

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: Milk in the Northeast and
 Other marketing areas

AO Docket No. 23-J-0067
AMS-DA-23-0031

**Post Hearing Brief and
Proposed Findings and Conclusions
Submitted by Select Milk Producers, Inc.**

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I. Executive Summary and Introduction.

Select Milk Producers, Inc. (“Select”) thanks the Secretary for conducting this hearing and for noticing Select’s three proposals for consideration. As Select’s witness testified during the hearing, the integrity of the end product pricing regime is essential: “The formulas establishing the minimum prices paid to producers should reflect the current economic realities of producing, transporting, processing, and marketing milk and dairy products.” Tr. at 4343 (Allen, Day 18). “The end product pricing system is intended to construct a series of formulas that allow USDA to ascertain the value of producer milk used to manufacture defined commodities, taking into account the costs to convert milk into finished products and the yields of the products produced.” Tr. at 4343 (Allen, Day 18).

Select believes that “all aspects of the formulas should be reviewed rather than limiting consideration to a small subset of factors” and that “achievable efficiencies should be promoted rather than discouraged.” Tr. at 4343 (Allen, Day 18). Select’s position on the other proposals under consideration reflects this belief, coupled with the Secretary’s stated rationale for the economic and policy considerations reflected in prior decisions regarding pricing formulas and classified pricing.

Select’s philosophy is shared, at least in part, by other hearing participants. National Milk Producers Federation’s (“NMPF”) economist testified that “the whole purpose of end product pricing” is to accurately transfer the price of a product to the components in the product and, ultimately, to a classified price. Tr. at 195-196 (Vitaliano, Day 1). NMPF’s economist appropriately explained that their goal (shared by Select) is to “improve the accuracy” of that “increasingly outdated” process. Tr. at 195-196 (Vitaliano, Day 1). National All Jersey’s (“NAJ”) witness opined that “the crux” of NAJ’s proposal to update the skim milk component factors was “to improve the

accuracy of the pricing formulas used to derive minimum pricing.” Tr. at 535 (Metzger, Day 3). Agri-Mark’s economist replied to a question from the Department about the need to make allowance adjustments by answering, “The importance of these hearings, not only from a Make Allowance perspective but all the other proposals that are being heard as well, the intent of all of these is to derive what a true market value is for milk...and that that market value be part of the regulated price.” Tr. at 3159 (de Ronde, Day 13).

There has been much testimony in this proceeding about whether the adoption of individual proposals or packages of proposals would increase or decrease class prices and producer prices. Those considerations are undoubtedly meaningful. Select believes the Secretary should remain mindful of dramatic increases or decreases in classified or uniform prices. The record is replete with testimony from both producers and handlers on the potential impacts of dramatic price changes. Select shares the concerns of NMPF and IDFA that dramatic increases in make allowances after nearly two decades of static factors could cause significant economic harm to dairy farmers. Tr. at 2432 (Vitaliano, Day 10), Tr. at 4248 (Brown, Day 18). Select is also sensitive to the concerns of handlers, particularly Class I handlers, in that excessive increases in Class I prices could affect the profitability of a sector of the dairy marketplace that has experienced declines in demand.

While the Secretary can and should consider those concerns, he should also recognize that he must ensure formulas that accurately transmit the prices of surveyed commodities to the value of milk produced by dairy farmers. The aggregate price impacts of those proposals ultimately adopted are relevant. Still, each proposal must be viewed and evaluated based on whether it comports with the Secretary’s previously stated policies and rationale and whether it is supported by the realities of milk production and dairy processing today.

Select's proposals are generally expected to increase minimum classified prices. But as Select's witness testified, "increased minimum prices are the result of, and not the impetus for" Select's proposals. Tr. at 4343 (Allen, Day 18). In providing additional context, Select's witness explained:

Precision and accuracy are paramount. Producers and handlers deserve to know that the calculation of the minimum class and component prices utilized the best available data and inherent assumptions for each of the three principal formula elements: Commodity prices, manufacturing allowances, and yields. To accomplish that goal, it is incumbent on USDA to adopt those changes that most closely tie the price discovery mechanisms to the actual conditions of the market for commodities and the processes used to convert raw milk into those commodities.

Tr. at 4344 (Allen, Day 18).

Select urges the Secretary to consider all the proposals in this manner. The federal order system's continued viability is contingent on the extent to which this hearing's outcome reflects the regulated system's ability to accurately determine the value of producer milk by reexamining all aspects of the formulas for which proposals have been noticed.

In developing its proposals and in evaluating the other proposals in this hearing, Select has relied extensively on the Department's prior rationale and policy determinations. Select contends that, on the whole, the policy goals and reasoning expressed in prior decisions should continue to guide the Department as it weighs the testimony and evidence presented in this hearing. Select's conclusions in this brief reflect both the testimony and evidence presented and the Department's stated rationale and policies, most notably those supporting the decisions from Order Reform and subsequent decisions adjusting make allowances and other aspects of the minimum price formulas.

Details on Select's positions and proposed findings and conclusions follow a discussion of the three proposals offered by Select. A summary of all of Select's proposals is appended as Exhibit 1 to this brief.

II. Select's Proposals to Update Certain Yield Factors Should Be Adopted.

A. Proposal 10: Butterfat Recovery.

1. The Department's Previous Statement on Butterfat Recovery.

Select's Proposal 10 would increase the butterfat recovery factor in the Class III price formula to 93%, increasing the butterfat yield in cheese to 1.624. Adoption of Proposal 10 ensures that the protein price accurately encompasses the actual and achievable butterfat recovery of current commodity cheddar cheese manufacturers.¹ Tr. at 4452 (Allen, Day 18). The Department last addressed a proposal to increase the butterfat recovery factor in the 2007 Class III and IV pricing formulas hearing. Then, the Department declined to increase the 90% recovery factor, stating:

While the record contains evidence of what butterfat recovery in cheese production is possible by the use of more modern manufacturing methods and technology, the preponderance of evidence reflects that many cheese manufacturers generally achieve butterfat recovery near 90 percent. It is important that the product-price formulas reflect current market conditions, not market conditions that may be possible but not widely achieved or not reflective of general industry wide conditions. Accordingly, this decision rejects adoption of [a 94% butterfat recovery factor].

Milk in the Northeast and Other Marketing Areas, 73 Fed. Reg. 35306, 35327, June 20, 2008. But testimony in this hearing evidences that higher butterfat recovery is now widely achieved across the industry.

2. Summary of Testimony.

Select presented detailed testimony from its expert witness, Dr. Nana Farkye. Dr. Farkye explained that not only do modern manufacturing methods and technology allow for butterfat recovery at 93% or greater, but such retentions are also achievable by plants using older

¹ This yield factor assumes only the adoption of Proposal 10. As Select discusses each of its Proposals, it will address the changes for each proposal in isolation. The effects of adopting Proposals 10, 11, and 12 will be addressed infra.

technology. Furthermore, Dr. Farkye testified that, in practice, plants are achieving recoveries of 93% or higher.

When discussing butterfat recoveries and cheese yields, we must begin with the Van Slyke formula, which recognized that butterfat recovery of 93% was readily achievable in the late 19th and early 20th centuries. Dr. Farkye explained, “There is an old formula called the Van Slyke and Price cheese yield formula. This formula was developed in 1894 from work done in New York. And this holds true up till today. So, this formula says that for cheese yield, cheddar cheese yield, you are going to retain about 93% of the fat.” Tr. at 4589 (Farkye, Day 19).²

Dr. Farkye further explained how the evolution of cheese vats from open vats to automated vertical agitation (“Double O”) vats to modern horizontal cheese vats has impacted butterfat retention. He explained that Double O vats made it more difficult (although not impossible with careful cheesemaking) to achieve 93% butterfat retention. Dr. Farkye then described how the modern horizontal vats allow for butterfat retention at or above 93%. Tr. 4590-4592 (Farkye, Day 19). He ascribed the improved butterfat retention in horizontal vats to a gentler cutting and agitation action, which allows the curd to heal after cutting, preserving the protein and fat matrix and limiting fat losses. Tr. 4595-4597 (Farkye, Day 19).

Dr. Farkye’s testimony established the following facts:

² Dr. Farkye’s testimony is consistent with that of Dr. David Barbano from the 2000 hearing on Class III formulas:

The values selected for percent fat recovery in the cheese for calculation can be debated. However, a 93 percent fat recovery in the cheese is achievable with modern cheese-making equipment and was achievable in the mid-1890s when Van Slyke developed his cheese yield formula based on observations of cheddar cheese-making practice in many factories in central New York over a two-year period.

Milk in the Northeast and Other Milk Marketing Areas, Transcript, p. 523-24 (May 9, 2000).
<https://www.ams.usda.gov/sites/default/files/media/DYTranscriptMay92000IIIVHearing2000.pdf>.

- Butterfat recovery of 93% was observed by Van Slyke using open vats in the late 19th and early 20th centuries.
- Enclosed Double O vertical vats made it more difficult, although not impossible, to achieve 93% butterfat recovery.
- Average operation of enclosed horizontal vats can achieve butterfat recoveries in excess of 93%.
- Horizontal vats combined with high-performing coagulants and careful attention to cheesemaking, butterfat retention of 97% is achievable.
- The majority of commodity cheddar cheese produced in the United States today is manufactured at plants that can achieve 93% or better butterfat recovery.
- The majority of commodity cheddar cheese plants are capable of achieving 93% butterfat recovery.

Tr. at 4590-4593, 4601, 4603 (Farkye, Day 19).

Dr. Farkye's explanation regarding the transition of cheese manufacturers to horizontal vats and the resulting improvement in butterfat recovery was corroborated by AMPI's witness, who explained that their butterfat recovery has improved since they installed horizontal vats after 2007. Tr. at 2625 (Schlangen, Day 11). AMPI testified that the new horizontal vats came at a cost, which is presumably reflected in the plant costs reported to Dr. Stephenson. Tr. at 2614, 2625 (Schlangen, Day 11). If the Department is going to increase make allowances to reflect additional costs, including plant investment by cheese manufacturers, then it follows that the increased butterfat recovery and yields resulting from those investments should likewise be reflected in the price formulas.

Dr. Farkye’s testimony that cheese plants are actually achieving butterfat recoveries at or above 93% was also supported by Glanbia’s witness, who testified that he believed all of Glanbia’s plants attained that level of butterfat recovery. Tr. at 3769 (DeJong, Day 16). Glanbia is the largest manufacturer of American cheese (including cheddar) in the nation. Tr. at 3742 (DeJong, Day 16).

The principal testimony opposing Proposal 10 was from the Center for Dairy Research (“CDR”), whose witness testified to a range of butterfat recovery of 91%-93% in horizontal vats and 90-92% in Double O vats. (Tr. at 7144, Sommer, Day 29). Ultimately, the witness opined that the average butterfat recovery was 91%, which differed from the opinion of Dr. Lucey, the director of CDR, who opined in 2017 that “typical fat recoveries for cheddar cheese average around 92%.” Tr. 7175, Ex. 308. If typical fat recovery was 92% seven to eight years ago, it is reasonable to expect that efficiencies and technology have increased that figure—as evidenced by the testimony of Dr. Farkye and Glanbia’s witness.

3. Proposed Findings and Conclusions With Respect to Proposal 10.

- a.** The preponderance of evidence establishes that many cheese manufacturers generally achieve butterfat recovery at or above 93%.
- b.** Even with older equipment and technology, most commodity cheddar cheese manufacturers should be capable of achieving 93% butterfat recovery.
- c.** Since the Department last considered the butterfat recovery factor in 2008, 93% butterfat recovery is now widely achieved and reflects industry-wide conditions.
- d.** To ensure that the product-price formulas reflect current market conditions, increasing the formula for the butterfat value in cheese

to 1.624 to account for the actual achieved butterfat recovery of 93% in commodity cheddar manufacturing is appropriate.

B. Proposal 11: Farm-To-Plant Shrink.

1. The Department's Previous Statement on Farm-To-Plant Shrink.

Select's Proposal 11 removes the adjustment for farm-to-plant milk losses in the yield factors for butter, the protein value in cheese, and the butterfat value in cheese. The Department's previous conclusions regarding farm-to-plant losses must be revisited to ensure that dairy farmers are paid for all components delivered to manufacturing plants. The farm-to-plant shrink adjustments do not materially change the yields for nonfat dry milk or whey. The current yield factors incorporate a farm-to-plant loss of 0.25% of all milk solids and an additional 0.015 pounds of butterfat per hundredweight on all milk. These losses are incorporated through reductions in the yield factors for each surveyed commodity. In combination, these two assumptions presume that 0.68% of milk solids are lost between the farm and the plant. Select's data from its milk shipments and milk receipts at its processing plants establish that these factors are incorrect.

If adopted, Proposal 11 would change the yield for butter to 1.22, the yield reflecting the protein value in cheese to 1.386, and the yield reflecting the butterfat value in cheese to 1.582.

As with Proposal 10, Select looked to the Department's previous statements and rationale in developing its proposal to eliminate the adjustments for farm-to-plant shrink. When the Department incorporated a farm-to-plant shrink adjustment into the pricing formulas, it stated, "The loss allowances in the Class III and IV formulas are **intended to reflect actual losses that are beyond the processing handler's ability to control.**" Milk in the Northeast and other Marketing Areas, 67 Fed. Reg. 67906, 67917 (November 7, 2002) (emphasis added) (referred to throughout as the "2002 Final Decision"). The 2002 Final Decision further reasoned, "Comments received on the recommended decision indicated that milk solid losses between the farm and the

receiving plant are real, **unavoidable, and common.**” 67 Fed. Reg at 67,917) (emphasis added).

In further explanation, the Department wrote:

It is **necessary** to include such an adjustment in using end-product pricing formulas for determining component prices. Since the handlers receiving milk from producers pay the producers on the basis of farm weights and tests, handlers do not receive all of the milk components due to farm-to-plant losses. An adjustment to the price formulas to account for the difference in milk components paid for versus components actually received is appropriate.

67 Fed. Reg. at 67,918 (emphasis added).

2. Summary of Testimony.

Select’s witnesses presented evidence about both its milk shipments from its producers and the milk receipts at its processing plants. The testimony of Harmoni Campbell established that Select’s milk shipments realize an average farm-to-plant shrink of 0.07%. Tr. 4394, Ex. 217 (Campbell, Day 18). Similarly, Cheslie Stehouwer’s testimony documented that shrinkage across all deliveries (both from Select producers and other cooperatives and plants) was 0.10% for the Continental Dairy Facilities Southwest plant and 0.15% for the Continental Dairy Facilities plant. Tr. at 4415, Ex. 218 (Stehouwer, Day 18). Together, these analyses establish that the current yield adjustments grossly overstate the milk lost between the farm and the plant.

The testimony from Select’s witnesses also established that where shrink occurs, the issue is not necessarily one beyond the processing handler’s ability to control, nor is it wholly unavoidable. Shrink is often the result of scale calibration issues, whether at the farm or the plant, hauler errors, the use of drop yards or different drivers, and even snow and ice. Tr. at 4415-4417 (Stehouwer, Day 18). Ms. Stehouwer and Steve Cooper also testified that the component tests of milk for protein and butterfat are the same for farm tests and silo tests. Tr. at 4415 (Stehouwer, Day 18), 4442 (Stehouwer, Day 18), 4562 (Cooper, Day 19). That is, to the extent that they occur, milk solids losses occur across all components equally. The CDF plants do not realize butterfat

losses at a rate greater than other components. The Department's assumption that additional butterfat is lost is not borne out by data.

3. Proposed Findings and Conclusions With Respect to Proposal 11.

- a.** Farm-to-plant shrink, except for limited hose losses on transfer, is within the control of the handler and the producer.
- b.** While a minimal amount of milk might be lost in the transfer, the amount and frequency of farm-to-plant losses have decreased to negligible amounts since the Department incorporated a farm-to-plant shrink adjustment in the minimum price formulas.
- c.** The evidence in this proceeding establishes that to the extent that there are minimal solids losses in the shipment of milk from farm to plant, losses of butterfat do not occur at rates greater than those of other components.
- d.** The current price formulas improperly reduce yield factors for non-occurring farm-to-plant shrink. Accordingly, it is appropriate to change the yield for butter to 1.22, the yield reflecting the protein value in cheese to 1.386, and the yield reflecting the butterfat value in cheese to 1.582.

C. Proposal 12: Buttermilk Solids in Class IV Milk.

1. The Department's Previous Statement on Buttermilk Solids in Class IV Milk.

The current formulas for valuing nonfat solids wrongly assume that the nonfat solids used in manufacturing buttermilk powder ("BMP") have no value. As a result, dairy farmers are grossly underpaid for the components delivered to Class IV plants. Select's Proposal 12 changes the yield

factor for NFDM to properly account for the value of milk solids utilized in manufacturing BMP. If adopted, Proposal 12 would correct the yield for NFDM from 0.99 to 1.03. Tr. at 4435 (Allen, Day 18).

Proposal 12, as with Select's other proposals, seeks to update the yield factor based on the Department's previously expressed rationale and current evidence. In the 2002 Final Decision, the Department wholly eliminated the value of nonfat solids that end up in buttermilk powder from the Class IV nonfat solids pricing formula. 67 Fed. Reg. 67906, 67,921-22 (November 7, 2002). This decision was premised on the Department's conclusion that "the effect of including buttermilk powder in the nonfat solids price and the Class IV skim milk price was negligible." 67 Fed. Reg. at 67,921-22. The basis for the Department's conclusion was twofold. First, the price of buttermilk powder was found to be "a low of 70% of the nonfat dry milk price for the same period." 67 Fed. Reg. at 67,921-22. Second, the make allowance for buttermilk powder was found to be two cents higher per pound than that for nonfat dry milk. 67 Fed. Reg. at 67,921-22.

2. Summary of Testimony.

Select's testimony evidences that the value of nonfat solids that end up in buttermilk powder was not "negligible." Chris Allen testified that:

Select sought to restore the proper value of the buttermilk solids in dry buttermilk. To do so we took the calculated quantity of buttermilk solids and multiplied it by 70%, reflecting the Department's conclusion regarding the value of dry buttermilk.

Next, we multiplied that result by 87.5% to account for the higher make costs for buttermilk powder recited by the Department. Next, we took the 0.9975 pounds of nonfat solids and subtracted the 0.0479 pounds of solids in dry buttermilk and restored 0.0293 pounds of those solids based on the calculation above.

Finally, we adjusted the pounds of nonfat solids to the presumed moisture content of 3.8%. That calculation results in a yield of 1.02, not 0.99.

This establishes that the Department's conclusion that the value of buttermilk powder in the nonfat solids price is not "negligible." It has a real impact on the stated yield.

Tr. at 4438, Ex. 219 (Allen, Day 18).

Having established that the nonfat solids in buttermilk powder have a more than negligible value, Select next evaluated whether the Department's prior conclusions regarding (a) the price relationship of buttermilk powder and nonfat dry milk and (b) the cost to manufacture buttermilk powder are still accurate. Select compared the prices for buttermilk powder and nonfat dry milk reported by Dairy Market News, which established that the prices for the two products were closely aligned. The price of buttermilk powder averages 97% of the nonfat dry milk price in the West and 98% in the Central/East area. Tr. 4439, Ex. 219 (Allen, Day 18).

Select also reviewed data from its plants for the two products to confirm alignment with the figures reported by Dairy Market News. Whereas the average price relationship reported by Dairy Market News was 97.5%, the same average price relationship for the Continental plants was 96.7%. Tr. 4556. In no month was Continental's price for buttermilk powder more than 18% lower than the nonfat dry milk price. Tr. 4555, Ex. 223 (Cooper, Day 19). This is also aligned with the data from Dairy Market News. Ex. 219.

Steve Cooper testified regarding the manufacturing costs for buttermilk powder. He testified that "it takes somewhat longer to dry buttermilk than skim milk. That additional drying time requires additional natural gas. While the specific additional cost would vary directly with the actual natural gas costs, the incremental fuel cost to CDF and CDF Southwest in 2023 would be approximately \$0.02." Tr. at 4555, 4579-80 (Cooper, Day 19). Mr. Cooper also testified that the Department's assumption regarding the volume of milk solids in buttermilk powder remains sound and that, if anything, newer production facilities would have resulted in more efficiency and, therefore, higher yields. Tr. at 4578 (Cooper, Day 19).

Having established that the relationship between the make costs for nonfat dry milk and buttermilk powder has remained the same while the price relationship between the two products has tightened, Select's Proposal 12 recalculates the appropriate yield for nonfat dry milk using the current average price relationship between the two products of 97.5%. Mr. Allen explained the calculation and logic:

Recognizing this close price alignment, I performed the same calculation of the NFDM yield performed by USDA in the 2002 Final Decision using the current price alignment. I maintained the same relationship between the cost of manufacturing BMP and NFDM (i.e., NFDM make costs are 87.5% of BMP make costs). The arithmetic works out as follows.

I took the calculated quantity of buttermilk solids and multiplied it by 97.5%, reflecting the proper price alignment. Next, I multiplied that result by 87.5% to account for the higher make costs for buttermilk powder. That calculation is as follows:

$$0.0479 * 0.975 = 0.0467$$

$$0.0467 * 0.875 = 0.0409$$

Next, I took the 0.9975 pounds of NFMS and subtracted the 0.0479 pounds of solids in dry buttermilk. I then restored 0.0409 pounds of those solids based on the calculation above. That calculation is as follows:

$$0.9975 - 0.0479 = 0.9496$$

$$0.9496 + 0.0409 = 0.9905$$

Finally, I adjusted the pounds of NFMS to the presumed moisture content of 3.8%. That calculation is as follows:

$$0.9905 / (1 - 0.038) = 1.0296 \text{ (rounded to 1.03).}$$

Tr. at 4439-4440, Ex. 219 (Allen, Day 18). Accordingly, Proposal 12 calls for a nonfat dry milk yield of 1.03.

3. Proposed Findings and Conclusions With Respect to Proposal 12.

- a.** The value of buttermilk powder in the nonfat solids price and the Class IV skim milk price is not negligible.

- b.** The price of buttermilk powder averages approximately 97.5% of the value of low heat nonfat dry milk, although the price relationship can vary from approximately 80% to over 120%.
- c.** Although not specifically measured, the make allowance for buttermilk powder is reasonably estimated to be two cents higher per pound than that for nonfat dry milk.
- d.** The current Class IV formula does not compensate dairy producers for the solids used in buttermilk powder.
- e.** Accounting for the slightly lower average value of buttermilk powder compared with nonfat dry milk and the slightly higher manufacturing costs of buttermilk powder, it is appropriate to restore 0.0409 pounds of buttermilk solids to the calculation of the nonfat dry milk yield.
- f.** Once those solids are restored, the appropriate yield for nonfat dry milk is 1.03.

D. Comments in Opposition to Select's Proposals.

Opposition to Select's proposals comes in two principal categories but universally fails to assail the rationale for updating these factors. First, some explicitly or implicitly acknowledge the need to update yield factors but erroneously believe this cannot be done without an audited survey of manufacturers. Second, some take issue with the quanta or quality of Select's evidence or allege narrowness of the factors Select has identified but then opt not to introduce their own evidence or proposals. The opposition from both groups fails to discredit Select's testimony and evidence.

1. The Department has Historically Addressed Yield Factors Without Plant Surveys.

NMPF testified that it would not support Select's Proposals 10, 11, or 12 because doing so "would be inconsistent with NMPF's basic position on updating make allowances and yield factors. Namely, the only way to establish the 'correct' values for those critical component formula coefficients is through conducting a mandatory, auditable survey of plants that manufacture the products used in these formulas." Tr. at 2441 (Vitaliano, Day 10). NMPF's position is patently intellectually inconsistent with its own Proposal 7, which proposes an increase in make allowances without a corresponding auditable survey of plants. The same is true for CDI, who, like NMPF, endorses updating make allowances without the benefit of a comprehensive survey but opposes addressing yields.

Witnesses from Glanbia, Leprino, and IDFA also opposed Select's proposals to increase butterfat recovery and farm-to-plant shrink until additional review of yields could be performed, while acknowledging that both butterfat recovery and farm-to-plant shrink factors are likely outdated. Tr. at 3726 (DeJong, Day 15), Tr. at 4624 (Krebs, Day 19), Tr. at 4650 (Brown, Day 19). But these same hearing participants propose increasing make allowances without such studies.

In addition to being intellectually inconsistent, these arguments fail because the substance of Select's proposals is not dependent on any survey but instead applies the rationale and logic of the Secretary's previous decisions on price formulas to quantifiable industry realities. For example, with respect to butterfat recovery, the Department's prior determination that the industry achieved 90% butterfat recovery was not the result of a survey but of record hearing evidence. For farm-to-plant shrink, the same is true. And the determination of the value of solids in Class IV milk contained in buttermilk powder was not a function of any survey of plant yields but a determination that buttermilk solids were of negligible value. Each of these prior policy decisions was made

without reliance on a survey of plant yields, and there is no precedent for delaying an update to these factors by first requiring a survey.

2. Select's Testimony and Evidence is Sufficient and Largely Uncontroverted.

Opponents of Proposals 10, 11, and 12 also argue that the data introduced by Select is insufficient. However, as explained by Select's witnesses, the evidence on each of the three proposals was the totality of relevant evidence that Select possessed and could introduce for the record. At the risk of stating the obvious, Select cannot introduce evidence it does not possess. But more importantly, those participants who have raised questions about the sufficiency of Select's evidence have simultaneously refused to introduce any evidence in their possession that could either support or contradict that which Select has provided. No alternative proposals on yields, whether on the issues raised in Select's proposals or others, have been introduced. Although Glanbia and Leprino argued that the current formulas overvalue butterfat in whey cream, neither offered proposals on that issue. Instead, they are using that point as a strawman to argue against the adoption of Select's proposals. *See* Tr. at 3843 (Krebs, Day 16).

Likewise, while Glanbia's witness opposed adjusting the farm-to-plant factor within the yield calculations, Glanbia did not introduce any evidence about the farm-to-plant losses experienced at its plants. Tr. at 3771 (De Jong, Day 16). Other witnesses who could have introduced evidence to rebut Select's testimony and evidence declined to do so.

E. The Department Should Implement Proposals 10, 11, and 12.

If the Department determines that the adoption of all three Select proposals is appropriate, then the yield factors to be included and the appropriate regulations would be as follows (See Ex. 226, Select-9):

7 C.F.R. § 1000.50(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 17.15 cents, with the result multiplied by ~~1.211~~ 1.22.

7 C.F.R. 1000.50(m): Nonfat solids price. The nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS nonfat dry milk survey price reported by the Department for the month, less 16.78 cents and multiplying the result by ~~0.99~~ 1.03.

7 C.F.R. § 1000.50(n)(2): (2) Subtract 20.03 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by ~~1.383~~ 1.386.

7 C.F.R. § 1000.50 (n)(3) Add to the amount computed pursuant to paragraph (n)(2) of this section an amount computed as follows:

(i) Subtract 20.03 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by ~~1.572~~ 1.635; and

(ii) Subtract ~~0.9~~ 0.93 times the butterfat price computed pursuant to paragraph (l) of this section from the amount computed pursuant to paragraph (n)(3)(i) of this section; and

7 C.F.R. § 1000.50 (q) (3): 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 17.15 cents from this average, and multiplying the result by ~~1.211~~ 1.22.

III. Select's Analysis of Proposals 1 and 2 – Milk Composition.

A. The skim milk component factors should be updated to reflect average components for milk pooled on federal orders.

Select supports Proposal 1 to update the formula for valuing skim milk to reflect the average components of producer milk. As NMPF's economist testified, "Federal order skim milk price formulas were constructed in Federal Order Reform to be reflective of the content of the skim portion of producer milk. Over the course of 23 years, the milk component content has increased [for multiple reasons]" Tr. at 156 (Vitaliano, Day 1).

Select agrees that the skim component levels should be updated. During order reform, in the context of the Class I mover, the Department stated,

The price link between Class I use and Grade A milk used to manufacture Class III and Class IV products should be maintained since Grade A milk can be used for

fluid uses as well as for manufacturing uses. Because handlers compete for the same milk for different uses, Class I prices should exceed Class III and Class IV prices to assure an adequate supply of milk for fluid use. Federal milk orders traditionally have viewed fluid use as having a higher value than manufacturing use. The replacement Class I price mover reflects this philosophy by using the higher of the Class III or Class IV price for computing the Class I price.

64 Fed. Reg. 16026, 16103 (April 4, 1999). This rationale also applies to the setting of skim component levels. Producers selling to manufacturing plants will be paid for all the components in their milk. However, those same producers will be underpaid for their milk when selling it to Class I plants. The Department has recognized that the Class I base price should reflect the value of milk when used in the manufacturing of commodity products. Maintaining a skim value that does not accurately recognize the value of milk when delivered for manufacturing results in the Class I price being understated.

NMPF's witnesses recognized this inequity by describing the issue as a dilution in the producer price differential, which resulted in an increase in depooling. Tr. at 159 (Vitaliano, Day 1). Later, the NMPF witness accurately described the problem with undervalued skim milk by explaining:

Again, the federal order component pricing formulas establish a value for the individual components. The skim milk composition factor(s) establish standardized levels of those components in producer skim milk, and **the current levels of those components [that] are valued by the component pricing formulas are... significantly understated** because the level of components in current producer skim milk are significantly higher than provided by the current component -- skim milk component pricing factors.

Tr. at 293 (Vitaliano, Day 2) (emphasis added).

A second NMPF witness provided additional justification for updating skim composition to better reflect the components in producer milk (and the value that milk would have when put to alternative manufacturing uses). "One, a longtime practice in the Federal Milk Marketing Order system is the establishment of the Class I milk price based on the value of milk used for

manufacturing, plus a specified Class I differential.” Tr. at 412 (Covington, Day 2). But where the Class I skim price does not reflect the true manufacturing value of that milk, that longtime practice is thwarted. The NMPF witness continued, “In 2000, the actual Class III and Class IV skim milk values approximated the announced Federal Milk Marketing Order Class III and Class IV skim milk values. This was because the Federal Milk Marketing Order skim milk factors closely aligned with the actual skim milk component levels at that time. Today, this is no longer true.” Tr. at 412 (Covington, Day 2). Proposal 1 would help to restore that close alignment.

Some opposition testimony argued that increasing skim components is inappropriate because Class I handlers cannot benefit from higher protein levels. However, that argument ignores that the Class I base price, as described above, should reflect the milk's manufacturing value. Furthermore, the blanket assertion that there is no value in Class I protein is belied by the success of specialty fluid milk products like fairlife[®], the higher milk solids required for milk sold in California, and increased advertising by the fluid milk industry touting the benefits of dairy protein.

Other opposition testimony argued that establishing a skim milk value based on average components would overvalue milk in certain instances. But that scenario existed when the current skim milk component levels were set. In fact, data introduced by the Department demonstrated that federal order average component tests fell below the current skim composition assumptions for many years following their adoption. Ex. 18 (Yearly Average Component Tests in Producer Milk). Adoption of Proposal 1 would be of little practical difference from what occurred then.

Although Select supports the adoption of Proposal 1, it does not support a delay in its implementation. In Section VIII, *infra*, Select addresses the reasons for its position against the delayed implementation of FMMO changes.

With respect to Proposal 2, which would operate similarly to Proposal 1 but potentially update the skim component levels on an annual basis, Select’s view is that Proposal 2 overly complicates the proposed updates and agrees with the testimony of the NMPF witness, who stated, “Skim milk factors need to be updated if components change; however, it's important to promote orderly marketing and make changes no more frequently than necessary.” Tr. at 418 (Covington, Day 2). Updating the skim component calculations on a triennial basis should be sufficient.

B. Proposed Findings and Conclusions With Respect to Proposals 1 and 2.

1. The average components in producer milk pooled on federal orders have increased since skim milk standards were implemented.
2. It remains a goal of the federal orders to utilize a base skim milk price that reflects the alternative value of producer milk to the manufacturing market and to set a Class I base skim milk price reflective of that alternative value.
3. The failure of the base skim milk price to recognize the alternative value of milk to the manufacturing market contributes to disorderly marketing conditions through the depression of producer price differentials, increased incidence of depooling, and uneconomic movements of milk.
4. The component content of skim milk should be updated to reflect average components in producer milk pooled on federal orders.

IV. Select’s Analysis of Proposals 3, 4, 5, and 6 – Surveyed Commodities.

A. Regarding Proposal 3: Barrel Cheese Should be Eliminated from the Class III Protein Price Formula.

Commodity cheddar cheese in 500-pound barrels no longer represents the commodity cheddar market. Accordingly, Select supports removing barrel cheese prices from the calculation of the protein component value. The Department’s rationale for including cheddar barrels in the

protein price formula was largely the perceived need to include additional cheese volume in the survey price. To ensure that prices for blocks³ and barrels were on par with each other, the price of barrels was adjusted to 38% moisture, and a three-cent adjustment to account for different packaging costs was incorporated:

The NASS cheese survey price will be determined by adding three cents to the moisture-adjusted barrel price and then computing a weighted average price using the block cheese price and the adjusted barrel price times the pounds of each cheese type in the NASS survey and dividing by the total pounds of block and barrel cheese in the NASS survey. Including both block and barrel cheese in the price computation increases the sample size by about 150 percent, giving a better representation of the cheese market. Since the make allowance of \$0.1702 is for block cheese, the barrel cheese price must be adjusted to account for the difference in cost for making block versus barrel cheese. The three cents that is added to the barrel cheese price is generally considered to be the industry standard cost difference between processing barrel cheese and processing block cheese.

64 Fed. Reg. at 16098.

Although the Department's order reform decision does not use the term, NMPF's description of the barrel price being modified to create "synthetic block" prices is, in Select's opinion, an appropriate one.

This hearing record clearly establishes that while the markets for barrel cheddar and block cheddar were so closely related that establishing a synthetic block cheddar price was achievable, that is no longer the case.

From 2000 to 2016, the spread between the NDPSR block and barrel cheese prices annually remained within a tight range of a few cents per pound. Subsequently, however, the correlation between the block and barrel prices deteriorated significantly starting around 2017.

The weighted average spread of block-over-barrel prices in the weekly NDPSR from January 2017 through July 2023 was \$0.12 per pound, with a much wider and more volatile range of between minus 30 and a half cents per pound to 72.7 cents

³ Select will refer to 40-pound cheddar blocks as "blocks." Cheddar in 640-pound blocks will be referred to as "640s."

per pound. The highest monthly block-barrel spread during that period, monthly spread, was \$0.69 per pound, and the lowest was minus \$0.29 per pound.

Tr. at 1487 and Ex. 114, Fig. 1 (Vitaliano, Day 6). Separate testimony stated, "From 2017 to 2022, NDPSR weekly average prices for blocks and moisture-adjusted barrels showed that blocks were more than \$0.03 per pound greater than barrels an astounding 73% of the time period." Tr. 2140 (Reynolds, Day 9). This dramatic and continuing divergence questions the continued use of both to establish minimum prices.

Cheddar cheese in 40-pound blocks is an appropriate commodity to establish the protein price. Testimony established that blocks are used to establish a price for the vast majority of cheese:

The CME 40-pound cheddar block price is used as a pricing index for most of the cheese sold in the U.S., whether it's selling 40-pound block cheddar, 640-pound block cheddar, mozzarella, other American cheese, such as Colby and Jack, or other styles such as parmesan and Hispanic cheeses. The 40-pound block cheddar market is typically used as an index for the cheese selling price.

Tr. at 1620 (Hanson, Day 7). Although the precise volume of cheese priced off 40-pound blocks is unknown, testimony placed the volume between 75% and 90%. Tr. at 1488 (Vitaliano, Day 6) (approximately 90%), 1620 (Hanson, Day 7) (at least 75%). The volume of cheese priced off barrels, including the barrels themselves, was estimated at 9% by NMPF. Tr. at 1489 (Vitaliano, Day 6). Given that barrels and blocks are of approximately equal weight in setting the protein price, the current formulas are dramatically overweighting the price of barrels relative to the market's actual use of barrels and the cheese priced off them. Tr. at 1489 (Vitaliano, Day 6).

The effect of disproportionate weighting was described by the witness from Ellsworth Cooperative Creamery, who noted that the barrel market is "singularly focused on processed cheese, a market driven by a few processors and purchasers." Tr. at 1778 (Bauer, Day 8). The witness suggested that this relatively small market skews the calculation of the protein price rather

than making it more accurate. In his description, “this small market [for barrel cheese] can be entirely disconnected from the rest of the cheese market.” Tr. at 1778 (Bauer, Day 8).

Select disagrees that there should still be a place for a weighting of barrels in the price formulas, as some witnesses have suggested. Tr. at 2250-2254 (Bozic, Day 10). Although the evidence in the record was not definitive, several witnesses accepted the possibility or explicitly agreed that part of the reason for the price volatility of barrels and their misalignment with blocks was due to barrel manufacturers producing barrels to sell the “clean whey” or “white whey” at a premium value and that the barrels themselves were a secondary product. Tr. 1597-1598 (Vitaliano, Day 7), 1810 (Bauer, Day 8). A witness from Land O Lakes characterized the pricing of barrel whey products as “one obvious driver” of the increased volatility in the price of barrels and the divergence from block prices. Tr. at 1974 (Edmiston, Day 9).

Cheese and whey manufacturers who are doing so should be applauded for maximizing their returns rather than criticized. But to the extent such activity is occurring, it only reinforces that barrels are not an appropriate commodity for establishing protein prices.

During federal order reform, the Department noted that including barrel cheese “increases the sample size by about 150%, giving a better representation of the cheese market.” 64 Fed. Reg. at 16098. Witnesses representing NMPF and testifying in favor of Proposal 3 cited evidence demonstrating that removing barrels from the protein price computation will not leave too thin a survey. First, block cheese represents 16% of all U.S. cheese production. A witness from Foremost Farms, testifying on behalf of his company and NMPF, noted that “while seemingly a small percentage, it would still be higher than the butter counterpart. The NDPSR butter represents just 9% of total U.S. butter production.” Tr. 1618 (Hanson, Day 7). Second, the total block volume reported to NDPSR in 2022 was more than twice that reported in 2000. Tr. at 2137 (Reynolds, Day

9). Not only are blocks a substantial portion of cheese production, but the absolute volume of surveyed blocks is also robust.

B. Regarding Proposal 4: 640-pound Block Cheddar Cheese Should be Included in the Class III Protein Price Formula.

Select supports Proposal 4 to include 640-pound block cheddar as a reported commodity to address concerns regarding the volume of cheese surveyed to establish the protein price. Select agrees with the American Farm Bureau Federation's ("AFBF") economist, who testified, "Adding 640-pound blocks would provide a deeper volume to the survey immediately and would avoid the need for a hearing in the future simply to address the further dwindling of 40-pound block volume." Tr. at 2067 (Cryan, Day 9).

The AFBF witness provided testimony about increasing capacity for the manufacturing of 640s, citing new capacity in Minnesota, New Mexico, Michigan, and Texas. Tr. at 2068 (Cryan, Day 9). Testimony from throughout the hearing confirmed that 640-pound blocks are broadly produced. As 640s become a larger proportion of the commodity cheddar market, it would be prudent to incorporate their prices and sales volume into the NDPSR survey.

Record evidence suggests that the manufacturing costs for 640s are on par with those for blocks and that the pricing of 640s is based on the block price. Tr. at 4277 (Brown, Day 18). Testimony from IDFA's economist indicated that blocks and 640s do not generally vary in butterfat content, moisture, or salt content. Tr. at 2113 (Brown, Day 9). When asked what specifications would change between blocks and 640s in a plant that could manufacture both, the witness answered, "Color may change. You may have a flavor or certain culture that you want [for aging.]" Tr. at 2113 (Brown, Day 9). Despite the commonalities between the two products, additional volume and price data would be useful if barrels were removed from the survey. Even if barrels

remain a surveyed commodity, the inclusion of 640s will help to align the NDPSR survey more closely to commodity cheddar production. Tr. at 2068-2069 (Cryan, Day 9).

C. Regarding Proposal 5: Unsalted Butter Should Not Be Included in the Butter Price Formula.

Select opposes Proposal 5 to include unsalted butter in the NDPSR survey. AFBF argues that “the growing volume of unsalted butter production and use in the U.S. market has meant that salted-only butter price collection... increasingly underrepresents the value of U.S. butter.” Tr. at 2069 (Cryan, Day 9). AFBF notes substantial growth in U.S. unsalted butter production. Tr. at 2071 (Cryan, Day 9).

Although the production of unsalted butter has grown significantly, other testimony establishes why increased production alone does not justify including unsalted butter in the NDPSR survey. First, unsalted butter has no uniform specification, as does Grade AA salted butter. Tr. at 2124 (Brown, Day 9). Second, unsalted butter is frequently produced for order rather than as a true commodity product. Tr. at 2379 (Vanden Heuvel, Day 10). Third, there is no active commodity market for unsalted butter in the same manner as there is for salted butter. Tr. at 2379 (Vanden Heuvel, Day 10). Fourth, unsalted butter, especially for export, is often produced with 82% butterfat versus 80% butterfat for salted butter. Tr. at 2381 (Vanden Heuvel, Day 10). Finally, unsalted butter is viewed as a higher-value product than salted butter. Tr. at 2387 (Vanden Heuvel, Day 10).

Due to these differences in composition, marketing, and pricing, Select opposes using unsalted butter as a surveyed commodity to determine the butterfat price.

D. Regarding Proposal 6: USDA Lacks the Necessary Data to Meaningfully Incorporate Mozzarella Cheese Prices in the Class IV Price Formula.

Select also opposes Proposal 6, which the California Dairy Campaign offered to add mozzarella cheese to the calculation of the protein price formula. Select appreciates the intent

behind Proposal 6 to ensure that a greater volume of cheese and the associated prices are included in the calculation of protein value. During the hearing, however, testimony established that there is no workable framework for incorporating mozzarella cheese into the protein price formula. Also, testimony from several witnesses included evidence suggesting that mozzarella cheese is not an appropriate commodity for establishing a minimum price, as is the case with cheddar blocks and 640s.

Practically, there is no current methodology for adding mozzarella to the price survey. First, there is no current make allowance or yield information for mozzarella that could be incorporated into the existing formulas. Second, the mozzarella cheese yield formula differs from cheddar cheese's. Accordingly, the basic building blocks needed to derive a protein price from mozzarella cheese are lacking. Also, there is no suggested standard for mozzarella composition, moisture, or sizes from which survey criteria could be developed. While there could be merit for future consideration of surveying mozzarella prices and yields, Proposal 6 needs to be more developed to implement at this time.

E. Proposed Findings and Conclusions Regarding Proposals 3-6.

1. Although the methods for manufacturing barrel cheddar cheese are substantially identical to those for producing block cheddar cheese, record evidence demonstrates that the two products are not substitutes and that the barrel market is a distinct product with a different pricing structure from block cheddar cheese.
2. While the price alignment of block cheddar cheese and barrel cheddar cheese has historically been close, the differences in markets for block and barrel cheese, along with the production of higher-value whey products from the manufacturing of barrel cheese, have resulted in price divergences,

indicating that barrel cheese prices are no longer correlated to block cheddar cheese prices.

3. As much as 90% of the natural cheese produced in the United States is priced off the block cheddar market. Accordingly, including block cheddar cheese in the determination of the protein price will result in more accurate pricing for the value of milk used in cheese manufacturing.
4. Barrel cheese is no longer an appropriate product to be surveyed to determine the protein price.
5. The volume of block cheddar cheese surveyed to establish the protein price has increased significantly since the Department established the Class III pricing formula. This volume is a sufficient representation of commodity cheddar cheese manufacturing to justify the elimination of barrels from the protein price calculation.
6. The cost to manufacture 640 lb. commodity cheddar cheese blocks is substantially the same as that for 40 lb. commodity cheddar cheese blocks.
7. The volume of 640 lb. commodity cheddar cheese blocks is a significant and growing proportion of commodity cheddar cheese manufacturing in the United States.
8. Although testimony suggests that the pricing of 640 lb. blocks is in close alignment to those for 40 lb. blocks, adding 640 lb. blocks to the surveyed commodities used to determine the protein price will add additional volume to the survey, providing a more complete representation of the commodity cheddar cheese market.

9. It is appropriate to add 640 lb. commodity cheddar cheese blocks to the cheese survey used to establish the protein price and weight 640 lb. blocks in the survey in the same manner as cheddar cheese barrels are now weighted.
10. As true commodity products, cheddar cheese blocks in both 40-pound and 640-pound units are sufficient and appropriate for determining a protein price.
11. Despite evidence demonstrating growth in the manufacturing of unsalted butter, the record establishes significant differences between salted and unsalted butter in their composition, marketing, and pricing.
12. Unsalted butter is neither a standardized commodity in the same manner as salted butter nor is it a market-clearing product for Class IV.
13. Adding unsalted butter to the survey of commodities utilized to establish the butterfat price is not appropriate.
14. Mozzarella cheese encompasses multiple different formulations and lacks standardization in the same manner as commodity cheddar cheese so as to enable its use as a surveyed commodity in determining the protein price.
15. The record lacks sufficient data and methodology to accurately determine the value of milk used in mozzarella cheese (in any formulation), which would allow mozzarella cheese to be incorporated into the Class III pricing formula.

V. Select’s Analysis of Proposals 7, 8, 9 – Make Allowances.

Addressing make allowances might be both the easiest and most difficult task for the Department. The matter is easy because there is near uniform acknowledgment from the producer and handler communities that make allowances need to be updated after 17 years. However, the problem is also quite difficult because the available data upon which to determine appropriate adjustments to the make allowance factors leaves much to be desired, and the methodologies behind all proposals have shortcomings.

A. Select Supports a Modest Approach to Adjusting Make Allowances.

The following table shows several different make allowance or manufacturing cost figures discussed during the hearing. The first column represents the current make allowances. The second represents NMPF’s Proposal 7. The following four columns show the stepwise approach proposed by WCMA and IDFA in Proposals 8 and 9. The three columns following are the results from Dr. Stephenson’s 2021 Report, Dr. Stephenson’s 2023 report, and the costs developed by Dr. Schiek. The final column includes the make allowance factors that Select believes the evidence in the hearing supports and which Select suggests the Department adopt.

	Current	NMPF	IDFA - 1	IDFA - 2	IDFA - 3	IDFA - 4	Stephenson 2021	Stephenson 2023	Schiek	Select
Cheese	0.2003	0.24	0.2422	0.2561	0.2701	0.284	0.2476	0.2643	0.3006	0.2281
Butter	0.1715	0.21	0.2251	0.2428	0.2607	0.2785	0.1411	0.3176	0.2364	0.2004
NFDM	0.1678	0.21	0.2198	0.2370	0.2544	0.2716	0.2933	0.2750	0.2653	0.2260
Whey	0.1991	0.23	0.2582	0.2778	0.2976	0.3172	0.2650	0.3361	0.2953	0.2498

B. The Department’s Prior Methodology on Make Allowances.

The Department has historically relied upon multiple sources to establish make allowances in the absence of a mandatory audited survey of all plants producing commodity products. In 2000, the Department utilized a weighted average of data from the rural business cooperative service and

CDFA to establish make allowances. In 2006, make allowances were adjusted using a weighted average of costs from CDFA and a survey of the Cornell Program on Dairy Markets and Policy conducted by Dr. Stephenson. In 2008, make allowances were again adjusted using Cornell data and data from CDFA. In each instance, the data from CDFA was relatively current actual plant cost data collected and audited by the California Department of Food and Agriculture. In addition, the data that was combined with CDFA data did not include costs from plants operating in California.

In this hearing, NMPF's Proposal 7 requests that the department implement make allowances resulting from a survey of NMPF's working group. Meanwhile, IDFA's Proposal 9 requests the department utilize data from Dr. Stephenson, combined with indexed and statistically modified data from CDFA's final audited plant cost survey conducted in 2016. Select contends that neither of these approaches is appropriate and instead recommends that make allowances be based on an average of Dr. Stephenson's 2021 and 2023 surveys.

C. NMPF's Proposed Make Allowances Are Unsupported.

Proposal 7 requests changes to make allowances as outlined in the table above. They are relatively close to the first step of the increases proposed by IDFA in terms of magnitude. But whereas NMPF would next revisit make allowances following the likely grant of Congressional approval for a mandatory survey of plant costs, IDFA⁴ would continue increasing make allowances annually for three successive years. Despite the similarity between Proposal 7 and the first step of Proposal 9, the justifications for the two proposals are dissimilar.

NMPF's witnesses offered testimony explaining how the make allowance factors in Proposal 7 were developed. An NMPF witness from Land O Lakes stated, "There was kind of an

⁴ Select recognizes that IDFA has submitted Proposal 9 and the Wisconsin Cheese Makers Association has submitted Proposal 8 and that the two proposals are identical. For convenience, we refer primarily to IDFA and Proposal 9 in this brief.

informal survey process done among NMPF membership, and that was kind of the driver for how we landed on the numbers that we landed on.” Tr. at 2543 (Edmiston, Day 11.) Another NMPF witness from Foremost Farms explained that the survey results were provided in a summary to the NMPF working group and that the factors proposed in Proposal 7 were close to the average of the survey, meaning that some plants had costs higher than Proposal 7 and some were lower. Tr. at 2752-2753 (Hanson, Day 11).

Despite this explanation of how the make allowances in Proposal 7 were determined, Select believes that there needs to be more transparency and representation in the NMPF working group to establish make allowances on that basis.

D. IDFA’s California Data Would Be Duplicative and Unrepresentative.

IDFA and WCMA rely, in part, on an updated model of plant processing costs from California to support their proposed make allowance changes. While the Department has relied upon data from the California Department of Food and Agriculture (“CDFA”) in establishing the current make allowances, the use of the data prepared by Dr. Schiek would be inappropriate in this hearing. First, California manufacturing plant data is already included in Dr. Stephenson’s reports. Tr. at 3687 (Schiek, Day 15). Incorporating data from CDFA here would include California plants twice. Second, the hearing record establishes that costs for labor and energy are higher in California than in other parts of the country, in some cases substantially so. Tr. at 3683-3683 (Schiek, Day 15). In addition, IDFA utilized Dr. Schiek’s data as a 50% weight in establishing their proposed make allowance factors. Tr. at 4239 (Brown, Day 18). In combination, the weighting of California's higher-cost plants would inappropriately skew the make allowances upward.

Furthermore, the California costs are not actual plant cost data. Instead, it is data collected and reported by CDFA in 2016, which Dr. Schiek then analyzed through an econometric model,

including cost indices, to estimate current manufacturing costs for California manufacturers. Tr. at 3622 (Schiek, Day 15).

The Department has never utilized indexed plant cost data to establish make allowances. It would be imprudent to initiate that practice here. In addition to the inherent uncertainty of using index factors to increase costs that are now at least eight years old, hearing participants expressed some concern that merely indexing costs fails to take into account additional efficiencies that plants would have realized in the improvement of their operations during that intervening 8-year period.

The plant cost surveys that CDFA historically conducted are of the type that there is broad industry support for once such authority is granted to the Department by Congress. The fact that the underlying 2016 data, which Dr. Schiek subsequently indexed, was collected using a mandatory and audited survey does not, however, mean that that data is reliable today or that simply applying index factors to it results in accurate and reliable cost data for the purposes of setting minimum price formulas in 2024.

On cross-examination, Dr. Stephenson explained that Dr. Schiek's cost modeling does not necessarily capture conditions as they evolve over time, including efficiencies and new technologies, which might affect the cost of manufacturing. Tr. at 3519 (Stephenson, Day 15).

E. Dr. Stephenson's Reports Have Flaws But Are the Most Reliable Data Available.

NMPF's economist testified that "USDA must consider the best plant processing cost data available when updating Make Allowances." Tr. at 2437 (Vitaliano, Day 10). Select agrees. Having reviewed all the testimony on make allowances and consulted the Department's prior decisions regarding make allowances, Select finds that the best available data is presented by Dr. Mark Stephenson.

During the hearing, two separate plant cost studies conducted by Dr. Stephenson were presented and discussed. The first study, which was commissioned by the Department (referred to herein as the “2021 Survey”), included results from ten cheese plants, 27 nonfat dry milk plants, 12 butter plants, and eight whey plants. In total, the 2021 survey included 61 plant product observations out of 153 plants invited to participate. Tr. 3528-3530.

The second study, which was commissioned by IDFA (referred to herein as the “2023 Survey”), included results from 18 cheese plants, 15 nonfat dry milk plants, 13 butter plants, and nine whey plants who responded to outreach from the International Dairy Foods Association and Wisconsin Cheese Makers Association to participate in the study. Tr. at 3431-3432. In total, there were 55 plant product observations in the 2023 Survey, and only 16 or 17 of them overlapped with the 2021 Survey. Tr. 3451. This means that the 2021 and 2023 surveys covered very different plant populations. One-third or more of the plants solicited to participate in 2021 reported no costs to either survey.

In addition to the differing number of responding plants, Dr. Stephenson noted that the average pounds of product per plant was higher in the 2023 survey of nonfat dry milk plants and cheese plants. He noted that the butter volume in each survey was similar even though the plants participating were “significantly different.” In noting that the sample of plants matters to the outcome, Dr. Stephenson opined that “the different sample is most responsible for the very different results” between the 2021 and 2023 surveys. Tr. 3432-3422.

Despite Select’s support for using Dr. Stephenson’s data to establish updated make allowance factors, the hearing record did illustrate certain strengths and shortcomings of the 2021 and 2023 surveys.

The 2021 survey, which the Department commissioned, is a more independent analysis than the 2023 survey, which IDFA commissioned for the express purpose of updating the make allowance factors in this hearing. However, Certain industry participants expressed concern that the 2021 survey's inclusion of a "degree of transformation" factor may have resulted in manufacturing costs for butter and nonfat dry milk that were less accurate than they may otherwise have been. Select notes that in his testimony, Dr. Stephenson believes the use of a degree of transformation factor remains valid and useful but did not employ that methodology in the 2023 Survey. "Although I stand by the concept of further accounting for the degree of activity needed to produce a product, I believe that the industry needs to be comfortable with the methodology used." Tr. at 3431.

Meanwhile, Dr. Stephenson's 2023 survey was commissioned by IDFA, causing some to question the composition of those plants who chose to participate. As a witness for California Dairies explained:

While we have a variety of data sources that are being discussed in this hearing, they all have one shortcoming or another, just by their design, through no fault of the dataset, it's what's available. And so one of those limitations is the data we have that's most recent does not include mandatory reporting, and so it's limited by those plants that voluntarily chose to participate in that survey.

Tr. at 2792.

F. Adopting an Increase Based on a Portion of Dr. Stephenson's Increases is Prudent.

As explained above, the make allowance figures proposed in Proposal 7 lack transparency as to how they were established. Select believes that they do, in fact, reflect some sort of average manufacturing cost of the NMPF members surveyed. However, without additional information to verify their accuracy, they alone are inappropriate for establishing make allowance factors. Likewise, despite the well-intentioned efforts of IDFA and the Wisconsin Cheese Makers

Association to make use of the most recent mandatory audited survey of plant costs available to the industry, that data, too, is insufficiently reliable. To utilize model-adjusted data or to overweight the costs from California plants, both of which would result from incorporating Dr. Shiels's data, into the make allowance factors would deviate from the Department's prior efforts to incorporate the best available data and to utilize a representative data set.

Excluding Proposal 7 and the model-adjusted California data, the Department is left with Dr. Stephenson's 2021 Survey and the 2023 Survey results. Despite whatever gaps might exist in the 2021 and 2023 surveys, the methodologies are the most sound of the options included in this record. Because the 2021 Survey and 2023 Survey largely include different plants, and one includes a degree of transformation factor while one does not, it is likewise difficult to rely entirely on one survey result or the other.

Accordingly, Select proposes that the make allowance factors be determined as follows. First, average the manufacturing cost factors for each commodity from the 2021 and 2023 Surveys. Second, subtract the current make allowance factors from survey averages to determine a difference. Third, increase the current make allowance factors by one-half of the calculated difference. Those results are as follows: cheddar cheese, 22.81 cents; butter, 20.04 cents; nonfat dry milk, 22.60 cents; and the way, 24.98 cents. The calculations are:

$$\text{Cheese:} \quad (\{[(0.2476+0.2643)/2] - 0.2003\}/2) + 0.2003 = 0.2281$$

$$\text{Butter:} \quad (\{[0.1411+0.3176]/2\} - 0.1715)/2 + 0.1715 = 0.2004$$

$$\text{Nonfat Dry Milk:} \quad (\{[0.2933+0.2750]/2\} - 0.1678)/2 + 0.1678 = 0.2260$$

$$\text{Whey:} \quad (\{[0.2650+0.3361]/2\} - 0.1991)/2 + 0.1991 = 0.2498$$

These four factors are quite close to those proposed by the NMPF Proposal 7 and in the first step of Proposals 8 and 9.

	Current	NMPF	IDFA - 1	Select
Cheese	0.2003	0.24	0.2422	0.2281
Butter	0.1715	0.21	0.2251	0.2004
NFDM	0.1678	0.21	0.2198	0.2260
Whey	0.1991	0.23	0.2582	0.2498

For the reasons explained below, Select proposes that the Department make these adjustments now and hold any further make allowance increases until a mandatory, comprehensive, and audited survey of plant costs and yields is performed. If the Department is not provided Congressional authority to conduct such a study by December 31, 2025, then the Department could make a call to the industry for new make allowance proposals, including guidance from the Department as to what data should be included in any such proposal.

Despite the passage of time since make allowances were last updated and the increase in manufacturing costs over that period, several pieces of testimony throughout the hearing indicate that adopting IDFA's full make allowance adjustments could be excessive. The same criticism could be made if Select proposed adopting make allowance increases based on the full difference between Dr. Stephenson's surveys and the current make allowances.

First, a dairy farmer from Wisconsin testified that even in the current environment, cheese manufacturers are still able to pay over-order premiums on Class III milk in that marketing area. This suggests that the Class III minimum price, at least in that marketing area, is not so high that processors cannot pay more than the minimum. Tr. at 2347 (Spadgenske, Day 10). Separately, a witness from Land O Lakes expressed his concern that the full make allowance adjustments proposed by IDFA could be excessive. Tr. at 2542-2543 (Edmiston, Day 11).

Testimony from the Foremost Farms witness that some NMPF members who provided costs used in the development of Proposal 7 had costs below the proposed make allowances also

speaks in favor of not adopting the full increases of Proposals 8 and 9. Tr. at 2753 (Hanson, Day 11). The witness from California Dairies testified that the make allowances in Proposal 7 were “generally representative” of CDI’s manufacturing costs. Tr. at 2806 (Vanden Heuvel, Day 12).

Agri-Mark’s witness testified that if IDFA’s full make allowances were implemented, the manufacturing costs for all commodities would be covered “and then some.” Tr. at 3147 (de Ronde, Day 13). Meanwhile, if Proposal 7 were adopted, Agri-Mark expects there will be plants with actual manufacturing costs above and below the proposed factors. Tr. at 3151 (de Ronde, Day 13). Finally, Dr. Stephenson noted that some of the plants in his survey sample have costs of production that are very close to the current make allowance levels and below those in NMPF’s Proposal 7. Tr. at 3436-3437 (Stephenson, Day 14).

Indeed, there is testimony that manufacturing costs have increased at rates greater than the increases in Proposal 7 (and those that Select advocates for here). But, given the previously cited testimony questioning whether Proposals 8 and 9 would go too far, especially given the valid concerns about the underlying data and overweighting of the statistically modified higher-cost plants in California, adopting the make allowances advocated by Select, to be followed by a mandatory audited survey of commodity plants is the most prudent approach.

Finally, to address concerns that the make allowances Select proposes here are too low, Select refers to the Department’s statement from its Order Reform decision, which addresses the risk of setting make allowances too low or too high:

If the Make Allowances are established at too low a level, manufacturers will fail to invest in plants and equipment, and reduced production capacity will result. If the Make Allowances are established at too high a level, there will be unwarranted incentive to increase capacity above the needs of the industry, leading to overcapacity, resulting in losses to manufacturers. ...Either scenario would not be in the best interest of the dairy industry.

64 Fed. Reg. at 16,097. The evidence in this record demonstrates robust and widespread investment in new plants and equipment and improvements to existing facilities. Tr. 3717 (De Jong, Day 15) (new \$470 million plant and multiple \$2.5 million water polishers), Tr. 3863-3864 (Eveland, Day 16) (new \$600 million plant under construction), Tr. 3926 (Krebs, Day 16), (new \$1 billion plant), Tr. 4033 (Brockman, Day 17) (hundreds of millions of dollars in processing equipment, packaging automation, and energy efficiency improvements). Well over two billion dollars in new manufacturing capacity in federal order geography has recently been commissioned or will be in the coming years. It is difficult to square that reality with make allowances that are too low to incentivize investment in plants and equipment. Conversely, adopting the make allowances requested by Proposals 8 and 9 could very well result in overcapacity.

Professor Chris Wolf, in a colloquy with Dr. Marin Bozic, acknowledged the possibility that setting the make allowance for cheese at NMPF's suggested \$0.24/lb, which is two cents higher than the low-cost cheese plants observed by Dr. Stephenson (\$0.2201) could spur unwarranted cheese manufacturing capacity. Tr. at 3069 (Wolf, Day 13). Dr. Wolf also agreed that "IDFA's proposal has a much greater likelihood of creating a situation where Make Allowances are too high than NMPF's proposal, which would allow for an interim approach and then the collection of real mandatory audited survey data." Tr. at 3103-3104 (Wolf, Day 13).

As a witness from AMPI stated, "Make allowances are an estimate of dairy processors' costs of converting milk into dairy products." Tr. at 2599 (Schlangen, Day 11). While costs have undoubtedly increased since make allowances were last modified, given the available data, the Department is certainly going to have to settle on an "estimate" of costs. Dr. Stephenson's surveys provide the most reliable data set from which that estimate can be derived. The additional

testimony cited above establishes that a conservative make allowance increase best achieves the statutory objective of orderly marketing.

G. Proposed Findings and Conclusions Regarding Proposals 7-9.

1. Increases in the cost of manufacturing commodity dairy products have undoubtedly occurred, necessitating updates to the make allowance factors.
2. Ideally, make allowances would be based on mandatory, audited surveys of actual manufacturing costs of plants that manufacture the surveyed dairy commodities.
3. In the absence of actual, comprehensive manufacturing cost data, make allowances should be based on the most reliable data available.
4. The record does not include sufficient reliable data to adopt the make allowance factors included in Proposal 7.
5. The use of indexed and statistically manipulated costs from the 2016 CDFA survey of manufacturing costs is not sufficiently reliable to use in setting make allowances.
6. The use of manufacturing cost estimates for California plants in combination with nationwide surveys of manufacturing costs would overweight the costs from California plants, resulting in unreliable manufacturing cost factors.
7. The two manufacturing cost surveys performed by Dr. Stephenson, in combination, include a sufficient representation of plants and their manufacturing costs to derive an appropriate estimation of manufacturing costs.

8. Record evidence establishes that adopting the full make allowances in Dr. Stephenson's surveys risks setting make allowances at a level that overstates the average costs of manufacturing commodity dairy products.
9. The use of make allowance factors incorporating one-half of the increase in manufacturing costs suggested by Dr. Stephenson's surveys is appropriate while the Department awaits expected authority to conduct a mandatory, audited survey of manufacturing costs.

VI. Select's Analysis of Proposals 13-18 - Base Class I Skim Milk Price.

A. The Experiment of Using an Average of Class III and Class IV Has Failed.

For nearly two decades, federal orders utilized the higher of Class III or Class IV to establish the Class I base skim milk price.⁵ Beginning in 2018, following a directive in the 2018 Farm Bill, the higher-of was replaced with an average-of Class III and IV plus an adjuster of \$0.74. At the time, the changes were expected to be revenue-neutral for dairy farmers and Class I handlers. Tr. at 4674-4675 (Vitaliano, Day 19) (citing 84 Fed. Reg 8,590 (March 11, 2019)).

The primary benefit of the change was to allow Class I handlers to better hedge their milk costs. Tr. at 4674-4675 (Vitaliano, Day 19) (citing 84 Fed. Reg 8,590 (March 11, 2019)).

Because the change was novel, and to afford time for the industry to operate under the new average-of system, Congress required the federal orders to use the average-of for two years. P.L. 115-334, Sec 1403(a).

With more than six years of operating under the average-of, it is evident that the experiment has failed. The change has been far from revenue-neutral. Dairy farmers have lost hundreds of

⁵ Select will refer to the Class I base price as the more common term of "Class I mover," the higher of Class III and IV as the "higher-of" and the current system and the various alternatives of it as the "average-of."

millions of dollars. Depooling has increased. For the most part, Class I handlers are not hedging their milk costs. And these problems are not limited to pandemic-related causes. Proposal 13 resolves all these issues. Select supports its adoption on an expedited basis.

Testimony from dairy farmers and dairy farmers associations were nearly unanimous in their support for returning to the higher-of mover. One dairy farmer from Michigan highlighted the effects of negative producer price differentials exacerbated by the use of an average Class 1 mover. He noted in his testimony that an \$8 negative PPD undermined his attempts at risk management. Tr. at 2309 (Chapin, Day 10). That producer, who also served on NMPF's Economic Policy Committee, also explained why returning to the higher-of is preferable to a rolling average mover, noting, "Today is when our farmers need that value for their businesses and families." Tr. at 2310 (Chapin, Day 10).

B. Using The Higher-Of Class III and Class IV Addresses the Department's Concerns for Establishing a Base Class I Price.

Select supports adopting Proposal 13, which would return to using the higher-of Class III and Class IV as the base skim milk price after the failed experiment of using an average-of the two classes. NMPF's economist, testifying in support of Proposal 13, set forth several considerations the Department made when it adopted the use of the higher-of as part of Order Reform:

First, basing Class I on the higher of III or IV would "more accurately reflect the value of milk in those these different categories of use," in a four-class system. Furthermore, given the separation of manufacturing milk into two classes, using the higher-of Class III and IV would "assure that shifts in demand for any one manufactured product would not lower Class I prices,"

Second, using the higher-of the two classes, "to move Class I prices [will help] to reduce the volatility in milk prices,"

Third, a major consideration was to address class price inversions and depooling. ... "Class price inversion occurs when a market's regulated price for milk used in manufacturing exceeds the Class I fluid milk price in a given month and causes serious competitive inequities among dairy farmers and regulated handlers ... Since volatility in the manufacturing product markets is expected to continue ...the Class

I price mover developed as part of this Federal Milk Order Reform process should address this disorderly marketing situation.”

And finally, the purpose was to assist Class I handlers in competing for a milk supply. “In some markets, the use of a simple or even a weighted average of the various manufacturing values may inhibit the ability of Class I handlers to procure milk supplies in competition with those plants that make the higher-valued of the manufactured products. Use of the higher-of the Class III or Class IV price will make it more difficult to draw milk away from Class I uses for manufacturing.”

Tr. at 4672-4673 (citing 64 Fed. Reg. at 16,092, 16,094, 16,202, and 16,104).

Had Congress not directed the change from the use of the higher-or as part of the 2018 Farm Bill, the orders would presumably still utilize it. The Department’s reasoning and rationale remain correct.

C. USDA Should Omit a Recommended Decision on the Base Class I Price

An economist testifying on behalf of the AFBF requested that the Department return to using the higher-of Class I mover on an expedited basis. Select believes it is appropriate to omit a recommended decision on this proposal. The omission of a recommended decision is permitted by USDA's rules of practice, broadly supported by the producers who will have to vote on the approval of any marketing order amendments, and supported by the testimony and evidence in this proceeding.

The procedures for the amendment of milk marketing orders are set forth at 7 CFR Part 900. See also, *Understanding the Milk Order Amendment Process*, USDA-AMS (official notice taken). The rules of practice contemplate the issuance of a recommended decision by the AMS Administrator “as soon as practicable following the termination of the period allowed for the filing of written arguments or briefs and proposed findings and conclusions.” 7 C.F.R. § 900.12(a). However, the rules of practice also provide a mechanism for omitting a recommended decision under certain circumstances. The applicable subsection of the rules states, “The procedure provided in this section may be omitted only if the Secretary finds on the basis of the record that

due and timely execution of his functions imperatively and unavoidably requires such omission.”
7 C.F.R. § 900.12(d).

Accordingly, the decision as to whether a recommended decision may be omitted is a decision reserved to the Secretary provided that a finding is made that the hearing record establishes that the due and timely execution of the Secretary’s functions may be accomplished by such omission. This conclusion is reserved entirely to the Secretary and his discretion, provided that the proper findings and conclusions are reached.

In a filing made in this record by the Milk Innovation Group (“MIG”) on March 7, 2024, it is argued that the request for the omission of a recommended decision is improper. Select disagrees. MIG’s argument is premised on a different section of the rules of practice, which addresses an emergency situation reducing the time between the issuance of a hearing notice and the commencement of a hearing—not the issuance of a recommended decision. 7 C.F.R. § 900.4(a) (“The time of the hearing shall not be less than 15 days after the date of publication of the notice in the Federal Register, as provided in this subpart, unless the Administrator shall determine that an emergency exists which requires a shorter period of notice...”).

Assuming that this proceeding closely approximates the regulatory timeline for a decision, a Recommended Decision would be issued around July 1, 2024. The omission of a Recommended Decision on the Class I mover could result in new operative regulations for October 2024 milk. If not expedited, the operative regulations would take place no less than four months further into the future.

The higher-of is a “known-commodity,” so to speak. The federal orders operated under them for nearly two decades before Congress usurped the Department’s authority and directed that they be altered. Nothing has changed concerning the Department's rationale or how the higher-of

will operate in practice if the Department finds that it should be restored. The Department has already concluded that the higher-of is the optimal solution to maintain orderly marketing. It now only needs to exercise its authority to restore it. The testimony in the record establishes that using an average-of mover is not revenue neutral and has resulted in market disorder, which will continue until the higher-of is restored. It is the Secretary's required function to ensure orderly marketing, which the average-of clearly obstructs. The omission of a recommended decision on this proposal is imperative.

D. Select Opposes the Adoption of Modified "Average-Of" Class I Movers as Set Forth in Proposals 14, 15, and 16.

Because Select supports Proposal 13 as a superior solution for establishing the Class 1 mover, it opposes Proposals 14, 15, and 16 and their alternative Class I base calculations. Proposals 14, 15, and 16 should be measured against the Department's rationale when it established the Class I base price during order reform. The higher-of more accurately reflects the value of milk in manufacturing classes, better manages shifts in demand for any one manufactured product, helps to reduce volatility in milk prices, better addresses class price inversions and depooling, and makes it more difficult to draw milk away from Class I uses for manufacturing.

E. Select Opposes the Elimination of Advance Pricing for Class I Milk as Set Forth in Proposals 17 and 18.

The elimination of advance pricing is an interesting academic discussion which proposes that if all advance pricing were eliminated and some sort of average Class I mover that could adequately protect producer interests was adopted, the frequency of price inversions and the resulting opportunistic depooling might be eliminated. Perhaps the industry may arrive at a point in the future where producers and processors would be willing to explore and consider this possible solution. However, it is evident from the testimony in this hearing that the vast majority of

producers prefer using the higher of Class III and Class IV to establish the Class I mover. It is equally evident that most Class I handlers desire to maintain advance pricing.

F. Proposed Findings and Conclusions Regarding Proposals 13-18.

1. Using the average-of-Class III and Class IV plus an adjuster to establish the Class I mover, although intended to facilitate milk hedging by Class I handlers while being revenue neutral to dairy producers, has proven not to be revenue neutral. The record evidence demonstrates that most Class I handlers have not engaged in milk hedging. Using an average-of-mover creates and exacerbates opportunistic depooling when Class III and IV prices diverge significantly.
2. The Department's prior rationale concludes that the use of the higher of Class III and Class IV to establish the Class I mover remains correct. The higher of ties the Class I price more directly to the manufacturing value of milk than alternative methods.
3. Adjustments to using the average-of-mover plus a rolling adjuster do not solve the problems of revenue neutrality, nor do they send appropriate, timely market signals.
4. It is appropriate to return to using the higher of Class III and Class IV to establish the Class I mover.
5. Using advanced prices to establish the Class I milk price provides a benefit to Class I handlers, particularly those producing HTST milk.
6. Although utilizing only announced prices for all classes of milk would reduce the incidence of opportunistic depooling and provide additional

benefits, this record establishes that maintaining advanced pricing is in the best interests of stability in the Class I market.

7. Proposals to eliminate advanced pricing should not be adopted.

VII. Select's Analysis of Proposals 19, 20, and 21 – Class I and II Differentials.

A. Select Supports Updating Class I Differentials to the Average Differentials Reported by the USDSS Model Without Further Adjustments.

Proposal 19, offered by NMPF, seeks to update the Class I price surface. Proposal 19 was developed in two stages. First, the United States Dairy Sector Simulator (“USDSS”), which provided the basis for the current Class I surface, was updated to reflect current market conditions and to reflect improvements in the USDSS itself. Tr. at 6830 (Vitaliano, Day 28), Tr. at 7276 (Sims, Day 29). The second stage in the development of Proposal 19 involved adjustments to the output of the USDSS by NMPF following a regional review by NMPF’s working group. Tr. at 6830 (Vitaliano, Day 28), Tr. at 7276 (Sims, Day 29).

When establishing the current Class 1 differentials during Order Reform, the Department stated as follows:

Option 1A establishes a \$1.60 per hundredweight fixed differential for three surplus zones (Upper Midwest, West, and Southwest) within a nine-zone national price surface, and for the other six zones, an added component that reflects regional differences in the value of fluid and manufacturing milk. This option emphasized current supply and demand conditions with the USDSS model output.

Some minor changes were made to the Option 1A differential levels presented in the PR. The changes only involved adjusting certain county specific differentials to provide for more appropriate price alignment in several counties in the northeast, seven counties in Florida, and one county in North Carolina. Other than these minor changes, Option 1A is the same as published in the PR.

64 Fed. Reg. at 16110. In the sense that NMPF began with the USDSS results and then made adjustments, the processes were similar. But the changes made by NMPF can in no way be characterized as “minor.”

As discussed further below, the number of deviations from the USDSS model included within Proposal 19 is far more substantial than the adjustments made by the Department to the USDSS output during order reform. Further, the effects of the wholesale restructuring of the Class I surface for “competitive reasons,” to maintain prior price relationships, and to account for private contractual relationships only undermine the efficient output of the USDSS and create different negative effects.

Because the USDSS sufficiently captures changes in the production of milk and the locations of dairy processing facilities and multiple other considerations, and because Select is concerned about the effects of further adjustments to the USDSS output, Select proposes updating the Class I surface utilizing only the output from the USDSS model. In particular, the average of the model output for its May and October results should be utilized to set the differentials. As further explained in this section, Select proposes that the Department maintain a base Class I differential of \$1.60 per hundredweight.

1. The Need for Updating Class I Differentials.

With the exception of adjustments to certain counties in the southeastern part of the United States, the Class 1 price surface has remained unchanged since the completion of order reform. Just as manufacturing costs have increased since make allowances were last updated, costs relevant to the calculation of appropriate Class I differentials have increased. As an NMPF economist testified, “Fuel costs and the basic per mile cost of hauling milk have increased significantly.” Tr. at 6825 (Vitaliano, Day 28). Further, the location of milk production and the location of milk processing facilities have shifted in the intervening years. As Dr. Chuck Nicholson noted in his testimony:

It has been approaching three decades nationwide spatial values of milk have been systematically evaluated using the USDSS. Over this time, there have been considerable changes to where milk is produced and where population growth has

taken place. There have also been substantive changes to transportation costs. Milk supply, demand, and transportation costs will have an impact on the spatial value of milk.

Tr. at 6927 (Nicholson, Day 28).

2. The USDSS Model Has Provided USDA With Proper Differentials for Adoption.

Dr. Chuck Nicholson from the University of Wisconsin, who was retained by NMPF to update the spatial values of milk using the USDSS, explained how the USDSS operates:

The model takes the total milk supply, plant locations, and product mix, and consumer demand as it existed for an individual month. It indicates how to move that farm milk to plants via the existing road network and distributes the finished products to consumers, also according to the road network. For the U.S. dairy industry as a whole, the USDSS minimizes the systemwide cost of assembling milk at plants, making final and intermediate dairy products, and transporting them to other plants and locations of final demand. The model includes the principal cost between the farm gate and the retail locations for the consumer. The model minimizes this total cost subject to the physical constraints, such as mass balance and required product composition that we have imposed upon the system.

Tr. at 6922 (Nicholson, Day 28).

Dr. Nicholson also provided testimony regarding the scope of data and factors included in the USDSS model: cities and distances, farm milk supply (quantity and composition), processing locations, intermediate products, consumption areas, dairy product composition, transportation costs (updated by a transportation model not included in the 1997 output used for order reform output). Tr. at 6972-6978 (Nicholson, Day 28). Dr. Nicholson identified three causes of changes to spatial milk values: changes in the milk supply, demand for dairy products, and transportation costs. Tr. at 6925 (Nicholson, Day 28). He opined that “Differences between the model-generated relative spatial values of milk compared to those of the current Class I differentials suggest a potential need to modify Class I differentials. Tr. at 6924 (Nicholson, Day 28).

In later testimony, Dr. Mark Stephenson, who maintains the USDSS in conjunction with Dr. Nicholson, added further information about what the model intends to convey and many of the

considerations built into the USDSS analysis. Tr. at 10190-1204 (Stephenson, Day 42) (Ex. 438).

Among the model's considerations are many of the factors that NMPF and its witnesses cited for making further adjustments to the USDSS output:

Any model is a simplification of reality, but in my opinion, the USDSS model is the most complete and systematic means that we have of considering spatial milk values across the country. We have been developing this model for more than 30 years. Over that time we have refined the model and made it much more sophisticated, and we have addressed concerns that folks have expressed through many iterations.

Tr. at 10199 (Stephenson, Day 42).

Dr. Stephenson continued, "We have been building this model over a 30-year time period, so we have had less sophisticated versions of the model, and today it is, we think, relatively sophisticated." Tr. at 10193 (Stephenson, Day 42). In fact, he opined that the current model is a more accurate representation of optimized, efficient milk movements than the model used in 1999. Tr. at 10211 (Stephenson, Day 42). Incorporating private business and contractual relationships into the model would undermine that efficient result. Tr. at 10420-10421 (Stephenson, Day 42).

The combined testimony of Sr. Stephenson and Dr. Nicholson plainly establishes that the USDSS's sophistication and reliability have greatly improved over its 1999 iteration. The result is an optimization of milk movements centered around efficiency. Tr. at 10202 (Stephenson, Day 42).

The Department should adopt this efficient output as an updated Class I surface.

3. Additional Adjustment of the USDSS Results Is Unnecessary and Fraught With Problems.

As Dr. Nicholson testified, some adjustments to the USDSS results could be justified, But the type and extent of the adjustments proposed by NMPF are not justifiable. The differentials in every single region of the country were substantially changed from the USDSS results by NMPF. Of the 3,108 different locations, 1,290 (42%) were altered by more than \$0.25. Tr. 10422 (Keefe, Day 43), Ex. Mig 64-A, Map 7. Only 243 locations were not modified. Ex. MIG 64-A Table 3. By

comparison, when setting the current differentials, the Department made only “minor changes” to a handful of counties. Dr. Stephenson recalled that those changes were “relatively small...nickels, dimes, and quarters.” Tr. at 10210, (Stephenson, Day 42).

Select now addresses NMPF’s modifications to the two areas where its member farms are located: the Mideast and Southwest.

a. Proposal 19’s Mideast Order Adjustments Are Unsupportable.

Although none of the testimony from NMPF clearly evidences how their regional working groups established the specific differentials for proposal 19, it appears that much of the Mideast order (“Order 33”) was driven by establishing a price for Chicago, Illinois, and using that price to align other areas in Order 30 and Order 33:

The members of NMPF's Class I price surface committee wanted to ensure that there was a price continuity for all the plants that serve the Chicago market. Also, we wanted to make sure no plant had a competitive advantage or a competitive disadvantage when serving this large population center.

Tr. at 8197 (Hoeger, Day 33). The NMPF witness further testified that its goal was not to utilize the optimally efficient results of the USDSS but to eliminate any competitive advantage that the efficient output might trigger for plants that might supply milk to the Chicago market, “The NMPF proposal assigned Class I differentials to those plants serving the Chicago market **to make sure that no plant had a competitive advantage or disadvantage relative to other plants** serving this large population center.” Tr. at 8198 (Hoeger, Day 33) (emphasis added). In addition, the testimony indicated that part of the impetus was to disincentivize farmers in Michigan from producing more milk. “The -- there was discussion in -- mainly in Michigan, because that's been a strong growth area, and in the last decade we know of the oversupply that Michigan has had, ... raising the differential that much would continue to promote more milk growth so we didn't want to, you know, overcompensate in that.”. Tr. at 8303-8304 (Hoeger, Day 34).

But reworking the USDSS output to eliminate economically sound competitive advantages or disincentivize to milk growth are only part of the problems with these adjustments. By altering the price for Grand Rapids, one of the cities that could service Chicago, ancillary impacts on Order 33 result.

Grand Rapids, Michigan, is in Order 33, with Cleveland, Ohio, as the base point. The following table compares the current differential, USDSS average differential, and Proposal 19 differential for Chicago (Cook County, IL), Grand Rapids (Kent County, MI), and Cleveland (Cuyahoga County, OH).

	Current Differential	USDSS Avg. (Ex. 302)	Proposal 19
Cook County, IL	1.80	3.70	3.10
Kent County, MI	1.80	3.40	3.10
Cuyahoga County, OH	2.00	4.10	3.70

Compared to the USDSS output, Proposal 19 decreases the Class I price in Kent County by \$0.30 and the Class I price for Ottawa County, MI, by the same amount (the location of fairlife’s plant). It is Select’s members who supply that fairlife plant.

Similarly, part of the rationale for lowering the Cook County, IL differential (leading then to the lowering of Kent County, MI) was to narrow the difference between the differentials of Cook County and Hennepin County, MN. Those comparisons appear in the following table:

	Current Differential	USDSS Avg. (Ex. 302)	Proposal 19
Cook County, IL	1.80	3.70	3.10
Kent County, MI	1.80	3.40	3.10
Hennepin County, MN	1.70	2.75	3.00

The difference between Hennepin County and Cook County is currently \$0.10. The USDSS average would increase that difference to \$0.95, which NMPF’s witness testified would disincentivize supplying Class I plants due to the zone back. Tr. at 8211 (Hoeger, Day 33). However, no such analysis was done for Kent County and Cuyahoga County, which would see its spread increase from \$0.20 to \$0.70 under the USDSS. NMPF’s witness (who served in the Mideast working group) acknowledged that there was no consideration of the zone back in Order 33. Tr. at 8307-8308 (Hoeger, Day 34). The witness did, however, acknowledge that a cooperative with farms in Michigan and Ohio might take exception with NMPF’s reduction of the differentials suggested by the USDSS. Tr. at 8310-8311 (Hoeger, Day 34).

b. Proposal 19’s Southwest Order Adjustments Are Unsupportable.

Whereas the prices in Order 33 were partly influenced by the differential at Chicago, IL, the proposed differentials for the Southwest Order (“Order 126”) resulted from establishing differentials in the Southeast and establishing successively lower differentials moving westward. Tr. at 9688-6991, (Sims, Day 40). That process resulted in a differential at Dallas County, Texas, of \$4.00. The NMPF working group then determined that the difference between Dallas County

and Potter County, Texas (Amarillo) should be \$1.00. Tr. at 6990. Then, the determination was made that Potter County and Lubbock County, Texas (Lubbock) should be the same.

The following table compares the current differential, USDSS average differential, and Proposal 19 differential for those counties, as well as two dairy production counties in New Mexico:

	Current Differential	USDSS Avg. (Ex. 302)	Proposal 19
Dallas County, TX	3.00	3.75	4.00
Potter County, TX	2.40	2.25	3.00
Lubbock County, TX	2.40	2.85	3.00
Curry County, NM	2.10	2.55	2.70
Eddy County, NM	2.10	2.75	2.70

As was the case with the Mideast order, these additional modifications to the USDSS model output are both inconsistent with the methodologies utilized by NMPF in other areas and simultaneously create their own problems within Order 126. First, Proposal 19 decreases the slope between the Texas Panhandle and the Dallas Metroplex. Tr. at 9699 (Sims, Day 40). Second, the leveling of Potter County and Lubbock County (and neighboring Lamb County) ignores the changes in milk production, milk processing, and population shifts encompassed in the USDSS output. In addition, the modifications made by NMPF in the Southwest widen the spread between Dallas and Eastern New Mexico compared to the USDSS while narrowing the spreads in the Texas panhandle, creating a disparity for producers in the same milkshed and who supply the same

manufacturing plants. Except that due to the greater zone back, milk in New Mexico will now be more likely to be depooled than the same milk in the Texas Panhandle.

That all stands in stark contrast to NMPF's approach to the Central order. There, the entire Class I price surface was essentially bulldozed to accommodate the interests of Dairy Farmers of America in servicing one of its customers in Weld County, Colorado. Tr. at 9442-9443 (Gallagher, Day 39). The testimony from the DFA witness on this point clearly explained that the deviations from the USDSS model were solely aimed at protecting the economic expectations of that single private contract. Going as far as to suggest that raw milk was not fungible if it happened not to be the milk DFA considered the most convenient for supplying its plants. Tr. at 9443. As a result, the spread between the base point and the central order and Weld County, Colorado, was all but eviscerated. The following table compares the current differential, USDSS average differential, and Proposal 19 differential for counties referenced by the NMPF witness as relevant to setting the Weld County, Colorado differential:

	Current Differential	USDSS Avg. (Ex. 302)	Proposal 19
Jackson County, MO	2.00	3.70	3.35
St. Louis County, MO	2.00	3.70	3.70
Denver County, CO	2.55	2.50	3.30
Weld County, CO	2.45	2.35	3.20

Testimony and evidence indicate that Weld County, Colorado, has realized tremendous growth in milk production and processing capacity, which in and of itself should explain the USDSS results. But again, NMPF would deviate from the economics to address “competitive

concerns.” The justification for the changes to the Central Order surface, other than accommodating a single cooperative supply contract, is to avoid depooling. Tr. at 9556 (Gallagher, Day 39). But no such consideration was given to Order 33 or Order 126. Tr. at 9556 (Gallagher, Day 39), Tr. at 9748 (Sims, Day 40). In fact, despite the similarities between the milk supplies and demand points in Order 32 and Order 126, the proposed solutions in Proposal 19 for Colorado in Order 32 and New Mexico in Order 126 could not be more disparate.

c. Proposal 19’s Adjustments to the USDSS Must Be Rejected.

In addition to the extent of the modifications to the USDSS output, it is also relevant that the only people and entities invited to participate in the development of the adjustments to the model were NMPF members. Other cooperatives and handlers were not part of the process. In NMPF’s opinion, “We felt that we had all the expertise we needed. We were not trying to exclude anybody. We were trying to get a job done, and we felt that we had the resources to do that.” Tr. at 6865 (Vitaliano, Day 28). Multiple witnesses from MIG also expressed their concerns that the changes made to the USDSS output placed their plants at a competitive disadvantage relative to the model output. Tr. at 9940-9942 (Carson, Day 41), Ex. 428, Tr. at 10736-10737 (Erickson, Day 45), Erickson, Tr. at 10976 (Turner, Day 46). Whether intended or not, the lack of input from those outside of National Milk results in inconsistent, inefficient, and untenable modifications to the USDSS results.

Select could propose additional adjustments to Proposal 19. But doing so would likely have its own shortcomings and consequences. Regardless of who was involved in adjusting the USDSS results to arrive at Proposal 19, when the result is that 92.2% of the model’s results were further changed for competitive reasons or to address the contractual obligations of some market participants, the result is no longer an efficient, optimized model suitable for establishing

regulations of general application. Rather than continue to dairymander the map to suit specific needs, the only option that proposes fairness, efficiency, and logical consistency is to scrap the modifications altogether.

The USDSS average should be utilized to update the Class I price surface, including such minor adjustments and smoothing of the surface as the Department finds appropriate to ensure orderly milk movements.

B. Select Opposes Reducing the Base Class I Differential to Zero as Set Forth In Proposal 20 and Maintaining a Base Differential of \$1.60.

1. Justification for a Base Differential.

In proposal 19, NMPF proposes increasing Class I differentials to a minimum of \$2.20 per hundredweight. Testimony from NMPF's witnesses creates an inscrutable distinction between a base differential and a minimum differential. Furthermore, the justifications for a minimum differential of \$2.20 and the methodology NMPF used to arrive at this differential are difficult to ascertain with clarity. Conversely, the Milk Innovation Group's Proposal 20 advocates eliminating any base Class I differential. In arriving at its position regarding the appropriate base Class I differential, Select examined the justification offered by the Department during Order Reform to establish the current \$1.60 level. Then, the Department stated:

After achieving Grade A status, producers must maintain the required equipment and facilities and adhere to certain management practices. Often, this will require additional labor, resources, and utility expenses. It has been estimated that this value may be worth approximately \$0.40 per hundredweight.

These marketing costs include such things as seasonal and daily reserve balancing of milk supplies, transportation to more distant processing plants, shrinkage, administrative costs, and opportunity or give-up charges at manufacturing milk plants that service the fluid Class I markets. This value has typically represented approximately \$0.60 per hundredweight."

Option 1A establishes an additional competitive factor into the development of the base zone Class I differential. Option 1A values this competitive factor to be worth about \$0.60 per hundredweight. This value reflects approximately two-thirds of

the actual competitive costs incurred by fluid plants to simply compete with manufacturing plants for a supply of milk

63 Fed. Reg. 4802, 4908-09 (January 30, 1998).

The evidence in this proceeding establishes that the volume of Grade B milk is minimal and that virtually all plants accept only Grade A milk. However, there remains a cost to dairy producers to maintain Grade A status. Evidence presented by NMPF estimates that this amount remains an actual cost to dairy producers and might exceed \$2.00 per hundredweight. Tr. at 7839 (Erba, Day 32) (estimating a cash cost of \$1.46 per hundredweight to maintain Grade A status and an additional depreciation expense of \$1.30); Tr. at 7619 (Sims, Day 31) (estimating an expense of \$2.66/cwt.).

This component of the base Class I differential in and of itself approaches or exceeds \$1.60 and exceeds the \$0.40 per hundredweight value recited by the Department during order reform. Testimony in the hearing also establishes significant balancing costs for cooperatives and producers who supply Class I markets. Tr. at 8003, 8006 (Covington, Day 33). While the cost of balancing is extraordinarily difficult to ascertain with certainty, there is no reason to believe that the \$0.60 per 100 weight cost noted by the department during order reform has declined. Tr. at 7621 (Sims, Day 31) (“The cost of balancing is a hard number to come up -- -it's a hard number to come up with a hard number for. But I would argue that certainly the \$0.60 is the bare minimum in many markets. There's a great lot of balancing that goes on with regard to Class I plants.”)

Finally, the competitive factor cited by the Department of \$0.60 per hundredweight (approximately 2/3 of actual competitive costs in 1998) remains. The totality of the evidence establishes that the base differential of \$1.60 per hundredweight remains appropriate, and Proposal 20, which aimed to eliminate the base differential, should be rejected.

2. There Is Justification for Segregating a Portion of the Base Differential for Those Producers Actually Delivering Milk Used in Class I Products.

Dr. Stephenson offered testimony regarding the merits of segregating part of the \$1.60 base differential to those producers and cooperatives who actually supply milk to Class I plants:

The slight change in the Federal Order mechanism does not take regulated value away from producers. The portion of that minimum Class I payment directly rewards the milk that helps to balance the industry or to attract the farm milk to the plant. The marketwide pool would have much less to distribute, which may discourage non-performing milk distant from a fluid plant as well from choosing to pool. That response could increase the Class I utilization in heavy manufacturing regions to something more like a level needed to balance the fluid needs.

Tr. at 10628 (Stephenson, Day 44).

Select believes that it would be appropriate to consider whether the portions of the base differential representing the cost of balancing the Class I market and attracting milk to Class I plants should be included in pooled revenue in a future proceeding.

Testimony from Class I handlers, as well as cooperatives, established that Class I premiums remain prevalent in most, if not all, markets and that these premiums help to account for additional balancing costs not compensated through the minimum class prices. As Class I utilizations decline, increases in differentials aimed at addressing the costs of servicing the Class I market may be spread too thin, thereby denying those producers who actually supply Class I plants compensation for the actual costs incurred in serving these markets. Segregating a portion of the base differential to address these costs would provide additional efficiencies to the market and adequately compensate those farmers who bear the costs of providing milk to fluid bottling plants.

We recognize that a proposal to segregate a portion of the differentials in this manner is not squarely before the Department and that Proposal 20 only speaks to eliminating the base differential. Because there remains ample justification for a base Class I differential of at least \$1.60. Select opposes Proposal 20 as noticed in this hearing.

C. Select Opposes Increasing the Class II Differential to \$1.56 as Set Forth In Proposal 21.

Select appreciates the intention behind AFBF's proposal to update the Class II differential. Select views this proposal as being offered in the same vein as Select's proposals to update elements of the Class III and IV price formulas. However, Select cannot support Proposal 21 for two reasons. First, the Proposal does not seem to follow the same rationale and methodology the Department utilized to establish the Class III differential during Order Reform. Second, even assuming that the rationale and methodology are consistent, the evidence in the hearing record suggests that the magnitude of the increase in the Class II differential is so great that it will have the unintended consequence of incentivizing Class II manufacturers to reformulate their products to utilize Class IV ingredients.

1. Proposal 21 Deviates From USDA's Rationale in Establishing the Current Class II Differential.

During order reform, the Department explained how a \$0.70/cwt. Class II differential was established.

The 70-cent differential between the Class IV and Class II skim milk prices is an estimate of the cost of drying condensed milk and re-wetting the solids to be used in Class II products. One commenter suggested that there should be a \$1.00 difference between Class IV and Class II.

63 Fed. Reg. at 16104.

The testimony of AFBF in support of Proposal 21 explains that it utilized the cost of drying skim milk rather than the cost of drying condensed milk. Although AFBF explains why it believes its methodology and calculations are nevertheless valid, it is unclear whether their assumptions result in a valid cost of drying condensed milk and re-wetting the solids, as the Department

calculated in 1999. Select is concerned that AFB's methodology overstates an appropriate Class II differential.

2. Increasing the Class II Differential to \$1.56 will Result in Uneconomic Product Formulations and Disincentivize the Use of Fresh Milk and Cream.

Select's concern about the magnitude of Proposal 21's suggested Class II differential increase was shared by several hearing participants. Multiple witnesses testified about their belief that adopting Proposal 21 would result in substituting Class IV ingredients for fresh milk Tr. at 11277-11278 (Schuelke, Day 47); Tr. at 11320-11321 (Doelman, Day 47); Tr. at 1590 (Keefe, Day 48).

Select believes that some increase in the Class II differential is likely appropriate. If reliable record evidence could be utilized to update the differential calculation using the Department's stated methodology, that figure could be vetted against the concern of fresh milk ingredient substitution and an appropriate increase endorsed. Unfortunately, the record here does not allow for these calculations and comparisons. Accordingly, the Department should reject Proposal 21.

D. Proposed Findings and Conclusions Regarding Proposals 19-21.

8. As evidenced by the results of the USDSS model, changes in the market occurring since Order Reform demonstrate that current Class I differentials are no longer appropriate and should be updated.
9. The USDSS adequately captures changes in milk production and manufacturing, transportation costs, changes in traffic and logistics, other supply and demand factors, and the other considerations set forth in the hearing record to utilize the USDSS results in establishing new Class I differentials.

10. The Class I differentials should be updated to reflect the average differentials determined by the USDSS model, maintaining a current base differential of \$1.60/cwt.
11. A base differential of \$1.60 remains appropriate. The costs of maintaining Grade A status, balancing milk supplies to Class I plants, and attracting milk to fluid plants from manufacturing plants remain real, actual costs to market participants and exceeds \$1.60. Because the base differential should not cover the entirety of such costs, establishing a base differential or minimum differential of \$1.60 should not be adopted.
12. A Class II differential of \$1.56, as proposed by AFBF, is not consistent with the Department's prior rationale in establishing the Class II differential. As proposed, a differential at that level would overstate the substitution expenses of Class IV ingredients for Class II fresh milk and result in the uneconomic substitution of Class IV ingredients for Class II products.
13. A Class II differential of \$0.70 remains appropriate.

VIII. Risk Management.

Select opposes delaying the implementation of any proposal for purposes of risk management. As a first principle, absent clear and compelling justification, Select believes necessary regulatory updates should not be subservient to private commodity markets. There is no clear and compelling justification here. Instead, testimony on the issue establishes that participants in both USDA risk management programs and participants in markets throughout the CME will receive the benefit of their contracted risk management programs even if order changes are not delayed. Tr. at 2694 (Johnson, Day 11), Tr. at 660 (Bozic, Day 3), Tr. at 767-769 (Krema, Day 4)

Second, the industry does not agree on which proposals should be delayed for risk management purposes. Proposal 1 explicitly requests a delay in implementation. Conversely, witnesses from EDGE Cooperative suggest that virtually all changes be delayed for up to 15 months. Select opposes a blanket delay in the implementation of all proposals. It has already been far too long since the pricing provisions of the orders have been updated. An unnecessary delay of an additional year or more is unacceptable.

But if the Department were to contemplate delaying the implementation of Proposal 1 for twelve months, the ostensible benefit to risk management accruing from the delay would be lost if other federal order changes are not similarly delayed. Delaying Proposal 1 implementation while allowing other changes to make allowances, yields, the Class I mover, and differentials would still expose those participating in risk management to the same impacts as if Proposal 1 were immediately implemented. In essence, the decision regarding delayed implementation is an all-or-nothing proposition if it is to achieve its stated goal.

Further, the real push for delaying implementation does not appear to be from producers but from market participants concerned about the potential ancillary effects of regulatory change. Principal testimony in favor of risk management delays was offered by an economist from DFA, who explained that the cooperatives' offsetting risk management positions could be jeopardized. Tr. 1340-1342 (Gallagher, Day 6). Testimony from representatives of the Chicago Mercantile Exchange, although invited to testify by the Department, expressed concerns about the liquidity of its offerings and the rates of CME participation, not about the ability of its customers to receive the benefit of their hedge positions. Tr. 735-736, 740 (Krema, Day 4). Edge Cooperative's witness focused much of his testimony on potential impacts on future offerings of Dairy Revenue Protection. While DRP is a valuable risk management tool for producers, Edge's witness could not

state with certainty that the adoption of any proposal without a delay would cause a disruption in the availability of DRP for any significant period. Tr. at 663-664 (Bozic, Day 3).

Moreover, there is no precedent for the Department delaying an order amendment based on risk management. Although testimony clearly demonstrated that risk management's importance for producers and processors has increased since the FMMO price formulas were last updated, there was also no testimony that those markets in existence during the last updates were adversely impacted in any material respect. Tr. at 762 (Krema, Day 4).

Dr. Stephenson, who testified on three separate issues in this hearing for different proponents, was asked to opine whether disruption to risk management practices due to regulatory change would meet his understanding of disorderly marketing. Dr. Stephenson replied, "No, I do not think it would be. I'm not sure that hedgers or speculators should be first and foremost in the minds of federal milk marketing order personnel. That's not what they're here to do, in my understanding." Tr. at 3443 (Stephenson, Day 14).

Finally, there should be a recognition that markets operate with efficiency. The participants in futures and options markets are extremely sophisticated and consider countless data points and potentialities in establishing their positions. As Glanbia's witness testified:

We urge USDA not to delay reform implementation due to risk management concerns. The industry knows change is coming, within a reasonable level of certainty in scope, and dairy producers should still be able to hedge. The CME's concerns about liquidity impacts are worth noting, but their concerns are not necessarily rooted in the health of the broader industry.

Tr. at 3744 (De Jong, Day 15).

The Department would be wise to assume that the risk of regulatory change is already priced into the market at some level. Assuming the Department issues a recommended decision, approximately six months will elapse between the recommended decision and the effective date of any resulting changes. The majority of open interest in CME dairy complex contracts will be

unaffected by the changes, and the remainder will continue to price in the impacts of the changes. Tr. at 736 (Krema, Day 4) (over 75% of open interest within six months). There should be no delay in the implementation of any proposal for risk management purposes.

IX. Conclusion.

Select urges the department to adopt federal order amendments as outlined in this brief and restated in the following exhibit. Select's analysis and positions are informed by a careful review of the evidence and testimony presented during the hearing and scrutinized through the lens of the Department's previous policy statements and rationale. They are guided by Select's philosophy that federal order pricing formulas should be based on reliable data, address all aspects of the minimum price formulas, and encourage efficiencies rather than reinforce outdated assumptions or be tailored to meet parochial and private issues.

Select's three proposals will ensure that the value of the milk components delivered to plants is appropriately included in the component price yields. Select's comprehensive positions on the other proposals would update make allowances using the best available data and at levels that recognize increased manufacturing costs while promoting continued efficiency improvement, survey those products that serve as the best indicators of dairy product values, update Class I pricing to reflect efficiency in milk production, processing, and transportation, and restore the high-of as the Class I mover consistent with the Department's prior conclusion that it is the best method to ensure orderly marketing.

Respectfully submitted,

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April 1, 2024

Exhibit 1: Summary of Select’s Positions on All Proposals

Proposal	Proponent; Short Description of Purpose	Select’s Position
1	National Milk Producers Federation (“NMPF”): increase the skim milk component factors to equal the weighted average components for milk pooled on federal orders using data for the three years prior to implementation with a 12 month implementation lag	Supports, except for the delay in implementation.
2	National All-Jersey (“NAJ”): to amend the milk component factors in the Class III and Class IV skim milk price formulas, updated annually, with a 12 month implementation lag	Opposes considering its support for Proposal 1.
3	NMPF: to eliminate the cheddar cheese 500 pound barrel price from the protein price formulas	Supports.
4	American Farm Bureau Federation (“AFBF”): to add 640 pound cheddar cheese blocks to the protein price formula	Supports.
5	AFBF: to add unsalted butter to the butterfat and protein price formulas	Opposes.
6	California Dairy Campaign (“CDC”): to add mozzarella cheese to the protein price formula	Opposes.
7	NMPF: to amend the make allowances found in the four component price formulas as follows: butterfat \$0.21/lb.; nonfat solids \$0.21/lb.; protein \$0.24/lb.; other solids \$0.23/lb.	Opposes. Select proposes the following make allowances: butterfat \$0.2004/lb.; nonfat solids \$0.2260/lb., protein \$0.2281/lb.; other solids \$0.2498, lb.
8	Wisconsin Cheese Makers Association (“WCMA”): to update make allowances with a four year phase-in schedule.	Opposes. Select proposes the alternative make allowances stated above.
9	International Dairy Foods Association (“IDFA”): to update make allowances with a four year phase-in schedule.	Opposes. Select proposes the alternative make allowances stated above.
10	Select: to increase the butterfat recovery factor in the Class III price formula to 93%, which would increase the butterfat yield in cheese to 1.624	Supports.
11	Select: to update specified yield factors to reflect actual farm-to-plant shrink, which would increase the butterfat yield to 1.22,	Supports.

	the protein value in cheese to 1.386 and the butterfat value in cheese to 1.582	
12	Select: to update the nonfat solids yield factor to 1.02 to reflect the value of not fat solids in buttermilk powder.	Supports.
13	NMPF: to amend the base Class I skim milk price to be based off the higher-of Class III and Class IV advanced skim milk pricing factors.	Supports.
14	IDFA: to amend the Class I skim milk price to equal the simple average of the Class III and Class IV priced plus the higher-of \$0.74 or a rolling 24-month adjuster of the average difference between Class III and Class IV advanced skim milk prices.	Opposes.
15	Milk Innovation Group (“MIG”): to retain the current Class I skim milk price and update the adjuster monthly using a 24 month look back period with a 12 month lag.	Opposes.
16	Edge Dairy Farmer Cooperative (“Edge”): to change the base Class I skim milk price to the announced Class III skim milk price plus an adjuster.	Opposes.
17	Edge: to use the higher of the Class III skim milk price and the Class IV skim milk price to calculate the base Class I skim milk price, but to use announced prices rather than advanced prices.	Opposes.
18	AFBF: To eliminate the advanced pricing of Class I skim milk and Class II skim milk.	Opposes.
19	NMPF: to update the Class I differentials for the contiguous 48 states.	Opposes the specific differentials in Proposal 19. Supports updating all Class I differentials using the average differentials determined by the USDSS model plus a base differential of \$1.60/cwt.
20	MIG: to lower the base Class I differential from \$1.60 to \$0.00.	Opposes.
21	AFBF: to increase the Class II differential to \$1.56.	Opposes.

CERTIFICATE OF SERVICE

Milk in the Northeast and Other Marketing Areas

Docket No.: 23-J-0067

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct, and this is to certify that a copy of the POST HEARING BRIEF AND PROPOSED FINDINGS AND CONCLUSIONS SUBMITTED BY SELECT MILK PRODUCERS, INC. has been furnished and was served by electronic mail upon the following parties on April 2, 2024 by the following:

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Docket No.: 23-J-0067

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