

Via E-Mail Only to fmmohearing@usda.gov and dana.coale@usda.gov

June 14, 2023

Dana H. Coale, Deputy Administrator
USDA-AMS, Dairy Programs
1400 Independence Ave., SW
Washington, DC 20250-0225

Re: Additional Proposals of Select Milk Producers, Inc. Regarding the Pricing Provisions of All Federal Milk Marketing Orders

Dear Deputy Administrator Coale:

This office represents Select Milk Producers, Inc. (“Select”). In response to the June 1, 2023 Action Plan on Proposed Amendments to the Pricing Provisions of All Federal Milk Marketing Orders and associated Invitation to Submit Proposals for Consideration in a Rulemaking Proceeding, Select submits the following three additional proposals for consideration.

Select’s three proposals each seek to update elements of the Class III and Class IV minimum price formulas codified at 7 C.F.R. § 1000.50. Select’s Proposal 1 updates the yield factors for butterfat, nonfat solids, protein, and other solids to reflect current industry realities and practices with respect to farm-to-plant shrink. Select’s Proposal 2 updates the formula assumptions for butterfat recovery to reflect current industry realities in the manufacture of cheddar cheese and to align the Class III pricing factors with the Van Slyke formula. Select’s Proposal 3 updates the yield factor for nonfat solids to reflect current industry realities in the manufacture of nonfat dry milk and buttermilk powder.

I. Explanation of the Proposals; Addressing Disorderly Marketing

a. Proposal 1: Update Yields to Reflect Actual Farm-To-Plant Shrink

The current formulas assume that farm-to-plant losses that occur and incorporate losses of 0.25 percent on all milk solids and additional butterfat solid losses of 0.015 pounds per hundredweight of milk. These losses are intended to reflect “out-of-plant losses that occur prior to processing raw milk into finished products.” See 67 Fed. Reg. 67906, 67917 (November 7, 2002). The 2002 Order Reform Decision incorporates this farm-to-plant shrink, embedded in the following elements of the Class III and IV formulas:

Butterfat: 1.20 (67 Fed. Reg. at 67,920) (subsequently updated to 1.211 in 2007, 73 Fed. Reg. 35,306)

Nonfat Solids: 0.99 (67 Fed. Reg. at 67,922) (rounded from 0.9871)

Butterfat Cheese Value: 1.572 (67 Fed. Reg at 67,927)

Protein Cheese Value: 1.383 (67 Fed. Reg. at 67,927)

Other Solids: 1.03 (67 Fed. Reg. at 67,930) (rounded from 1.0305)

The 2002 Order Reform Final Decision found that farm-to-plant “losses are inherent in the handling of milk” and that the applied shrink factors “are intended to reflect actual losses that are beyond the processing handler’s ability to control.” 67 Fed. Reg. at 67,917.

Those findings, to the extent that they were correct in 2002, are no longer appropriate. Farm-to-plant losses are neither inherent nor beyond the ability of the producer and handler to control. Improvements in technology, changes in the collection and hauling of raw milk, and other structural factors now provide the ability to effectively eliminate the loss of milk solids from farm-to-plant. Select intends to present such evidence and testimony at a hearing, should its Proposal I be included in a hearing notice.

Just as other aspects of the pricing formulas need to be re-examined, the assumptions regarding farm-to-plant shrink must reflect current technologies and practices. The failure to do so under compensates producers. Farm margins are continually thin. Formulas that begin by deducting one-third of a percent of a dairy farmer’s income only further erode those margins.

Select’s Proposal I updates the yield factors for butterfat to 1.22, for the protein value in cheese to 1.386, and for the butterfat value in cheese to 1.582. The yield factors for nonfat solids and other solids remain unchanged due to rounding. The regulatory text would be amended as follows:

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 ~~1.21~~ 1.22.

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)(i): Subtract 20.03 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by ~~1.572~~ 1.582; and

b. Proposal 2: Update Butterfat Recovery Factor

The current formulas assume a butterfat recovery of 90% in the manufacture of cheddar cheese. The 2002 Order Reform Final Decision recognizes that butterfat recovery is not a static coefficient:

Suggestions to increase the butterfat recovery factor of 1.582 (to 1.6 or 1.617) were made by DFA; Select, Elite, et. al; and National All-Jersey, Inc. These commenters relied on hearing testimony that butterfat recovery in cheddar cheese generally ranges between 90 and 93 percent, although Kraft testified that their butterfat recovery is lower. The commenters favored use of a factor that reflected 91 or 92 percent fat recovery because that level of recovery is common. In a comment filed by Leprino, the cheese manufacturer urged that the 1.582 factor not be increased, as any increase would exacerbate the overvaluation of whey fat in the current formula and because **the 90 percent recovery factor reflects results from many cheese vats installed prior to the late 1980's.**

The recommended decision stated that even though many cheese makers may be able to achieve a higher fat retention in cheese, the use of the 1.582 factor representing 90 percent fat recovery in cheese continued to be appropriate. The recommended decision also stated that as a result of the 90 percent level, butterfat in cheese was not overvalued, and those cheese makers who fail to recover more than 90 percent of the fat would not suffer a competitive disadvantage. The preponderance of the record indicates that most cheese manufacturers should be able to obtain a 90 percent butterfat recovery.

67 Fed Reg. at 67,929 (emphasis added).

The “classical” or “basic” Van Slyke formula, however, recognizes that the actual butterfat recovery in cheddar cheese manufacturing is 93%. See, Frank V. Kosikowski & Vikram V. Mistry, Cheese and Fermented Milk Foods, Vol. I: Origins and Principles, p. 622-24 (3d ed., F.V. Kosikowski, L.L.C. 1997). In fact, most cheddar cheese manufacturing plants, and especially those cheddar cheese plants that have been constructed since the Department last meaningfully considered the butterfat recovery in cheese, achieve at least 93% butterfat recovery. That is to be expected, given that the “basic” Van Slyke Formula discussed by Professor Kosikowski was developed in 1894—nearly 130 years ago. Select intends to present evidence and testimony to support updating the butterfat recovery factors to reflect modern efficiencies and processing realities.

Select’s Proposal 2 increases the butterfat recovery factor in the Class III formula to 93%, which necessitates a corresponding increase in the butterfat yield in cheese to 1.624. This change to the butterfat yield in cheese does not take into account the correction of farm-to-plant shrink.

The regulatory text would be amended as follows:

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~~ **1.624**; 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

c. Proposal 3: Update Nonfat Solids Yields

The current formulas incorporate a yield factor for nonfat solids of 0.99. The 2002 Order Reform Final Decision includes a change from the prior Recommended Decision. The Final Decision “eliminates the consideration of nonfat solids that end up in buttermilk powder from the Class IV nonfat solids pricing formula.” 67 Fed. Reg. at 67,921-67,922. The Department concluded then that the elimination of these nonfat solids from the Class IV formulas was appropriate because:

[R]ecognizing a minimum value for buttermilk powder does not materially affect the Class IV skim milk price. Record evidence indicates that the price of buttermilk powder can be a low of 70 percent of the nonfat dry milk price for the same period. In addition, according to the record, the make allowance of buttermilk powder is an additional 2 cents per pound higher than the nonfat dry milk make allowance. Official notice of weekly Dairy Product Prices published by the National Agricultural Statistics Service for January 2000 through May 2002 is hereby taken. [dead weblink deleted]

Using the 2-cent higher make allowance for buttermilk and prices for nonfat dry milk and buttermilk powder for the period of January 2000 through May 2002 it was determined that the effect of including buttermilk powder in the nonfat solids price and the Class IV skim milk price was negligible. Therefore, this decision eliminates the consideration of nonfat solids that end up in buttermilk powder from the Class IV nonfat solids pricing formula.

Id. However, the effect of buttermilk powder on the formulas is not “negligible.” Even the 2002 Order Reform Final Decision acknowledges that the removal of buttermilk powder from the formula reduces the nonfat dry milk yield from 1.02 to 0.99. Id. at 67,921.

Further, current data demonstrate that the spread between the prices of nonfat dry milk and buttermilk powder is minimal and not uniformly negative. A comparison of 2021 and 2022 Western Dry Buttermilk Monthly Average Mostly Prices and Western Nonfat Dry Milk Monthly Low/Medium Heat Averages reveals that buttermilk powder prices averaged 98.5% of nonfat dry milk prices, ranging from 86.5% to 118.6%.

Select’s Proposal 3 recognizes that the current yield factor wholly fails to compensate producers for the value of these components. It is evident that removing these nonfat solids does have a meaningful impact on the nonfat dry milk yield. Specifically, if ninety percent of the nonfat solids that end up in buttermilk powder are restored to the formula ((a) acknowledging that the relative value of buttermilk powder to nonfat dry milk fluctuates but are largely aligned and (b)

accepting the Department's earlier finding that the manufacturing costs for buttermilk are marginally higher than those for nonfat dry milk powder), the recalculated yield is 1.0319. This yield does not recognize the correction of farm-to-plant shrink. Factoring in the farm-to-plant shrink correction, the yield increases further to 1.0345. Once rounded, the difference is immaterial, and Select proposes a yield of 1.03.

The regulatory text would be amended as follows:

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**.

d. Regulatory Text of All Select Proposals

The proposed regulatory text for each proposal is set forth above. If, however, all three proposals were adopted, then the aggregate impacts of them would result in modestly different changes to the regulations. They are set forth below:

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 ~~1.21~~ **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

2. Purpose of the Proposals

Select's proposals are submitted in the same vein as those of the National Milk Producers Federation ("NMPF"). Their intent is to update and modernize aspects of the minimum price formulas that have not been comprehensively updated since the reform of the federal milk marketing orders following the 1996 FAIR Act. The NMPF hearing proposal submitted on May 1, 2023 properly outlines many of the market realities and structural changes that have occurred since federal order reform. While Select intends to address those structural changes and others through its hearing testimony, should the Department elect to proceed to a hearing, we intend to focus our attention on the overarching need for the minimum price formulas to (a) reflect the realities of the current landscape for the production, transportation, and marketing of milk, as well as the manufacturing of commodity dairy products, (b) strive to discover the actual value of milk utilized to manufacture the majority of the commodities used to set end-product price formulas, (c) compensate producers for the full value of the on-farm production, and (d) recognize and encourage efficiency in the marketing of raw milk.

3. Current Federal Order Requirements and Industry Practices Relative to the Proposal

The current minimum price formulas in general, and the provisions addressed by Select's proposals specifically, are premised on assumptions and data dating back to the last century—in some cases utilizing data and practices commonplace in the 1970s and 1980s. If the federal order system is to retain its critically important role in establishing the de facto base prices for all classes of raw milk (to say nothing of its role in providing critical market data and terms of trade), then it must remain current. The NMPF proposals play a critical role in updating many aspects of the pricing formulas but fail to address these other important factors.

If the Department agrees to consider updating the basic assumptions and data regarding the costs to manufacture commodity dairy products, then it is incumbent on the Department to likewise consider the assumptions and data underpinning the remainder of the price formulas. Select's proposals address several of these elements. We urge the Department to notice these proposals for hearing and to take testimony and evidence on them.

4. Expected Impact on the Industry, Including Producers, Handlers, and Consumers

a. Impacts on Classified Prices

Utilizing a five-year average and ten-year average of commodity prices through April 2023, Select has calculated the impacts of each proposal on the component and Class III and Class IV prices. A summary of this analysis is presented below. If the Department agrees to proceed to a hearing on Select's proposals, additional analysis and supporting data will be offered through testimony and exhibits.

Five Year Average

	Current	Proposal 1 (Farm-to-Plant Shrink)	Proposal 2 (Butterfat Recovery)	Proposal 3 (Nonfat Solids Yield)	All Proposals
Butterfat Price	\$2.3960	\$2.4138	\$2.3960	\$2.3960	\$2.4138
Protein Price	\$2.6961	\$2.7024	\$2.7104	\$2.6961	\$2.7175
Nonfat Solids Price	\$1.0219	\$1.0219	\$1.0219	\$1.0632	\$1.0632
Class III Price	\$17.98	\$18.06	\$18.02	\$17.98	\$18.11
Class IV Price	\$17.26	\$17.32	\$17.26	\$17.62	\$17.68

Ten Year Average

	Current	Proposal 1 (Farm-to-Plant Shrink)	Proposal 2 (Butterfat Recovery)	Proposal 3 (Nonfat Solids Yield)	All Proposals
Butterfat Price	\$2.3475	\$2.3650	\$2.3475	\$2.3475	\$2.3650
Protein Price	\$2.6505	\$2.6566	\$2.6646	\$2.6505	\$2.6717
Nonfat Solids Price	\$1.0021	\$1.0021	\$1.0021	\$1.0426	\$1.0426
Class III Price	\$17.68	\$17.75	\$17.72	\$17.68	\$17.80
Class IV Price	\$16.92	\$16.98	\$16.92	\$17.27	\$17.33

b. Impacts on Consumers

With respect to consumers, the impacts on the cost of raw milk resulting from Select’s proposals, less than 1% of recent minimum prices, could result in incrementally higher product prices for purchasers of dairy products.

Select notes, however, that its proposals and the economic impacts resulting from them should be analyzed in the context of any other formula proposals that are considered by the Department. For example, increases in the manufacturing allowances, as proposed by both NMPF and the International Dairy Foods Association, will result in lower minimum prices and, therefore, potentially lower consumer prices. Full econometric modeling of the various proposals notice for hearing will be an important aspect of any hearing record and a critical tool for hearing participants to evaluate the impacts of proposals both in isolation and in concert.

5. Expected Effects on Small Businesses

Most dairy farms pooled on federal milk marketing orders are classified as small businesses. To the extent that Select's proposals increase the regulated prices that handlers pay for pooled milk, those farms that are small businesses would be expected to benefit economically. Conversely, any handlers that are required to pay the regulated minimum prices, including those that are small businesses, will see milk costs increase.

However, federal order regulations and the minimum prices that they establish are not size-dependent. To that extent, Select does not expect that small businesses, whether producers, handlers, or retailers, will be impacted differently from businesses that are not classified as small businesses. Furthermore, Select does not anticipate that any business not currently subject to federal milk marketing order regulation will become regulated by the adoption of any of Select's proposals. Accordingly, no small businesses should be expected to have an increased regulatory burden because of Select's proposals.

6. Impacts on Costs to Producers, Handlers, Others in the Marketing Chain, Consumers, Market Administrators, and the Secretary

Apart from the impacts on the regulated minimum class prices paid by handlers and the uniform prices received by producers, Select does not anticipate any additional costs on producers or handlers. Similarly, other than the costs associated with the implementation of new marketing order language, Select does not anticipate any impact on the costs to the market administrators or to the Secretary. Other than as stated above, Select anticipates no impact on consumers.

7. Usefulness of a Pre-Hearing Information Session.

Select believes that these particular proposals are of sufficient simplicity that a pre-hearing information session is not necessary. However, Select would be happy to discuss the proposals and to answer any questions or provide any additional information to the Department as part of the Pre-Hearing Information Session scheduled for June 16, 2023.

We appreciate the Department's consideration of our proposals.

Very truly yours,



Ryan K. Miltner

Counsel for Select Milk Producers, Inc.

cc: Bruce Summers, AMS Administrator
Erin Taylor, Director of Order Formulation and Enforcement
Federal Milk Market Administrators