

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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IN RE: MILK IN THE NORTHEAST )  
AND OTHER MARKETING AREAS; )  
HEARING ON CLASS III AND IV )  
MILK PRICING FORMULAS )  
\_\_\_\_\_)

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

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**Comments on the Secretary's Tentative Final Decision  
on Behalf of Suiza Foods Corporation**

Suiza Foods Corporation files these comments for the purpose of challenging the propriety and legality of that portion of the Secretary of Agriculture's Tentative Final Decision establishing a separate butterfat price for Class III. *See* 65 Fed. Reg. 76831 *et seq.* (December 7, 2000) ("Tentative Decision"). The Tentative Decision fails to address the concerns raised by Suiza during the hearing, and instead alters the Class III butterfat and protein pricing formulas in a way that will actually exacerbate disorderly marketing, and negatively affect Suiza. The butterfat portion of the Tentative Decision also will cause widespread harm to dairy farmers, manufacturers, and processors alike. Accordingly, Suiza also joins in filing "Unified Comments on Class III Butterfat and Protein Pricing Formulas."

**Substantive Flaws in the Secretary's Decision**

During the rule-making hearing, Suiza presented evidence in support of a proposal to adjust the butterfat price used in the Class III and IV price formulas to reflect Grade A prices, rather than Grade AA prices. Suiza advocated this proposal because it believed the adjustment was necessary to return the classified price system to market-clearing levels. At the same time, however, Suiza made clear that if faced with a choice between living with the existing rule and solving the problem only as to Class IV, Suiza would opt to avoid disorderly marketing conditions and prefer to live with the existing rule. The danger and uncertainty associated with

creating different butterfat prices for different classes would be far worse than living with artificially enhanced minimum prices. Tr. 801; Tr. 1364, lines 18-21.

While Suiza respectfully disagrees with the Secretary's decision not to adjust the butterfat price in Classes II, III, and IV to reflect the Grade A butter price, Suiza's opposition to a partial fix being applied only to Class IV is highly relevant to the issue of establishing a separate butterfat price for Class III. During the hearing and in the post-hearing brief, Suiza specifically opposed a proposal that would have lowered the butterfat price for Class IV relative to Class II and III. Tr. 797, lines 24-25, Tr. 798, lines 1-2. Such a scenario would create a cost difference between loads of cream intended for Class II and III, on the one hand, and Class IV on the other hand. Tr. 800, lines 15-17. A reduction in the Class IV butterfat price would create a cost advantage to those processors selling cream to Class IV buyers, and therefore induce cream sellers to seek out Class IV outlets to the exclusion of Class II and III operations. Tr. 1335, lines 19-24. Such a supply response would impact decisions by Class II and III processors, who for example, might be forced to seek alternatives to cream such as anhydrous fat, or who might look to California to meet their cream needs. Tr. 1336, lines 1-15; Tr. 1382, lines 5-12.

The Secretary's tentative decision to adopt a separate butterfat price for Class III threatens to create the very disorderly marketing conditions Suiza opposed. According to the Secretary's own analysis of the Tentative Decision, the change in the Class III butterfat price calculation would make the regulated cost of Class III butterfat substantially higher than the regulated cost of Class IV butterfat (*e.g.*, Class III butterfat would have been 46.51 cents per pound higher for the 22-month period analyzed in the decision). 65 Fed Reg. 76848. Thus, similar to the situation with which Suiza was concerned, the Tentative Decision would create a lower butterfat price for Class IV (and Class II) than for Class III.

The Tentative Decision will make the problem of disorderly marketing conditions worse than was discussed by those who previously opposed a different butterfat price for Class IV. Not only will the Tentative Decision alter market decisions based solely on regulation, but also, under the Tentative Decision, cream sellers will be unable to know, and therefore unable to factor into their pricing decisions, the cost wedge created by the different butterfat price for Class III. At least under the proposal to establish a six-cent lower Class IV butterfat price, processors would have been able to gauge the full extent of the cost wedge, and would know the extent of any disadvantage for which to adjust. However, the Tentative Decision places processors in the untenable situation of not knowing the extent of the cost wedge until approximately one month after they have been forced to price their cream. Processors will be completely unable to adjust their pricing decisions, thereby exacerbating the problem.

#### **Procedural Flaws in the Secretary's Decision**

There are two significant procedural flaws in the establishment of a separate butterfat price for Class III. First, the decision represents a departure from decades of precedent maintaining a uniform butterfat price for all classes. Significantly, the decision also represents a departure from the most recent position taken by the Secretary, wherein the Secretary opted not to establish a separate Class III butterfat price reasoning as follows:

An alternative to incorporating the butterfat value in cheese with the protein price is to compute a separate butterfat price for Class III. This would be a relatively simple formula to compute. However, having multiple butterfat prices would require full plant accountability of components in all manufacturing plants. The resulting increased accounting, reporting, and administrative costs were determined to not be warranted when viewed against the small gain from having an additional butterfat price. *Milk in New England, Proposed Rule*, 64 Fed. Reg. 16099 (April 2, 1999).

According to the precedent of *Motor Vehicle Manufacturers Association v. State Farm*, an agency changing its course is subject to a heightened standard of scrutiny and must, for instance,

take special care to establish how the rulemaking record supports the departure. 463 U.S. 29, 41-42 (1983). The Secretary has not adequately demonstrated how the circumstances have changed so much in the intervening 21 months so that the gains from establishing a separate Class III butterfat price now outweigh the adverse consequences associated with such a change. In particular, the Secretary does not address the “resulting increased accounting, reporting, and administrative costs” with which the Department was so concerned. *See* 65 Fed. Reg. 76486. The very fact that processors and manufacturers are unified in their stance against adoption of a separate Class III butterfat price, when such a decision would result in lower Class III minimum prices on average, and lower Class I prices when Class III becomes the mover, is an indication that the “accounting, reporting and administrative costs” associated with the separate butterfat price remain substantial. *See* Unified Comments on Class III Butterfat and Pricing Formulas.

Moreover, the Secretary cannot very well have satisfied the *Motor Vehicle Manufacturers* requirement of reliance on the rulemaking record since such a proposal was not received into the record and thus was not given due consideration by the industry. The absence of such a specifically enumerated proposal in the record is the second procedural problem with the Secretary’s Tentative Decision as it relates to Class III butterfat. The Agriculture Marketing Agreement Act of 1937 (“AMAA”) requires that the Secretary give interested parties notice and an opportunity to be heard on proposed amendments to Federal Milk Marketing Orders. *See* 7 U.S.C. § 608c(3); *see also* 7 C.F.R. § 900.1(j). Establishing a separate butterfat price for Class III was not among any of the specifically noticed proposals. *See* 65 Fed. Reg. 20094 *et seq.* (April 14, 2000). Though the Administrative Law Judge (ALJ) admitted testimony that related to the establishment of a separate butterfat price for Class III, the testimony was admitted for the limited purpose of providing information relating to issues within the scope of the hearing. Tr.

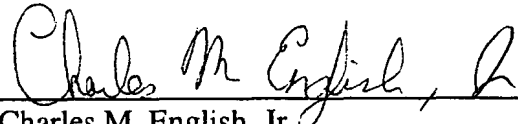
512, lines 7-18. The presiding ALJ expressly excluded consideration of the witness' proposal as outside the scope of the hearing notice. Tr. 790. Moreover, the ALJ charged the Secretary with the responsibility of disregarding those portions of the witness' testimony that were not within the scope of the hearing. Tr. 512. By relying on portions of the witness' testimony as support for his decision to adopt a separate Class III butterfat price, the Secretary violated the ALJ's order and the mandate of the AMAA.

In that regard, this rule-making proceeding raises the specter that industry participants may feel alienated from the process in the future. Notwithstanding the Secretary's good intentions, the decision to alter the Class III butterfat and protein pricing formulas, the Secretary adopted a proposal that was not noticed prior to the hearing and which was ruled not within the scope of the hearing by the Secretary's own representatives. As a result, the industry did not have an opportunity to fully analyze and comment on it.

Further, the Tentative Decision suggests a disregard for evidence presented by some parties. For example, the Secretary said: "Any means of reducing Class I prices to handlers should meet with the approval of these [fluid] processors, regardless of the economic merits of the proposal." *See e.g.*, 65 Fed. Reg. 76849. This statement is troublesome since the Federal Milk Marketing Order program necessarily impacts the economic interests of all industry participants, all of whom provide evidence regarding their own economic interests. However, a valid position taken by a participant should not be undervalued simply because adoption of a proposal may provide economic benefit to that entity. Nor is the assumption in the above-referenced quote valid as is evidenced by the fact that Suiza, together with other processors, takes exception to USDA's separate Class III butterfat price even though they will end up paying more under the old rule. Finally, without full industry participation and evidence regarding the

economic impacts on all members of the industry, the Secretary would be impaired in his ability to balance these interests and achieve a just result.

Respectfully submitted,

A handwritten signature in cursive script that reads "Charles M. English, Jr." is written over a horizontal line.

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