

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

USDA
CALJ/HCO
2000 DEC 18 P 4: 29

In re:)
Milk in the Northeast and)
Other Marketing Areas)
)

Docket Nos. AO 14-A69, et al.; DA-00-03

RECEIVED

**EMERGENCY MOTION OF THE NATIONAL CHEESE INSTITUTE FOR
THE ISSUANCE OF AN ORDER STAYING THE IMPLEMENTATION OF
THAT PORTION OF THE TENTATIVE FINAL DECISION THAT
PROVIDES FOR A SEPARATE CLASS III BUTTERFAT PRICE**

On December 7, 2000, the United States Department of Agriculture published in the Federal Register a "Tentative Final Decision" implementing, as of January 1, 2001, several amendments to the Class III and IV pricing formulas in all federal milk orders. See 65 Fed. Reg. 76832-61. That tentative final decision follows hearings held May 8-12, 2000, to consider a number of proposed amendments previously submitted for consideration by interested parties.

Recognizing that the participants in the May 2000 hearings had not been afforded the normal opportunity to comment on these amendments in the form of a recommended decision, USDA described its December 7, 2000, decision as "tentative," and provided an opportunity for interested parties to submit comments on the changes by February 5, 2001. After a review of these comments, USDA will proceed to determine which of the amendments it has tentatively adopted should be made final, which should be modified or rejected, and which proposed amendments that were not adopted as part of the interim

final decision should be implemented. In all events, ample notice will be provided prior to the effective date of the final decision.

The National Cheese Institute (NCI) is a trade association with over 75 member companies, which manufacture more than 80% of the cheese consumed in the United States. NCI and its member companies participated extensively in the May 2000 hearings, and will be submitting comments by the February 5, 2000, deadline regarding both the amendments that were adopted and others that were considered but not made in the tentative decision.

The purpose of the instant filing is not to provide such comments, but rather to urge USDA in the strongest terms to issue an immediate order staying the implementation of that portion of the tentative final decision that provides for a separate Class III butterfat price, pending the receipt of all interested parties' comments and a final determination by USDA whether implementation of that amendment is appropriate. The reasons why a stay is necessary are as follows:

1. The new Class III butterfat price formula, and resulting changes to the Class III protein price formula, are of tremendous concern to NCI and its members. By USDA's own analysis, the Class III butterfat price would have been 46.51 cents per pound higher for the 22-month period analyzed in the tentative decision. We calculate that the Class III butterfat price per pound under the tentative decision would have been 33% higher for the period January through October 2000, while the Class III skim price per cwt would have been 23% lower. (See Attachment 2).

2. Since milk is almost never sold with exactly 3.5% butterfat and 96.5% skim, the value of milk inputs at the minimum federal order prices will be substantially different depending on both the component levels in the producer milk and the component profiles of the end Class III product. For instance, at the Federal standard of identity for cream cheese of 33% butterfat and 12% nonfat solids, the tentative decision increases the dairy ingredient cost at the Federal order minimum price by an enormous amount-- 23% had the change been in effect for the first 10 months of 2000. (See Attachment 2). Other Class III products, such as processed cheese, also will see significantly higher ingredient costs at the Federal order minimum prices in the tentative decision.

3. Under this tentative decision, the value of cream at the federal order minimum price will, for the first time, be significantly different depending whether that cream is used in Class III or in Class II or Class IV products. So far in 2000, the value of cream at the federal order minimum price has been nearly the same for Class III and IV, and only slightly higher for Class II (0.7 cents per pound of butterfat higher). In fact, cream used in Class III was valued 2% less at the federal order minimum price on average so far in 2000 than cream used in Class IV. (See Attachments 2 and 3). But under the tentative decision, the same Class III cream would have been valued 26% higher at the federal order minimum prices than Class IV cream. *Id.* This has tremendous implications for the marketing of cream -- up until now, the value of cream at the minimum federal order price differed very little depending upon which class the cream was used in. Under the tentative decision, this is no longer true.

4. The tentative decision's new Class III product price formulas will introduce a tremendous misalignment between milk and dairy product manufacturers regulated by federal orders and those subject to the equivalent Class III component prices in the California state order program. Cream cheese and processed cheese are Class 4b products in California, and the California Class 4b price is already lower than the federal Class III price. The creation of a separate, and substantially higher, federal order price for butterfat in Class III products completely skews the competitive balance between federal order and California handlers.

5. The dairy industry simply has not had sufficient time to adjust to a change of the magnitude resulting from the adoption of a separate Class III butterfat price. Producers and processors normally obtain an initial understanding of USDA's intentions through its publication of a recommended decision, and the final decision, promulgated after the receipt and consideration of any objections to the recommended decision, is normally published sufficiently in advance of implementation as to provide ample time for the industry to adjust to the new price regulations. Here, however, the tentative final decision was published less than four weeks before implementation, far too little time for individual companies to assess the impact of the changes and make such adjustments in their operations as were required. We would note that USDA missed by nearly a week the congressionally imposed deadline of December 1,

2000 for the publication of the rule in the Federal Register¹, and of course Congress in no way indicated that the decision should not be preceded by the publication of a recommended decision and the receipt of comments.

6. Ample legal authority exists for NCI's request. While Congress required that at least some changes resulting from the May 2000 hearings be implemented by January 1, 2001, it did not require that all such changes be implemented by that time. Indeed, the fact that USDA has solicited comments on the tentative changes necessarily means that the agency recognizes that some changes it did impose by that date may be altered or deleted, and other changes that it did not impose may yet be imposed if the comments demonstrate a valid reason for doing so. Thus, ample flexibility exists for staying the implementation of the separate Class III butterfat price for the time being, while permitting USDA to receive and consider comments on that concept. Moreover, because USDA is engaged in the amendment of existing orders as opposed to the creation of new orders, there is no legal requirement that a producer referendum be conducted, see Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c(19) ("the Secretary may conduct a referendum among producers or processors and in the case of an order *other than an amendment* shall do so")(emphasis added).

7. The justifications for a stay described above are only reinforced by the unusual, at best, manner in which the separate Class III butterfat price was adopted. As required by the AMAA and Administrative Procedure Act, USDA on

¹ See H.R. 3428, Sec. 1(c), adopted by reference in Section 1000(a)(8) of P.L. 106-113.

April 14, 2000 had published in the Federal Register the 32 proposals to be considered during the May hearings, see 65 Fed. Reg. 20094 *et seq.* Not a single one of these proposals had called for the creation of a separate Class III butterfat price. Furthermore, an effort to interject such a proposal at the hearing itself, through the testimony of Dr. Barbano, was explicitly rejected by presiding Administrative Law Judge Hunt because it had not been adequately noticed: "I'm going to rule that Dr. Barbano's pricing formula is not one of the proposals being considered at this hearing. Although there is a lot of testimony and comments on it, this is not a proposal being considered..." (Transcript Of May 10, 2000 Hearing, p. 790). Yet Dr. Barbano was the only witness who presented evidence relating to the creation of a separate Class III butterfat price, and that price as set forth in the tentative final rule reflects in all material respects the very proposal by Dr. Barbano's that the Administrative Law Judge had rejected on procedural grounds.

Leaving aside for purposes of the instant motion the legal implications of these events, the practical effect was that no hearing participant could have anticipated and prepared for the creation of a separate Class III butterfat price as reflected by the tentative decision.

8. The granting of a stay would not negatively impact dairy farmers. To the contrary, the effect would be an increase in the Class III price. NCI only seeks a stay of that part of the tentative decision that dramatically realigns the butterfat and skim values at the Federal order minimum prices for Class III components, specifically the change to value Class III butterfat at the cheese

price. The granting of the stay would have resulted in an increase in the Class III price at 3.5% butterfat for the period January through October 2000 of about 9 cents per cwt. (See Attachment 2). Accordingly, the impact of the stay upon dairy farmers would be positive. While NCI does not support a long-term increase of this magnitude in minimum Class III prices, it is a price worth bearing for the short term given the severe disruptions that would otherwise result from implementation of the tentative decision's change in the Class III butterfat price.

CONCLUSION

For all these reasons, NCI asks that USDA issue an immediate stay of that portion of the tentative final decision that provides for a separate Class III butterfat price. Whether such a separate Class III butterfat price should be established should be deferred to the final decision. The specific federal order language needed to carry out this stay is set forth in Attachment 1 hereto.

Respectfully submitted,



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Attachment 1

CHANGES TO THE TENTATIVE FINAL DECISION NECESSARY TO IMPLEMENT
THE STAY

The following changes should be made to the order language appearing at 53
Fed. Reg. 76852:

1000.50 Class prices, component prices and advanced pricing factors.

Remove the changes made in the tentative decision to the introductory text and
paragraphs (a), (b), (c), (g), (h), (j), (p)(1),

Leave the changes made in the tentative decision to paragraphs (m) and (o),

Do not add the tentative decision paragraph (q)(4), and

Make the following changes to the tentative decision paragraphs (l), (n), and
(q)(3):

(l) **Butterfat price.** The butterfat price per pound, rounded to the nearest
one-hundredth cent, shall be the U.S. average NASS AA Butter survey price
reported by the Department for the month less 11.5 cents, with the result divided
by 0.82.

(n) **Protein Price.** The protein price per pound, rounded to the nearest one-
hundredth cent, shall be computed as follows:

1. Compute a weighted average of the amounts described in paragraphs
(n) (1) (i) and (ii) of this section:

(i) The U.S. average NASS survey price for 40-lb. block cheese reported by
the Department for the month; and

(ii) The U.S. average NASS survey price for 500-pound barrel cheddar
cheese (38 percent moisture) reported by the Department for the month plus 3
cents;

2. Subtract 16.5 cents from the price computed pursuant to paragraph (n)
(1) of this section and multiply the result by 1.405;

3. Add to the amount computed pursuant to paragraph (n) (2) of this
section an amount computed as follows:

(i) Subtract 16.5 cents from the price computed pursuant to paragraph (n)
(1) of this section and multiply the result by 1.582;

(ii) Subtract the butterfat price computed pursuant to paragraph (1) of this
section from the amount computed pursuant to paragraph (n) (3) (i) of this
section; and

(iii) Multiply the amount computed pursuant to paragraph (n) (3) (ii) of this
section by 1.28.

(q)(3) Advanced pricing factors. An advanced butterfat price per pound, rounded to the nearest one-hundredth cent, shall be calculated by computing a weighted average of the 2 most recent U.S. average NASS AA Butter survey prices announced before the 24th day of the month, subtracting 11.5 cents from this average, and dividing the result by 0.82.

In addition, USDA should not make those proposed amendatory changes to the provisions of individual orders regarding payments to farmers that resulted from the provision of a separate butterfat price for Class III.

Class III Under Current Price Formulas

	Butterfat/lb	Skim/cwt	Milk 3.5%BF/cwt	Cream 40% BF/cwt	Cream Cheese/lb
January	0.9366	7.02	10.05	41.68	0.4027
February	0.9588	6.41	9.54	42.20	0.4019
March	1.0191	6.19	9.54	44.48	0.4188
April	1.1352	5.63	9.41	48.79	0.4497
May	1.2854	5.05	9.37	54.45	0.4915
June	1.4128	4.68	9.46	59.32	0.5286
July	1.2691	6.44	10.66	54.63	0.5047
August	1.2659	5.91	10.13	54.18	0.4965
September	1.2707	6.54	10.76	54.75	0.5065
October	1.2444	5.87	10.02	53.30	0.4889
Averages	1.1798	5.97	9.89	50.78	0.4690

Class III Under Tentative Decision Price Formulas

	Butterfat/lb	Skim/cwt	Milk 3.5%BF/cwt	Cream 40% BF/cwt	Cream Cheese/lb
January	1.5793	4.63	10.00	65.95	0.5829
February	1.5065	4.38	9.50	62.89	0.5555
March	1.5115	4.39	9.53	63.09	0.5573
April	1.4978	4.35	9.44	62.52	0.5523
May	1.5007	4.35	9.45	62.64	0.5532
June	1.5196	4.42	9.58	63.44	0.5604
July	1.6851	4.95	10.67	70.37	0.6221
August	1.5995	4.73	10.16	66.82	0.5909
September	1.7037	4.97	10.76	71.13	0.6285
October	1.5904	4.64	10.04	66.40	0.5867
Averages	1.5694	4.58	9.91	65.53	0.5790

Compared to Current Pricing	0.3896	-1.39	0.02	14.75	0.11
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Class III Under Amended Tentative Decision Price Formulas

	Butterfat/lb	Skim/cwt	Milk 3.5%BF/cwt	Cream 40% BF/cwt	Cream Cheese/lb
January	0.9354	7.14	10.16	41.70	0.4039
February	0.9576	6.53	9.65	42.22	0.4031
March	1.0179	6.32	9.66	44.51	0.4202
April	1.1340	5.75	9.52	48.81	0.4509
May	1.2841	5.17	9.48	54.47	0.4927
June	1.4116	4.82	9.59	59.36	0.5301
July	1.2679	6.57	10.78	54.66	0.5060
August	1.2646	6.02	10.24	54.20	0.4976
September	1.2695	6.65	10.86	54.77	0.5076
October	1.2432	5.98	10.12	53.32	0.4900
Averages	1.1786	6.10	10.01	50.80	0.4702

Compared to Current Pricing	0.00	0.12	0.11	0.02	0.00
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Compared to Tentative Decision	-0.3908	1.51	0.09	-14.72	-0.11
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Monthly Wholesale Dairy Product Prices

	Butter	Nonfat Dry Milk	Cheese (39% moisture)	Cheese (38% moisture)	Dry Whey
January	0.8820	1.0115	1.1517	1.1633	0.1857
February	0.9002	1.0106	1.1067	1.1173	0.1788
March	0.9497	1.0094	1.1093	1.1204	0.1780
April	1.0449	1.0078	1.1011	1.1117	0.1765
May	1.1680	1.0071	1.1022	1.1136	0.1760
June	1.2725	1.0097	1.1137	1.1255	0.1794
July	1.1547	1.0102	1.2189	1.2302	0.1909
August	1.1520	1.0108	1.1660	1.1761	0.1929
September	1.1560	1.0166	1.2315	1.2419	0.1856
October	1.1344	1.0127	1.1602	1.1703	0.1826
Averages	1.0814	1.0106	1.1461	1.1570	0.1826

Class IV Under Current Price Formulas

	Butterfat/lb	Skim/cwt	Milk 3.5%BF/cwt	Cream 40% BF/cwt
January	0.9366	7.72	10.73	42.10
February	0.9588	7.71	10.80	42.98
March	1.0191	7.70	11.00	45.38
April	1.1352	7.68	11.38	50.02
May	1.2854	7.68	11.91	56.02
June	1.4128	7.70	12.38	61.13
July	1.2691	7.70	11.87	55.38
August	1.2659	7.71	11.87	55.26
September	1.2707	7.76	11.94	55.48
October	1.2444	7.73	11.81	54.41
Averages	1.1798	7.71	11.57	51.82

Class IV Under Tentative Decision Price Formulas

	Butterfat/lb	Skim/cwt	Milk 3.5%BF/cwt	Cream 40% BF/cwt
January	0.9354	7.84	10.84	42.12
February	0.9576	7.84	10.92	43.01
March	1.0179	7.82	11.11	45.41
April	1.134	7.81	11.51	50.05
May	1.2841	7.80	12.02	56.04
June	1.4116	7.83	12.50	61.16
July	1.2679	7.83	11.99	55.41
August	1.2646	7.84	11.99	55.29
September	1.2695	7.89	12.06	55.51
October	1.2432	7.85	11.93	54.44
Averages	1.1786	7.84	11.69	51.84
Compared to Current Pricing	-0.0012	0.13	0.12	0.03

CERTIFICATE OF SERVICE

I certify that I have this 18th day of December, 2000 served the foregoing Emergency Motion Of The National Cheese Institute For The Issuance Of An Order Staying The Implementation Of That Portion Of The Tentative Final Decision That Provides For A Separate Class III Butterfat Price on the following individuals by the method indicated:

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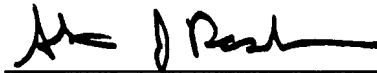
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