

# Proposed Rules

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

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1033

[Docket No. AO-361-A35; DA-01-04]

#### Milk in the Mideast Marketing Area; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and To Order

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This tentative decision adopts, on an interim final and emergency basis, provisions that amend certain features of the pooling standards of the Mideast Federal milk order. Specifically, this tentative decision adopts amendments to the *Pool plant* provisions by eliminating automatic pool plant status for the 6-month period of March through August, eliminating milk shipments to a distributing plant regulated by another Federal milk order as pool-qualifying shipments under the Mideast order, eliminating the "split plant" feature, eliminate including diversions made by a pool supply plant located outside the marketing area to a second pool plant, and establishing a "net shipments" provision. For the *Producer milk* provisions, this tentative decision adopts, on an interim basis, amendments that would seasonally adjust and increase the number of days that the milk of a producer needs to be delivered to a pool plant and establishes year-round diversion limits, adjusted seasonally, for producer milk for distributing plants pooled under the Mideast order. Public comments on these actions and the other pooling and payment issues not adopted by this tentative decision are requested. Additionally, this decision requires determining if producers approve the issuance of the amended order on an interim basis.

**DATES:** Comments are due on or before August 9, 2002.

**ADDRESSES:** Comments (6 copies) should be filed with the Hearing Clerk, Room 1081, South Building, U.S. Department of Agriculture, 14th & Independence Avenue, SW., Washington DC 20250.

**FOR FURTHER INFORMATION CONTACT:** Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2968, 1400 Independence Avenue, SW STOP 0231, Washington, DC 20090-6456, (202) 690-1366, e-mail address [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and therefore is excluded from the requirements of Executive Order 12866.

These proposed amendments have been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. If adopted, this proposed rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this

action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a small business if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a small business if it has fewer than 500 employees. For the purposes of determining which dairy farms are small businesses, the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most small dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500 employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees. In October 2001, there were 11,120 producers pooled on and 40 handlers regulated by the Mideast order. Based on these criteria, the vast majority of the producers and handlers would be considered small businesses. The adoption of the amended pooling standards serve to revise and establish criteria that ensure the pooling of producers, producer milk, and plants that have a reasonable association with, and are consistently serving, the fluid milk needs of the Mideast milk marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market, and determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an equal fashion to both large and small businesses. Therefore, the Department has determined that proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that

these proposed amendments would have little or no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

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

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This rulemaking proceeding does not duplicate, overlap, or conflict with any existing Federal rules.

#### *Prior Documents in This Proceeding*

Notice of Hearing: Issued September 21, 2001; published September 28, 2001 (66 FR 49571).

#### **Preliminary Statement**

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

Interested parties may file written exceptions to this decision with the Hearing Clerk, Room 1081, South Building, U.S. Department of Agriculture, 14th & Independence Avenue, SW., Washington DC 20250, by the 60th day after publication of this decision in the **Federal Register**. Four (4) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing notice specifically invited interested persons to present

evidence concerning the probable regulatory and informational impact of the proposals on small businesses. While no evidence was received that specifically addressed these issues, some of the evidence encompassed entities of various sizes.

The amendments set forth below are based on the record of a public hearing held at Wadsworth, Ohio, on October 23–24, 2001, pursuant to a notice of hearing issued September 21, 2001, and published September 28, 2001 (66 FR 49571).

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

1. Pooling standards of the marketing order.
  - a. Standards for pool plants.
  - b. Standards applicable for producer milk.
2. Rate of partial payments to producers by handlers.
3. Conforming changes to the order.
4. Determining whether emergency marketing conditions exist that would warrant the omission of a recommended decision and the opportunity to file written exceptions.

#### **Findings and Conclusions**

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pooling Standards of the Order
  - a. Standards for Pool Plants

#### **Distributing Plants**

A proposal seeking to increase one of the distributing plant pooling standards and providing for the seasonal adjustment of the standard should not be adopted. Published in the hearing notice as Proposal 1, this proposal specifically sought to raise the minimum amount of the total quantity of fluid milk products physically received by a distributing plant and disposed of as route disposition, or transferred in the form of packaged fluid milk products, by 5 percentage points (from 30 to 35 percent) for the months of May through July, and by 10 percentage points (from 30 to 40 percent) for the months of August through April.

#### **Supply Plants**

Several amendments to the supply plant pooling provisions of the Mideast order should be adopted immediately. Certain inadequacies of the supply plant pooling provisions, together with unneeded features contained in the current provision, are resulting in disorderly marketing conditions and unwarranted erosion of the blend price

received by those producers who are providing milk to satisfy the fluid milk demands of the Mideast marketing area. Specifically, the following amendments to the supply plant pooling standards should be adopted immediately: (1) Eliminate automatic pool plant status during the 6-month period of March through August for certain supply plants; (2) eliminate the volume of milk shipments made by supply plants to distributing plants regulated by another Federal milk marketing order as a qualifying shipment for the purpose of meeting the Mideast supply plant shipping standard; (3) eliminate the feature of providing for a “split plant”; (4) exclude from receipts diversions made by a pool plant to a second pool plant from the calculation of the diversion limitation established for pool plants; and (5) provide a “net shipment” standard for supply plant (and supply plants operated by a cooperative association) deliveries to the order’s distributing plants for the purpose of meeting the Mideast supply plant shipping standard. These amendments to the pool plant pooling standards were largely represented by, and in testimony related to, Proposal 2 and Proposal 5.

A proposal that would, in part, establish a 6-month re-pooling delay, Proposal 8, whenever a pool supply plant elects not to meet the supply plant pooling standards for the month should not be adopted. However, this decision adopts that portion of the proposal that would have August as the beginning month for meeting the pool supply plant shipping standard. The adoption of this feature of Proposal 8 makes it identical to the adoption of the same feature in Proposal 2.

Four proposals seeking to modify the pooling standards for pool plants of the Mideast order were considered in this proceeding. The record evidence makes clear that the proponents of these four proposals, described and discussed further below, are of the opinion that the current pooling provisions of the order are not accurately identifying those producers and the milk of those producers consistently serving the fluid needs of the marketing area. Part of the pooling standards of the Mideast order are contained in the *Pool plant* provision of the order. Published in the hearing notice as Proposals 1, 2, 5, and 8, these proposals offered various changes to specific components of the current pooling standards for supply plants and distributing plants.

Proposals 1, 2, and 5 were proposed by Dairy Farmers of America (DFA), Continental Farms Cooperative, Inc., Michigan Milk Producers, Inc., and Prairie Farms Cooperative, Inc.

Hereinafter, this decision will refer collectively to these proponents as the "Cooperatives." These organizations are cooperatives owned by dairy-farmer members that supply a significant portion of the milk needs of the Mideast marketing area and whose milk is pooled on the Mideast order.

Proposal 8 was proposed by Dean Dairy Products Company, Schneider's Dairy Inc., Turner Dairy Farms, Inc., Marburger Farm Dairy, Inc., Fike's Dairy, Inc., United Dairy, Inc., Carl Colteryahn Dairy, Inc., Smith Dairy Products Company, Superior Dairy, Goshen Dairy, and Reiter Dairy. Hereinafter, this decision will refer collectively to these organizations as the "Handlers." These organizations receive milk from dairy farmers and cooperatives and distribute fluid milk and other dairy products within the marketing area. They are regulated under the terms of the order.

Proposal 1, offered by the Cooperatives, seeks to amend the pool plant definition by increasing the minimum amount of milk that would, in part, cause a distributing plant to become pooled on the Mideast order. Proposal 1 would provide that 35 percent or more of the total quantity of fluid milk products physically received at a distributing plant be disposed of as route disposition or transferred in the form of packaged fluid milk products to other distributing plants for the months of May through July. Proposal 1 would also increase this same minimum standard to 40 percent for the months of August through April. The order currently provides a minimum standard of 30 percent and, unlike the proposal, makes no seasonal adjustments.

Proposal 1 does not seek to change this provision's current exclusion of concentrated milk received from another plant for other than Class I use.

Proposal 2, offered by the Cooperatives, seeks to amend three features of the supply plant provision of the order as follows: change certain details that currently provide for the automatic pooling of supply plants; not consider milk shipments from a Mideast supply plant to a distributing plant regulated by another Federal milk order as a qualifying shipment in meeting the performance standards for becoming a pool plant on the Mideast order; and count on a "net receipts" basis all supply plant shipments, including milk that is transferred or diverted and physically received by distributing plants regulated by the order. The "net receipts" criteria would exclude from a supply plant's qualifying shipment any transfer or diversions of bulk fluid milk products made by a distributing plant

receiving a qualifying shipment. In this regard, the concept of a "net receipt" is similar to what is also commonly referred to as a "net shipment." The difference between the two terms is that a "net receipt," as presented in this proceeding, applies to distributing plants receiving milk. The term "net shipment," as referred to in the record of this proceeding, applies to supply plants shipping milk to distributing plants. The intended use of these terms is clear, and herein after, this tentative final decision will refer to this feature of Proposal 2 as "net shipments" because the proposed change would amend how the order applies pooling performance standards to supply plants shipping milk to distributing plants. The Mideast order currently has no "net shipment" provision.

The order currently provides automatic pool plant status during the months of March through August, provided the supply plant met the applicable performance standards for pool supply plants during each of the immediately preceding months of September through February. Additionally, the order currently considers shipments of milk to a distributing plant regulated by another Federal order as qualifying shipments in meeting the performance standards of the Mideast order.

Proposal 8, offered by the Handlers, seeks to change the months in which the pool plant standard is applicable for supply plant shipments to distributing plants from September through February to August through February. In this regard, Proposal 8 is similar to Proposal 2. However, Proposal 8 also seeks to provide that in the event a supply plant opts not to be a pool plant during the month, the plant will not be eligible to regain pool plant status for a period of six months.

Proposal 5, offered by the Cooperatives, seeks to eliminate what is often referred to as the "split plant" provision. This provision provides for designating a portion of a pool plant as a nonpool plant, provided that the nonpool portion of the plant is physically separate and operated separately from the regulated or pool side of the plant.

A DFA witness, representing the Cooperatives, testified that two primary benefits of the Federal order program are allowing producers to benefit from the orderly marketing of milk and the marketwide distribution of revenue that results mostly from Class I milk sales. Orderly marketing influences milk to move to the highest value use when needed, and for milk to clear the market when not used in Class I, said the

Cooperatives. The witness noted that marketwide pooling allows qualified producers to equitably share in the returns from the market and in a manner that provides incentives for supplying the market in the most efficient manner. The witness insisted that the pooling of milk which does not service the Class I market is inconsistent with Federal order policy.

The Cooperatives' witness was of the opinion that the new Class I pricing structure, implemented under Federal order reform, together with the pooling provisions found in each order, resulted in changes in the marketplace for milk pooled on Federal milk orders, including the Mideast order. The link between performance and pooling, said the witness, was altered by these reforms and needs review. The Cooperatives noted that many entities, including DFA, moved quickly to take advantage of these changes in order rules. The witness indicated that as a participant in a competitive dairy economy, one must make pooling decisions that aim to increase returns or risk their competitive position.

The Cooperatives' witness was of the opinion that the principles underlying the economic models that formulated the Class I price surface established during Federal order reform assumed that supplies of milk associated with a demand point were aggregated into a single market and were actually shipped from the counties that were located in the population centers where demand points were fixed. There were no provisions in the mathematical equations for those models allowing for milk to be associated with a market if it did not actually ship to or supply the market, said the witness. The current pooling practices, say the Cooperatives, clearly exploit the price surface, and if we are to retain it, pooling standards need to be restructured to parallel the model.

Pooling standards are universal in their intention, stressed the Cooperatives, requiring a measure of commitment to a market marked by the ability and willingness to supply the Class I fluid needs of that market. The witness noted that pooling standards are individualized in their application and each market requires standards that work for the conditions that apply in that individual market. The witness quoted the Final Decision of milk order reform: "The pooling provisions for the consolidated orders provide a reasonable balance between encouraging handlers to supply milk for fluid use and ensuring orderly marketing by providing a reasonable means for producers with a common marketing

area to establish an association within the fluid market.”

The Cooperatives’ witness also relied on, and drew heavily from, the order reform Final Decision detailing the primary criteria used to form the boundaries of the consolidated orders, including the consolidated Mideast order. The Cooperatives’ witness emphasized the first and most important criteria of Federal order consolidation as the area of overlapping route distribution of Class I milk. Also taken from the Final Decision, the Cooperatives’ witness noted that, “The pooling of milk produced within the same procurement area under the same order facilitates the uniform pricing of producer milk,” concluding that milk procurement areas were also considered as a criteria in establishing the consolidated marketing area boundaries. The witness also noted other criteria used, including the number of handlers within a market, naturally occurring boundaries, cooperative association service areas, features or regulatory provisions common to existing orders, and milk utilization in common dairy products.

The Cooperatives’ witness continued to rely on, and drew heavily from, the Final Decision of milk order reform by relating the decision’s geographical description of the Mideast order and how the aforementioned criteria were applied to form the boundaries of the Mideast marketing area. In this regard, the witness indicated that the consolidated Mideast marketing area was the result of combining the pre-reform orders of the Ohio Valley, Eastern Ohio-Western Pennsylvania, Southern Michigan, and Indiana Federal milk orders, plus Zone 2 of the Michigan Upper Peninsula Federal milk order, and most of the then unregulated counties in Michigan, Indiana, and Ohio. The witness stressed that the order reform Final Decision concluded that nearly all milk produced within the area would be pooled on the consolidated Mideast order.

The Cooperatives’ witness was of the opinion that “open pooling” is not appropriate for the Mideast order. When milk shares in a pool’s proceeds but does not service the Class I needs of the market or help to balance the market, the witness indicated, there is cause for concern. The witness emphasized that the cost of providing service to the Class I market always falls back on the local milk supply. To allow the pooling of milk which does not provide such services to the Class I needs of the market only lowers returns of those dairy farmers whose milk is actually

supplying the local Class I market, concluded the witness.

The Cooperatives’ witness presented evidence which reviewed the various Federal order performance standards, concluding that while all the standards differ, they nevertheless address the importance of performance to the market by serving the Class I needs of the market as a condition for milk to be pooled and receive the order’s blend price.

According to the Cooperatives’ witness, a new phenomenon is occurring in the area of performance standards. Several entities have solicited milk located in the marketing area in order to pool milk located outside of the marketing area, said the witness. Their deliveries of this local supply to distributing plants, said the Cooperatives’ witness, provide the opportunity to pool much more milk located outside the marketing area. This practice, the Cooperatives’ witness said, does not bring any new milk to be actually received at pool plants, and the milk located outside of the marketing area is not available and does not demonstrate any consistent or actual service to meeting the fluid milk needs of the market.

This practice of pooling milk located far outside the Mideast marketing area, said the Cooperatives’ witness, is accomplished through a feature of current pool plant performance standards which allows a supply plant to use direct deliveries from farms to satisfy up to 90 percent of its performance standard by diversions. This standard, said the witness, is a good standard for milk located inside the marketing area, but is not an appropriate standard for milk supplies located outside of the area.

The use of direct deliveries from inside the marketing area to qualify supply plants and milk supplies located far outside the marketing area should be greatly limited if allowed at all, said the Cooperatives’ witness. The witness stated that allowing direct shipped milk from the farm to qualify a supply plant was intended to provide economic efficiency in moving milk, for example, thereby saving the reload in and pump-over costs for the sole purpose of meeting a pooling standard. However, this feature is now being used to qualify milk supplies physically located far outside of the Mideast. This, emphasized the witness, runs counter to the initial intent of the provision and has resulted in disorderly marketing conditions.

The Cooperatives’ witness provided evidence indicating that the Mideast order has the second largest volume of

Class I use in the Federal Order system. According to the witness, the performance standards for the Mideast order should assure meeting this demand by specifying a performance standard that results in actual serving of the market’s Class I needs as a condition to receive the order’s blend price.

Along this theme, the Cooperatives’ witness relied on data showing that the volume of Class I and II milk used in the Mideast changed little in the (then) 21 months since implementation of Federal order reform. However, noted the witness, the amount of reserve milk, represented by Class III and IV use, had grown dramatically. The witness concluded from the data that it is difficult to justify the need to have pooling standards which have allowed pooling some 250 percent of additional milk on the Mideast order when that milk does not service the Class I needs of the market. The witness indicated that additional milk pooled on the order was produced in states far from the marketing area, including the States of Illinois, Iowa, Kansas, Minnesota, New York, North Dakota, South Dakota, and Wisconsin.

The witness also faulted the Mideast order’s lack of having a performance standard for pool supply plants during the months of March through August as another way to pool milk on the Mideast order from other marketing areas that have lower blend prices. The evidence for this observation, said the Cooperatives’ witness, is exhibited by data indicating that producers located in Wisconsin and South Dakota began pooling large volumes of their milk beginning in March 2000. The Cooperatives’ witness, relying on the same statistics, observed that the volume of milk pooled on the order during this 21-month time period, but produced on farms located far outside the marketing area, increased by 395.66 percent, or by 430,222,762 pounds.

A witness appearing on behalf of Land O’Lakes (LOL) expressed support for Proposal 1 because it seeks to promote pooling standards that are based on performance. The LOL witness was of the strong opinion that pooling standards should not be based on the physical location of milk alone, stressing that standards should be “performance oriented” rather than “location oriented.”

Additional support for Proposals 1 and 2 was offered by Prairie Farms Dairy, Inc. (Prairie Farms). Prairie Farms operates three pool distributing plants regulated by the Mideast order. Their milk is supplied by their 176 producer members located in Indiana, Michigan, and Ohio.

The Prairie Farms witness stated that certain provisions of the Mideast order have made it too easy to pool milk without the milk actually servicing the Class I needs of the market. Federal orders should not be written so restrictive that pooling any milk supplies beyond normal basic Class I needs is impossible, said the Prairie Farms witness. However, continued the witness, orders should not be written so liberally that pooling milk becomes an end unto itself rather than a standard that assures milk is actually serving the fluid needs of the market. As the Mideast milk order regulations are currently written, added the witness, the pooling of milk far beyond the day-to-day needs of the market can and does occur.

According to the Prairie Farms witness, Class I use by Mideast order distributing plants has been relatively stable since implementation of order reform, but the amount of Class III and Class IV milk pooled on the order has increased markedly. The witness indicated the additional quantities of milk pooled on the order only lower the returns to its members and others who actually do serve the Class I needs of the market every day.

A witness from Foremost Farms who appeared on behalf of the Mideast Milk Marketing Agency (MEMA), testified in support of Proposals 1 and 2. The MEMA is an new organization resulting from the union of three previous milk marketing agencies that served milk processors by arranging for milk supplies in the pre-reform milk orders consolidated to form the current Mideast milk marketing area. The MEMA witness indicated that the needs of their customers and variations in production cause them to have an occasional need to secure additional volumes of milk, citing the opening of schools as an example of when additional milk supplies are needed. The witness also indicated that the supply and demand situation in spring months shows increased production and decreased Class I demands that generally begin in late April and continue through mid-July. During this time of the year, the MEMA witness indicated, they assume responsibility to sell milk not required by their customers. Most often these sales are to manufacturing plants located in the marketing area and to plants located as far away as Wisconsin and Minnesota, the witness said. Often, noted the witness, such sales are below the minimum class prices of the order and the costs of disposing of surplus milk are borne by MEMA members.

The MEMA witness noted that sufficient raw milk is secured through its member cooperatives and other suppliers within the marketing area to service its customers on a year-round basis, with the fall months being the only exception. In light of this supply and demand situation, the witness could find no reason why the Mideast marketing order should provide for the pooling of two to three times the milk supply actually needed to serve the Class I needs of the market.

A witness appearing on behalf of the Michigan Milk Producers Association (MMPA) also testified in support of Proposals 1 and 2. MMPA is a dairy farmer owned-and-operated cooperative engaged exclusively in the marketing of milk and dairy products on behalf of 2,600 of their member dairy farmers in Michigan, Ohio, northern Indiana, and northeast Wisconsin.

The MMPA witness testified that each of the five predecessor orders merged into the consolidated Mideast order had more demanding pool plant qualification standards. The witness stressed that pooling provisions are not intended to create barriers to pooling. However, the witness indicated, it is reasonable to expect that a market with a fluid demand as large as the Mideast warrants a higher level of performance than in markets with lower Class I use.

The MMPA witness stated that adequate supplies of milk exist within the order to satisfy the requirements of at least the Michigan portion of the marketing area. The witness noted that during the past 24 months, Class I sales in Michigan had declined 7 percent. Also, the witness noted that milk production in Michigan has been increasing and indicated that local supplies have increased 7 percent since 1998. The MMPA witness was of the opinion that with declining fluid sales and increasing milk production, pooling standards that result in pooling additional quantities of milk supplies cannot be justified.

The MMPA witness noted that nearly all of the increased volume of milk pooled on the Mideast order since order reform was used at Class III or IV manufacturing plants, which the witness concluded has only served to lower producer pay prices. In their opinion, this occurred because the current performance standards required for pool qualification are too lenient. These performance standards have resulted in an inequitable distribution of proceeds from this market's pool, stressed MMPA, while the proceeds from the fluid market were improperly shared with producers who did not service the Class I needs of the market.

The MMPA witness was of the strong opinion that this situation should be treated as an emergency by the Department and a Recommended Decision should therefore be omitted.

In addition to supporting the testimony given by the DFA witness on behalf of the Cooperatives regarding Proposal 2, the MMPA witness offered a modification to Proposal 2. The MMPA modification would specifically limit the practice of using pooled milk located inside of the marketing area to qualify milk of a plant located outside of the marketing area for pooling its milk receipts on the order. According to the witness, a one-time delivery of the milk of a producer located outside the marketing area qualifies a "distant" producer as a producer under the Mideast order and, in turn, qualifies the milk of a "distant" producer to thereafter be diverted to nonpool plants. Most often, stressed the witness, these plants are also located at a great distance from the marketing area and this milk need never meet the order's performance standards. The MMPA witness concluded that the pooling standards should not allow such milk to be part of the Mideast pool. The witness stressed that eliminating the ability to pool milk in this manner would not affect the efficiencies afforded by direct-shipped milk from farms located within the marketing area. The MMPA witness added it would also prohibit an abuse of pooling principles that never intended to qualify milk for pooling under the order without an actual relationship to the order's supply plants in supplying the Class I needs of the market.

A witness from Dean Foods (Dean) testified in support of a portion of Proposal 2. They supported eliminating the feature of the current pool supply provision which does not establish a performance standard during the months of March through August. They were also in agreement with other witnesses that the Department should treat this proceeding on an emergency basis. The Dean witness reasoned that the economic damage to the producers whose milk actually serves the Class I needs of the market should be resolved as soon as possible.

A witness appeared on behalf of Suiza Foods (Suiza) in general support of Proposals 1 and 2. The witness reasoned that once performance becomes a monthly requirement to pool milk, both processors and producers will be better able to plan deliveries based upon the need for milk during the fall months when milk supplies are generally less plentiful. The witness also stated that August should be the initial month

when higher performance standards should apply because of increased demand caused by the opening of schools occurring at the same time as generally declining overall milk supplies.

The Suiza witness also was of the opinion that the adoption of a net shipment provision for supply plants should also be applicable for plants operated by a cooperative association—another type of pool plant provided for in the Mideast order. In their post-hearing brief, Suiza emphasized that in the interest of fairness and equitable regulatory treatment, providing a net shipment provision applicable to this type of pool plant would be appropriate. According to Suiza, not providing for a net shipment feature for supply plants operated by a cooperative association would merely change the incentives for cooperatives that operate supply plants to become a pool plant under this provision applicable for cooperative associations. Although not a part of the direct testimony by the proponents of Proposal 2, or its supporters, all parties agreed that a net shipment provision should also be provided for plants operated by cooperative associations.

A witness representing Scioto County Cooperative Milk Producers Association (Scioto) testified in support of Proposals 1 and 2. Scioto has dairy farmer members in southern Ohio and northern Kentucky whose milk is pooled on the Mideast order.

The Scioto witness noted that during the period of 2000–2001, the amount of producer milk pooled on the Mideast market increased by nearly 42 percent. Virtually all of this increase can be attributed to producers in States not included as part of the Mideast marketing area, while the amount of the Class I use in the Mideast order remained relatively constant, maintained the witness. In light of the increased amount of milk pooled on the Mideast order, Scioto indicated their support for proposals which would establish higher pooling standards. Scioto indicated this would also ensure that the revenue generated by Class I sales are properly shared with those producers and pool plants which actually perform service to the Class I market.

The Scioto witness also indicated support for the addition of August as a month when additional shipments should be made to distributing plants. However, Scioto opposed establishing performance standards for the remaining months which currently have none. The witness concurred that the hot days of August have a significant impact on milk production and noted

more schools are starting as early as middle August. Scioto said that this combined effect makes it more difficult to meet the fluid needs of the market and concluded that supply plant standards should be established to assure those needs.

Opposition to a part of Proposal 2 was offered by Scioto. The feature of specifying “net shipments” for supply plant deliveries to pool distributing plants should be not adopted, testified Scioto. The witness was of the opinion that performance standards should only require supply plants to ship milk when needed by the market and that performance standards should provide the flexibility to retain milk at local supply plants during the flush season when milk supplies are more plentiful.

Opposition to a portion of Proposal 2 by LOL was provided in their post-hearing brief. LOL indicated they do not support establishing a “net shipments” provision because it would effectively raise the supply plant shipping standards above the indicated pool supply plant performance standard. The LOL brief indicated that virtually all distributing plants have some transfers or diversions resulting from decreased demand on weekends and holidays for Class I milk. According to LOL, this should be considered so that supply plants are not penalized by being viewed as not performing in supplying the fluid market during such situations.

Proposal 8, offered by the Handlers, seeks, in part, to change the months during which pool supply plant shipping standards would be applicable—to begin in August and continue through to February. Proposal 8 also seeks to establish a 6-month re-pooling delay whenever a pool supply plant elects to not meet the pool plant standards for the month. According to the Handlers, a 6-month delay in being able to return to the order as a pool plant would eliminate the ability of handlers to participate in the pool only when it was advantageous and to not participate in the pool when it was not.

A witness from Dean Foods, appearing on behalf of the Handlers, testified that the current pool supply plant provisions permitting handlers to pool and de-pool milk causes market instability. The witness noted the occurrence of a class-price inversion (when the blend price is lower than the Class III price) as an example of when supply plants have the economic incentive to opt out of pooling their milk supplies. Nevertheless, the Dean witness was of the opinion that a 6-month re-pooling delay would serve to assure consistent and reliable association of milk with the marketing

area and in meeting the market's Class I demands.

Opposition to Proposal 8 was raised by DFA. DFA was of the opinion that class-price inversions are a function of the order providing advanced pricing to handlers for Class I and II milk. The witness indicated advanced pricing is a needed and good provision of Federal milk marketing orders. However, if the Class I sector of the market were not provided advanced pricing, reasoned the DFA witness, depooling might never occur. Nevertheless, noted the DFA witness, there should be no reason why Class III and IV handlers should ever have to equalize class-use values with the blend price by paying this difference into the pool for the benefit of Class I handlers simply because of price inversion. Imposing a 6-month re-pooling delay may cause Class III and IV handlers to pay into the pool only to retain pool status, but doing so can result in causing financial damage to the reserve and balancing sectors of the market, maintained the DFA witness.

Proposal 5, offered by the Cooperatives, seeks to eliminate what is commonly referred to as the “split plant” provision from the Mideast order. A split plant designates a portion of the plant as the “pool” side and another portion of the plant as the “nonpool” side.

According to the Cooperatives, this provision was initially used to accommodate a plant's use of both Grade A and Grade B milk while providing for diversion from the pool plant side of the plant to the nonpool side for use in manufactured products. This designation was provided, said the witness, for orders with lower Class I differentials and low Class I use. However, the witness noted that its purpose seems to have been broadened to also afford a supply plant to gain economic efficiencies by avoiding incurring costs for transporting milk solely to meet pool standards.

The Cooperatives' witness argued that the split plant provision continues to have validity in low Class I use and low Class I differential orders, but does not have a legitimate role to play in a higher differential, higher utilization order like the Mideast. This provision, said the witness, serves no purpose for the Mideast order, stressing that none of the Mideast's predecessor orders provided for it and that no plant located within the Mideast marketing area makes use of the provision. Rather, it has only become a tool to pool distant milk on the market which is not serving the Class I milk needs of the market, maintained the witness.

Citing data provided by the Mideast Market Administrator, the Cooperatives observed that increasing volumes of milk pooled from distant areas began in June 2000. The amount of distant milk pooled then was about 16 million pounds and grew dramatically to some 480.5 million pounds by June 2001. The total pounds of milk pooled through split plants ranged from 69 to 179 million pounds for the months of January through August 2001, noted the witness. The witness indicated that this statistic represents a significant percentage of the total milk pooled on the order. Diversions of distant milk by pool distributing plants, added the witness, were similarly significant. However, the witness stressed that actual physical deliveries used to qualify the additional volumes of milk pooled through split plants were as little as 50,000 pounds. These statistics, said the Cooperatives' witness, clearly prove that the current pooling standards are allowing milk to be pooled without demonstrating reasonable relationship, or providing actual service, to the market's fluid needs. According to the witness, using split plants to pool milk in this way can only be viewed as an abuse of an accommodation not intended when originally adopted for the Mideast order.

Scenarios were presented by the Cooperatives' witness as examples for illustrating the harm being caused by the split plant provision. One example depicted how milk currently being pooled on the order, but located far from the marketing area, would not likely seek to be on the Mideast order without a split plant provision. According to the Cooperatives' witness, this is because the cost of transportation would exceed the gain of receiving the Mideast's blend price. Another example demonstrated the negative impacts of split plants to the Mideast market because of the lack of diversion limits.

According to the Cooperatives' witness, the pool side of the split plant is being used to establish an "outpost" that serves no other purpose than to qualify milk for pooling from other marketing areas where blend prices are lower. By meeting the minimal one-day delivery standard for becoming a producer on the order, the milk of producers located far from the marketing area, but whose milk is actually delivered to an "outpost" pool plant nearer their farms, may qualify milk for pooling on the Mideast order. Further, stressed the witness, the milk of these producers can thereafter be diverted to manufacturing plants nearer their farms without ever again being delivered to pool plants located in

marketing area. This milk can hardly be viewed as servicing the market, the Cooperatives' witness asserted. Additionally, concluded the witness, the daily, weekly, and seasonal supplying of fluid milk, and meeting the balancing needs of the market are consistently being borne by the local producers who are only having their blend price diluted from the pooling of milk that does not consistently provide these services.

A witness representing Suiza testified in support of Proposal 5. This witness stressed that the split plant provision did not exist in all marketing orders prior to order reform and is not used today for the purpose for which it was originally intended. The Suiza witness concluded that the split plant provision is clearly not needed nor justifiable under the Mideast order.

MMPA also testified in support of Proposal 5. The witness similarly observed that pooling milk through the split plant provision only serves to depress prices for producers who actually supply the market. The witness maintained that a principle responsibility of the Federal milk order program is to preserve the proceeds from the fluid market for those producers who demonstrate an ability and willingness to serve that market. Since the split plant provision does not serve this end, concluded the witness, it should be eliminated from the order.

The witness representing Scioto expressed doubt that adopting Proposal 5 would solve the pooling problem presented by split plants. In this regard, the witness proposed a limit on the maximum amount of producer milk that could be associated with a pool supply plant during the months when no performance standard is applicable. The witness offered that 110 percent of the daily average producer receipts, pooled during the months specifying a performance standard, is a reasonable alternative performance standard for such months. According to the Scioto witness, amending the split plant feature in this way would recognize normally higher production levels during the spring and summer months as compared to generally lower production levels during the fall and winter months. It would still allow supply plants from outside the marketing area to participate in the Class I returns of the market for the entire year, noted the witness, but would prevent plants from abusing the market by only pooling milk during the spring and summer months with milk that does not service the market.

Post-hearing briefs submitted by LOL expressed opposition to the adoption of

Proposal 5. The split plant provision, indicated LOL, has historically recognized commingled Grade A and Grade B milk in procurement areas and has provided a way for Grade A milk to be diverted to the non-pool plant for manufacturing uses. Removing this pooling feature, concluded LOL in their brief, would result in the need for full plant accountability, including determining milk shrinkage and overage, in the manufacturing (nonpool) portion of a plant. LOL is of the opinion that this would be very burdensome and would result in the need for costly record keeping by both handlers and the Market Administrator's office, while providing no benefit to producers or handlers.

The record contains testimony clearly indicating general support for increasing and seasonally adjusting the distributing plant pooling standard offered by Proposal 1. The proposal would increase minimum standards for triggering pool plant status for a distributing plant and therefore become regulated under the terms of the Mideast milk marketing order. Beyond statements indicating general support for the adoption of Proposal 1, the record contains little, if any, evidence that indicates why this pooling standard should be increased. To the extent that excess milk is being pooled on the order through distributing plants, this decision attributes the pooling of excess milk to inadequacies in other pooling standards of the order. Specifically, the record reveals that the lack of diversion limits during certain times of the year provides the ability for distributing plants to pool milk on the Mideast order (the issue of diversions and diversion limits are discussed later in this decision) far beyond the legitimate reserve supply of milk for the plant. Therefore, in the absence of other evidence, the record does not support a finding that distributing plants should meet a higher standard by increasing the amount of milk receipts disposed of as route disposition, or transferred in the form of packaged fluid milk products, as a condition for designation as a pool plant.

The record of this proceeding strongly supports concluding that the various features of the Mideast order's supply plant pooling standards are either inadequate or unnecessary. Because the order currently contains inadequate pooling standards for supply plants, much more milk is able to be pooled on the order than can be considered properly associated with the Mideast market. This milk does not demonstrate a reasonable level of performance necessary to conclude that it provides a

regular and reliable service in satisfying the Class I milk demands of the Mideast marketing area. Therefore such milk should not be pooled on the order.

The pooling standards of all milk marketing orders, including the Mideast order, are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying those who are reasonably associated with the market for sharing in the Class I proceeds. Pooling standards of the Mideast order are represented in the *Pool Plant*, *Producer*, and the *Producer milk* definitions of the order. Taken as a whole, these definitions set forth the criteria for pooling. The pooling standards for the Mideast order are based on performance, specifying standards that, if met, qualify a producer, the milk of a producer, or a plant to enjoy the benefits arising from the classified pricing of milk.

Pooling standards that are performance based provide the only viable method for determining those eligible to share in the marketwide pool. It is primarily the Class I use of milk that adds additional revenue, and it is reasonable to expect that only those producers who consistently supply the market's fluid needs should be the ones to share in the distribution of pool proceeds. Pool plant standards, specifically standards that provide for the pooling of milk through supply plants, also need to be reflective of the supply and demand conditions of the marketing area. This is important because pooling this milk ensures the receipt of the market's blend price.

Similarly, supply plant pooling standards should provide for those features and accommodations that are reflective of the needs of proprietary handlers and cooperatives in providing the market with milk and dairy products. When a pooling feature's use deviates from its intended purpose, and its use results in pooling milk that is not serving the fluid needs of the market, it is appropriate to re-examine the need for continuing to provide for that feature as a necessary component of the pooling standards of the order. One of the objectives of pooling standards is to ensure an adequate supply of fluid milk for the marketing area. A feature which results in pooling milk on the order that does not provide such service should be considered as unnecessary for that marketing area. Similarly, another objective of pooling standards is for the proper identification of the milk of those producers who are providing service in meeting the Class I needs of the market. If a pooling provision does not reasonably accomplish this end, the

proceeds that accrue to the marketwide pool from fluid milk sales are not properly shared with the appropriate producers. The result is the lowering of returns to those producers whose milk is serving the fluid market.

The record provides sufficient evidence to conclude that several features of the supply plant definition are not being used for the reasons they were originally intended. Other shortcomings of the Mideast order's pooling standards, specifically as they relate to producer milk, also contribute to inappropriately pooling the milk of producers who are not a legitimate part of the Mideast marketing area. Here too, the impact is an unwarranted association of milk on the order. Milk is classed at lower prices—a decrease in the relative Class I utilization of the market—which results in a lower blend price to those producers who do supply the Class I needs of the market.

This decision finds that the milk of some producers is benefitting from the blend price of the Mideast order while not reasonably demonstrating a service to the Class I needs of the Mideast marketing area. This finding is attributable to faulty pooling standards. The pooling provisions provided in the Final Decision of milk order reform, implemented on January 1, 2000, established pooling standards and pooling features that envisioned the needs of the market participants resulting from the consolidation of those pre-reform orders. The reform Final Decision, as it related to the Mideast marketing area, did not intend or envision that the pooling standards adopted would result in the sharing of Class I revenues with those persons, or the milk of those persons, who do not provide a reasonable measure of service in providing the Class I needs of the market. The reform Final Decision examined and discussed the various pooling standards and features of the pre-reform orders for their applicability in a new, larger, consolidated milk order. The pooling standards and features adopted for the Mideast order were designed to reflect and retain those standards and features of the pre-reform orders so as to not cause a significant change, and indeed to provide for, the continued pooling of milk that had been pooled by those market participants. The record of this proceeding reveals that the combination of the standards and features adopted for pool plants, especially those that apply to pool supply plants, are not the appropriate or reasonable standards for a much larger milk marketing area.

Accordingly, this decision finds basic agreement in the evidence presented by

the proponents of Proposal 2 and Proposal 5, and those entities who expressed their support for adopting these proposals, that certain pool plant provisions should be eliminated from the Mideast order. These include: (1) The provision of the order that currently provides for automatic pool plant status during the 6-month period of March through August for certain pool supply plants; (2) the provision that currently counts supply plant shipments to distributing plants regulated by another Federal milk marketing order as a qualifying shipment for meeting supply plant performance standards of the Mideast order; and (3) the provision of the order that provides for "split plant" recognition.

Supply plant deliveries of milk to a distributing plant regulated by another Federal milk marketing order should no longer be considered as a qualifying shipment for meeting the supply plant performance standards of the Mideast order. While such milk is providing some servicing of the fluid needs of another marketing area, such milk provides no service to the Class I needs of the Mideast order. Pooling standards for the Mideast marketing area, in part, provide for determining those producers and the milk of those producers who are serving the Class I needs of the Mideast marketing area and thereby receive the blend price of the Mideast order. It is reasonable, in light of this objective, to conclude that serving the fluid needs of another market provides no service to the Mideast market. Accordingly, such milk should not be considered as a qualifying shipment for meeting the supply plant performance standard of the Mideast order.

The modification of Proposal 2, offered by MMPA, intended to provide a pooling standard that assists in the proper identification of the milk of those producers who actually provide a service to the order's Class I market, should also be adopted immediately. However, the proposed amendatory language has been modified by the Department and is presented below. Safeguards are added to the supply plant provision allowing that up to 90 percent of a supply plant's qualifying shipments to distributing plants be directly from farms of producers by diversion. The intent of this pooling feature for supply plants was to provide flexibility and offer efficiency in transporting milk, and thereby be less burdensome, for those market participants of the pre-reform orders who would continue to be pooled on the larger consolidated Mideast order. This feature was not intended to be used as a mechanism to pool milk on the order

that was not providing a reasonable measure of service in supplying the Class I needs of the Mideast marketing area.

The intent of the modification of Proposal 2 by MMPA sought reasonable safeguards so that milk pooled by handlers from sources distant from the marketing area, resulting from the pooling of milk from within the marketing area, would end. The reasons for modifying Proposal 2 are well supported by evidence contained in the record of this proceeding. Currently, plants located far from the marketing area can use diversion of near-in milk for up to 90 percent of the distant plant's qualifying deliveries. Supply plants qualified in this manner do not provide milk to the marketing area that can be shown to be a service in meeting the Class I needs of the Mideast marketing area. Therefore, there is no reasonable basis to conclude that such milk should be pooled on the order and thereby receive the order's blend price. This modification would establish that supplemental milk supplies actually perform a reasonable measure of service in supplying the fluid needs of the Mideast marketing area.

Finally, the evidence of this proceeding supports adopting a "net shipment" provision, a feature of Proposal 2. As intended by the proponents, a net shipment feature would not include transfers or diversions of bulk fluid milk products of a supply plant's qualifying shipments to a distributing plant by any amount of bulk milk transfers or diversions made from the distributing plant. Providing such a feature for the pooling standards for the Mideast order supply plants is reasonable, notwithstanding the objections to its adoption by Scioto and LOL. It is true that distributing plants have some transfers and diversions resulting from variations in demand stemming from weekend days and holidays. However, the current supply plant performance standard is below the Mideast market's Class I use of milk, even with the pooling of milk inappropriately associated with the market due to faulty pooling standards. This decision finds it unlikely that transfers and diversions by distributing plants on such occasions would involve a sufficient volume of milk to cause a supply plant to lose pool status. Additionally, given other changes to the order's pooling standards adopted in this decision (discussed below), placing a limit on diversions that can be made by any pool plant to a nonpool plant should provide the necessary safeguards that would make it even more unlikely that a supply plant would lose its pool

status. This decision finds that adoption of a net shipment feature in the pooling standards for Mideast supply plants will aid in properly identifying the milk of those producers who actually supply milk to meet the fluid needs of the market.

A brief submitted by Suiza emphasized the need for providing a net shipment provision for a supply plant operated by a cooperative association. The brief indicated that it would provide for fair and equitable regulatory treatment of two similar types of supply plants. This decision agrees with the need to apply the same net shipment provision to supply plants operated by a cooperative association. Both supply plant and cooperative supply plant performance standards are, for all intents and purposes, identical. Therefore it is reasonable to adopt the same standard in considering the actual, or net, shipments made to distributing plants by a plant operated by a cooperative association.

Providing a 6-month re-pooling delay whenever a supply plant opts not to meet the pooling standards for the month would not tend to provide for orderly marketing conditions in the Mideast marketing area. The record indicates that handler interests seek every assurance for a steady and reliable milk supply as the order can reasonably provide. Providing pooling standards that may cause a supply plant to consider the longer-term implications of dropping off the pool may also tend to ensure the desired outcome of assuring reliable deliveries of milk to fluid handlers. However, the need for a provision which denies a supply plant the ability to rejoin the pool through proper performance after a 6-month delay is not supported by the record.

Milk marketing orders are instruments for promoting stability in the marketing relationship between producers and handlers. In this regard, and considering the marketing conditions of the Mideast marketing area, promoting stability in this manner is not appropriate or needed. The record indicates that fluid milk handlers have not had significant difficulties in securing milk supplies since the implementation of milk order reform. To the extent that handlers fear the potential disruption to the market that may arise from depooling, that fear to date is only speculative.

The most important evidence provided on the record that provides any justification for adopting a 6-month re-pooling delay rests on the possible occurrence of a class-price inversion. Handlers see the issue of opting off-and-on the pool as rushing to join the pool to secure the advantages of price

protection and dropping from the pool when prices for Class III and IV milk are higher than the order's blend price. Further, handlers worry that during such times, their ability to obtain needed milk supplies is diminished. The DFA witness is of the opinion that penalizing supply plants, often cooperative owned, may cause financial damage to be borne by the manufacturing sectors of the market. Additionally, DFA does not endorse the notion that producers should incur any penalty because of price outcomes which, they conclude, are the result of the order program providing for the advance pricing of Class I and II milk that serves the interest of handlers.

This decision makes no finding on whether advance pricing is a cause or contributor to class-price inversions. Neither does this decision make any findings regarding the damage that may result to cooperatively owned manufacturers by being prevented from rejoining the pool. These are both far beyond the scope of this proceeding. However, this decision does find that the amendments to the pooling standards adopted by this decision, taken as a whole, strengthen the effectiveness of the order for the benefit of both producers and handlers and will restore orderly marketing conditions and a consistent supply of milk to Class I handlers.

#### b. Standards for Producer Milk

##### **Minimum Deliveries to Pool Plants—The Touch Base Standard**

The proposal seeking to change certain standards and features of the *Producer milk* provision of the order should be adopted immediately. The following amendments include:

(1) Increasing the number of days of milk production of a producer to be delivered to a pool plant before the milk of the producer is eligible for diversion during each of the months of August through November, or "touch base" is increased to 2-days' milk production. In this regard, August is an addition to the touch base period. Additionally, the amended touch base provision establishes a 2-day touch base standard for new producers coming on the Mideast market during each of the months of December through July. The 2-days' milk production touch base standard will be applicable only if the producer has not been part of the Mideast market during each of the previous months of August through November. Adoption of a 2-day touch base standard therefore concludes that the higher standards of either 3 or 4

days, supported by handlers and Scioto, is not adopted.

(2) Establishing diversion limits for all pool handlers in each month of the year. Additionally, diversion limits will be seasonally adjusted. For each of the months of August through February, the diversion limit shall be 60 percent. For each of the months of March through July, the diversion limit shall be 70 percent.

(3) Eliminating the ability of a pool plant to increase diversions to nonpool plants by diverting milk to a second pool plant.

Proposal 7, which sought to add the months of August and March to the current diversion limit standard of 60 percent for each of the months of September through February, should not be adopted.

Proposals 3, 7, and 9 seek to modify the order's standards for determining the eligibility to pool the milk of a producer on the order. The standards for determining this are described in the *Producer milk* provision of the order. These three proposals are similar in the changes proposed and the specific details of each proposal are discussed in greater detail below. As explained earlier in this decision, the collective references of the proponents as the "Cooperatives" and "Handlers" continues. Proposal 3 was offered by the Cooperatives, Proposal 9 by the Handlers, and Proposal 7 by the Independent Dairy Producers of Akron (IDPA), an association of dairy farmers whose milk is pooled on the Mideast order.

A proposal, published in the hearing notice as Proposal 6, did not receive testimony at the hearing and is considered by this decision to be abandoned. This proposal called for providing year-round diversion limits as did Proposal 3, but offered slightly differing seasonal adjustments. No further reference will be made in this proceeding to Proposal 6.

Published in the hearing notice as Proposal 3, the Cooperatives seek changes in the number of days the milk of a dairy farmer must be physically received at a pool plant, and in what months the standards should apply (commonly referred to as a "touch base" provision), before being eligible for diversion to nonpool plants. Additionally, Proposal 3 would establish diversion limits for producer milk in months where no limit is currently provided by the order and would seasonally adjust these limits.

(1) *Touch base.* Proposal 3 would change the touch base feature of the *Producer milk* provision by raising the current standard from one day's milk

production to two days' milk production of a producer in each of the months of August through November. Additionally, Proposal 3 also includes a proviso that, in the event a handler did not cause at least two days' milk production of a producer to touch base during each of the months of August through November, at least two days' production would need to touch base in each of the months of December through July before milk is eligible for diversion to nonpool plants. Proposal 7, proposed by the IDPA, seeks a 4-day touch base provision only for each of the months of August through March.

(2) *Diversion limits.* Proposals 3 and 9 seek diversion limits that would be applicable year round but differ on the level proposed for the spring and summer months. Under Proposal 3, a 60 percent limit would be applicable in each of the months of August through February, and a 70 percent limit would be applicable in each of the months of March through July. Alternatively, Proposal 9 would specify a 60 percent limit in each of the months of August through February, but an 80 percent limit for each of the months of March through July. Proposal 7 seeks only to change the months in which a diversion limit would be provided from the current 60 percent during each of the months September through February and have the 60 percent limit be applicable during each of the months of March through August.

The witness representing the Cooperatives testified that the current provisions of the Mideast order do not adequately define the potential amount of milk that can be pooled on the order and attributed this shortcoming, in part, to the lack of adequate diversion limits. The witness also indicated that establishing a limit on the amount of producer milk that a pool plant can divert to a nonpool plant where none are now specified would correct these deficiencies of the order's pooling standards. The witness also cited the current touch base standard as contributing to the improper pooling of the milk of producers not actually serving the Class I needs of the market. The new 2-day touch base standard offered by Proposal 3, indicated the witness, would need to be met before additional milk would be eligible for diversion to nonpool plants.

Continental Dairy Products (Continental), a cooperative of dairy farmers with members whose milk is marketed and pooled on the Mideast order, indicated their support for amending the touch base standard as well as providing year-round diversion limits on producer milk. They noted

that producer blend prices in the Mideast marketing area have been reduced by as much as \$8 million in a single month because of inappropriate pooling standards. The pooling standards in the Mideast order do not currently require a physical and economic association with the marketing area, noted the witness, and therefore an enormous amount of milk has been pooled on the Mideast order.

A witness from Prairie Farms, representing the positions of the Cooperatives, testified in support of Proposal 3. The witness testified that increasing the touch base provision would ensure that enough milk would be available to cover the day-to-day fluid needs of the market along with providing for adequate milk reserves. At the same time, said the witness, the proposal would reduce the ability to pool milk on the order that is not serving the market's fluid needs. The witness noted that their dairy farmer members have been financially harmed by the unwarranted additional supplies of milk being pooled on the order. The Cooperatives' witness stressed that pooling additional volumes of milk only serves to lower returns to Mideast producers and supplemental suppliers who are actually serving the fluid needs of the market every day.

A witness appearing on behalf of MEMA also testified in support of Proposal 3. The MEMA witness related that in responding to changes in customer needs, in addition to variations in production, their need to secure additional volumes of milk for the fall months actually begins in August and continues through November. This, noted the witness, is because as schools return to session the demand for milk tends to increase.

A witness appearing on behalf of MMPA testified in support of Proposal 3. The MMPA witness offered that increasing the touch base standard to 2-days' production better reflects the higher fluid needs of the market that exist during specific months of the year. The increase in demand for fluid milk attributed to school openings was also offered by the witness as an example of such increased demand beginning in August.

MMPA also indicated support for the proviso in Proposal 3 that would establish a two-day touch base standard for each of the months of December through July for producer milk which did not meet the touch base standard in the preceding months of August through November. According to the witness, this feature of the touch base standard supports the concept that pooling standards be performance oriented and

more accurately identify the milk of those producers which actually service the fluid needs of the market.

A witness from Dean also testified in general support of Proposal 3. However, Dean offered a modification to Proposal 3 by endorsing a 3-day touch base standard for producer milk. The witness provided an analysis on the effects of "non-historic" milk pooled on the Mideast order over the period of January 2001 through August 2001. This analysis concluded that the Mideast's Producer Price Differential (PPD) had been reduced by an average of 55 cents per hundredweight during this 8-month time period. The witness stressed that this loss of revenue is being borne by the producers who actually and regularly supply the fluid needs of the market. Accordingly, indicated the Dean witness, the pooling provision standards regarding producer milk need changing.

A witness appearing on behalf of Suiza expressed similar general support for Proposal 3 and endorsed the Dean modification calling for a 3-day touch base standard. Suiza was of the opinion that without a meaningful touch base standard, individual producer-suppliers do not actually have to perform by physically delivering milk to the Mideast market as a condition for pooling. Meaningful touch base provisions, noted Suiza, also provide handlers with reasonable assurance of performance while simultaneously ensuring that the milk of dairy farmers that actually serves the market is protected against lower returns caused by pooling unneeded milk. Additionally, the Suiza witness testified in support of specifying August as a month when lower diversion limits should be applicable. The witness also cited the opening of schools and the stresses on production from summer as reflections of increasing demand for Class I milk occurring during a time of generally lower milk production.

A witness representing Scioto expressed general support for Proposal 3 but offered a 4-day touch base standard for each of the months of August through November and a 2-day touch base standard for each of the months of December and January.

Testifying in support of Proposal 7, the IDPA witness stressed that increasing the touch base standard to 4 days' production should be applicable for each of the months of August through March and providing a 60 percent diversion limit for each of these same months would be beneficial to Mideast producers. The witness indicated that a physical delivery of milk to the order's pool plants is a key indicator of milk being a legitimate part

of the market. The witness expressed support of the need for an emergency decision because their returns are being lowered by pooling milk that should not be considered as part of the Mideast market.

Proposal 9, offered by the Handlers, seeks to limit the amount of milk that could be diverted from a pool plant to a nonpool plant. The proposal would set a 60 percent limit during each of the months of August through February and an 80 percent limit during each of the months of March through July. This proposal was abandoned by its proponents. Instead, the proponents agreed to support Proposal 3 offered by the Cooperatives. While the Handlers indicated support for Proposal 3, they were of the opinion that adopting a 3-day touch base standard instead of a 2-day touch base standard would be best. They indicated a 3-day touch base standard would contribute to a more accurate identification of the milk of producers that actually supply the fluid milk needs of the Mideast marketing area.

The witness representing Scioto testified in support of Proposal 9. Proposal 9 limits diversions to a percentage of the milk physically received at a plant, noted the witness. The concept of allowing diversions based on milk physically received is logical, said the witness, and is preferred by most of the dairy industry. The witness was also of the opinion that August should be included as a month that provides for a lower level of diversions to nonpool plants. The combination of schools opening in the middle of August together with the typically hot days of the summer season, cited the witness, has negative impact on milk production and therefore the order should have lower limits on the amount of milk that can divert to nonpool plants. Diversion limits of 60 percent during each of the months of August through February and 80 percent during each of the months of March through July would also assure consumers and fluid milk processing plants that their needs will be met, concluded the Scioto witness.

All milk marketing orders, including the Mideast, provide some standard for identifying those producers who supply the market with milk. To qualify as a producer on most orders, including the Mideast, a producer can be associated with a market by making a delivery to a market's pool plant. Additionally, other standards need to be met before the milk of that producer is eligible to be diverted to a nonpool plant and have that diverted milk pooled and priced under the terms of the order. Currently,

the Mideast order's standard is that one day's production of milk of a producer be delivered to a pool plant before that plant can divert the milk of the producer to a nonpool plant.

The touch base standard of an order establishes an initial association by the producer and the milk of the producer with the market. Markets that exhibit a higher percentage of milk in fluid use generally have touch base standards specifying more frequent physical milk deliveries to pool plants. In this way, the touch base provision serves to maintain the integrity of the order's performance standards. When a touch base standard is too low, the potential for disorderly marketing conditions arises on two fronts. First, pool plants are less assured of milk supplies. Second, and most important for the Mideast marketing area, an inadequate touch base standard provides the means for the milk of producers, not providing a service in meeting the fluid needs of the market, to be pooled on the order. This reduces the order's blend price paid to producers who are providing service to the Class I market.

The record of this proceeding indicated various opinions about what the proper touch base standard for the Mideast order should be and when it should be applicable. These opinions ranged from 2 days' to as much as 4 days' milk production of a producer. All agree that August would be a more appropriate beginning month for its applicability. The more compelling observation is that all participants in this proceeding recognized the need for, and supported increasing, the touch base standard. The issue for the Department is reduced to deciding which standard best serves the needs of the Mideast order.

On the basis of the evidence, this decision supports adopting a 2-day touch base standard and having this standard be applicable beginning in August. While a higher standard would tend to further maintain the integrity of the order's performance standards, adopting a higher touch base standard may result in the uneconomic movement of milk solely for the milk of producers to meet a pooling standard. Additionally, the Mideast order currently provides that the Market Administrator may adjust the touch base standard in the same way the order provides for the Market Administrator to adjust the performance standards for supply plants and the diversion limits for all pool plants. Other changes adopted in this decision will also serve to more accurately identify the milk of producers who should be pooled on the order. Together with the Market

Administrator's authority to administratively change the touch base standard, sufficient safeguards are provided to accomplish both needs.

Provisions for diverting milk are a desirable and needed feature of an order because they facilitate the orderly and efficient disposition of the market's milk not used for fluid use. When producer milk is not needed by the market for Class I use, its movement to nonpool plants for manufacturing, without loss of producer milk status, should be provided for. Preventing or minimizing the inefficient movement of milk solely for pooling purposes need also be reasonably accommodated. However, it is just as necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

A diversion limit establishes the amount of producer milk that may be associated with the integral milk supply of a pool plant. With regard to the pooling issues of the Mideast order, it is the lack of diversion limits to nonpool plants that significantly contributes to the pooling of milk on the order that does not provide service to the Class I market. Such milk is not a legitimate part of the reserve supply of the plant.

Milk diverted to nonpool plants is milk not physically received at a pool plant. However, it is included as a part of the total producer milk receipts of the diverting plant. While diverted milk is not physically received at the diverting plant, it is nevertheless an integral part of the milk supply of that plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not be associated with the diverting plant. Therefore, such milk should not be pooled.

Associating more milk than is actually part of the legitimate reserve supply of the diverting plant unnecessarily reduces the potential blend price paid to dairy farmers. Additionally, pooling milk far in excess of reasonable needs of the market due to the lack of diversion limits only provides for the association of milk with the market by what is often described as "paper-pooling" and not by actual service in meeting the Class I needs of the market. Without a diversion limit, the order's ability to provide for effective performance standards and orderly marketing is weakened.

The lack of a diversion limit standard applicable to pool plants opens the door for pooling much more milk and, in theory, an infinite amount of milk on the market. While the potential size of the pool should be established by the order's pooling standards, the lack of diversion limits renders the potential

size of the pool as undefined. With respect to the marketing conditions of the Mideast marketing area evidenced by the record, this decision finds that the lack of year-round diversion limits on producer milk has caused more milk to be pooled on the order than can reasonably be considered as properly associated with the market.

The lack of a diversion limit standard applicable for diversions to nonpool plants has also resulted in the pooling of milk that does not provide a service in meeting the Class I needs of the Mideast marketing area. Proposal 7 offers reasonable diversion limit standards that would be adjusted seasonally to reflect the changing supply and demand conditions of the Mideast marketing area. Therefore, a 60 percent diversion limit standard for each of the months of August through February and a 70 percent diversion limit standard for each of the months of March through July should be adopted immediately. To the extent that these diversion limit standards may warrant adjustments, the order already provides the Market Administrator with authority to consider and act to adjust these diversion standards as marketing conditions may warrant by the Market Administrator.

As mentioned above, the Mideast order currently provides for the diversion of milk from a pool plant to a second pool plant. However, the order does not consider such diversions in the total diversion limit established for pool plants. It is through this shortcoming of the order's pooling standards that the intent to only pool the milk of producers who are consistently serving the Class I demands of the market are circumvented. In this regard, a pool plant is able to increase its milk diversions to a nonpool plant through diversions to a second pool plant. The amendment provided below in the *Producer milk* definition of the order provides the necessary technical correction that will include diversions to other pool plants in the manner no differently than diversions to nonpool plants.

Several changes to the pooling standards contained in the *Producer milk* definition of the order are needed to maintain the integrity of the other amendments made in this decision affecting the performance standards for supply plants. As indicated earlier, the record indicates that certain pooling provisions of the Mideast order are either inadequate or unnecessary. With respect to the pooling standards of the order as they are contained in the *Producer milk* provision, this decision finds that certain features of the

provision are inadequate. These include:

(1) The touch base standard currently requiring one-days' milk production of a producer be delivered to a pool plant is not providing a sufficient standard in identifying those producers and the milk of those producers who are serving the fluid needs of the market.

(2) The lack of year-round diversion limits for all pool plants has resulted in the ability to pool far more milk than can be reasonably part of the reserve supply of the plants pooling such milk. The lack of a diversion limit for each and every month of the year has left the potential size of the marketwide pool undefined. This inadequacy of the Mideast order has resulted, too, in pooling the milk of producers who are not providing a service to the Class I needs of the market. This inadequacy contributes to the unnecessary erosion of the order's blend price caused by pooling additional volumes of milk used in lower priced classes which, in turn, reduces the market's Class I utilization percentage of milk.

(3) The lack of limiting the ability of a pool plant to divert milk to a second pool plant in the same manner as diverted milk to a nonpool plant contributes and magnifies the impact of pooling the milk of producers who provide no service to the Class I needs of the market. The receipt of a lower blend price to those producers who are serving the Class I needs of the market is found to be unwarranted and contributes to disorderly marketing conditions in the Mideast marketing area.

## 2. Rate of Partial Payment

Proposal 4, seeking to increase the rate of partial payment for milk, should not be adopted. This proposal, offered by DFA, would increase the rate of partial payment to producers and cooperative associations for milk delivered during the first 15 days of a month to 110 percent of the previous month's lowest class price.

The intent of this proposal, according to the DFA witness, is to improve the cash flow of dairy farmers pooled on the Mideast order. According to DFA, a partial payment that more closely equals the final payment for milk would more accurately reflect the true value of the milk delivered to handlers during the first 15 days of the month. The DFA witness testified that the partial payment rate, as a share of the total payment for milk, has widened since the formation of the consolidated Mideast marketing area. The witness stressed that producers need a more consistent cash flow than they are

currently experiencing and adopting a higher partial payment rate would meet this need.

The DFA witness provided data and an analysis they maintain indicates that since the implementation of order reform on January 1, 2000, the amount of the partial payment received by producers relative to the total payment for milk each month has been reduced when compared to the pre-reform orders. The analysis consisted of approximating a weighted average blend price as a proxy for a comparable order from the pre-reform orders' information. The witness indicated that data for a 36-month period, from January 1997 through December 1999, was compared to the current Mideast order data of 17 months—the number of months then available for which data existed.

Since the current Mideast order provides 4 classes of milk use, the DFA witness indicated they used the pre-reform order's Class III-A price as a proxy for the lowest class price so that a comparison could be made between the pre-reform and post-reform partial payment relationships to the total price for the month. The result of this analysis, concluded the DFA witness, clearly indicates that by using the lowest class price of the previous month as the rate of partial payment, the relationship between the partial and total payment for milk during the month has widened since the implementation of order reform.

Three other witnesses testified in support of amending the partial payment provision. These witnesses included an Ohio dairy farmer, a representative of MMPA, and Scioto. All three witnesses testified that their cash flow, or the cash flow of their members, has deteriorated since the implementation of order reform.

Opposition by handler interests for increasing the rate of partial payment was significant. However, handler interests did not counter the expressed need for improvement in producers' cash flow positions. Rather, handler interests focused on presenting the impact to milk processors if a higher partial payment rate was adopted.

A representative of Leprino Foods (Leprino), a national cheese-processing firm which purchases and pools milk on the Mideast order, testified that disparity between the partial and final payments is a combination of a failure to blend the pool's higher use values into the partial payment and using the lowest class price of the previous month. The witness argued that increasing the rate of partial payment would merely transfer the burden of producers' cash flow concerns to

processors. The Leprino witness was also of the opinion that increasing the rate of partial payment would violate minimum pricing principles used by Federal milk orders. In this regard, the witness noted that Class III and IV products compete for sales in a national market, unlike milk used in Class I products. The witness maintained that the resulting differences in the rate of partial payment between orders would cause disparate economic positions for handlers competing for sales in areas where the rate of partial payment is lower.

A witness representing the Handlers also testified in opposition to increasing the rate of partial payment. The witness provided an analysis that evaluated the financial impact on handlers based on the economic principle of the time value of money. In the analysis, the Handlers' witness presented the financial impacts to handlers that would likely result by advancing or delaying the partial payment. Notwithstanding the desire or need of producers to improve their cash flow positions, the witness was of the opinion that the cash flow problem of producers would better be addressed through adoption of other proposals under consideration in this proceeding.

Because of initial confusion in the data presented at the hearing regarding appropriate historical prices and the months for which they were applicable, the Department reconstructed noticed data that recreated the intended analysis presented by witnesses. The Department's reconstruction relied, in part, on the partial payment provisions of the pre-reform orders. The Department used the previous month's Class III price of the pre-reform orders as the lowest class price because the Class III price was used then to set the rate of partial payment. In this regard, comparing partial payment relationship outcomes using actual historical provisions provided for comparing pre- and post-reform partial payment relationships as to the total payment for milk in a month.

Even with the limited amount of data available since the implementation of order reform, the Department's comparison of pre- and post-reform partial payment relationships to total payments does appear to support the observations made by the DFA witness. However, this initial observation alone is not sufficient basis for changing the rate of the partial payment. Some significant differences in certain key assumptions were made by the proponents of Proposal 4 from those assumptions used by the Department in comparing pre- and post-reform time periods.

Also of concern is the limitations inherent in comparing a 36-month period to one of only 17 months. Additionally, the 36-month time period shows price trends rising and falling, while the 17-month time shows a period of generally an upward trend in prices. This may suggest that there has not yet been a sufficient period of elapsed time to infer the impact of downward trends in prices and the possible effect on the relationship between the partial and final payments to producers.

With regard to Leprino's concern about uniformity of partial payment rates between orders, the current milk orders have a variety of partial payment rates. Several orders use a partial payment rate based on a percent of the previous month's blend price, and the Florida order, for example, provides for two partial payments. Additionally, the Western and Arizona-Las Vegas orders, both of which pool significant volumes of milk used in cheese, provide for partial payment rates of 120 and 130 percent, respectively, of the previous month's lowest class price.

There may be times when the rate of partial payment exceeds the balance due for the month. In this regard, handler interests point to this outcome as requiring them to pay more for milk for part of the month than its actual value for the month. It is appropriate to note that this exact outcome occurred several times during the pre-reform 36-month period used by DFA. Thus, it is determined that the concerns of handlers in this regard are unpersuasive.

The DFA witness noted that deductions authorized by producers are normally made in the final payments for milk. There could be times when the amount deducted from the final payment exceeds the amount of the final payment. If the deductions are high enough for this to happen, it would be reasonable to conclude that producers desiring to even out their cash flow would opt to allow a portion of their deductions to be made with receipt of the partial payment, as the order allows.

The partial payment provision in Federal orders is a minimum requirement placed on handlers to pay producers for milk delivered. It is important to note that cooperatives and handlers are not restricted to paying only one partial payment at the rate specified in the order; partial payments for milk can be made more often. Additionally, cooperatives and handlers are also at liberty to negotiate agreements for more frequent billings for milk and in payments for milk above the minimum established by the order. As made evident by the record, more

flexible partial payment options are available to both producers and handlers than relying solely on changing the minimum payment provision.

As the Leprino witness noted, DFA's proposal does not incorporate or blend the higher-valued uses of milk in their analysis. In response to this observation, the Department compared the relationships between the partial and total payment using 90 percent of the previous month's Mideast blend price. Interestingly, if the desired objective is to more closely approximate the partial payment rate using the 36-month period before order reform, a 90 percent rate of the previous month's blend price seems to accomplish this. Nevertheless, the same limitations and concerns mentioned above prevent a finding that the Mideast order's rate for partial payment should be increased.

This decision finds general agreement with the Handlers' opinion that the cash flow concerns of producers would be better served by the adoption of other proposals considered in this proceeding. Other amendments adopted in this decision affecting the pooling of milk in the Mideast order will likely end the unnecessary erosion in the blend price received by Mideast producers. Higher expected blend prices will result from more accurately identifying those producers and the milk of those producers who actually serve the Class I needs of the market. Similarly, the relationship between the partial payment and the total price received by producers may change by the adoption of these pooling standard amendments. Accordingly, a finding that the rate of partial payment to producers by handlers should be increased is not supported by the evidence contained in the record of this proceeding.

### 3. Conforming Changes

One conforming change is made to the pool plant definition of the order. Words to implement the consolidated order were needed when the order first became effective on January 1, 2000. Since the order has become effective such wording is no longer needed to effectuate the implementation of the order. The removal of the wording presented below is self explanatory.

### 4. Emergency Marketing Conditions

Evidence presented at the hearing establishes that the pooling standards of the Mideast order are inadequate and result in the erosion of the blend price received by producers who are serving the Class I needs of the market and should be changed on an emergency basis. The unwarranted erosion of such

producers' blend price stems from improper performance standards as they relate to pool supply plants and the lack of diversion limits for pool plant diversions to pool and nonpool plants. These shortcomings of the pooling provisions have allowed milk to be pooled on the order that does not provide a reasonable or consistent service to meeting the needs of the Class I market as a standard for enjoying the pricing benefits arising from Class I sales in the Mideast marketing area. Consequently, it is determined that emergency marketing conditions exist and the issuance of a recommended decision is therefore being omitted. The record clearly establishes a basis as noted above for amending the order on an interim basis and the opportunity to file written exceptions to the proposed amended order remains.

In view of this situation, an interim final rule amending the order will be issued as soon as the procedures are completed to determine the approval of producers.

### Rulings on Proposed Findings and Conclusions

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

### General Findings

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

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

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the interim marketing agreement and the order, as hereby proposed to be amended, are

such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

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

### Interim Marketing Agreement and Interim Order Amending the Order

Annexed hereto and made a part hereof are two documents, an Interim Marketing Agreement regulating the handling of milk, and an Interim Order amending the order regulating the handling of milk in the Mideast marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire tentative decision and the interim order and the interim marketing agreement annexed hereto be published in the **Federal Register**.

### Determination of Producer Approval and Representative Period

The month of October, 2001 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Mideast marketing area is approved or favored by producers, as defined under the terms of the order as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

It is hereby directed that a referendum be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300-311), to determine whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Mideast marketing area is approved by producers, as defined under the terms of the order (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

The representative period for the conduct of such referendum is hereby determined to be October, 2001.

The agent of the Department to conduct such referendum is hereby

designated to be David Z. Walker,  
Market Administrator.

### List of Subjects in 7 CFR Part 1033

Milk marketing orders.

Dated: June 4, 2002.

A.J. Yates,

Administrator, Agricultural Marketing  
Service.

### Interim Order Amending the Order Regulating the Handling of Milk in the Mideast Marketing Area

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

#### Findings and Determinations

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

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

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

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

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

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

#### Order Relative to Handling

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

The authority citation for 7 CFR part 1033 continues to read as follows:

Authority: 7 U.S.C. 601–674.

#### PART 1033—MILK IN THE MIDEAST MARKETING AREA

1. Section 1033.7 is amended by revising “; and” at the end of paragraph (c)(1)(iii) to read “.”, removing paragraph (c)(1)(iv), revising paragraphs (c)(2), (c)(4), and (d)(2), removing the words “or its predecessor orders” in paragraph (e) introductory text, and removing paragraph (h)(7) to read as follows:

##### § 1033.7 Pool plant.

\* \* \* \* \*

(c) \* \* \*

(2) The operator of a supply plant located within the marketing area may include deliveries to pool distributing plants directly from farms of producers pursuant to § 1033.13(c) as up to 90 percent of the supply plant’s qualifying shipments. Handlers may not use shipments pursuant to § 1033.13(c) to qualify plants located outside the marketing area.

\* \* \* \* \*

(4) Shipments used in determining qualifying percentages shall be milk transferred or diverted and physically received by pool distributing plants, less any transfers or diversions of bulk fluid milk products from such pool distributing plants.

\* \* \* \* \*

(d) \* \* \*

(2) The 30 percent delivery requirement may be met for the current month or it may be met on the basis of deliveries during the preceding 12-month period ending with the current month. Shipments used in determining qualifying shipments in meeting this 30 percent delivery requirement shall be milk transferred or diverted and physically received by pool distributing plants, less any transfers or diversions of bulk fluid milk products from such pool distributing plants.

\* \* \* \* \*

2. Section 1033.13 is amended by revising paragraph (d)(2), re-designating paragraphs (d)(3) through (d)(6) as paragraphs (d)(4) through (d)(7), adding a new paragraph (d)(3), and revising newly redesignated paragraph (d)(4) to read as follows:

##### § 1033.13 Producer milk.

\* \* \* \* \*

(d) \* \* \*

(2) The equivalent of at least two days’ milk production is caused by the handler to be physically received at a pool plant in each of the months of August through November;

(3) The equivalent of at least two days’ milk production is caused by the handler to be physically received at a pool plant in each of the months of December through July if the requirement of paragraph (d)(2) of this section in each of the prior months of August through November are not met, except in the case of a dairy farmer who marketed no Grade A milk during each of the prior months of August through November.

(4) Of the total quantity of producer milk received during the month (including diversions but excluding the quantity of producer milk received from a handler described in § 1000.9(c) or which is diverted to another pool plant), the handler diverted to nonpool plants not more than 60 percent in each of the months of August through February and 70 percent in each of the months of March through July.

\* \* \* \* \*

#### Marketing Agreement Regulating the Handling of Milk in the Mideast Marketing Area

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

I. The findings and determinations, order relative to handling, and the provisions of §§ 1033.1 to 1033.86 all inclusive, of the order regulating the handling of milk in the Mideast marketing area (7 CFR 1033 which is annexed hereto); and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of October, 2001, \_\_\_\_\_ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

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

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

Signature \_\_\_\_\_

By (Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Address) \_\_\_\_\_

(Seal) \_\_\_\_\_

Attest \_\_\_\_\_

[FR Doc. 02-14455 Filed 6-10-02; 8:45 am]

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Parts 550 and 551

[No. 2002-22]

RIN 1550-AB49

#### Recordkeeping and Confirmation Requirements for Securities Transactions; Fiduciary Powers of Savings Associations

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of Thrift Supervision (OTS) is proposing new regulations specifying the recordkeeping and confirmation requirements for savings associations that effect securities transactions. Under a recent rule issued by the Securities and Exchange Commission (SEC), savings associations may perform certain broker-dealer activities without registering with the SEC. Today's proposal affords savings association customers the same protections and disclosures provided to bank customers; ensures that examiners will be able to evaluate a savings association's compliance with securities laws and to assess whether savings associations effect securities transactions safely and soundly; and provides savings associations with formal guidance for effecting securities transactions.

OTS also is proposing to amend its regulations governing the fiduciary powers of federal savings associations. The proposed amendments codify a series of OTS legal opinions regarding the fiduciary powers of federal savings associations. This action is consistent with the Office of the Comptroller of the Currency's (OCC) recent codification of a similar series of legal opinions regarding the fiduciary powers of national banks. The rule would also streamline application procedures,

clarify when a federal savings association may act in a fiduciary capacity without obtaining fiduciary powers from OTS, and make other minor or technical changes to OTS's fiduciary powers regulations.

**DATES:** Comments must be received on or before August 12, 2002.

**ADDRESSES: Mail:** Send comments to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: Docket No. 2002-22. Commenters should be aware that there have been some unpredictable and lengthy delays in postal deliveries to the Washington, DC area in recent weeks and may prefer to make their comments via facsimile, e-mail, or hand delivery.

**Delivery:** Hand deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9:00 a.m. to 4:00 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Docket No. 2002-22.

**Facsimiles:** Send facsimile transmissions to FAX Number (202) 906-6518, Attention: Docket No. 2002-22.

**E-Mail:** Send e-mails to [regs.comments@ots.treas.gov](mailto:regs.comments@ots.treas.gov), Attention: Docket No. 2002-22, and include your name and telephone number.

**Availability of comments:** OTS will post comments and the related index on the OTS Internet Site at [www.ots.treas.gov](http://www.ots.treas.gov). In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906-7755. (Please identify the materials you would like to inspect to assist us in serving you.) We schedule appointments on business days between 10:00 a.m. and 4:00 p.m. In most cases, appointments will be available the business day after the date we receive a request.

**FOR FURTHER INFORMATION CONTACT:** Timothy P. Leary, Counsel (Banking & Finance), (202) 906-7170, Regulations and Legislation Division, or Kevin Corcoran, Assistant Chief Counsel, (202) 906-6962, Business Transactions Division, Office of the Chief Counsel; or Judith McCormick, Trust Specialist, (202) 906-5636, Examination Policy Division, Office of Supervision, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

## I. Discussion

### A. Recordkeeping and Confirmation Requirements for Securities Transactions

Until recently, savings associations could not effect securities transactions for customers directly unless they registered with the SEC as a broker-dealer. Under an interim final rule issued by the SEC, savings associations are now treated as banks under the definitions of "broker" and "dealer" in sections 3(a)(4) and (a)(5) of the Securities Exchange Act of 1934 (Exchange Act). 66 FR 27760 (May 18, 2001).<sup>1</sup> As a result, a savings association may perform certain broker-dealer activities without registering with the SEC as broker-dealers.

The OCC, Federal Deposit Insurance Corporation (FDIC), and Federal Reserve Board (FRB) regulations include recordkeeping and confirmation requirements for securities transactions effected by banks. Until the recent SEC rule, OTS did not need similar requirements. Today's proposal affords savings association customers the same protections and disclosures provided to bank customers. Proposed part 551 establishes recordkeeping and confirmation requirements for a savings association that effects securities transactions. Proposed part 551 is based on the recordkeeping and confirmation requirements of the other federal banking agencies.<sup>2</sup> Where appropriate, however, OTS has modified the proposed requirements to reflect SEC regulatory requirements for registered broker-dealers. A section-by-section description of the proposed recordkeeping and confirmation regulations follows.

#### What Does This Part Do? (Proposed § 551.10)

Proposed § 551.10 states that part 551 establishes recordkeeping and confirmation requirements for a savings association that effects securities transactions for customers. The new part would apply to all savings associations.

#### Must I Comply With This Part? (Proposed § 551.20)

Proposed § 551.20 sets out the scope of part 551. Generally, any savings

<sup>1</sup> The SEC recently extended until May 12, 2003 the savings association exemption from the definition of "broker" under the Exchange Act, and extended until November 12, 2002 the savings association exemption from the definition of "dealer" under the Exchange Act. SEC Release No. 34-45897 (May 8, 2002); see also SEC Release No. 34-44570 (July 18, 2001).

<sup>2</sup> See 12 CFR part 12 (2001) (OCC); 12 CFR 208.24 (2001) (FRB); 12 CFR part 344 (2001) (FDIC).