms to the plant of physical receipt, and if that plant is a nonpool plant the milk shall be excluded from producer milk.

PART 1303—HANDLERS REPORTS

Sec.

1303.1 Reports of receipts and utilization

1303.2 Other reports of receipts and utilization

1303.3 Reports regarding individual producers and dairy farmers

1303.4 Notices to producers

Authority: 7 U.S.C. 7256.

§ 1303.1 Reports of receipts and utilization.

On or before the eighth day after the end of each month, each handler shall report for such month to the compact commission, in the detail and on the forms prescribed by the compact commission as follows:

(a) Each handler, with respect to each of the handler's pool plants shall report the quantities of fluid milk products contained in or represented by:

(1) Receipts of producer milk (including the specific quantities of diverted milk and receipts from the handler's own production);

(2) Receipts of milk from cooperative association in their capacity as handlers under § 1301.9(d);

(3) Receipts of fluid milk products from other pool plants;

(4) Receipts of fluid milk products from partially regulated plants;

(5) Inventories at the beginning and end of the month of fluid milk products;

(6) All Class I utilization or disposition of milk, filled milk, and milk products required to be reported pursuant to this paragraph.

(b) Each handler operating a partially regulated plant shall report with respect to such plant in the same manner as prescribed for reports required by paragraph (a) of this section. Receipts of milk that would have been producer

milk if the plant had been fully regulated shall be reported in lieu of producer milk.

(c) Each handler described in § 1301.9 (d) shall report:

(1) The quantities of all fluid milk product contained in receipts of milk from producers; and

(2) The utilization or disposition of all such receipts.

(d) Each handler shall report bulk milk received at a handler's pool plant from a cooperative association in its capacity as the operator of a pool plant or as a handler under § 1301.9 (d), if such milk was rejected by the handler subsequent to such handler's receipt of the milk on the basis that it was not of marketable quality at the time the milk was delivered to the handler's plant, and such milk was removed from the plant in bulk form by the cooperative association and was replaced in the other milk from the association. Except for purposes of this paragraph and § 1303.2 (a), such milk that was so removed from the handler's plant shall be treated for all other purposes of the pricing regulation as though it had not been delivered to and received at the handler's plant.

(e) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to the handler's receipts and utilization of milk, filled milk, and milk products in such manner as the compact commission may prescribe.

(f) Any handler who operates a pool plant which has no Class I disposition and receives no milk from producers is exempted from reporting to the compact commission under this section.

§ 1303.2 Other reports of receipts and utilization.

(a) Each handler who intends to have a receipt of unmarketable milk replaced with the other milk in the manner described under § 1303.1 shall give the compact commission, at the request and in accordance with instructions of the compact commission, advance notice of the handler's intention to have such milk replaced.

(b) In addition to the reports required pursuant to paragraph (a) of this section and § 1303.1 and § 1303.3 each handler shall report such other information as the compact commission deems necessary to verify or establish such handler's obligation under the order.

§ 1303.3 Reports regarding individual producers and dairy farmers.

(a) Each handler shall report on or before the 15th day after the end of each month the information required by the compact commission with respect to

producer additions, producer withdrawals, changes in farm locations, and changes in the name of farm operators.

(b) Each handler that is not a cooperative association, upon request from any such association, shall furnish it with information with respect to each of its producer members from whose farm the handler begins, resumes, or stops receiving milk at his pool plant. Such information shall include the applicable date, the producer-member's post office address and farm location, and, if known, the plant at which his milk was previously received, or the reason for the handler's failure to continue receiving milk from his farm. In lieu of providing the information directly to the association, the handler may authorize the compact commission to furnish the association with such information, derived from the handler's reports and records.

(c) Each handler shall submit to the compact commission within ten (10) days after their request made not earlier than twenty (20) days after the end of the month, his producer payroll for the month, which shall show for each producer:

(1) The daily and total pounds of milk delivered and its average butterfat test; and

(2) The net amount of the handler's payments to the producer, with the prices, deductions, and charges involved.

§ 1303.4 Notices to producers.

Each handler shall furnish each producer from whom he receives milk the following information regarding the weight and butterfat test of the milk:

(a) Whenever he receives milk from the producer on the basis of farm bulk tank measurements, the handler shall give the producer at the time the milk is picked up at the farm a receipt indicating the measurement and the equivalent pounds of milk received;

(b) Whenever he receives milk from the producer on a basis other than farm bulk tank measurements, the handler shall give the producer within three (3) days after receipt of the milk a written notice of the quantity so received;

(c) If butterfat tests of the producer's milk are determined from fresh milk samples, the handler shall give the producer within ten (10) days after the end of each month a written notice of the producer's average butterfat test for the month. Such notice shall not be required if the handler has given the producer a written notice of the butterfat test for each of the sampling periods within the month; and

(d) If butterfat tests of the producer's milk are determined from composite milk samples, the handler shall give the producer within seven (7) days after the end of each sampling period a written notice of the producer's average butterfat test for the period.

PART 1304—CLASSIFICATION OF MILK

Sec.

1304.1 Classification of milk.

1304.2 Classification of transfers and diversions.

1304.3 General classification rules.

1304.4 Classification of producer milk at a pool plant.

1304.5 Classification of producer milk at a partially regulated plant.

Authority: 7 U.S.C. 7256.

§ 1304.1 Classification of milk.

All fluid milk products required to be reported by a handler pursuant to this section shall be classified as follows:

(a) Class I milk shall be all fluid milk products disposed of in the regulated area, and in packaged inventory of fluid milk products at the end of the month, except as otherwise provided in paragraphs (b), (c), and (d) of this section;

(b) Fluid Milk Products:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or six percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b) (1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the compact commission is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour

cream mixtures containing nonmilk items, yogurt and any other semi-solid product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) All fluid milk products:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form, except nonfat dry milk;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (v)(4) (i)–(iv) of this section, that are dumped by a handler. The compact commission may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use, if advance notification of such dumping is not possible, or if the compact commission so requires, the handler must notify the compact commission on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the compact commission.

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1301.14 and the fluid cream product definition pursuant to § 1301.15.

(d) All fluid milk products used to produce nonfat dry milk.

§ 1304.2 Classification of transfers and diversions

(a) *Transfers and diversions to pool plants.* Fluid milk products transferred or diverted from a pool plant to another pool plant or partially regulated plant shall be classified as Class I milk unless the operators of both plants request not to classify it Class I. In either case, the classification of such transfers or diversion shall be subject to the following conditions:

(1) The fluid milk products classified in Class I shall be limited to the amount of fluid milk products, respectively, remaining in Class I at the transferee-plant or diverted-plant.

(b) *Transfers and diversions to producers-handlers.* Fluid milk products transferred or diverted from a pool plant to a producer-handler shall be classified as Class I.

§ 1304.3 General classification rules.

In determining the classification of producer milk pursuant to § 1304.4, the following rules shall apply:

(a) Each month the compact commission shall correct for mathematical and other obvious errors all reports filed pursuant to § 1303.1 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1301.9(d) the pounds of skim milk and butterfat, respectively, in Class I in accordance with §§ 1304.1 and 1304.2;

(b) The classification of producer milk for which a cooperative association is the handler pursuant to § 1301.9(d) shall be determined separately from the operations of any pool plant operated by such cooperative; and

(c) If receipts from more than one pool plant are to be assigned, the receipts shall be assigned in sequence according to the zone locations of the plants,

beginning with the plant in the lowest-numbered zone for assignments to Class I milk.

§ 1304.4 Classification of producer milk at a pool plant.

For each month the compact commission shall determine the classification of producer milk of each handler described in § 1301.9(a) for each of the handler's pool plants separately and of each handler described in § 1301.9(d) by allocating the handler's receipts of fluid milk products to the handler's utilization pursuant to paragraphs (a) and (b) of this section.

(a) Fluid milk products shall be allocated in the following manner:

(1) Subtract from the total pounds of fluid milk products in Class I the pounds of fluid milk products in:

(i) Beginning inventory packaged fluid milk products;

(ii) Receipts of Class I fluid milk products from other pool plants and partially regulated plants;

(iii) Disposition of Class I fluid milk products outside of the regulated area;

(iv) Receipts of exempt fluid milk products pursuant to section 1301.13 (a), (b), and (c).

(b) The quantity of producer milk in Class I shall be the combined pounds of fluid milk product remaining in Class I.

§ 1304.5 Classification of producer milk at a partially regulated plant.

For each month the compact commission shall determine the classification of producer milk of each handler described in § 1301.9(b) for each of the handler's partially regulated plants separately by allocating the handler's receipts of fluid milk products to the handler's utilization pursuant to paragraphs (a) through (c) of this section.

(a) Fluid milk products shall be allocated in the following manner:

(1) Subtract from the total pounds of fluid milk product in Class I the pounds of fluid milk products in:

(i) Beginning inventory packaged fluid milk products;

(ii) Receipts of Class I fluid milk products from other pool plants and partially regulated plants;

(iii) Disposition of Class I fluid milk products outside of the regulated area;

(iv) Receipts of exempt fluid milk product pursuant to § 1301.13 (a), (b), and (c).

(b) The quantity of producer milk in Class I shall be the combined pounds of fluid milk product remaining in Class I, not to exceed the total pounds of fluid milk products disposed of in the regulated area.

(c) Producer milk will be allocated pursuant to paragraph (b) of this section in the following manner:

(1) Receipts from producers located in the regulated area;

(2) Receipts of diverted pool milk;

(3) Receipts from producers not located in the regulated area shall then be assigned to any remaining Class I in the regulated area.

PART 1305—CLASS PRICE

Sec.

1305.1 Compact over-order class I price and compact over-order obligation.

1305.2 Announcement of compact over-order class I price and compact over-order obligation.

1305.3 Equivalent price.

Authority: 7 U.S.C. 7256.

§ 1305.1 Compact over-order class I price and compact over-order obligation.

The compact over-order Class I price per hundredweight of milk shall be as follows:

(a) The Class I price shall be announced pursuant to § 1305.2.

(b) The compact over-order obligation shall be computed as follows:

(1) The compact Class I price;

(2) Deduct Federal Order #1, Zone 1 price;

(3) The remainder shall be the compact over-order obligation.

§ 1305.2 Announcement of compact over-order class I price and compact over-order obligation.

The compact commission shall announce publicly on or before the 5th day of each month the Class I over-order price and the compact over-order obligation for the following month.

§ 1305.3 Equivalent price.

If, for any reason, a price specified in this part for use in computing class prices or for other purposes is not reported or published in the manner described in this part, the compact commission shall use one determined by the commission to be equivalent to the price that is specified.

PART 1306—COMPACT OVER-ORDER PRODUCER PRICE

Sec.

1306.1 Handler's value of milk for computing basic over-order producer price.

1306.2 Partially regulated plant operator's value of milk for computing basic over-order producer price.

1306.3 Computation of basic over-order producer price.

1306.4 Announcement of basic over-order producer price.

Authority: 7 U.S.C. 7256.

§ 1306.1 Handler's value of milk for computing basic over-order producer price.

For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1301.9(d) with respect to milk that was not received at a pool plant, as directed in this section:

(a) Multiply the pounds of Class I fluid milk products as determined pursuant to § 1304.1(a) by the compact over-order obligation.

§ 1306.2 Partially regulated plant operator's value of milk for computing basic over-order producer price.

For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk disposition in the regulated area by the operator of a partially regulated plant, as follows:

(a) Multiply the pounds of Class I fluid milk products as determined pursuant to § 1304.1(a) by the compact over-order obligation.

§ 1306.3 Computation of basic over-order producer price.

The compact commission shall compute the basic over-order producer price per hundredweight applicable to milk received at plants as follows:

(a) Combine into one total the values computed pursuant to § 1306.1 and § 1306.2 for all handlers from whom the compact commission has received at the compact commission's office prior to the 9th day after the end of the month the reports for the month prescribed in § 1303.1 and the payments for the preceding month required under § 1307.3(a).

(b) Add an amount equal to not less than one-half of the unobligated balance of the producer-settlement fund at the close of business on the 8th day after the end of the month;

(c) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk;

(2) The total hundredweight for which a value is computed pursuant to § 1306.2 (a); and

(d) Subtract not less than four (4) cents nor more than five (5) cents for the purpose of retaining a cash balance in the producer-settlement fund. The result shall be the basic over-order producer price for the month.

§ 1306.4 Announcement of basic over-order producer price.

The compact commission shall announce publicly on or before: The 13th day after the end of each month the over-order producer price resulting from the adjustment of the basic over-order producer price for such month, as computed under § 1306.3.

PART 1307—PAYMENTS FOR MILK

Sec.

1307.1 Producer-settlement fund.

1307.2 Handler's producer-settlement fund debits and credits.

1307.3 Payments to and from the producer-settlement fund.

1307.4 Payments to producers.

1307.5 [Reserved].

1307.6 Statements to producers.

1307.7 Adjustment of accounts.

1307.8 charges on overdue accounts.

Authority: 7 U.S.C. 7256.

§ 1307.1 Producer-settlement fund.

(a) The compact commission shall establish and maintain a separate fund known as the *producer-settlement fund*. They shall deposit into the fund all amounts received from handlers under §§ 1307.3, 1307.7, and 1307.8 and the amount subtracted under § 1306.3(d). They shall pay from the fund all amounts due handlers under §§ 1307.3, 1307.7, and 1307.8 and the amount added under § 1306.3(b) subject to their right to offset any amounts due from the handler under these sections and under § 1308.1.

(b) All amounts subtracted under § 1306.3(d), including interest earned thereon, shall remain in the producer-settlement fund as an obligated balance until it is withdrawn for the purpose of effectuating § 1306.3(b).

(c) The compact commission shall place all monies subtracted under § 1306.3(d) in an interest-bearing bank account or accounts in a bank or banks duly approved as a Federal depository for such monies, or invest them in short-term U.S. Government securities.

§ 1307.2 Handlers' producer-settlement fund debits and credits.

On or before the 15th day after the end of the month, the compact commission shall render a statement to each handler showing the amount of the handler's producer-settlement fund debit or credit, as calculated in this section.

(a) The producer-settlement fund debit for each plant and each cooperative association in its capacity as a handler under § 1301.9(d) shall be the value computed pursuant to § 1306.1 and § 1306.2.

(b) The producer-settlement fund credit for each plant and each

cooperative association in its capacity as a handler under § 1301.9(d) shall be computed as specified in this paragraph.

(1) Multiply the quantities of producer milk that were allocated to Class I pursuant to § 1304.4 and the quantities of route disposition in the marketing area by partially regulated plants for which a value was determined pursuant to § 1306.2(a) by the basic over-order producer price computed under § 1306.3.

(2) For any cooperative association in its capacity as a handler under § 1301.9(d), multiply the quantities of milk moved to each pool plant by the basic over-order blended price computed under § 1306.3; and to the result add the value determined under § 1306.1.

(c) The producer-settlement fund debit or credit of any handler shall be the net of the producer-settlement fund debits and credits as computed for all of its operations under paragraphs (a) and (b) of this section.

§ 1307.3 Payments to and from the producer-settlement fund.

(a) On or before the 18th day after the end of the month, each handler shall pay to the compact commission the handler's producer-settlement fund debit for the month as determined under § 1307.2(a).

(b) On or before the 20th day after the end of the month, the compact commission shall pay to each handler the handler's producer-settlement fund credit for the month as determined under § 1307.2(b). If the unobligated balance in the producer-settlement fund is insufficient to make such payments, the compact commission shall reduce uniformly such payments and shall complete them as soon as the funds are available.

§ 1307.4 Payments to producers.

(a) On or before the 20th day after the end of the month, each handler shall make payment to each producer for the milk received from him during the month at not less than the basic over-order producer price per hundredweight computer under § 1306.3. If the handler has not received full payment for the compact commission under § 1307.3(b) by the date payments are due under this paragraph, he may reduce pro rata his payments to producers by an amount not to exceed such underpayment. Such payments shall be completed after receipt of the balance due from the compact commission by the next following date for making payments under this paragraph.

(b) If the handler's net payment to a producer is for an amount less than the

total amount due the producer under this section, the burden shall rest upon the handler to prove to the compact commission that each deduction from the total amount due is properly authorized and properly chargeable to the producer.

(c) In making payment to producers under paragraph (b) of this section for milk diverted from a pool plant the handler may elect to pay such producers at the price of the plant from which the milk was diverted, if the resulting net payment to each producer is not less than the otherwise required under this section and the rate of payment and the deduction shown on the statement required to be furnished under § 1307.6 are those used in computing the payment.

(d) If a handler claims that the required payment cannot be made because the producer is deceased or cannot be located, such payment shall be made to the producer-settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the compact commission shall make such payment from the producer-settlement fund to the handler or to the lawful claimant, as the case may be.

(e) If not later than the date when such payment is required to be made, legal proceedings have been instituted by the handler for the purpose of administrative or judicial review of the compact commission findings upon verification as provided above such payment shall be made to the producer-settlement fund and shall be held in reserve until such time as the above-mentioned proceedings have been completed or until the handler submits proof to the compact commission that the required payment has been made to the producer in which latter event the payment shall be refunded to the handler.

(f) At a partially regulated plant each handler shall make payments, on a pro rata basis, to all producers and dairy farmers for milk received from them during the month, the payment received pursuant to § 1307.3(b).

§ 1307.5 [Reserved]

§ 1307.6 Statements to producers.

In making the payments to producers required under § 1307.4, each handler and each cooperative shall furnish each producer, in addition to the information required under Federal and State regulations, a supporting statement, in such form acceptable to the commission, which shall show: The rate

and amount of the compact over-order producer price.

§ 1307.7 Adjustment of accounts.

(a) Whenever the compact commission verification of a handler's reports or payments discloses an error in payments to or from the compact commission under § 1307.3 or § 1308.1, the compact commission shall promptly issue to the handler a charge bill or a credit, as the case may be, for the amount of the error. Adjustment charge bills issued during the period beginning with the 10th day of the prior month and ending with the 9th day of the current month shall be payable by the handler to the market administrator on or before the 18th day of the current month. Adjustment credits issued during that period shall be payable by the compact commission to the handler on or before the 20th day of the current month.

(b) Whenever the compact commission's verification of a handler's payments discloses payment to a producer or a cooperative association of an amount less than is required by § 1307.4, the handler shall make payment of the balance due the producer not later than the 20th day after the end of the month in which the handler is notified of the deficiency.

§ 1307.8 Charges on overdue accounts.

Any producer-settlement fund account balance due from or to a handler under § 1307.3, § 1307.7 or § 1307.8 for which remittance has not been received in or paid from the compact commission office by close of business on the 18th day of any month, shall be increased one percent effective the following day.

PART 1308—ADMINISTRATIVE ASSESSMENT

Authority: 7 U.S.C. 7256.

§ 1308.1 Assessment for pricing regulations administration.

On or before the 18th day after the end of the month, each handler shall pay to the compact commission his pro rata share of the expense of administration of this pricing regulation. The payment shall be at the rate of 3.2 cents per hundredweight. The payment shall apply to:

(a) The quantity of fluid milk products disposed in the regulated area from a pool plant for which a value is determined under § 1306.1;

(b) The quantity of fluid milk products disposed in the regulated area from a cooperative association in its capacity as a handler under Section

1301.9(d) for which a value is determined under Section 1306.1; and

(c) The quantity distributed as route disposition in the regulated area from a partially regulated plant for which a value is determined under § 1306.2.

Daniel Smith,

Executive Director.

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NORTHEAST DAIRY COMPACT COMMISSION

7 CFR Chapter XIII

Results of Producer Referendum on Compact Over-Order Price Regulation

AGENCY: Northeast Dairy Compact Commission.

ACTION: Notice of Referendum Results.

SUMMARY: The Northeast Dairy Compact Commission adopted an over-order price regulation by Final Rule on May 14, 1997, which is published elsewhere in this issue of the **Federal Register**. To become effective the price regulation must be approved by at least two-thirds of all producers voting by referendum. A producer referendum was held during the period of May 15 through May 27, 1997. The Commission's price regulation was approved by more than two-thirds of all producers voting in the referendum.

ADDRESSES: Northeast Dairy Compact Commission, 43 State Street, P.O. Box 1058, Montpelier, Vermont 05601.

FOR FURTHER INFORMATION CONTACT: Daniel Smith, Executive Director, Northeast Dairy Compact Commission at the above address or by telephone at (802) 229-1941 or by facsimile at (802) 229-2028.

SUPPLEMENTARY INFORMATION: The Compact Commission was established under the authority of the Northeast Interstate Dairy Compact ("Compact"). The Compact was enacted into law by each of the six participating New England states as follows: Connecticut—Pub. L. 93-320; Maine—Pub. L. 89-437, as amended, Pub. L. 93-274; Massachusetts—Pub. L. 93-370; New Hampshire—Pub. L. 93-336; Rhode Island—Pub. L. 93-106; Vermont—Pub. L. 89-95, as amended, 93-57. Consistent with Article I, Section 10 of the United States Constitution, Congress consented to the Compact in Public Law 104-127 (FAIR ACT), Section 147, codified at 7 U.S.C. 7256. Subsequently, the United States Secretary of Agriculture, pursuant to 7