UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:	
MILK IN THE NORTHEAST AND	
OTHER MARKETING AREAS;	**Dockets: AO-14-A77**
Class III/IV PRICING FORMULAS	**DA-07-02**
72 Fed. Reg. 6179 (Feb. 7, 2007), and	
72 Fed. Reg. 7753 (Feb. 20, 2007	

POST-HEARING BRIEF OF TWIN COUNTY DAIRY, INC.

Twin County Dairy submits this brief in support of proposals of IDFA and the Cooperatives (Agri-Mark, Land O'Lakes, etc.) who request USDA to restore a reasonable margin between commodity cheese prices and regulated Class III prices.

Twin County is a small business in Kalona, Iowa, with 55 employees (Roetlin, Tr. 1400). Twin County makes commodity cheddar cheese in 500 pound barrels, with an annual production volume of about 40 million pounds (Tr. 1403, 1417-18). Twin County receives federally pooled Class III producer milk from about 350-400 farmer-members of midwest dairy cooperatives, and serves to balance the local markets (Tr. 1407-09). To improve product yields, the plant fortifies the cheese vat with cream and with NFDM, depending upon composition of producer milk. With fortification, the plant realizes cheese yields of 10 pounds cheese per hundredweight vat ingredients, subject to seasonality (Tr. 1417-18). Twin County has made recent investments in its operations, including whey processing equipment to produce whey protein concentrate, but does not make whey powder (Tr. 1403-06). The plant's whey cream by product is sold at a discount below fresh cream prices, to a limited number of buyers (Tr. 411-12).

Twin County's operations, in other words, are prototypical of the kind of plant for which the FMMO Class III product price formula was developed in the course of Federal Milk Order Reform, to replace M-W and BFP competitive price measures for the value of producer milk used in cheese through 1999. Twin County's woes are also typical of cheddar cheese manufactures represented by IDFA and the cooperatives who have struggled to recover costs since 1999.

The fact is, Twin County operated its cheese plant profitability in every year during the decade before Federal Order Reform, 1990 – 1999. Since Federal Order reform, it has seen a profit, and a small profit at that, in only two years, 2000 and 2003. The difference between profit and loss before and after 2000 has been federal milk order Class III pricing. The company's losses are escalating, and severely aggravated by the way USDA prices whey, and attributes phantom whey

revenue to many cheese plants (Tr. 1399-1406).

Twin County adopts the Class IIII pricing arguments in briefs of IDFA and the Agri-Mark group, except to state that their solutions do not seem to go far enough for a medium-sized commodity cheddar plant like Twin County's.

Twin County understands that USDA has an obligation to assess whether its proposed rules have a special burden on small businesses, and whether there are alternatives that will relieve that burden. It is clear to Twin County that a "make allowance" or other component of the regulated plant margin designed to fit very large cheese plants, with lower costs due to economies of scale, will create a special burden on small business cheese plants like ours. The large plants may operate at a small profit. The small plants, like Twin County's, are virtually guaranteed a loss. The alternative solution, of course, is to design the Class III price and imputed margin, to produce a better fit with smaller plants.

In the prior "make allowance" decision of 2006, USDA concluded that a Regulatory Impact Analysis was not required because the same allowance applied to plants large and small. That, however, is not the point of the Regulatory Flexibility Act.

A February 2005 report to Congress by the Chief Counsel for Advocacy, Small Business Administration, explains agency rulemaking obligations to small businesses under the 1980 Regulatory Flexibility Act (5. U.S.C. §601, et seq.), the 1996 Small Business Regulatory Enforcement Fairness Act (5 U.S.C. § 604), and Executive Order 13272,[1] as follows:

> Before Congress enacted the Regulatory Flexibility Act in 1980, federal agencies did not recognize the pivotal role of small business in an efficient marketplace, nor did they consider the possibility that agency regulations could put small businesses at a competitive disadvantage with large businesses or even constitute a complete barrier to small business market entry. Similarly, agencies did not appreciate that small businesses were restricted in their ability to spread costs over output because of their lower production levels. As a result, *when agencies implemented "one-size-fits-all" regulations, small businesses were placed at a competitive disadvantage with respect to their larger competitors. This problem was exacerbated by the fact that small businesses were also disadvantaged by larger businesses' ability to influence final decisions on regulations*. Large businesses have more resources and can afford to hire staff to monitor proposed regulations to ensure effective input in the regulatory process. As a result, consumers

[1] Executive Order 13272, 67 Fed. Reg. 53461 (Aug. 16, 2002), is not mentioned in the Notice of Hearing. USDA's Office of Budget and Program Analysis' previously adopted specific *Regulatory Decisionmaking Requirements* (Mar. 1997) for USDA agencies' compliance with the RFA, http://www.ocio.usda.gov/directives/files/dr/DR1512-001.pdf.

and competition were undercut while larger companies were rewarded.

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The Small Business Regulatory Enforcement Fairness Act of 1996 amended the RFA in several critical respects. First, the SBREFA amendments to the RFA were specifically designed to ensure meaningful small business input during the earliest stages of the regulatory development process. ****

Most significantly, SBREFA authorized judicial review of agency compliance with the RFA, and strengthened the authority of the SBA's Chief Counsel for Advocacy to file *amicus curiae* briefs in regulatory appeals brought by small entities.

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In 2002, President George W. Bush signed Executive Order 13272, titled "Proper Consideration of Small Entities in Agency Rulemaking." The E.O. requires agencies to place emphasis on the consideration of potential impacts on small entities when promulgating regulations in compliance with the RFA.

The RFA requires each federal agency to review its proposed and final rules to determine if the rules will have a "significant economic impact on a substantial number of small entities." Section 601 of the RFA defines small entities to include small businesses, small organizations, and small governmental jurisdictions. Unless the head of the agency can certify that a proposed rule is not expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) must be prepared and published in the *Federal Register* for public comment. ****

When an agency issues a final rule, it must prepare a final regulatory flexibility analysis (FRFA) unless the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities and provides a statement containing the factual basis for the certification. The final regulatory flexibility analysis must:

- provide a succinct statement of the need for, and objectives of, the rule;

- summarize the issues raised by public comments on the IRFA and the agency's assessment of those issues;

- describe and estimate the number of small entities to which the rule will apply or explain why no such estimate is available;

- describe the compliance requirements of the rule, estimate the classes of entities subject to it and the type of professional skills essential for compliance;

- describe the steps followed by the agency to minimize the economic impact on small entities consistent with the stated objectives of the applicable statutes; and

- give the factual, policy, and legal reasons for selecting the alternative(s) adopted in the final rule, and explain why other alternatives were rejected.

http://www.sba.gov/advo/laws/flex/04regflx.html, Report on the Regulatory Flexibility Act (February 2005, footnotes omitted, italics supplied).

While supporting the IDFA and Cooperatives' efforts to improve the possibility of cost recovery in Class III regulated margins, Twin County believes that USDA can, and should, go farther. Small cheddar plants were not forced to operate at losses by pre-FMMO reform pricing practices. A Regulatory Flexibility Analysis may reveal whether there are options that allow small businesses to survive in the future. A proper analysis will at least explain why, as a matter of dairy policy, the agency may feel obligated by policy or economics to employ requiem prices for small cheddar cheese plants in the future.

Respectfully submitted,

September 14, 2007

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For Twin County Dairy, Inc.