5. PROVISIONS APPLICABLE TO ALL ORDERS

In addition to the terms and conditions of milk orders previously described, there are a number of other provisions common to all milk orders that describe and define those persons and plants affected by the regulatory plan of the program. Different marketing conditions in the consolidated areas, together with institutional factors, do not lend themselves to an entirely uniform set of provisions for all orders. Consequently, in each of the consolidated orders there are provisions that are unique to each order.

This part of the final decision discusses the nature of these common order provisions, their purpose, and whether or not a provision can be uniformly applied to all orders. When a provision does not lend itself to uniform application, it is discussed in subsequent sections of this final rule together with the provisions unique to each of the individual orders.

To the extent that provisions can be uniformly applicable for all of the consolidated orders, they are included in Part 1000, the General Provisions of Federal Milk Marketing Orders which are, by reference, already a part of each milk order. Thus, as provided here, the General Provisions include the definitions of route disposition, plant, distributing plant, supply plant, nonpool plant, handler, other source milk, fluid milk product, fluid cream product, cooperative association, and commercial food processing establishment. In addition, the General Provisions include the milk classification section of the order, pricing provisions, and some of the provisions relating to payments. These additions to the General Provisions should make milk order provisions more understandable to the general public by removing the differences that now exist and by consolidating uniform provisions in one place. Thus, an interested person would only have to read one “nonpool plant” section, for instance, to understand how that term is applied to all orders. By contrast, at the present time, “nonpool plant” is defined in every order and there are slight differences in the definition from one order to the next.

No comments to the proposed rule were received with regard to most of the provisions discussed in this section. To the extent that there were comments, they are specifically discussed below. Most of the provisions in the proposed rule are adopted without substantive change. Any substantive changes are specifically discussed below.

The Concept of Pooling Milk Proceeds

All Federal milk orders today, save one, provide for the marketwide pooling of milk proceeds among all producers supplying the market. The one exception to this form of pooling is found in the Michigan Upper Peninsula market, where individual handler

pooling has been used.

Marketwide sharing of the classified use value of milk among all producers in a market is one of the most important features of a Federal milk marketing order. It ensures that all producers supplying handlers in a marketing area receive the same uniform price for their milk, regardless of how their milk is used. This method of pooling is widely supported by the dairy industry and has been universally adopted for the 11 consolidated orders.

There were a number of proposals and public comments considered in determining how Federal milk orders should pool milk and which producers should be eligible to have their milk pooled in the consolidated orders. Many of these comments advocated a policy of liberal pooling, thereby allowing the greatest number of dairy farmers to share in the economic benefits that arise from the classified pricing of milk.

A number of comments supported identical pooling provisions in all orders, but others stated that pooling provisions should reflect the unique and prevailing supply and demand conditions in each marketing area. Fundamental to most pooling proposals and comments was the notion that the pooling of producer milk should be performance-oriented in meeting the needs of the fluid market. This, of course, is logical since a purpose of the Federal milk order program is to ensure an adequate supply of milk for fluid use.

A suggestion for “open pooling,” where milk can be pooled anywhere, has not been adopted, principally because open pooling provides no reasonable assurance that milk will be made available in satisfying the fluid needs of a market. Proposals to create and fund “stand-by” pools are similarly rejected for the same reason.

The pooling provisions for the consolidated orders provide a reasonable balance between encouraging handlers to supply milk for fluid use and ensuring orderly marketing by providing a reasonable means for producers within a common marketing area to establish an association with the fluid market. Obviously, matching these goals to the very disparate marketing conditions found in different parts of the country requires customized provisions to meet the needs of each market. For example, in the Florida marketing area, where close to 90 percent of the milk in the pool will be used for fluid use, pooling standards will require a high degree of association with the fluid market and will permit a relatively small amount of milk to be sent to manufacturing plants for use in lower-valued products. In the Upper Midwest market, on the other hand, a relatively small percentage of milk will be needed for fluid use. Accordingly, under the pooling standards for that order smaller amounts of milk will be required to be delivered to fluid milk plants and larger amounts of milk will be

permitted to be sent to manufacturing plants for use in storable products such as butter, nonfat dry milk, and hard cheese. The specific pooling provisions adopted for each order are discussed in detail in the sections of this document pertaining to each of the consolidated orders.

Route Disposition

Route disposition is a measure of fluid milk sales in commercial channels. It is defined to mean the amount of milk delivered by a distributing plant to a retail or wholesale outlet (except a plant), either directly or through any distribution facility (including disposition from a plant store, vendor or vending machine), of a fluid milk product in consumer-type packages or dispenser units that is classified as Class I milk.

The route disposition definition adopted here differs from the definition contained in some current orders. Presently, the route disposition definition of several orders makes reference to plant movements of packaged fluid milk products between distributing plants with respect to determining if such transfers should be considered "route disposition" of the transferring plant or the receiving plant. As provided here, however, this issue is addressed in Section 7(a) of the pool plant section, which essentially treats such transfers as if they were route disposition.

Plant

A plant definition is included in all orders to specify what constitutes an operating entity for pricing and regulatory purposes. As provided in § 1000.4 of the General Provisions, a plant is the land, buildings, facilities, and equipment constituting a single operating unit or establishment at which milk or milk products are received, processed, or packaged. This is meant to encompass all departments, including those where milk products are stored, such as a cooler. The plant definition does not include a physically separate facility without stationary storage tanks that is used only as a reload point for transferring bulk milk from one tank to another, or a physically separate facility that is used only as a distribution point for storing packaged fluid milk products in transit for route disposition.

To account for regional differences and practices in transporting milk, some of the consolidated orders provide for the use of reload points for transporting bulk milk that do not have stationary storage tanks.

Farm-separated Milk

With the advent of new technology for on-farm separation of milk into its components, some additional regulatory language has been added to the plant definition to specify who is the responsible handler for the milk or milk components leaving the farm and how these components will be classified and priced. This

determination will be based, in part, on whether the farm processing facility is a plant.

Ultrafiltration (UF) is a membrane process that transfers water and low-molecular weight compounds through a membrane while retaining suspended solids, colloids, and large organic molecules. It selectively fractionates some milk solids components and selectively concentrates other solids components of milk.

When a UF membrane is used, water, lactose, uncomplexed minerals and other low-molecular-weight organic compounds pass through the membrane. For example, if unaltered milk containing 3.5 percent fat, 3.1 percent protein, and 4.9 percent lactose is run through a UF membrane until half of the original volume is eliminated, the remaining product not passing through the membrane (i.e., retentate) will contain all of the fat and protein but only half of the lactose. The permeate (i.e., that part of the original milk that does pass through the membrane) will contain water, lactose, non-protein nitrogen, and about one-sixth of the minerals.

Reverse osmosis (RO) is also a membrane process, but the membranes have much smaller pores than UF membranes, allowing only the water to pass through. The end product essentially is concentrated milk.

At the present time, both reverse osmosis and ultrafiltration systems are being utilized on some farms, principally large farms in the southwestern United States. The product shipped from these farms (i.e., the retentate) currently is sent to processing plants for use in manufactured products but it could be used in a range of milk products.

The retentate received from a farm with a UF or RO system will be treated as producer milk at the pool plant at which the milk is physically received or, if the retentate is shipped to a nonpool plant, as producer milk diverted to a nonpool plant. In either case, the milk or milk components will be priced at the pool plant or nonpool plant where the milk is physically received.

To be considered a farm and a producer, as opposed to a plant and a handler, an RO or UF unit must be under the same ownership as the farm on which it is located and only milk from that farm or other farms under the same ownership may be processed through the unit. The producer operating the unit shall be responsible for providing records of the daily weights of the milk going through the unit. Also, the producer must provide samples for each load of milk going through the unit and must furnish the receiving plant with a manifest on each load of retentate showing the scale weight along with samples of the retentate. Finally, the producer operating the RO or UF unit must maintain records of all transactions which must be available to the Market Administrator upon request. If the producer does not meet these recordkeeping

and reporting requirements, the unit will be considered to be a plant.

RO and UF retentate will be considered to be producer milk at the plant which receives it. The pounds of RO and UF retentate received will be priced according to the skim-equivalent pounds of such milk. The skim-equivalent pounds for RO retentate will be determined by dividing the solids-not-fat pounds in the retentate by the average producer solids-not-fat in the skim portion of the producer milk used in the product. The butterfat pounds would then be added to this number to arrive at the product skim-equivalent pounds.

In computing the fluid equivalent of UF retentate, the fluid equivalent factor should be computed by dividing the true protein test in the skim milk portion of the retentate by the true protein test in the skim milk portion of the producer milk used in the product. Adding the butterfat pounds to this computation will yield the product equivalent pounds.

In addition to having UF and RO equipment, some farms today may have a separator to separate skim milk from cream before they leave the farm. Rules are also established for this type of operation.

Skim milk and cream going through a farm separator also should be treated as producer milk if received at a pool plant or diverted to a nonpool plant. The producer will be required to obtain scale weights and tests on each load of skim and cream shipped along with samples of each. The same ownership, recordkeeping, sampling and reporting requirements that apply to RO and UF units will also be applicable.

In formulating a policy for the treatment of RO and UF retentate, it is important to recognize that the milk produced on a farm with RO or UF equipment is fully available to meet the needs of the fluid market, either before or after passing through such units. Therefore, there should be no question concerning the propriety of pooling this milk along with other producers' milk.

At this writing, the Food and Drug Administration (FDA) has not yet decided whether UF retentate can be reconstituted and sold as fluid milk. However, FDA has approved the use of UF retentate in certain cheese products on a trial basis. Therefore, before receiving UF retentate for use in any product, handlers should be certain that such use has been approved by the FDA.

Distributing Plant

A distributing plant is defined as a plant that is approved by a duly constituted regulatory agency to handle Grade A milk and at which fluid milk products are processed or packaged and from which there is route disposition or transfers of packaged fluid milk products to other plants. This definition, and the following supply plant definition, are essentially the same as those found

in present orders, except for minor changes made to conform with the pool plant provisions adopted for the consolidated orders.

Supply Plant

A supply plant is a regular or reserve supplier of bulk milk for the fluid market that helps to coordinate the supply of milk with the demand for milk in a market. As defined in this decision, a supply plant is a plant approved by a duly constituted regulatory agency for the handling of Grade A milk that receives milk directly from dairy farmers and transfers or diverts fluid milk products to other plants or manufactures dairy products on its premises.

Pool Plant

The pool plant definition of each order describes those plants which receive milk that shares in the marketwide pool. It provides standards to identify those plants engaged in serving the fluid needs of the marketing area. Pool plants serve the fluid market to a degree that warrants their producers sharing in the added value that derives from the classified pricing of milk. While the pool plant definition in every consolidated order provides for a set of common principles, the standards applicable to pool plants differ among the consolidated orders, reflecting the fact that marketing conditions vary across the country. The goal in drafting pooling standards is to ensure both an adequate supply of milk for fluid use and orderly marketing by allowing all milk in a marketing area the opportunity to serve the fluid market and thereby share in the pool.

There are 2 performance standards applicable to pool distributing plants in the consolidated orders. The first standard, which varies among orders, requires a distributing plant to have a minimum Class I utilization. Since route disposition includes only Class I milk, the specific standard is a measure of a distributing plant's route disposition as a percent of its total receipts of fluid milk products. This standard is generally directly related to the market's Class I utilization. Accordingly, in the higher Class I utilization markets in the Southeast, the overall route disposition standard is 50 percent. In a market such as the Upper Midwest, on the other hand, where Class I utilization will be much lower, the overall route disposition standard is only 15 percent. The specific standards for each consolidated order are discussed in Section 6 of this decision.

One change common to all orders from the proposed rule to this final decision is the substitution of "total receipts of fluid milk products" for "receipts of bulk fluid milk products" in computing the total and in-area disposition for a distributing plant. This change was made to achieve consistency in accounting for packaged receipts at a distributing plant that are

subsequently disposed of as route disposition or transferred to another plant. Since all such disposition will count towards meeting an order's specified pooling standards, receipts of such products from another plant also should be counted as part of the plant's receipts.

Once it is determined that a distributing plant is sufficiently associated with the fluid market to share in the pool, a second standard determines if the plant is sufficiently associated with a particular market to share in the pool applicable to that market. The "in-area" standard adopted for the consolidated orders requires that a distributing plant have 25 percent of its route disposition within a marketing area before it can be fully regulated by the order covering that marketing area.

The 15 percent in-area standard in the proposed rule has been changed to 25 percent for all orders to reflect the larger, merged marketing areas that are adopted. This change should not affect the regulatory status of any current distributing plant.

At the present time, some orders describe the in-area route disposition standard as a percent of plant receipts, while in other orders it is described as a percent of route disposition. For the new orders, the in-area standard for all orders is expressed as a percent of total route disposition. This methodology will ensure that the in-area route disposition standard never exceeds the total route disposition standard, a situation that is now possible under the terms of the present Upper Midwest order. For most orders, this change will make little difference and should not result in regulating any plant that is now unregulated.

Under the consolidated orders, a distributing plant that has sales in more than one Federal order marketing area will be regulated, for the most part, under the order in which it has the most sales. There are certain exceptions to this rule, however, particularly in the 3 Southeast orders, where the shifting of plants among markets has created disorderly marketing conditions in recent times. In the Florida, Southeast, and Appalachia orders, a distributing plant that is located within the marketing area and that meets the order's pooling standards will be regulated under that order even though it might have more route disposition in some other marketing area.

When the regulation of a plant does shift from one order to another, the shift will only occur after the plant has had greater sales in such other market for 3 consecutive months. This provision will provide some stability to avoid the frequent shifting of regulation between orders.

To facilitate proper administration and accounting, all orders currently provide that packaged fluid milk products transferred from one handler to another be treated as

inter-handler transfers, with each transaction properly identified and specifically reported to affected market administrators. This should continue in the consolidated orders. However, for the single purpose of qualifying a plant as a pool distributing plant, the pool distributing plant definition has been modified to treat transfers of packaged fluid milk products to other plants as if they were route disposition of the transferring plant for the purpose of identifying the plant's association with the fluid market. This is necessary to preclude a plant from becoming partially regulated if the plant shipped significant quantities of packaged fluid milk products to another distributing plant. A conforming change has been made to the distributing plant definition in § 1000.5 to reflect this change.

A special pool distributing plant provision (i.e., Section 7(b) of the consolidated orders) has been adopted for distributing plants that distribute ultra-pasteurized or aseptically-processed fluid milk products. Such plants must be located in the marketing area and must process a certain percentage of their milk receipts into ultra-pasteurized or aseptically-processed fluid milk products during the month. The minimum percentage used for each order in Section 7(b) is equal to the total route disposition percentage required in Section 7(a) of the order for distributing plants processing standard shelf-life fluid milk products. However, unlike the standards for a 7(a) plant, there is no route disposition standard for a 7(b) plant to meet.

Plants specializing in ultra-pasteurized or aseptically-processed fluid milk products tend to have erratic processing and distribution patterns reflecting the long-life nature of the product they process. In some months, they may process fluid milk products but have little or no route disposition because the products are stored in inventory. In addition, these plants often have much wider distribution patterns than do other distributing plants and, under current orders, frequently shift regulation from one order to another. This shifting regulation is disruptive to the producers and/or cooperatives supplying these plants and is an additional regulatory burden to the plant operator.

To provide regulatory stability for these plants, they will be treated as a fully regulated plant if they process a minimum percent of their milk receipts into ultra-pasteurized or aseptically-processed fluid milk products during the month. Having met this standard, which varies among orders, they will not shift regulation to another order simply because they have more route disposition in such other order's marketing area. In fact, they need not have any route disposition in the order in which they are located to remain regulated. However, if they do not meet the processing standard of the order in which they are

located but do meet the 7(a) standards for a distributing plant under one or more other orders, they will become regulated under the order in which they have the most route disposition. If they continue to qualify for pool status on this basis, they may be subject to regulatory shifts depending upon the pattern of their route disposition.

Pool Supply Plant

Performance standards for pool supply plants are designed to attract an adequate supply of milk to meet the demands for fluid milk in a market. Pool supply plants move milk to pool distributing plants that service the marketing area.

The pool supply plant definition, like the distributing plant definition, does not lend itself to uniform application in all consolidated orders. Consequently, pool supply plant performance standards should be established according to regional needs. The specific standards adopted in each order are described in Section 7(c) of each new order and are explained in more detail in the regional discussions of this document.

In most current orders, a pool supply plant does not include any portion of a plant that is not approved for handling Grade A milk and that is physically separated from a portion of the plant that has such approval. Some inspection agencies render only one type of approval for an operation. To accommodate those areas where split operations are permitted, some of the consolidated orders provide for a physically separated portion of the plant as a “nonpool plant.”

Pooling Options

Unit Pooling

Unit pooling allows 2 or more plants located in the marketing area and operated by the same handler to qualify for pool status as a unit by meeting the total and in-area route disposition standard as if they were a single pool distributing plant. To qualify as a unit, at least one of the plants in the unit -- i.e., the primary plant-- must qualify as a pool distributing plant on its own standing and the other plants in the unit must process only Class I or Class II milk products.

Unit pooling serves to accommodate and provide a flexible regulatory approach in addressing the specialization of plant operations. It also minimizes unintended regulatory effects that may cause the uneconomical and inefficient movement of milk for the sole purpose of retaining pool status. However, some conditions need to be satisfied for unit pooling. The “other” plant(s) of the pool unit--i.e., the plants that would not qualify for pool status as a single plant--must be located in an equivalent or a lower price zone than the primary pool distributing plant. This condition is required to assure that the transportation of milk for Class II uses will not be subsidized

through the marketwide pool and to assure pricing equity to all handlers processing Class II products that do not use unit pooling. Unit pooling status must be requested in writing and approved by the market administrator for its proper implementation and administration.

System Pooling

Supply plants and reserve supply plants provide a benefit to the market because they are required to meet certain performance standards in supplying the needs of the fluid market. They also serve to balance the market. Because handlers often operate more than one supply plant within the market, some of the merged orders allow a single proprietary handler or one or more cooperative associations to combine their plants into systems for the purpose of meeting the order’s performance standards for pooling. Under system pooling, 2 or more plants in a system can qualify for pool status by meeting the applicable performance standards in the same manner as a single plant. However, not all plants in a system of supply plants must transfer or divert milk to a distributing plant. In recognition of this fact, the supply plant definition in § 1000.6 has been modified to conform with this provision.

Adjustment of Pooling Standards

The consolidated orders provide the market administrator with authority to adjust shipping standards for supply plants, reserve supply plants, balancing plants, and supply plant units if he/she finds that such revision is necessary to encourage needed shipments or to prevent uneconomic shipments of milk. A finding by the market administrator that adjustments are warranted would follow an investigation conducted on the market administrator's own initiative or at the request of interested parties. Before making a finding that revisions are warranted, the market administrator would notify interested parties of this possibility and invite data, views, and arguments. If the market administrator determines that a revision is warranted, he/she shall provide written notification to interested parties of such revision at least one day before the revision goes into effect.

This provision allows the market administrator to respond promptly to changes in local marketing conditions and should result in better service to the dairy industry and to the public. The authority given to the market administrator to make needed adjustments in the manner specified is commensurate with the authorities already delegated by the Secretary to the market administrator.

As provided in the proposed rule, the market administrator would have had the authority to adjust pooling standards for distributing plants as well as supply plants. However, such authority has not been provided in any of the current marketing orders except for the Southeast, and in that market it has never

been needed. Consequently, it was concluded that any changes that may need to be made to pool distributing plant standards can best be handled through normal amendatory and suspension procedures.

Treatment of Concentrated Milk

An issue related to pooling that should be clarified with the issuance of new orders is the treatment of concentrated milk that is shipped between plants.

Prior to the 1993 classification decision, condensed milk was not defined as a fluid milk product. Accordingly, when condensed milk was shipped from a supply plant to a distributing plant it was not counted as a qualifying shipment for the purpose of determining the pool status of the supply plant. By the same token, when a distributing plant received a shipment of condensed milk from another plant, the condensed milk was excluded from the distributing plant's receipts for the purpose of computing the pool plant status of the distributing plant.

In the 1993 classification decision, condensed milk was redefined as concentrated milk[1] and was included in the fluid milk product definition. An unintended consequence of this change was that certain plants which had never been pool plants before suddenly became pool plants because of their shipments of condensed milk, and certain distributing plants that had been pool plants suddenly found themselves unable to qualify as pool plants because their receipts of "fluid milk products" were enlarged to include their condensed milk receipts. When handlers complained about these unforseen and unexplained changes, it was decided administratively to continue the previous treatment for condensed milk until the orders could be amended.

The consolidated orders should continue this special treatment for condensed milk. Although condensed milk conceivably may be reconstituted for fluid use, as a practical matter this is rarely, if ever, done. Sometimes, condensed milk is used to fortify fluid milk, but for the most part condensed milk is made to be used in ice cream mix or some other manufactured dairy product.

When condensed milk is transferred from the plant of origin to a distributing plant in the same or another order, it is generally transferred, by agreement, for Class II or III use. Using this criteria as a distinguishing feature of this product,

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[1]As used in Parts 1000 through 1135, the term concentrated milk means milk that contains not less than 25.5 percent, and not more than 50 percent, total milk solids. It may include milk that has been condensed or milk that has been filtered using such methods as reverse osmosis and ultra-filtration. Concentrated milk may be pasteurized and it may be homogenized.

the pool supply plant provision of each order should exclude from qualifying shipments to distributing plants “concentrated milk transferred, by agreement, for other than Class I use.” By the same token, a distributing plant also should exclude from its receipts, for pooling purposes, “concentrated milk received, by agreement, for other than Class I use.”

Using this language will preserve the regulatory treatment that has applied to condensed milk for many years. At the same time, however, this language allows flexibility for different treatment in the case of concentrated milk that is not destined for Class II or III use.

In recent years, there has been much greater use of filtering equipment to remove water from milk at the farm. This technology may be used to reduce hauling costs in shipping milk long distances for use as fluid milk products. Although this concentrated milk is not at present being used for fluid use, this situation may change in the future. For this reason, it is reasonable to provide some flexibility in handling this type of product for both shrinkage and pooling purposes. At this point in time, we believe that the best way to provide this flexibility is to allow the handlers involved in making and using this product to decide among themselves how it will be used and reported, knowing ahead of time the shrinkage and pooling implications involved with these decisions. Thus, if concentrated milk is purchased from another plant by agreement for other than Class I use, the buying handler understands that there will be no shrinkage allowance allowed on the milk. The buying handler also knows that the volume of concentrated milk received will not be counted as a plant receipt for the purpose of determining its pool status.

A supply plant shipping concentrated milk for Class II use may or may not wish to be pooled under a Federal order. If the plant wished to be treated as a nonpool plant, concentrated milk could be transferred for Class II or III use by agreement with the receiving handler. In such case, the transfer of concentrated milk would not be counted as a qualifying shipment in meeting the pool supply plant shipping standards and the receipt of concentrated milk at the distributing plant would not be counted as part of the distributing plant’s receipts for purposes of computing its total route disposition. Of course, the agreement to transfer milk for a pre-arranged use is contingent upon the receiving distributing plant having sufficient Class II or III utilization to absorb these receipts.

On the other hand, if a supply plant making concentrated milk wished to qualify for pool status, it could simply transfer concentrated milk to a pool distributing plant without specifying its designated use. In such case, the shipment would count as a qualifying shipment for the purpose of meeting the order’s pool

supply plant shipping requirements provided that the distributing plant receiving the concentrated milk was a pool plant. Since the receipt of concentrated milk would be counted as part of the receiving distributing plant's receipts in determining the distributing plant's pool status under the order, the plant would have to have sufficient Class I sales to maintain its identity with the fluid market. If the distributing plant did not have sufficient Class I use to meet the order's pooling standards, it would not be qualified to have its receipts pooled under the order and, by extension, neither would the supply plant that shipped the concentrated milk to the distributing plant.

This regulatory flexibility for concentrated milk should accommodate varied situations in the consolidated orders. It will follow the historical treatment for condensed milk but, at the same time, it will provide for new uses and treatment for other types of concentrated milk.

Nonpool Plant

A definition is provided in all orders describing plants which receive, process or package milk, but which do not satisfy the standards for being a pool plant. While providing for such a definition may appear redundant, this provision is useful to more clearly define the extent of regulation applicable to plants.

Nonpool plants should include a plant that is fully regulated under another Federal order, a producer-handler plant, a partially regulated distributing plant, an unregulated supply plant, and an exempt plant. The definitions for these nonpool plants are not materially different than those provided in the current orders with the possible exception of an "exempt plant."

Certain plants are exempt from regulation under Federal milk orders. These plants fall into 4 categories: (1) plants that are operated by a governmental agency which have no route disposition in commercial channels; (2) plants operated by a college or university that dispose of fluid milk products only through their own facilities with no route disposition in commercial channels; (3) plants from which the total route disposition is for individuals or institutions for charitable purposes without remuneration; and (4) plants that have route disposition of 150,000 pounds or less during the month. These types of plants have little impact on the regulated market and need not be regulated to ensure the integrity of the regulatory plan.

A number of Federal orders exempt from regulation small distributing plants which, because of their size, do not significantly impact competitive relationships among handlers in the market. The level of route disposition required before an exempt plant becomes regulated varies in the current orders. As adopted for the merged orders, any plant with route disposition during the month of 150,000 pounds or less would be exempt from

regulation. This limit reflects the maximum amount of fluid milk products allowed by an exempt plant in any current Federal milk order and ensures that plants currently exempt from regulation will remain exempt.

Many current Federal orders also provide regulatory exemption for a plant operated by a state or Federal governmental agency. For example, some states have dairy farm and plant operations that provide milk for their prison populations. As provided herein, regulatory exemption would be continued under the consolidated orders unless pool plant status is requested.

Regulatory exemption also should apply to colleges, universities, and charitable institutions because these institutions generally handle fluid milk products internally and have no impact in the mainstream commercial market. However, in the event that these entities distribute fluid milk through commercial channels, route sales by such entities, including government agencies, will be monitored to determine if Federal regulation should apply.

The determination and verification of exempt plant status will, from time to time, necessitate the need for the market administrator to require reports and information deemed appropriate for the sole purpose of making this determination. Such authority is currently provided in orders and should continue.

Handler

Federal milk orders regulate those persons who buy milk from dairy farmers. Such persons are called handlers under the order. These persons have a financial responsibility for payments to dairy farmers for milk in accordance with its classified use. They must file reports with the market administrator detailing their receipts and utilization of milk.

The handler definition adopted for the consolidated orders includes the operator of a pool plant, a cooperative association that diverts milk to nonpool plants or delivers milk to pool plants for its account, and the operator of a “nonpool plant,” which would encompass a producer-handler, a partially regulated distributing plant, a plant fully regulated under another Federal order, an unregulated supply plant, and an exempt plant.

In addition, "third party" organizations that are not otherwise regulated under provisions of an order are included in the handler definition. This category includes any person who engages in the business of receiving milk from any plant for resale and distribution to wholesale and retail outlets, brokers or others who negotiate the purchase or sale of fluid milk products or fluid cream products from or to any plant, and persons who, by purchase or direction, cause the milk of producers to be picked up at the farm and/or moved to a plant. Such

intermediaries provide a service to the dairy industry. These persons are not, however, recognized or regulated as entities required to make minimum payments to producers. The expanded marketing chain brought about by such intermediaries has made it increasingly difficult for the market administrator to track the movement of milk from farms to consumers. The revised handler definition enables the market administrator to more readily identify those entities.

Producer-handler

It has been a long-standing policy to exempt from full regulation many of those entities that operate as both a producer and a handler. Generally, a producer-handler is any person who provides satisfactory proof to the market administrator that the care and management of the dairy farm and other resources necessary for own-farm production and the management and operation of the processing plant are the personal enterprise and risk of such person. A primary basis for exempting producer-handlers from the pricing and pooling provisions of a milk order is that these entities are customarily small businesses that operate essentially in a self-sufficient manner. Also, during the history of producer-handler exemption from full regulation there has been no demonstration that such entities have an advantage as either producers or handlers so long as they are responsible for balancing their fluid milk needs and cannot transfer balancing costs, including the cost of disposing of reserve milk supplies, to other market participants.

The current orders have varying producer-handler definitions that address specific marketing conditions and circumstances. For example, they specify different limits on the amount of milk that producer-handlers may purchase and retain their exempt status. Some modifications have been made to the producer-handler provisions in the consolidated orders for standardization. However, no changes have been made that would intentionally regulate a producer-handler that is currently exempt from regulation under their current operating procedures. Because the producer-handler provision is slightly different from one order to the next, the specific details regarding each definition are described in the regional discussions that follow. Any general provision in the proposed rule, such as the phrase “or acquired for distribution” in § 1000.44(a)(3)(iv), that would have changed the status of a current producer-handler has been eliminated.

Public comments were received regarding the extent of regulation that should apply to producer-handlers. The majority of public comments supported the status-quo regarding the regulatory treatment of producer-handlers, emphasizing that they should remain exempt from regulation in accordance with current order provisions and that the provisions should be regional in

nature so as not to affect or change the current regulatory status of producer-handlers.

One of the public comments received proposed that the exemption of producer-handlers from the regulatory plan of milk orders be eliminated. This proposal is denied. In the legislative actions taken by the Congress to amend the AMAA since 1965, the legislation has consistently and specifically exempted producer-handlers from regulation. The 1996 Farm Bill, unlike previous legislation, did not amend the AMAA and was silent on continuing to preserve the exemption of producer-handlers from regulation. However, past legislative history is replete with the specific intent of Congress to exempt producer-handlers from regulation. If it had been the intent of Congress to remove the exemption, Congress would likely have spoken directly to the issue rather than through omission of language that had, for over 30 years, specifically addressed the regulatory treatment of producer-handlers.

Since producer-handlers are intended to be exempt from most regulation, some means must be provided to determine and to verify producer-handler status. Accordingly, the market administrator is provided with the authority to require reports and other information deemed appropriate to determine that an entity satisfies the requirements for producer-handler status. Such authority is currently provided in the orders and should continue.

Producer

Under all orders, <u>producers</u> are dairy farmers that supply the market with milk for fluid use or who are at least capable of doing so if necessary. Producers are eligible to share in the revenue that accrues from marketwide pooling of milk. The producer definitions of the individual orders are described under the regional discussions later in this document. Responding to regional needs, producer definitions will differ by order with respect to the degree of association that a dairy farmer must demonstrate with a market.

A dairy farmer may not be considered a producer under more than one Federal milk order with respect to the same milk. If a dairy farmer’s milk is diverted by a handler regulated under one Federal order to a plant regulated under another Federal order, and the milk is allocated at the receiving plant (by request of the diverting handler) to Class II, III or IV, the dairy farmer will maintain producer status in the original order from which milk was diverted.

Since producer-handlers and exempt plants are specifically exempt from Federal order pricing provisions, the term producer should not include a producer-handler as defined in any Federal order. Likewise, the term producer should not apply to any person whose milk is delivered to an exempt plant, excluding producer

milk diverted to such exempt plant. Some of the new orders (See Orders 1001, 1124, 1131, and 1134) also exclude from producer status a dairy farmer whose milk is received at a nonpool plant as other than producer milk. The reasons for including this provision are explained in the regional discussions describing those orders.

Producer Milk

The producer milk definition identifies the milk of producers which is eligible for inclusion in a particular marketwide pool. This definition is specific to each consolidated order, reflecting the fact that marketing conditions differ among regions.

In general, the definition of producer milk for all consolidated orders continues to include the milk of a producer which is received at a pool plant or which is received by a cooperative association in its capacity as a handler. Most current orders consider milk to be "received" when it is physically unloaded at the plant and the consolidated orders would continue that treatment.

In order to promote the efficient handling of milk, all orders currently allow a handler to move producer milk, within certain specified limits, from a producer's farm to a plant other than the handler's own plant. This is referred to as a "diversion" of milk. Under the consolidated orders, the definition of producer milk allows unlimited diversions to other pool plants, thereby providing maximum flexibility in efficiently supplying the fluid market.

Under some orders, unlimited diversions to nonpool plants would also be allowed once a dairy farmer has become associated with a particular order. Under other orders, however, a producer would be required to "touch base" at a pool plant one or more times each month and, in addition, aggregate diversion limits may be applied to a handlers' total diversions. The specific touch base and diversion limits are described in the regional discussions pertaining to each order.

Even for orders without any diversion limits, there is a practical limit to how much milk may be diverted from a pool plant because of the pooling standards that must be met. For a pool supply plant, for example, there is a standard computed by dividing the amount of milk shipped to distributing plants by a plant's total receipts. As provided in the orders, "receipts" include milk that is physically received at the plant as well as diverted to nonpool plants. This inclusion of diverted milk in a plant's receipts automatically limits the amount of milk that may be diverted by those plants. Thus, the maximum quantity of milk that such plants would be able to divert and still maintain their pool plant status would be 100 percent less the pool plant shipping standards for the month.

This treatment of diverted milk will mitigate the need for suspending order diversion limitations, an action that is quite common in some of the current orders. Unlimited diversions for many of the new orders will allow for maximum efficiency in balancing the market's milk supply. The market administrator's ability to adjust shipping percentages for pool supply plants, pool reserve supply plants, and balancing plants will ensure that an adequate supply of milk is available for the fluid market without the imposition of diversion limits.

While a one-time producer "touch base" standard and virtually unlimited diversions are appropriate for most of the consolidated Federal orders, they are not appropriate for certain "deficit" markets in the Southeast. For these orders, touch base requirements and diversion limits provide another tool to ensure that an adequate supply of fluid milk is available to meet the markets' needs. The specific standards for these orders are discussed in the regional section of this document.

In order to provide regulatory flexibility and marketing efficiencies, all of the new orders having diversion limits allow the market administrator to increase or decrease these limits on relatively short notice. This provision currently exists in some Federal orders and has proven to be a responsive, efficient, and effective way to deal with rapidly changing marketing conditions.

Cooperative Association

All current orders provide a definition for dairy farmer cooperative associations that market milk on behalf of their dairy farmer members. Providing for a uniform definition of a cooperative association facilitates the administration of the various order provisions as they apply to such producer organizations and recognizes the unique standing granted to dairy farmer cooperatives under the Capper-Volstead Act. Dairy farmer cooperatives are responsible for marketing the majority of the milk supplied to regulated handlers under the Federal order system.

As provided herein, a cooperative association means any cooperative marketing association of producers which the Secretary determines, after application for such recognition by the cooperative, is qualified as such under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act". Additionally, the new orders continue to require that a cooperative association have full authority in the sale of the milk of its members and that it be engaged in making collective sales or marketings of milk or milk products for its dairy farmer members.

Several current orders provide a definition for a federation of 2 or more cooperative associations. As adopted here, all consolidated orders recognize a federation of cooperatives as

satisfying the cooperative definition for the purposes of determining milk payments and pooling. Individual cooperatives of a federation of cooperatives must also meet the criteria as set forth for individual cooperative associations and their federations as incorporated under state laws.

Handler Reports

All current orders require handlers to submit monthly reports detailing the sources and uses of milk and milk products so that market average use values, or blend prices, can be determined and administered. Payroll reports and other reports required by the market administrator are also provided for in the orders. The order language for the consolidated orders is similar to that contained in current orders. The dates when reports are due in the market administrator's office differ slightly by order according to custom and industry practice.

Announcements by the Market Administrator

In the course of administering the order, the market administrator is required to make several announcements each month with respect to classification, class prices and component prices, an "equivalent price" when necessary, and various producer prices. As adopted here, these provisions are uniform and are nearly identical to current order provisions, with the exception of Section 62 (Announcement of producer prices), which differs to some extent among orders depending on the degree of component pricing used in the order.

Producer-settlement Fund

In all of the current and consolidated orders, handlers are required to pay minimum class prices for the milk received from producers. These proceeds are blended through the marketwide pool so that producers are returned a uniform, or blend, price for their milk. The mechanism for the equalization of a handler's use value of milk is the producer-settlement fund. It is established and administered by the market administrator for each order.

The producer-settlement fund ensures that all handlers are able to return the market blend price to producers whose milk was pooled under the order. Payments into the producer-settlement fund are made each month by handlers whose total classified use value of milk exceeds the value of such milk calculated at the uniform price (or at component prices for those orders with component pricing). Similarly, payments out of the producer-settlement fund are made each month to any handler whose use value is below the value of milk at the uniform price or component prices, as the case may be. The transfer of funds enables handlers with a use value below the average for the market to pay their producers the same uniform price as handlers whose Class I utilization exceeds the market average. This provision is uniform for all consolidated orders.

The consolidated orders vary with respect to dates for payments to the producer-settlement fund, due largely to industry practices and regional preferences. Each consolidated order provides for payment dates, and they are specific for each consolidated order.

In view of the need to make timely payment to handlers from the producer-settlement fund, it is essential that money due the fund be received by the due date. Accordingly, under all of the new orders payment to the producer-settlement fund will be considered made upon receipt by the market administrator.

The new orders specify that payment cannot be received on a nonbusiness day. Therefore, if the due date for a payment, including a payment to or from the producer-settlement fund, falls on a Saturday, Sunday, or national holiday, the payment would not be due until the next business day. This is specified in § 1000.90 of the General Provisions.

Payments to Producers and Cooperative Associations

The AMAA provides that handlers must pay to all producers and producer associations the uniform price. The existing orders generally allow proper deductions authorized by the producer in writing. Proper deductions are those that are unrelated to the minimum value of milk in the transaction between the producer and handler. Producer associations are allowed by the statue to "reblend" their payments to their producer members. The Capper Volstead Act and the AMAA make it clear that cooperative associations have a unique role in this regard.

The payment provisions to producers and cooperatives for the consolidated orders vary with respect to payment frequency, timing, and amount. These differences are generally consistent with current order provisions and with industry practices and customs in each of the new marketing areas.

Each of the new orders will require handlers to make at least one partial payment to producers in advance of the announcement of the applicable uniform prices. The Florida order will require 2 partial payments, mirroring the payment schedule now provided in the 3 separate Florida orders.

The amount of the partial payment varies among the new orders, reflecting the anticipated uniform price. Thus, for example, in the Upper Midwest order, the partial payment rate for milk received during the first 15 days of the month will be not less than the lowest announced class price for the preceding month. By comparison, the partial payment for the Florida order for milk received during the first 15 days of the month will be at a rate that is not less than 85 percent of the preceding month's uniform price, adjusted for plant location.

The final payment for milk under the new orders will be required to be made so that it is received by producers no later

than 2 days after the required pay-out date of monies from the producer-settlement fund.

Cooperatives will be paid by handlers for bulk milk and skim milk on the terms described for individual producers except that payment will be due one day earlier. Providing for an earlier payment date for cooperative associations is warranted because it will permit the cooperative association the time needed to distribute payments to individual producer members. The cooperative payment language in each of the consolidated orders has been expanded to include bulk milk and skim sold by cooperatives from their pool plants as well as by cooperatives acting as handlers for milk delivered directly from producers' farms.

When bulk milk is received by transfer from a cooperative's pool plant, a minimum payment should be required for such milk just as if it were producer milk received directly from producers' farms. Many, but not all, of the current orders have such a provision.

For Class I bulk milk that is received from a cooperative's pool plant, the minimum Class I price level for such milk should be the price applicable at the location of the receiving handler's plant. In the case of such transfers, it is presumed that milk will move from lower-priced areas to higher-priced areas. Under these circumstances, part of the transportation cost in moving the milk is covered by the difference in the Class I prices at the receiving plant and shipping plant.

Pricing Class I transfers at the receiving plant's location ensures that a handler would not have an incentive to receive more distant plant milk instead of closer milk directly from producers' farms. It also ensures that all similarly-located pool plants will pay the same minimum prices for their receipts regardless of whether the milk comes from another plant or directly from producers. Finally, it ensures that the handler receiving transferred milk pays at least a portion of the transportation cost to move the milk to its plant. Since transportation cost is likely to exceed the difference in prices between the transferor and transferee plants, the difference in cost will have to be made up through over-order premiums.

All of the payment dates are receipt dates. Since payment cannot be received on a non-business day, payment dates that fall on a Saturday, Sunday, or national holiday will be delayed until the next business day. While this has the effect of delaying payment to cooperatives and producers, the delay is offset by the shift from "date of payment" to "date of payment receipt."

Minimum Payments to Producers

In a proceeding involving the current Carolina, Southeast, Louisville-Lexington-Evansville, and the former Tennessee Valley

Federal milk orders (Orders 5, 7, 46, and 11, respectively), a proposal was made to clarify what constitutes a minimum payment to producers. The proposal was recommended by Hunter Farms (Hunter) and Milkco Inc. (Milkco), 2 handlers regulated under the current Carolina order. Under the proposal, a handler (except a cooperative acting in its capacity as a handler pursuant to paragraph 9(b) or 9(c)) may not reduce its obligations to producers or cooperatives by permitting producers or cooperatives to provide services which are the responsibility of the handler. According to the Hunter/Milkco proposal, such services include: (1) preparation of producer payroll; (2) conduct of screening tests of tanker loads of milk; and (3) any services for processing or marketing of raw milk or marketing of packaged milk by the handler.

At the May 1996 hearing, representatives of Hunter and Milkco testified that both handlers receive milk from cooperative associations and Piedmont Milk Sales, a marketing agent handling the milk of non-member producers. The Hunter representative explained that due to competitive marketing conditions in the Southeast in late 1994 and early 1995 handlers were able to purchase milk supplies at Federal order minimum prices without any over-order premiums being charged. As a result of the absence of over-order premiums, the representative stated, Hunter received underpayment notices from the market administrator on milk that it had received from Piedmont Milk Sales.

Hunter argued that the problem of what constitutes a minimum payment to producers should be clarified to preclude another underpayment situation should premiums again disappear in the future. If this issue is not resolved, according to Hunter, it will suffer a loss of milk sales and its producers will receive lower prices. Hunter stated that the current policy is discriminatory and unfair and that everyone would benefit from a clarification of the rules defining Federal order minimum prices.

Based on the testimony presented at the public hearing and comments received, the Department issued a final decision on July 16, 1998 (63 FR 39039), denying the Hunter/Milkco proposal. However, the decision stated that this issue should be revisited as part of Federal order reform.

In the proposed rule for Federal order reform, interested parties were invited to comment on this issue. Only one Federal order reform comment, besides Hunter/Milkco's, discussed this issue. This comment letter, filed by the same law firm that represents Hunter/Milkco, expressed sentiments nearly identical to those that have been expressed by Hunter/Milkco.

Based on our review of these comments, we continue to believe that incorporation of Hunter/Milkco's proposed language in the consolidated Federal orders will not necessarily solve the handler

equity problem but could create a host of additional problems. For the reasons stated in the aforementioned final decision, the proposal is again denied for the consolidated orders.

Payment Obligation of a Partially Regulated Distributing Plant

All current and consolidated orders provide a method for determining the payment obligations due to producers by handlers that operate plants which are not fully regulated under any Federal order. These unregulated handlers are not required under the scope of Federal milk order regulation to account to dairy farmers for their milk at classified prices or to return a minimum uniform price to producers who have supplied the handler with milk. However, such handlers may sell fluid milk on routes in a regulated area in competition with handlers who are fully regulated. Therefore, the regulatory plan of Federal milk orders provides a minimum degree of regulation to all handlers who have routes sales in a regulated marketing area. This is necessary so that classified pricing and pooling provisions of an order can be maintained. It is also necessary so that orderly marketing conditions can be assured with respect to handlers being charged the classified value under an order for the milk they purchase from dairy farmers. Without this provision, milk prices in an order would not be uniform among handlers competing for sales in the marketing area, a milk pricing requirement of the AMAA.

There are 3 regulatory options available to a partially regulated handler. First, the handler can purchase Class I milk that is priced under a Federal order in an amount equal to, or in excess of, quantities sold in the marketing area. Second, a payment may be made by the partially regulated handler into the producer-settlement fund of the regulated market at a rate equal to the difference between the Class I price and the uniform price of the regulated market. Finally, the operator of a partially regulated plant can demonstrate that the payment for its total supply of milk received from dairy farmers was equal to the amount which the partially regulated plant would have been required to pay if the plant had been fully regulated. This amount may be paid entirely to the dairy farmers that supplied the handler or in part to those dairy farmers with the balance paid into the producer-settlement fund of the regulated market.

The regulatory options described above and the payment option for reconstituted milk have worked well in the current orders and are continued uniformly in § 1000.76 for the consolidated orders.

Adjustment of Accounts

All current orders provide for the market administrator to adjust, based on verification of a handler's reports, books, records, or accounts, any amount due to or from the market administrator, or to a producer or a cooperative association. This provision is continued in the consolidated orders. The

provision requires the market administrator to provide prompt notification to a handler of any amount so due and requires payment adjustment to be made on or before the next date for making payments as set forth in the provisions under which the error(s) occurred.

Charges on Overdue Accounts

All current orders provide for an additional charge to handlers who fail to make required payments to the producer-settlement fund when due. Such payments include payments to the producer-settlement fund, payments to producers and cooperative associations, payments by a partially regulated distributing plant, assessments for order administration and marketing service, and certain other payment obligations in orders with specialized provisions such as transportation credits. This should continue to be provided for in the consolidated orders.

In order to discourage late payments, a 1.0 percent charge per month is incorporated in the consolidated orders. This rate represents the mid-point in the range of charges by all orders presently. Overdue charges shall begin the day following the date an obligation was due. Any remaining amount due will be increased at the rate of 1.0 percent on the corresponding day of each month until the obligation is paid in full.

All overdue charges would accrue to the administrative assessment fund. The late-payment charge is to be a penalty that is meant to induce compliance with the payment terms of the order. If late-payment charges for monies due on producer milk were to accrue to the balance owed to either producers, cooperatives or producers/cooperatives via the producer-settlement fund, it could result in such producers and cooperatives being less concerned whether they are paid on time. By placing late-payment charges in the administrative fund, however, cooperatives and producers would not be placed in a position where they would prefer to be paid several days late so that they would receive the late-payment charges (or increase the level of producer prices due to late payment fee accrual to the producer-settlement fund). This is of particular concern in markets with a single dominant cooperative. Additionally, by having late-payment fees accrue to the administrative fund, monies are made available to enforce late-payment provisions that would otherwise have to be generated through handlers' administrative assessments.

Assessment for Order Administration

The AMAA provides that the cost of order administration shall be financed by an assessment on handlers. Under the consolidated orders, a maximum rate of 5 cents per hundredweight is provided. This assessment would apply to all of a handler's receipts pooled under the order.

Deduction for Marketing Services

As in most current orders, the consolidated orders provide for the furnishing of marketing services to producers for whom cooperative associations do not perform services. Such services include providing market information and establishing or verifying weights, samples, and tests of milk received from such producers. In accordance with the Act, a marketing services provision must benefit all nonmember producers under the order.

The market administrator may contract with a qualified agent, including a cooperative association, to provide such services. The cost of such services should be borne by the producers for whom the services are provided. Accordingly, each handler will be required to deduct a maximum of 7 cents per hundredweight from amounts due each producer for whom a cooperative association is not providing such services. All amounts deducted must be paid to the market administrator not later than the due date for payments to the producer-settlement fund.