The application states that the trade name is used in connection with the sale of rope and other cordage, including rope made of polypropylene, nylon, polyester, Mylar, and blended materials; they are of three-stranded twisted and of braided construction. The merchandise is manufactured in the United States.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATES: Comments must be received on or before May 4, 1993.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, DC 20006 (202–482–6960).

Dated: February 24, 1993.

John F. Atwood,

Chief, Intellectual Property Rights Branch.

[FR Doc. 93–5143 Filed 3–4–93; 8:45 am]

BILLING CODE 4820–02–M

Application for Recordation of Trade Name: "United States Rope Company"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to § 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "United States Rope Company," used by United States Rope Company, a corporation organized under the laws of the State of California, located at 709 Hamilton Avenue, Menlo Park, California 94025.

The application states that the trade name is used in connection with the sale of rope and other cordage, including rope made of polypropylene, nylon, polyester, Mylar, and blended materials; they are of three-stranded twisted and of braided construction. The merchandise is manufactured in the United States.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATES: Comments must be received on or before May 4, 1993.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, DC 20006 (202)–482–6960).

Dated: February 24, 1993.

John F. Atwood,

Chief, Intellectual Property Rights Branch.

[FR Doc. 93–5144 Filed 3–4–93; 8:45 am]

BILLING CODE 4820–02–M

Application for Recordation of Trade Name: "U.S. ROPE CO.,"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to § 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "U.S. Rope Co.," used by United States Rope Company, a corporation organized under the laws of the State of California, located at 709 Hamilton Avenue, Menlo Park, California 94025.

The application states that the trade name is used in connection with the sale of rope and other cordage, including rope made of polypropylene, nylon, polyester, Mylar, and blended materials; they are of three-stranded twisted and of braided construction. The merchandise is manufactured in the United States.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATES: Comments must be received on or before May 4, 1993.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention, Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington D.C. 20006 (202–482–6960).

Dated: February 24, 1993.

John F. Atwood,

Chief, Intellectual Property Rights Branch.

[FR Doc. 93–5142 Filed 3–4–93; 8:45 am]

BILLING CODE 4820–02–M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 42
Friday, March 5, 1993

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: Commission Meeting, 10:00 a.m., Thursday, March 4, 1993.

LOCATION: Room 556, Westwood Towers, 5401 Westbard Avenue, Bethesda, Maryland.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED:

FY 1994 Budget

The Commission will consider issues related to the budget for Fiscal Year 1994.

*The Commission decided on March 1, 1993 that agency business required scheduling this meeting without the normal seven day notice.

For a recorded message containing the latest agenda information, call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, MD. 20207 (301) 504–0800.

Dated: March 1, 1993.

Sheldon D. Butts,

Deputy Secretary.

[FR Doc. 93–5185 Filed 3–2–93; 4:38 pm]

BILLING CODE 6355–01–M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, March 10, 1993.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets NW., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1 Publication for comment on proposed rulemaking to revise the Board's risk-based capital guidelines to implement Section 305 of the Federal Deposit Insurance Corporation Improvement Act regarding concentration of credit risk and the risks of nontraditional activities. (Proposed earlier for public comment; Docket No. R–0764)

2. Publication for comment on proposed rulemaking to revise the Board's risk-based capital guidelines to implement Section 305 of the Federal Deposit Insurance Corporation Improvement Act regarding interest rate risk. (Proposed earlier for public comment; Docket No. R–0764)

3. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452–3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: March 3, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93–5311 Filed 3–3–93; 10:27 am]

BILLING CODE 6210–01–M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: Approximately 11:30 a.m., Wednesday, March 10, 1993, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: March 3, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93–5214 Filed 3–3–93; 10:27 am]

BILLING CODE 6210–01–M

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

TIME AND DATE: 10:00 a.m., March 15, 1993.

PLACE: 4th Floor, Conference Room, 1250 H Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the last meeting.

2. Thrift Savings Plan activity report by the Executive Director.

3. Congressional Budget Office option to reduce TSP matching contributions.

CONTACT PERSON FOR MORE INFORMATION: Tom Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: March 3, 1993.

Francis X. Cavanaugh,

Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 93–5311 Filed 3–3–93; 3:29 pm]

BILLING CODE 6760–01–M

PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION

Board of Directors' Meeting

AGENCY: Pennsylvania Avenue Development Corporation.

ACTION: The Pennsylvania Avenue Development Corporation announces the date of their forthcoming meeting of the Board of Directors.

DATE: The meeting will be held Wednesday, March 24, 1993, at 10:00 a.m.

ADDRESS: The meeting will be held at the Pennsylvania Avenue Development Corporation, Suite 1220 North, 1331 Pennsylvania Avenue, NW., Washington, DC.

SUPPLEMENTARY INFORMATION: This meeting is held in accordance with 36 Code of Federal Regulations Part 901, and is open to the public.

Dated: March 1, 1993.

M.J. Brodie,

Executive Director.

[FR Doc. 93–5298 Filed 3–3–93; 3:25 pm]

BILLING CODE 7630–01–M

Corrections

Federal Register
Vol. 58, No. 42
Friday, March 5, 1993

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Farmers Home Administration

7 CFR Parts 1901 and 1944

Rural Development Administration

7 CFR Part 4284

RIN 0570–AB00

Community Facility Loans and Grants

Correction

In rule document 93–1408 beginning on page 5564 in the issue of Friday, January 22, 1993, make the following corrections:

PART 1901—[CORRECTED]

1. On page 5565, in the second column, in the amendatory instruction 2., in the second line, "(a)(2)" should read "(a)(20)".

PART 1944—[CORRECTED]

2. On page 5566, in the first column, in paragraph designation "(5)", should read "(4)".

PART 4284—[CORRECTED]

3. On the same page, in the third column, in the table of contents, in the third line from the bottom, "Guide" should read "Guides".

Exhibit A to Subpart E [Corrected]

4. On page 5569, in the 1st column, in the 13th line, "loans" should read "loan" and in the 16th line, 'signatures" should read "signature".

BILLING CODE 1505–01–D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 13

[FO Docket No. 92–206; FCC 93–33]

Privatization of the Administration of Examinations for Commercial Operator Licenses and Clarification of Certain Rules

Correction

In rule document 93–3895 beginning on page 9123 in the issue of Friday, February 19, 1993, make the following correction:

§ 13.7 [Corrected]

On page 9124, in the third column, § 13.7(c)(2) was omitted and should appear as follows:

"(2) Six Months Service Endorsement (First and Second Class Radiotelegraph Operator's License)."

BILLING CODE 1505–01–D

federal register

Friday
March 5, 1993

Part II

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 1001, et al.
Milk in the New England and Other Marketing Areas; Decision on Proposed Amendments to Tentative Marketing Agreements and Orders; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1097, 1098, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, 1139

[Docket No. AO–14–A64, et al.; DA–90–017]

RIN 0581–AA37

Milk in the New England and Other Marketing Areas; Decision on Proposed Amendments to Tentative Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA

ACTION: Proposed rule.

7 CFR Part	Marketing area	AO Nos.
1001	New England	AO–14–A64
1002	New York-New Jersey	AO–71–A79
1004	Middle Atlantic	AO–160–A67
1005	Carolina	AO–388–A3
1006	Upper Florida	AO–356–A29
1007	Georgia	AO–366–A33
1011	Tennessee Valley	AO–251–A35
1012	Tampa Bay	AO–347–A32
1013	Southeastern Florida	AO–286–A39
1030	Chicago Regional	AO–361–A28
1032	Southern Illinois-Eastern Missouri.	AO–313–A39
1033	Ohio Valley	AO–166–A60
1036	Eastern Ohio-Western Pennsylvania.	AO–179–A55
1040	Southern Michigan	AO–225–A42
1044	Michigan Upper Peninsula.	AO–299–A26
1046	Louisville-Lexington-Evansville.	AO–123–A62
1049	Indiana	AO–319–A38
1050	Central Illinois	AO–355–A27
1064	Greater Kansas City	AO–23–A60
1065	Nebraska-Western Iowa.	AO–86–A47
1068	Upper Midwest	AO–178–A45
1075	Black Hills, South Dakota.	AO–248–A21
1076	Eastern South Dakota	AO–260–A30
1079	Iowa	AO–295–A41
1093	Alabama-West Florida	AO–386–A11
1094	New Orleans-Mississippi.	AO–103–A53
1096	Greater Louisiana	AO–257–A40
1097	Memphis, Tennessee	AO–219–A46
1098	Nashville, Tennessee	AO–184–A55
1099	Paducah, Kentucky	AO–183–A45
1106	Southwest Plains	AO–210–A52
1108	Central Arkansas	AO–243–A43
1124	Pacific Northwest	AO–368–A19
1126	Texas	AO–231–A60
1131	Central Arizona	AO–271–A29
1134	Western Colorado	AO–301–A22
1135	Southwestern Idaho-Eastern Oregon.	AO–380–A9
1137	Eastern Colorado	AO–326–A26
1138*	New Mexico West Texas.	AO–335–A36
1139	Great Basin	AO–309–A30

*The Lubbock-Plainview, Texas Panhandle and Rio Grande Valley Orders were merged to form the New Mexico-West Texas order, effective December 1, 1991.

SUMMARY: This final decision deals with a wide variety of industry proposals to amend all Federal milk marketing orders. The issues addressed in this decision include: Class I (bottling) and Class II (soft products) milk prices; classification of milk used in various products; and the treatment of concentrated and reconstituted milk under the orders. The amendments adopted in this decision are based on evidence received at a hearing held in September, October and November 1990, at six locations, and on exceptions and comments filed in response to Recommended Decision that was published in the Federal Register on November 22, 1991. Any changes from the Recommended Decision are discussed in the document. The amendments adopted in this decision include providing three uniform classes of milk use in all orders; and changing the pricing of reconstituted fluid milk products made from concentrated milk or nonfat dry milk.

Referendums will be conducted in eight markets, and dairy farmer cooperatives will be polled in the remaining 32 markets to determine whether dairy farmers approve issuance of the revised orders.

FOR FURTHER INFORMATION CONTACT: Richard A. Glandt, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 720–4829.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12291.

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The amended orders will promote more orderly marketing of milk by producers and regulated handlers.

These proposed amendments have been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. If adopted, this proposed action will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

When this proceeding was initiated, the Notice of Hearing listed separately the Lubbock-Plainview, Texas (part 1120); the Texas Panhandle (part 1132); and Rio Grande Valley (part 1138) orders. A hearing on a merger of these three orders was held in December 1989. As a result of that hearing, the three orders were merged effective December 1, 1991, under the name of the New Mexico-West Texas order, which is 7 CFR part 1138. Therefore, all proposed order language in connection with this proceeding is in terms of the merged order. In this and future documents in this proceeding, the New Mexico-West Texas order will replace the three orders named above.

Prior documents in this proceeding:

Advance Notice of Proposed Rulemaking: Issued March 29, 1990; published April 3, 1990 (55 FR 12369).

Notice of Hearing: Issued July 11, 1990; published July 17, 1990 (55 FR 29034).

Extension of Time for Filing Briefs and Reply Briefs: Issued March 28, 1991; published April 3, 1991 (56 FR 13603).

Recommended Decision: Issued November 6, 1991; published November 22, 1991 (56 FR 58972).

Extension of Time for Filing Exceptions: Issued December 24, 1991; published January 6, 1992 (57 FR 383).

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the New England and other marketing areas. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice (7 CFR part 900), at Eau Claire Wisconsin; Minneapolis, Minnesota; St.

Cloud, Minnesota; Syracuse, New York; Tallahassee, Florida; and Irving, Texas, on September 5, 1990, through November 20, 1990. Notice of such hearing was issued on July 11, 1990, and published July 17, 1990 (55 FR 29034).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on November 6, 1991, issued his recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein, subject to the following modifications:

1. Under the subheading "Background".

a. Three new paragraphs are added after paragraph 8.

b. Paragraph 9 is revised by adding three new lines to the subsection "Federal and State Government Witnesses".

2. Under material issue "1. Class I milk pricing and related issues."

a. The last sentence of paragraph 10 is revised and two new paragraphs are added following it.

b. Fourteen new paragraphs are added after paragraph 136.

c. Four new paragraphs are added after paragraph 138.

d. Twelve new paragraphs are added after paragraph 140.

e. One new paragraph is added after paragraph 142.

f. Two new paragraphs are added after paragraph 143.

g. Two new paragraphs are added after paragraph 150.

h. Six new paragraphs are added after paragraph 165.

3. Under material issue "2. Class II pricing and related issues.", three new paragraphs are added after paragraph 27.

4. Under material issue "3. Product Classification".

a. Paragraph 20 is revised and ten new paragraphs are added following it.

b. Paragraph 21 is revised.

c. Eleven new paragraphs are added after paragraph 21.

d. Paragraph 28 is revised.

e. Seven new paragraphs are added after paragraph 29.

f. Two new paragraphs are added after paragraph 32.

g. Four new paragraphs are added after paragraph 33.

h. Paragraph 34 is revised.

i. Nine new paragraphs are added after paragraph 36.

j. Seven new paragraphs are added after paragraph 38.

k. Two new paragraphs are added after paragraph 41.

l. A sentence is added to paragraph 42 and two new paragraphs are added following it.

m. Six new paragraphs are added after paragraph 45.

n. Eleven new paragraphs are added after paragraph 47.

o. Two new paragraphs are added after paragraph 49.

p. Twelve new paragraphs are added after paragraph 56.

5. Under material issue "4. Pricing concentrated and Reconstituted Milk."

a. Paragraphs 1 and 7 are revised and 4 new paragraphs are added after paragraph 7.

b. Paragraphs 18, 19 and 24 are revised and 10 new paragraphs are added after paragraph 24.

c. Three new paragraphs are added after paragraph 35.

d. Eleven paragraphs are added after paragraph 37.

e. Paragraph 38 is deleted.

The material issues on the record of the hearing relate to:

1. Class I milk pricing and related issues;

2. Class II milk pricing and related issues;

3. Product classification; and

4. Pricing of concentrated and reconstituted milk.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

Background

This proceeding was initiated in response to concerns voiced by midwestern dairy farm groups about the Federal milk marketing order program, and particularly about those provisions relating to Class I prices.

Federal milk marketing orders classify milk according to its use. Most orders have three classes: Class I includes primarily beverage milk; Class II consists primarily of fluid cream items plus "soft" products, such as cottage cheese, ice cream and yogurt. Class III consists primarily of "hard" manufactured products, including butter, nonfat dry milk and hard cheeses. Each class has a specific price, with Class I being the highest, Class II being an intermediate price and Class III being the lowest price.

Class I milk prices since the mid-1960's and early 70's have been determined by adding a market-specific Class I differential to the Minnesota-Wisconsin (M-W) price, which more recently has been for the second preceding month. The differentials currently vary from $1.20 per hundredweight at Minneapolis, Minnesota, to $4.18 per hundredweight at Miami, Florida.

This basic system of pricing was developed over a long period of time. Prior to Congress' passage of the Food Security Act of 1985, the Class I differentials had not been significantly changed in nearly 20 years. However, on May 1, 1986, Class I differential increases mandated by Congress in the Food Security Act of 1985 were implemented in 35 of the orders. Congress also specified that none of the differentials could be reduced for a two-year period beginning May 1, 1986. Congress took this action because the then-current differentials, which reflected a hauling cost of 1.5 cents per hundredweight per 10 miles, no longer covered the costs of hauling milk.

The Class I differential increases implemented on May 1, 1986, varied from $.08 per hundredweight for the Upper Midwest order to $1.03 per hundredweight for the Southeastern Florida order. Since then, increasing dissatisfaction with the resulting Class I pricing structure of Federal milk orders has been voiced by various Upper Midwest parties. Others across the country also expressed various criticisms about the program.

On March 29, 1990, the Secretary announced that USDA would hold a national hearing on milk marketing orders to "* * * determine whether reasons exist to change current Federal milk orders." The main issues at the hearing would be: (1) Class I pricing differentials, (2) multiple base points for pricing, (3) pricing of reconstituted milk, and (4) pricing of Class II milk. Concurrently, the Administrator of the Agricultural Marketing Service issued an Advance Notice of Proposed Rulemaking inviting any interested person to submit proposals on the main issues. Proposals were to be mailed by May 31, 1990.

A Notice of Hearing was issued on July 11, 1990, setting forth 70 proposals that would be considered and announcing the dates and locations of the hearing. The hearing began September 5, 1990, in Eau Claire, Wisconsin, and concluded on November 20, 1990, in Irving, Texas. Other sessions were held in Minneapolis and St. Cloud, Minnesota, Syracuse, New York, and Tallahassee, Florida. In all, the hearing lasted 43 days and produced about 10,000 pages of transcript, 237 exhibits, and an estimated 3,000 pages of Officially Noticed documents.

About 200 witnesses participated in the hearing. Rather than attempting to

detail or summarize the testimony of each person or organization we are providing a detailed list of hearing participants, except that we have not identified by name some 25 dairy farmers who testified. Thus, recognition of the hearing participants is provided without reiterating who said what in regard to the Class I and Class II price issues. This will aid in keeping this document a reasonable length.

The exceptions filed by the Upper Midwest Federal Order Coalition (UMFOC) noted with interest that while certain state officials were listed as participants, those from Minnesota and Wisconsin were not.

In response we would point out that both the Minnesota Department of Agriculture and the Wisconsin Department of Agriculture, Trade and Consumer Protection were indicated as hearing participants by being listed as organizations included in UMFOC.

Nevertheless, in this decision we have included additional parties under the heading of "Federal and State Government Witnesses".

The following list of hearing participants is grouped according to affiliation:

Dairy Farmer Cooperatives & Other Farmer Organizations:

Agri-Mark, Inc.
Alabama Farmers Federation
American Farm Bureau Federation
Bear Lake Milk Cooperative
Central Milk Producers Cooperative (CMPC), consisting of the following organizations: A-G Cooperative Creamery, Alto Dairy Cooperative, Associated Milk Producers Inc., Golden Guernsey Dairy Cooperative, Greenwood Milk Producers Cooperative, Independent Milk Producers Cooperative, Lake to Lake Cooperative (a Division of Land O'Lakes, Inc.), Manitowac Milk Producers Cooperative, Mid-America Dairymen Inc., Midwest Dairymens Company, Milwaukee Cooperative Milk Producers, Southern Milk Sales, Inc., Wisconsin Dairies Cooperative, and Woodstock Progressive Milk Producers Association.
Coalition of Northeastern Dairy Farmers (CONE), consisting of the following organizations: Agri-Mark, Inc., Allied Federated Cooperatives, Inc., Cabot Farmers' Cooperative Creamery Company, Dairylea Cooperative, Inc., Eastern Milk Producers Cooperative Association, Inc., Niagra Milk Cooperative, Inc., St. Albans Cooperative Creamery, Inc., Upstate Milk Cooperatives, Inc., and Regional Cooperative Marketing Agency, Inc.
Darigold Inc.
Dairymen's Creamery Association, Inc.
Farm Bureau Federations of North Carolina, South Carolina, Georgia, Tennessee, and Virginia
Farmers Union Milk Marketing Cooperative (FUMMC)
Land O'Lakes, Inc.
Louisiana Farm Bureau
Lowville Producers Dairy Co-Op
Maine Farm Bureau
Mid-America Dairymen, Inc. (Mid-Am)
Milk Marketing, Inc. (MMI)
National Family Farm Coalition
National Farmers' Organization (NFO)
National Milk Producers Federation (NMPF)
New York Farm Bureau
New York State Grange
North Dakota Milk Producers Association and the North Dakota Dairy Industries Association
Penn Marva Dairymen's Federation (Penn Marva), consisting of the following organizations: Atlantic Dairy Cooperative, Mid-Atlantic Division of Dairymen, Inc., Maryland Virginia Milk Producers Cooperative Association, and Valley of Virginia Cooperative Milk Producers Association
Pennsylvania Farmers' Association Dairy Committee
Pennsylvania Farmers Union and Northern Tier Milk Cooperative
Pennsylvania State Grange
Prairie Farms Dairy, Inc. (PFD)
Producers Equalization Committee (PEC), consisting of the following organizations: Michigan Milk Producers Association, Independent Cooperative Milk Producers Association, and the National Farmers Organization
Rusk County (Wisconsin) Farm Bureau
Southern Coalition of Dairy Farmers (SCDF), consisting of the following organizations: Associated Dairy Farmers, Inc., Associated Milk Producers, Inc. (Southern Region), Carolina Dairies, Carolina Jersey Milk Producers Association, Carolina Virginia Milk Producers Association, Coble Dairy Products Cooperative, Inc., Dairymen, Inc., Edisto Milk Producers Association, Florida Dairy Farmers Association, Gulf Coast Dairymen, Gulf Dairy Association, Inc., Land-O-Sun Independent Producers, Mountain Milk Producers Association, Palmetto Milk Producers Association, Piedmont Milk Sales, Inc., Southern Milk Sales, Inc., and Tampa Independent Dairy Farmers Association, Inc.
Texas Farm Bureau
Texas Farmers Union
United Dairy Services
United Oneida-Lewis Milk Producers
Upper Midwest Federal Order Coalition (UMWFOC), consisting of the following organizations: Iowa Dairy Products Association, Minnesota Association of Cooperatives, Minnesota Farm Bureau, Minnesota Farmers Union, Minnesota Milk Producers Association, Wisconsin Farm Bureau Federation, Wisconsin Farmers Union, Wisconsin Federation of Cooperatives, A-G Cooperative Creamery, Alto Dairy Cooperative, Associated Milk Producers, Inc. (Morning Glory Farms Region), Associated Milk Producers, Inc. (North Central Region), Ellsworth Cooperative Creamery, Farmers Union Milk Marketing Cooperative, First District Association, Glencoe Butter and Produce, Land O'Lakes, Inc., Manitowac Milk Producers Co-op, Milwaukee Co-op Milk Producers, Plainview Milk Products Association, Swiss Valley Farms, Co., Wisconsin Dairies Cooperative, Minnesota Department of Agriculture, and Wisconsin Department of Agriculture, Trade and Consumer Protection
Western Dairymen Cooperative, Inc. (WDCI)
Wisconsin Farm Bureau Federation
Women Involved in Farm Economics (WIFE)

Proprietary Handlers & Handler Organizations:

Americana Foods, Inc., Morningstar Foods, Inc., Blue Bell Creameries, Inc., Hunter Jersey Farms, Inc., Hygeia Dairy Company, Inc., and Pine State Creamery Company (Americana et al.)
Anderson-Erickson Dairy Company
Borden Company
Dean Foods Co.
Farm Fresh
Galloway Company
Gold Star Dairy
Hershey Chocolate, USA
Hunter Jersey Farms, Inc.
Kraft General Foods, Inc.
Kroger Company
Lamers Dairy, Hansens Dairy, Oberweis Dairy, Seeger's Dairy, Inc., Stoer Dairy (Lamers et al.)
Lifeway Foods, Inc.
Marigold Foods
Malone & Hyde Dairy
Milk Industry Foundation and International Ice Cream Association (MIF/IICA)
Morningstar Foods, Inc., Hunter Jersey Farms, Inc., Hygeia Dairy Company, Inc., Pine State Creamery Company (Morningstar et al.)
Nestle Foods Corporation
Northeast Ad Hoc Federal Order Committee (NEFOC), composed of the following entities: Crowley Foods, Inc., Durling Farms, Farmland Dairies, Inc., H.P. Hood, Inc., Johanna Dairies, and Middlebrook Dairy.
Nutrasweet Company
Southern Foods Group
Trade Association of Proprietary Plants (TAPP)
Turner's Dairy
United States Cheesemakers Association, Wisconsin Cheese Makers Association, Ohio Swiss Cheese Association, American Producers of Italian Type Cheese Association, (U.S. Cheesemakers et al.)
Wells Dairy

Individual Dairy Farmers:

A total of 25 individual dairy farmers testified at this hearing. They include 2 dairy farmers from New York; 3 from Pennsylvania; 7 from Wisconsin; and 13 from Minnesota.

U.S. Members of Congress, Governors, State Representatives, and Candidates:

Senator James M. Jeffords, Vermont
Steve Kerr for 25 members of the House of Representatives from the northeastern states of the U.S.
John McCann, New York State Legislator
Marc Smith for Congresswoman Louise Slaughter, New York
Leslie Rowan for Congressman Sherwood L. Boehlert, New York
Jim O'Connor for Congressman James T. Walsh, New York

R. Stephen Hawley, New York State Legislator
James Ziegeweid, Candidate for U.S. House of Representatives, Wisconsin
Al Baldus, Wisconsin State Assemblyman
Congressman Steven Gunderson, Wisconsin
Congressman David R. Obey, Wisconsin
Al Zepp for Congressman Robert W. Kastenmeier, Wisconsin
Virgil Roberts, Wisconsin State Assemblyman
Senator Robert Kasten, Wisconsin
Tommy Thompson, Governor of Wisconsin
Brenda Kettleson for Senator Herb Kohl, Wisconsin
Congressman Arland Stangeland, Minnesota
Steve Wenzel, Minnesota State Legislator
Sylvester Uphus, Minnesota State Legislator

Federal and State Government Witnesses:

Carolyn Liebrand, Agricultural Cooperative Service, USDA, for the Economic Research Service, USDA
Deputy Commissioner of Agriculture, Vermont, for the Commissioner
Director, Dairy Division, Georgia Department of Agriculture
Commisioner of Agriculture, State of Minnesota
Counsel for the Minnesota Department of Agriculture
Secretary of Agriculture, Trade and Consumer Protection, State of Wisconsin
U.S. Department of Justice, Antitrust Division
Representatives from 16 Market Administrator Offices of the Agricultural Marketing Service (AMS), USDA

Other Witnesses:

Dr. Robert E. Jacobson, Professor, Department of Agricultural Economics, Ohio State University, at the request of Milk Marketing, Inc.
James N. Putnum, Farm Credit Banks of Springfield, Massachusetts
Milo Olsen, Retired County Agent, Wisconsin
Dr. Emerson Babb, Professor, Food and Resource Economics Department, University of Florida
Dr. Jerome Hammond, Professor, Department of Agricultural and Applied Economics, University of Minnesota

1. Class I Milk Pricing and Related Issues.

No changes should be made in the Class I differentials on the basis of this record. The Notice of Hearing contained 35 proposals on the Class I price issue. Four of those (A–1, A–2, A–3 and A–6) involved eliminating or reducing significantly the Grade A and distance differential components of Class I prices.

Proposals A–1 and A–3 involved the Grade A differentials, while A–2 and A–6 involved distance differentials. There was no sworn testimony in support of proposals A–3 and A–6. Testimony in support of proposals A–1 and A–2 was presented by a witness for the Department of Justice as part of its entire presentation on the general desirability, in its view, of deregulating the milk industry.

Proposals A–4 and A–5 would merge orders to result in four to eight regional orders of more or less equal Class I utilization. Proposal A–4 also would have based the prices to be paid producers on a single site in a milk surplus area in each such region, including adjustments for volume, market, and production differentials and the grade or quality of milk purchased. The total amount of such adjustments would be not less than $1.12 per hundredweight of milk having 3.5 percent milkfat. There also was no sworn testimony in support of either of these proposals.

Numerous parties spoke in opposition to all of the proposals listed above.

Proposal A–7 called for eliminating the Class I differential increases included in the Food Security Act of 1985, or establishing a uniform system of determining Class I differentials that would be fair to all dairy producers in Federal orders. The latter concept alone was proposal A–8. There was no sworn testimony in support of either proposal. However, several parties specifically opposed adoption of the proposals because there was no detail provided on the notion of "fairness".

Proposal A–9 in the Notice of Hearing called for the Class I milk price to be tied to an escalator formula representing the cost of production plus a return on equity as well as a true representative figure for management. At the hearing, a witness for the proponent (Pennsylvania Farmers Union) modified the proposal to provide a "floor price" on Class III milk at $14.00 per hundredweight, which would be adjusted for inflation twice a year. Also, modified Class I differentials should reflect the total cost of transportation and be adjusted twice each year for inflation. Thus, the modified proposal became similar, in concept, to proposals A–10 (proposed by MMI) and A–11 (proposed by the Producers Equalization Committee), which proposed basic formula "floor prices" of $10.60 and $11.00, respectively.

Several witnesses testified on proposal A–9 as included in the Notice of Hearing, apparently unaware that the proponents had modified, or would modify, the proposal. As a result, there was considerable testimony presented regarding the cost of production for milk in various areas. Although many witnesses indicated a strong belief that cost of production should be a factor in determining Class I milk prices under Federal orders, no one offered any specific mechanism for doing so. Five witnesses spoke in opposition to proposal A–9. Further discussion relative to costs of producing milk appears later in discussing the Class I price issue.

Proponents of specifying a floor under Federal order milk prices generally expressed the view that such action would remove price fluctuations so that producers can better plan their dairy operations. They also claimed that it would provide a greater incentive to have milk made available for Class I use during a falling M-W price, it would assure an equal cost to handlers, rather than relying so heavily on over-order charges, and it would assure an adequate supply of Class I milk to consumers. Opposition to "flooring" prices was presented on behalf of the Milk Industry Foundation and Borden, Inc., and in briefs by Anderson-Erickson Dairy, Co., Marigold Foods, and the Southern Foods Group.

Proposal A–12 in the hearing notice called for a Class I differential of $1.00 over the Class II price (when set at the M-W price) nationwide. The Class I differential would be increased temporarily to attract more milk, if needed. Also, a Class I transportation differential (amount unspecified) would be added to the Class I price nationwide to pay handlers 75 percent of the cost of hauling milk more than 100 miles to meet local needs. There was no sworn testimony in support of this proposal. However, five witnesses voiced strong opposition to the proposal.

Proposal A–13, (by Lamers Dairy, Inc., et al.) specified that the Class I milk price for all orders should be the basic formula price for the second preceding month plus $0.75. At the hearing the proponent modified the proposal so that the differential on all classes would be $0.30, plus an additional $0.30 on the Class I milk price.

The exception filed by Lamers Dairy, Inc., contained a "Correction of interpretation of proposal A–13". According to the exception, the modified proposal, which was received as Exhibit 56, indicated that there would be a Grade A differential of 30 cents per hundredweight plus an additional 30 cents for a Class I differential.

Based on this information, the description of proposal A–13 above has been revised to reflect this interpretation.

In support of this proposal, the proponent offered the following points:

(a) Class differentials are no longer needed to attract Grade A producer milk since the supply of Grade A milk is more than adequate.

(b) The manufacturing market over the five-year period 1984–1988 averaged $0.47 higher than the announced M–W price, with a low of $0.29.

(c) Over-order premiums are paid to producers in almost every area in the country. Plants will continue to pay producers a price high enough to ensure themselves an adequate supply.

(d) A 30-cent differential on all classes would still reward dairy farmers for producing Grade A milk, as opposed to producing manufacturing grade milk.

The proponent contended that this proposal would result in a free, competitive market, with over-order charges setting actual prices, simpler orders to administer, no location adjustments, no inefficient movements of milk, and would be a step toward deregulation of business by the government. This would best protect the interests of producers and consumers, in proponent's view.

There was no other supporting testimony. Opposition was voiced by two parties which opposed any reduction of Class I differentials and elimination of classified pricing. One party maintained that the proposal is based on false perceptions about the nature of Federal order markets.

Proposals A–14 and A–15 would specify Class I differential amounts at certain cities and change the Class I differentials for six orders back to what they were prior to May 1, 1986. These proposals were abandoned.

Proposal A–16 proposed a new set of Class I differentials in all Federal order markets in order to restore the alignment of Class I prices that existed prior to May 1, 1986. The proposal, as modified at the hearing amounted to increasing the differentials in a pattern such that the increases due to the Food Security Act of 1985 plus the changes now being proposed would total a minimum 69-cent increase in all orders east of the Rocky Mountains. The only decrease proposed was a minus 12 cents for the Texas order. Increases were not proposed for orders in the Far West and the Southeast.

Proposal A–16 was combined with proposal A–30, which would establish transportation credits for handlers receiving Class I or Class II milk at a rate that would compensate the party responsible for shipping the milk for 80 percent of its transportation costs. The proposed rate would be 2.8 cents per hundredweight per 10 miles for supplemental milk, which was defined as inter-order movements of milk. The monies to fund the transportation credits would come from the higher differentials proposed in A–16, and from an increase in the Class II differential to 50 cents (proposal B–1). The funds would be paid out as transportation credits to handlers operating distributing plants on receipts of supplemental milk and in the form of a fluid market differential to producers whose milk is received at a distributing plant or a supply plant that ships milk to a fluid distributing plant. The testimony offered by a witness for the proponent offered details of exactly how these payments would be calculated. The basic reason for the proposals is to help attract milk to fluid distributing plants. The testimony included examples of difficulties the proponent had experienced in obtaining the desired quantities of milk for its Class I and Class II needs. Two other handlers indicated support for the proposal.

Proposal A–17 would increase the Class I differential in each order by amounts ranging from five cents for the Southwestern Idaho-Eastern Oregon order to $1.10 for the New England order. The proponent of A–17 is Agri-Mark, Inc., a cooperative association of dairy farmers with 2,000 members in seven northeast states. The proponent's witness indicated he also was authorized to indicate support for the proposal by two other cooperatives in Vermont, which together with the proponent, represent the majority of producers in the New England order.

The proponent's witness indicated the belief that Class I differentials throughout the Federal order system have been administratively depressed for the last two decades. He maintained that information on general price levels, inequities in over-order pricing, intermarket alignment problems in securing adequate supplies for Class I needs, and projections of future milk prices and supplies clearly show that increased differentials are both needed and warranted.

In support of A–17, the witness cited the criteria provided in the Agricultural Marketing Agreement Act of 1937 that the Secretary must consider in establishing milk prices in Federal order markets. The thrust of his testimony was that those criteria need to be reviewed in light of the current situation compared to the situation that existed in the markets when the Class I differentials were set in the late 1960's and then modified somewhat as a result of the 1985 Farm Bill.

The witness then proceeded to review various price changes, concluding that the "real" value of Class I differentials has declined dramatically since 1970. He then reviewed changes in the receipts of producer milk between 1970 and 1989, along with changes in Class I utilization. Although the changes varied from order to order or among regions, he concluded that from a "northeast perspective," existing Class I differentials have not brought about excess supplies of milk. He cited data to show that milk production and the number of farms in all New England States declined in the last 20 years, while U.S. milk production increased more than 23 percent.

The proponent's spokesman projected that milk prices would decline by the end of 1990. He then cited cost-of-production data and foresaw "tremendous" attrition in farm numbers and milk production in the Northeast in general, and in New England in particular. He stated a best guess that over 20 percent of New England dairy farms would go out of business in the next two or three years, removing at least 12 to 15 percent of milk production in the region. Thus, by his analysis, the area could become short of milk and might have to bring in milk from the Upper Midwest. He testified that the proponent's transportation experts estimate that it would cost at least 4.3 cents per hundredweight per 10 miles to haul milk long distances without regular backhauls. In his view, the nation's ultimate reserve supply of Grade A milk is in the Upper Midwest. He noted that the Class I differentials in proposal A–17 are less than transportation costs plus a Grade B/Grade A conversion factor, regardless of whether a transportation cost of 3.5 cents or 4.5 cents per hundredweight is used, except for the Upper Midwest and Southeastern Idaho-Eastern Oregon orders.

The final point offered in justification for higher differentials in the Northeast is over-order Class I premiums. The witness cited premiums charged by the proponent as well as higher differentials that prevailed in Massachusetts, New York, and Pennsylvania.

Adoption of proposal A–17 was supported by a federation of four cooperatives, three in New York and one in Pennsylvania. In addition, the Federation's witness called for a consolidated single Northeast order, continued classified pricing, a Class I differential over $3.00 per hundredweight, component pricing of all milk, and adoption of membrane technology to leave water on the farm and reduce hauling costs. However, the proposals for order merger, component pricing, and adoption of membrane technology are beyond the scope of proposals included in the hearing notice. Therefore, these proposals are not considered further in this decision.

Specific opposition to proposals A–16 and A–17 was voiced by three parties. A witness for the Milk Industry Foundation and the International Ice Cream Association (MIF/IICA) stated that there is no economic justification

for broad-based increases or changes in Federal order Class I prices. He also expressed the view that perceived inequities between producers in one area versus others is not a proper basis to increase prices.

A witness spoke in opposition to the proposals on behalf of four handlers that operate milk plants in Florida, Maryland, Texas, Wisconsin, and North Carolina. The primary thrust of his testimony was that higher Class I prices would hurt fluid milk sales. He claimed that the primary area of growth in commercial dairy products is in the cheese segment, while fluid milk sales are stagnant. He also expressed the view that a Class I price surface should not exceed two cents per hundredweight per 10 miles, which would mean a "flattening" of prices rather than price increases. In support of this view, he called attention to development of a new method of hauling packaged milk: The use of one way corrugated boxes, which makes the truck available for a revenue-generating backhaul that can cut in half the costs of distributing milk.

A third witness, on behalf of a handler that, in addition to other plants, operates 28 milk plants fully regulated under 22 Federal orders, also opposed adoption of proposals A–16 and A–17.

Proposal A–18 calls for providing Class I differentials of not less than $2.30 in the New England, New York-New Jersey, Southern Michigan, Eastern Ohio-Western Pennsylvania, Ohio Valley, Indiana, Chicago Regional, Central Illinois, Louisville-Lexington-Evansville, Upper Midwest, Eastern South Dakota, Black Hills, Iowa, Nebraska-Western Iowa, and Greater Kansas City orders and changing the location adjustments in each of these orders as necessary in view of the new level of Class I differentials. The proponents of this proposal were four separate associations of cheesemakers, which operate 176 plants in 18 states and process about 14 billion pounds of milk annually.

The proponents' spokesman clarified the proposal by stating that it is not a proposal for a flat $2.30 in all the areas specified. Rather, it is a proposed minimum for those orders. Also, the proposal to change location adjustments should be considered on a regional basis at a separate hearing or hearings. In this regard, he suggested the Secretary issue a final decision adopting the proposed Class I differential changes but delay the effective date of such prices for six months to hold hearings and adopt location adjustment changes.

In support of proposal A–18, the witness testified that the portion of the value of milk represented by Class I differentials has shrunk during the last several decades because they have not been adjusted to account for inflation or the declining purchasing value of the dollar. As a result, a greater portion of the Class I value is paid through over-order premiums. He claimed purchasing power in constant dollars is a very relevant factor for the Secretary to consider. He also claimed the reduction in the value of the Class I differential has contributed to several problems:

(a) When the M-W price increases at a rate equal to the Class I differential over a period of two months, the minimum Class I price will be below the M-W price, or Class III price for the month, as happened in the fall of 1989. This situation caused a considerable volume of milk to not be pooled. Moreover, handlers that had Class II and Class III milk remaining in the pool had to make payments into the producer-settlement fund.

(b) The decreasing value of Class I differentials has been offset in many markets by increasing over-order prices for Class I milk, which cause instability that the order program was designed to alleviate.

The witness also said higher Class I differentials in the Midwest are justified because milk production costs there are no longer lower than in most other parts of the country. He claimed that the current level of Class I differentials in the Midwest reflects an assumption that production costs are lower there.

Finally, according to the witness, increased Class I differentials would permit implementation of an effective seasonal incentive plan to help balance the seasonal variations in milk production. The specific seasonal incentive plan proposed by the proponents is described later.

Direct testimony in support of proposal A–18 was presented by NFO. According to the NFO witness, the answer to economic difficulties of dairy farmers is in building up dairy farm prices. He contended that Federal order pricing policy needs to be fashioned with an element of income recognition in it for dairy farmers. In his view, the present structure of Federal order Class I differentials does not generate an adequate and equitable amount of income for producers in the lowest-priced orders east of the Rocky Mountains. This represents a substantial failure of the Federal order program to provide any income to a significant group of producers in an important dairy region. According to the witness, adoption of proposal A–18 would have several positive effects:

(a) It would provide a modest blend price increase to dairy farmers in the lowest-priced Federal orders.

(b) It would establish pricing in the Chicago Regional and Upper Midwest orders that would eliminate the disorder involved in volumes of milk being flip-flopped on and off the orders, as has occurred in recent years and will continue unless some price changes are made. This pooling and de-pooling of milk makes the determination of shipping standards in both orders difficult, if not impossible, with regard to the discretionary adjustments to supply plant performance standards that may be made by the market administrators and the Director of the Dairy Division.

(c) It would establish a larger flat price, northern zone which would tend to encourage more efficient movements of milk to southern points from the nearest geographical location where milk supplies are not committed to fluid usage during times of short supply in the South.

The NFO witness stated that such an increase in northern Class I differentials would require some adjustments in the Class I differentials in the Northeast, Southeast, and Mid-South, as shown in Exhibit No. 89. No changes were proposed for other areas.

A representative for Anderson-Erickson Dairy Company expressed opposition to proposal A–18. He opposed a flat Class I price for the Midwest because it would make it difficult to compete and move milk to areas south of his location and would cause similar problems for other handlers in other orders. He suggested that the Class I price increases advocated by the cheesemakers would do nothing to address the real problem of fluid milk handlers, which is how to attract milk to fluid uses in markets with low Class I utilization levels.

Proposal A–19, by MMI, would increase Class I differentials $1.20 in the Ohio Valley, Eastern Ohio-Western Pennsylvania, and Louisville-Lexington-Evansville orders and $1.00 in the Indiana order.

In support of the proposal, the MMI witness testified that in order for milk to move from where it is produced to where it is needed for Class I, a higher price must be established. He maintained that costs of production and local supply/demand conditions must also be considered in establishing Class I prices. He pointed out that the Pennsylvania Milk Marketing Board has established a Class I minimum price in western Pennsylvania that is $1.20 above the Federal order Class I price for the same area, and that the Board

determined such a price was necessary to insure a continuing adequate supply of milk. This is the basis for the proposed increase of $1.20 for the Eastern Ohio-Western Pennsylvania order. The other increases are proposed for price alignment purposes and to insure consumers in those markets a continuing adequate supply of milk.

Opposition to proposal A–19 was expressed by witnesses for MIF and one other handler on the same basis noted above for proposals A–16 and A–17. Opposition testimony also was presented by a witness for the Milk Foundation of Indiana, an organization of six proprietary handlers that operate distributing plants. The witness stated that because of price disparities created by the Class I differential changes implemented on May 1, 1986, Indiana plants lost some 15 to 16 million pounds of Class I sales per month, or nearly 14 percent of their Class I sales, based on a comparison of sales in November 1985 to November 1989. Also, he noted that for the same monthly comparison, Indiana plants' Class I sales in other markets declined some 13 million pounds. Thus, he expressed the view that if A–19 were adopted, Indiana plants would lose another 30 million pounds of Class I sales because of even greater price disparities between Indiana and its neighboring markets.

Proposal A–20 was declared abandoned by the proponent, Prairie Farms Dairy, Inc. A–20 would have established minimum Class I differentials of $2.00 in 18 orders ranging from the Eastern Ohio-Western Pennsylvania order to the Pacific Northwest order and as far south as the Greater Kansas City order. It also would have established multiple basing points at six locations and would have established prices at orders south of a basing point by adding 3 cents for each 10 miles from the nearest basing point, with no changes in plant and producer location adjustments. Class I differentials in the Indiana, Western Colorado, Eastern Colorado, and the three northeastern orders would have been changed. On a simple average, Class I differentials in the 41 orders would have been increased by 40 cents per hundredweight. One handler offered specific opposition to A–20.

Proposal A–21, also proposed by Prairie Farms Dairy, Inc., similarly was abandoned. This proposal would have changed the calculation of location adjustments at pool plants under all orders.

Opposition to proposal A–21 was expressed by two witnesses on behalf of the Coalition of Southern Dairy Farmers and a witness for a group of four proprietary handlers.

Proposal A–22 was offered by Mid-America Dairymen, Inc., a large midwestern dairy farmer cooperative. The proposal would provide a minimum Class I differential of $2.00 in any order currently having a differential less than $2.00. Testimony by a witness for the proponent, however, was limited to supporting the $2.00 figure for the Chicago Regional, Central Illinois, Southern Illinois-Eastern Missouri, Upper Midwest, Eastern South Dakota, Iowa, Nebraska-Western Iowa, and Greater Kansas City orders. He stated that the proposed increases are necessary and justified because of the decrease in milk production that has taken place throughout the area. Compared to 1988, he cited production declines in 1989 throughout the area ranging from 4 percent in Wisconsin to 0.3 percent in Nebraska. He expressed the view that production declines in Minnesota and Wisconsin are highly significant because these two States have historically served as a reserve supply for other areas of the country, particularly the Southeast. The witness said that unless dairy farmers in the Upper Midwest area receive assurances of long-term price stability they will continue to exit the dairy business. He contended that the order Class I differentials have not been sufficient to attract sufficient supplies of milk for Class I use and that over-order pricing had been utilized to assure bottling plants an adequate supply of milk. He also expressed the view that a portion of the increased differentials should be used to provide a market service payment to those dairy farmers actually supplying the Class I needs of the market.

Proposal A–22 was opposed by witnesses for the MIF/IICA, and by two handlers for the same reasons cited in opposition to other proposals to increase Class I differentials.

Proposal A–23 would reduce the Class I differential for the Nebraska-Western Iowa order from $1.75 to $1.68. This proposal also was abandoned.

Proposal A–24 by the Trade Association of Proprietary Plants (TAPP) has four parts. Part one would restructure Class I differentials throughout the Federal order system. First, the minimum Class I differential would be $2.00 per hundredweight. The maximum Class I differential would be $3.75, based on the cost of processing and transporting nonfat dry milk 1400 miles (estimated straight-line distance) from Eau Claire, Wisconsin, to the Southeastern Florida market. All other Class I differentials would be aligned by drawing a line from the western border of Minnesota southeasterly through the western border of Alabama. East of that line, Class I differentials would be computed based on 200-mile zones radiating out from Eau Claire to the primary basing point in each market. For each 200 miles the differential would increase by 25 cents (reflecting a rate of 12.5 cents per 100 miles). West of the line, differentials would decrease by 25 cents per 200 miles. The proposal would increase Class I differentials in some orders and reduce them in others.

Part two would provide a uniform transportation allowance, or credit, of 30 cents per hundredweight per 100 miles for interplant movements of Class I milk within and between all Federal order markets regardless of direction of milk movement.

Part three would provide a supply-demand adjustor for all Federal orders. Each year, on January 1, Class I differentials would be adjusted based on the percentage of milk production purchased by the Commodity Credit Corporation (CCC) on a total solids milk equivalent basis the prior marketing year. If the percentage was 0 to 5 percent, there would be no adjustment. Negative adjustments would increase from minus 10 cents at 5 percent, up to minus 50 cents if 10 percent of national production was purchased by CCC.

Part four proposed price incentives to encourage producers to adjust the supply of milk to demand on a national seasonal basis through two separate provisions. The first provision would add 50 cents to all Class I differentials in the six lowest U.S. production months and subtract 50 cents in the highest production months. The second provision would institute a takeout-payback plan simultaneously in all Federal orders with the same takeout amounts and months and the same payback months. If both provisions are adopted, maximum takeout in the months of December through June would be 10 cents per hundredweight with a payback period of August through November. If the first provision is not adopted, the maximum takeout would be 10 cents per hundredweight.

The witness for TAPP contended that changes in the Class I price structure were needed and offered his rationale as to why proposal A–24–1 would provide a reasonable system of Class I prices:

(a) The most economical source of supplemental milk for a deficit market, such as Southeastern Florida, for example, is nonfat dry milk for reconstitution.

(b) The Class I differential in the most distant market should be the delivered cost of the amount of powder sufficient

to make 100 pounds of reconstituted milk, including the Class I differential at Eau Claire ($1.64), plus a processing cost of making powder ($1.22), plus the cost of reconstituting (estimated at 10 cents), plus the hauling of 11 pounds of powder to West Palm Beach, Florida (43 cents), for a total delivered cost of $3.39.

(c) The difference between $3.39 and $1.64 is $1.75, which divided by 1400 miles (the air-miles distance from Eau Claire to West Palm Beach) results in an adjustment factor of 12.5 cents per 100 miles, or 25 cents per 200 miles. This rate would be used to set the Class I differential in intermediate markets.

This would result, in the proponents' view, in a superior system of Class I prices. Also, according to the witness, a $2.00 Class I differential in Chicago is justified to:

(a) Solve the problem of de-pooling milk because of rapid, large increases in the M-W price.

(b) To allow for a national seasonal pricing plan.

(c) To allow for a national supply-demand adjustor.

(d) To maintain a reasonable Class I price level in other markets.

Under cross-examination, the witness acknowledged that adoption of this part of the proposal is contingent upon adoption of another of TAPP's proposals to classify powder used for reconstitution as a Class I use in the originating market. That proposal is considered elsewhere under issue No. 4 in this decision.

With regard to the transportation credit part of this proposal (A–24–2), the witness maintained that increased costs of transportation have made zoning to cover costs of transportation in Federal orders obsolete. In his view, the transportation credit would result in more equitable pricing and orderly movement of milk within and between Federal orders.

According to the witness, a supply-demand adjustor is needed because over the years Class I prices have become higher than necessary, thus encouraging a more than adequate supply in most Federal order markets.

Finally, the witness contended that there is a need to encourage better seasonal balancing of milk production with demand. He indicated that problems associated with seasonality of production are:

(a) Waste of money associated with:

(1) Unnecessary inventories and storage costs for hard products.

(2) Added hauling costs of moving milk around to handle seasonal surpluses and deficits.

(3) Inefficient manufacturing due to fluctuating milk supplies.

(4) Maintaining costly excess manufacturing capacity.

(b) Erratic fluctuation of milk prices due to manufacturing plants and fluid milk handlers competing for milk during short production months.

There was no other testimony in support of proposal A–24. General opposition was voiced in the testimony of six other parties. One, a proprietary handler, maintained that Class I differentials should be tied to the cost of moving fluid milk, not milk powder.

Proposal A–25, by the Farmers Union Milk Marketing Cooperative, is comprised of three parts. The first part would establish the Class I milk price for each area by adding $1.20 to the basic formula price for the second preceding month plus a "market area differential", derived by multiplying a regional Class I utilization percentage by $2.98 per hundredweight. To this would be added a handler transportation adjustment. From the monies generated by the transportation adjustment, shipping handlers would receive a transportation credit, and there would also be a producer credit adjustment.

The second part of the proposal would provide that the basic Class I differential of $1.20 would be pooled in a separate national pool. The third part would establish one or more regional marketing areas for pricing and pooling the Class I marketing area differential.

Three witnesses testified in support of proposal A–25, two on behalf of the proponent. The first witness testified that the General Accounting Office Report to the Congress on the milk order program describes "* * * what's wrong and what has to be fixed if marketing orders are to be effective tools in the 1990's."

The second witness testified that proposal A–25 is supportive of proposal A–27, but goes a little farther toward FUMMC's goals. He indicated support for proposal A–27 and cited the testimony of others who testified in support of A–27. The FUMMC witness said national pooling should be adopted because, in his view, the market for Grade A milk is national in scope. In support of this concept he pointed to expanding areas of packaged milk distribution and noted that reserve supplies of Grade A milk can be obtained from many different sources in many different areas. He also contended that Federal order blend prices "* * * do not recognize the integrated nature of fluid milk markets on the production side." He further maintained that orders "* * * serve to artificially localize, through regulation, naturally broader markets by imposing economic penalties on the use of reconstituted concentrated milk.

The brief filed by FUMMC said that the $1.20 in its proposal is justified by the testimony of another witness regarding proposal A–27. The brief relies on a producer's cost of converting to and maintaining Grade A status at 15 cents per hundredweight divided by a national Class I utilization of 45 percent, which gives a factor of 33 cents. This figure, added to an imputed net margin for manufacturing plants of 87 cents equals $1.20.

The FUMMC brief also said that the second tier of the Class I price should be equal to the difference between the individual order's current Class I differential and the $1.20 base differential, or $1.00, whichever is greater. Thus, the smallest Class I differential would be $2.20 and the largest would be $4.18.

The brief also called for a national transportation pool that would compensate handlers for up to 70 percent of the cost of transporting milk to fluid handlers.

The third witness who testified in support of proposal A–25 is a Professor in the Department of Agricultural and Applied Economics at the University of Minnesota. He also was critical of the current Federal order pricing system. He took the view that the current system is inequitable to producers in the Upper Midwest region of the U.S. and that it creates inefficiencies and frequently fails to provide an incentive for suppliers to provide milk for fluid uses.

This witness indicated that the orders should be grouped into regions and suggested the regions that USDA uses for its cost of production studies. He proposed that the Class I price should be the national Class III price (Class II in markets with only two classes) plus a single national base differential of $1.00. To this would be added a price element determined by multiplying the average Class I use percentage of the region for the preceding year by a factor representing the location value of milk and production cost differences among regions. He used $3.00 for illustrative purposes. A third pricing factor would be a transportation Class I component as supported in the testimony of a principal witness for the proponents of proposal A–27. As envisioned by this witness, the base Class I differential of $1.00 would be pooled nationally and would require interregional transfers of funds. Equity considerations justify this approach, according to the witness.

Five witnesses specifically opposed adoption of proposal A–25, mostly on the basis that no changes should be made. In addition, because of the many

similarities between A–25 and A–27, opposition to proposal A–27 would generally also be opposition to A–25.

Proposal A–26, by Land O'Lakes, would provide supply balancing credits for handlers who operate plants that supply milk to distributing plants. Also, handlers who have to obtain supplemental milk supplies for Class I use from nonpool sources would receive a payment to cover give-up costs plus a transportation credit. The witness for the proponent indicated that other aspects of proposal A–26 had been incorporated into proposal A–27 and therefore he would not testify on them in connection with proposal A–26.

As proposed, handlers who provide more than ordinary service to the fluid market relative to handlers who provide less than ordinary service would be compensated for that service. Each year the market administrator would use a formula to estimate the total amount of balancing payments to be paid over the next 12 months at a proposed rate of 50 cents per hundredweight. The total of such estimated payments would be divided by the estimated volume of milk at distributing plants to arrive at the Class I surcharge that would fund the balancing payments. Thus, the balancing payment would be funded by handlers as an increment of the Class I differential.

The basis for this proposal is that, according to the proponent: (1) Differences in seasonality of milk production and contra-seasonality in the needs of distributing plants result in a variable volume of reserve milk; (2) Handlers who secure an outlet for the orderly disposal of this reserve incur costs; (3) This disposal cost is not shared equally by the participants in the Federal order pool; (4) This proposal would reestablish equity between pool handlers who provide varying levels of service to distributing plants in the market; and (5) The level of the balancing payment should reflect the fixed costs of maintaining a level of manufacturing capacity adequate to handle the variable Class I market reserve supplies.

This proposal is related to the price issue only because the surcharge would become an annual element in the Class I differential. Basically, it is a proposal for a marketwide service payment.

A second aspect of this proposal is to establish in each order a supplemental milk fund. As proposed, a handler that obtained supplemental milk for Class I uses from nonpool sources would receive a payment of $3.00 per hundredweight plus a transportation credit of 3.5 cents per 10 miles per hundredweight.

As proposed, the market administrator would estimate the total of such payments and would include the rate per hundredweight to cover the payments as part of the transportation surcharge on Class I milk proposed by the UMFOC proposal No. 27.

Land O' Lakes' brief expressed the view that the Secretary should consider limiting the acquisition payment to the months when over-order charges approximate $3.00 per hundredweight and when Class I utilization exceeds 75 percent in the receiving market.

The proponent maintains that this provision would restore equity among handlers because not all handlers have to buy supplemental milk and, therefore, some handlers have higher costs than others. Although no one else specifically addressed this aspect of proposal A–26, other parties did indicate agreement with this view.

A witness for the Southern Coalition of Dairy Farmers (SCDF) testified in opposition to proposal A–26. In his view, this proposal calls "* * * for the extension of regulation and control over marketing activities and functions which can best be carried out, and made efficient through the competitive process." In its brief, the NFO opposed adoption of balancing payments. The brief noted that claims for such payments "are very market-specific and, therefore, not ripe for adoption on this hearing record." NFO also expressed the view that balancing services are services performed for handlers and that, therefore, the payments for such services should be made by handlers.

Proposal A–27 by the Upper Midwest Federal Order Coalition (UMFOC) as included in the hearing notice was general, calling for Class I prices to be the M-W price for the second preceding month plus a uniform Class I base differential to be pooled nationally and a Class I marketing area differential consisting of a producer credit adjustment and a transportation credit adjustment. In addition, one or more marketing areas would be established for pricing and pooling Class I milk.

At the hearing, a witness for UMFOC modified the proposal and indicated that UMFOC would not present testimony on national pooling. As modified, proposal A–27 would establish the Class I price for each order using the following elements:

(a) The basic formula price for the second preceding month.

(b) A uniform Class I base differential of $1.80 for all markets.

(c) A marketwide service differential based on the hauling costs associated with delivery of pool and nonpool milk to pool distributing plants, which would be unique to each order.

As proposed by UMFOC, the common $1.80 Class I price element was composed of two parts. The first part is an imputed net margin for Minnesota and Wisconsin manufacturing plants of 87 cents per hundredweight. The second part is a Grade A element of 96 cents per hundredweight.

The first element is intended to offset costs incurred by manufacturers in Federal milk order pools. They include the extra cost of maintaining Grade A certification of plant facilities, the market administrator's administrative fees on pooled milk, and the extra cost of maintaining records and filing reports to the market administrator, according to UMFOC's witness. The 87 cents represents an average calculated return to cover such costs at Minnesota and Wisconsin manufacturing plants over a ten-year period ending with 1989, as estimated by another witness for UMFOC. The details of how the imputed net returns were calculated are in the record; they need not be repeated here.

The second element, 96 cents, was based on an analysis of the costs involved for a dairy farmer to convert the farm from Grade B to Grade A. According to UMFOC's witness, the major element of costs involved in converting is the drilling of a new well. Amortized over 10 years, the cost of conversion averaged about 15 cents per hundredweight. The UMFOC position was that producers must be able to recover this cost if they are to continue to produce Grade A milk. In the Chicago Regional market, Class I utilization of milk for August 1989 through July 1990 was about 15.6 percent of all the Grade A milk normally associated with the market, according to the UMFOC witness. In order to have 15 cents per hundredweight available to pay to producers in a market with 15.6 percent Class I use, the Grade A component must carry a value of 96 cents (15 cents divided by .156 = 96 cents). This was the basis for the 96 cents component. The two components added together total $1.83 (.87 + .96 = $1.83), which was rounded to $1.80 for the proposal. This $1.80 would be the basic Class I differential in all Federal milk orders.

The UMFOC also proposed, in addition to the Class I base differential ($1.80), that there be a "producer credit adjustment" and a "transportation credit adjustment," that the Class I base differential be pooled in a separate national pool, and that one or more marketing areas be established for purposes of pricing Class I milk and pooling Class I revenues. At the hearing,

these additional proposals were abandoned, except the transportation credit adjustment.

As developed through testimony at the hearing, a transportation credit would be established for each order as follows:

(a) Based on evidence concerning hauling rates, a rate of 3.5 cents per hundredweight per 10 miles is representative of hauling rates. However, to avoid overcompensation and to provide incentives for promoting efficient movements of milk, it was proposed that the transportation credit be 80 percent of the hauling rate. Thus, the transportation credit would be based on 2.8 cents (3.5 cents x .80 = 2.8 cents) per hundredweight per 10 miles.

(b) Each year the market administrator for each order would estimate separately the total distance that milk will be transported from pool and nonpool sources to pool distributing plants over a 12-month period.

(c) The total estimated distance would be multiplied by $0.0035 per mile and the result multiplied by 0.80. For concentrated milk, the multiplier would be 1.0 on product weight. The final figure would be the expected amount of hauling compensation to be provided during the succeeding 12 months.

(d) The total estimated value of handler location adjustments would be deducted from the above estimate of total hauling compensation. The remainder would be the estimated hauling compensation to be provided through marketwide service payments.

(e) The estimated hauling compensation would be divided by the total estimated amount of producer milk to be allocated to Class I in the 12-month period to arrive at the Class I surcharge needed to fund the marketwide service payments.

(f) Payments of hauling compensation would be made to handlers at the rate of $0.28 per hundredweight times the distance from the origin of the milk to the distributing plant on all milk received direct from the farms of producers or as transfers of bulk fluid milk products from pool and nonpool plants, less the difference in location adjustment between the originating plant and the destination plant. For concentrated milk the rate of compensation would be $0.35. Receipts from cooperatives acting as bulk tank handlers would be treated the same as direct-shipped milk.

(g) Distances between plants would be determined using the latest Mileage Guide as published by the Household Goods Carriers Bureau. For direct-shipped milk, it was proposed that the trunk highway intersection nearest to the closest producer on the farm bulk pickup route be used. In the case of plant transfers, transportation credits would not be available on movements of milk from the farms of producers to the plant of first receipt.

(h) Payments in compensation for hauling would be made directly to the handler who ordinarily receives a location adjustment credit for transfers between pool plants. For transfers from a nonpool plant, payment would be made to the operator of the receiving pool distributing plant. For direct-shipped milk, payment would be made to the handler that accounts to the pool for that producer milk. For cooperative bulk tank handler milk, payment would be made to the cooperative. For diverted milk, payment would be made to the diverting handler. For direct-shipped milk, any handler receiving the marketwide service payments would be required to keep records that show that the payments received were in fact paid out for hauling services or paid directly to producers as partial reimbursement for hauling charges paid by the producers.

(i) Because the amounts of money generated by the Class I surcharge to fund the marketwide service payments may not match exactly the payments to be made, it was proposed that the market administrators establish a reserve within the producer settlement fund so that the accumulation of funds be treated as an obligated reserve.

This proposal for a Class I differential composed of the $1.80 plus the transportation surcharge was designed, according to the proponents, to provide all the necessary incentives to assure an adequate supply of Grade A milk for fluid use in all markets. It would provide incentives to produce and pool Grade A milk, attract it away from manufacturing uses, and transport it to fluid processors. Proponents maintained that if adopted it would perform these functions more efficiently and more effectively than the system of incentives now provided in Federal milk orders.

As envisioned by the proponents, this proposal would have several impacts:

(a) It would likely increase minimum Class I and blend prices in a few midwestern markets and reduce them elsewhere. In those markets with reduced blend prices, locally produced milk could decline while Class I sales would increase in response to lower prices. Overall, national milk supplies would be expected to decrease, resulting in an increase in the value of milk used in manufactured dairy products. The net impact on total dollars flowing into the Grade A milk sector is unknown. Another witness for the proponents later testified about using a computer model and input data for 1988 and 1989 to estimate the net impact of adopting proposal A–27 four years after its implementation. That analysis indicated that after four years, 23 markets would lose $337 million and 14 markets would gain $156 million for a net loss of $181 million.

(b) It would create some new price alignment problems, but the proponents were not able to anticipate in advance all the alignment problems that might arise. It was suggested that local market alignment problems be addressed through regional hearings, as was done in 1986. In this regard, it was stated by a witness for the proponents that if the Secretary "* * * concludes, based on what others may say, that adoption of our proposal without a concurrent change in location adjustments could lead to disorderly marketing, then we suggest that he defer implementation of our final decision until he arrives at a final decision relative to location adjustment hearings and implement them both at the same time."

(c) Another impact of this proposal would be to change the economics of fluid milk distribution. Currently, it is generally more favorable to expand distribution in the direction of higher-priced markets to the south. Under this proposal, expansion of distribution in any direction would be equally favorable. Thus, fluid processors would likely face stiffer competition from their more southerly competitors and less stiff competition from their more northerly competitors. This change in the competitive environment may be painful for some distributing plant operators, according to proponents' witness.

In summary, the principal witness for the proponents indicated their belief that adoption of this proposal would accomplish the following:

(a) Assure an adequate supply of Grade A milk for the system of Federal order markets.

(b) Provide improved incentives to promote the release of Grade A milk and its delivery to the fluid market.

(c) Reduce the Class I cost of assuring an adequate supply of Grade A milk for the fluid market.

(d) Provide greater equity among producers regulated under different orders by reducing blend price differences.

(e) Reflect supply and demand conditions on a system-wide basis.

Thirty-three different persons spoke in support of proposal A–27, including members of Congress, a governor, state representatives, representatives of State government, University faculty and staff

members, members of farm organizations and individual dairy farmers. Most of the supporting testimony was very general in nature, basically endorsing the notion that a change is needed in the way milk is priced under Federal orders and indicating support for proposal A–27 as the way to do that.

Fifteen witnesses spoke in opposition to proposal A–27. These included representatives of numerous dairy farmer cooperatives, some speaking on behalf of coalitions and others just for their own organizations. In addition, opposition to A–27 was voiced by proprietary handlers, the Milk Industry Foundation and International Ice Cream Association, and individual dairy farmers.

More will be said later regarding both supporting and opposing testimony concerning proposals A–24, A–25, A–26, and A–27.

Proposal A–28 would provide seven basing points for Class I pricing: Boise, Idaho; Southern Arizona; Central Texas; Eau Claire, Wisconsin; Nashville, Tennessee; North Central Pennsylvania; and Northern New Hampshire and Vermont. Initial Class I differentials would range from $1.50 to $2.50. A location differential of about 10 cents per hundredweight per 100 miles distance from the basing point would be added to the Class I differential, with pricing points in individual marketing areas to allow for movement of milk to metropolitan areas within the marketing area. Also, there could be established a transportation credit pool to pay for transportation of milk from another base point area, controlled by the market administrator based on the need for additional Class I milk. The proponents of this proposal were the North Dakota Milk Producers Association and North Dakota Dairy Industries Association.

The witness for the proponents introduced two exhibits showing details of the proposed prices for each existing order, which would range from $1.75 for the Upper Midwest order to $4.18 for the Southeastern Florida order.

The witness contended that the current pricing system does not adequately price milk throughout the United States and that new production centers now exist other than in Wisconsin. As proposed, Class I milk prices would be increased in the Midwest to stem declining production that is occurring because prices are not sufficient to cover production costs, according to the witness. He cited increased milk production in the Southwest (Texas, Arizona, New Mexico and California) and maintained that if that production increase trend continues, there would be milk available to move to the Southeast or other parts of the country.

The witness also indicated that the Upper Midwest order needs a larger location adjustment to provide an incentive to ship milk. This proposed pricing would allow 20 cents per hundredweight to move milk and would restructure the zones to provide higher prices in southern and northwestern Minnesota and in eastern South Dakota. He suggested that if other areas of the country have similar problems, location adjustments should be changed as indicated based on testimony at the hearing in this proceeding.

In summarizing, the witness indicated that this proposal is designed to provide a new system for the 1990's and beyond and to recognize an ever-changing dairy supply system, and that it could work towards fewer orders if that is desired by the industry. The witness stated that "It is hopeful that it will stabilize production in the Midwest and slow down the increase that is occurring in the Southwest, both of which would be in the best interest of the industry."

On cross-examination the witness indicated that for those areas for which the proposal did not provide a specific basing point, there would need to be local input from those areas to determine where the basing point should be. He agreed that lacking such input, the record would be short of enough information to decide exactly what to do. There was no other supporting testimony on proposal A–28.

Proposal A–29 was a non-specific proposal to establish a system of multiple basing points. It was proposed by the Rusk County Farm Bureau (Wisconsin). The witness for the proponent contended that a new system was needed and referred to a study by the Economic Research Service of the USDA as the source of information he had relied on in proposing a multiple basing point pricing system. He also indicated that he had relied on the General Accounting Office study. He further indicated that he was supporting a concept but that he did not have a specific proposal to offer.

Five parties specifically opposed adoption of multiple basing points. Mostly the testimony was in opposition to any changes from the current system or was general opposition to any increases in Class I differentials. One witness, for CMPC, expressed the view that proponents have not advanced sufficient data to define the term "multiple basing points", or the need for it or its operation. He further stated that only those areas that have volumes of milk in the fall months in excess of their Class I and Class II needs could be considered as reserve supply areas.

Proposal A–30 was described in connection with proposal A–16.

Proposal A–31 called for a producer fall production incentive program in all Federal order markets. As proposed, five cents per hundredweight would be deducted from the uniform price on all producer milk during the months of April, May and June. The funds so generated would be paid back to producers in the short production months. The payment would be made on the quantity of milk that each dairy farmer produced in excess of 95 percent of the amount produced during the flush months. The proponent was Milk Marketing, Inc.

At the hearing, proponent's witness stated that the seasonal incentive fund should be created by increasing all class prices by 10 cents per hundredweight in the months that the individual markets are normally in the tightest supply/demand conditions.

The witness indicated that seasonally varying patterns of production cause inefficiency in the entire milk marketing system and that seasonal incentive pricing would be beneficial to everyone in the industry and to consumers as well. Since it would be paid for by handlers, producers would view the program as very beneficial and would adjust production patterns to meet market demands. This would result in less costs associated with a low seasonal production pattern and should reduce procurement costs and over-order prices. No one else testified in direct support of proposal A–31.

Proposal A–32 also proposed a seasonal incentive plan providing a take-out of as much as 45 cents per hundredweight during a four-month period, to as little as 20 cents per hundredweight during a nine-month period, and a pay-back of not less than 60 cents per hundredweight each month of September through November. This plan was proposed by the cheesemaker organizations mentioned as proponents of A–18.

The witness for the proponents expressed the view that seasonality of milk production is a national problem requiring a national solution. The problem is one of imbalance between the production of milk with demand for milk in various products, which causes: shortages of milk supplies during the fall months; seasonal needs to transport milk long distance during the fall; assessment of give-up charges to release fall milk supplies; idle manufacturing plant capacity in the fall; inadequate manufacturing capacity in the spring; and instability of minimum prices and

premiums. In supporting adoption of the proposal, he pointed to testimony of another witness for the proponent who had studied the costs of contra-seasonality in milk production and who concluded that there is an annual minimum cost of $40 million to the industry.

The proponents' witness claimed that there has been little improvement in the pattern of seasonal production over the last decade. In order to provide an incentive for producers to adjust production seasonally, he proposed a take-out of 45 cents per hundredweight from the uniform price during each of the months of January through June for all markets. The amount so set aside would be paid back to producers with interest during September, October and November. He believed the pay-back would likely exceed $1.00 per hundredweight. However, he urged that the take-out be floored at the M–W price plus 10 cents.

The brief filed by the cheesemakers stated that if the Secretary found that producers under such a plan would lose income not likely to be compensated for in the marketplace, the cheesemakers would not object to a uniform sharing of such costs with producers by all handlers through implementation of a surcharge on Class prices not to exceed 5 cents per hundredweight on a year-round basis. This would allow the take-out to be reduced about 30 percent without reducing the payback, according to the brief.

There was no other direct testimony in support of A–32.

Proposal A–33, by Prairie Farms Dairy, Inc., was another proposal for a seasonal incentive plan. As proposed, for producer milk delivered during April, May and June, an amount equal to 35 percent of the Class I differential would be subtracted, from each handler's total value of pooled milk, provided such adjustment does not provide a uniform price at location of less than the Class III price. For milk delivered in September, October and November, one-third of the amount subtracted would be added.

In his testimony supporting the proposal the proponent's witness modified the proposal by adding March as a deduct month and adding December as a payback month. In addition, the deduction would be equal to 25 percent of the Class I differential, and the deductions could not yield a blend price below the Class III price plus 10 cents. He indicated that the variable deduction would encourage some markets with low Class I utilization and low Class I differentials to participate, even though there is a small difference between the Class III price and the Uniform price. This was the reason for snubbing the deduction so that the blend price would not be less than the Class III price plus 10 cents.

According to the witness, higher deducts in markets with higher Class I use and higher Class I differentials would be beneficial because such markets tend to have a greater need for the market to provide a balancing service to fluid handlers. Thus, if production is balanced to meet fluid handlers' needs, they will need less supplemental milk on a yearly basis, which should reduce the volatility of their raw milk prices. He also said it would benefit suppliers as well. Moreover, larger paybacks in deficit markets would help attract milk to those markets.

The witness said his analysis showed that nearly 80 percent of the markets would see seasonal blend price swings of at least $1.00 per hundredweight, which would cause many producers to shift their production to better meet the needs of the industry. He also cited several problems that result from an imbalance of production relative to demand for milk. There was no other direct testimony in support of A–33.

A witness for CMPC did not specifically endorse any particular seasonal incentive plan, but indicated support for such a concept, if it is adopted in all orders, has a maximum deduct or charge of four to five cents per hundredweight, pays out to only those producers who perform, and allows some flexibility in developing provisions appropriate to Federal orders.

The brief filed by NFO opposed proposals A–32 and A–33, but supported adoption of A–31 as the best-designed seasonal incentive plan and urged its adoption to address the seasonality cost problem.

Over all, there was not a great deal of support for any seasonal incentive plan except as noted above. Moreover, there was some general opposition to any changes in the orders regarding Class I prices.

Proposal A–34 would amend all orders to provide that the Class I and Class II butterfat differentials be announced on the fifth day of the month for the following month. The proponents are the MIF/IICA. The principal reason advanced by the proponents' witness in support of this proposal was that it would "* * * greatly enhance the ability of Class I and Class II handlers to more accurately determine their raw product costs." He also indicated that over the long run, adoption of the proposal would have no impact on producers and would facilitate more orderly marketing of both Class I and Class II milk products.

Several parties supported adoption of proposal A–34. There was no opposition.

Proposal A–35, submitted by Prairie Farms Dairy, Inc., would provide that a uniform butterfat differential for the month be announced by the fifth of the month. The proposal was abandoned by the proponent.

The above description of proposals and testimony portrays a wide range of views regarding how Federal orders should be changed or not changed. Altogether, nearly 200 persons, including dairy farmers, cooperative association representatives, members of other general farm organizations, proprietary handlers, state officials, members of the United States Congress, and others, testified at the hearing. Thus, the record contains the views and testimony of a broad cross-section of the dairy industry and other interested parties.

In general, the testimony reflects one of two basic views. The first is one of basic support for the order program as is. This point of view was expressed by virtually all parties from areas of the country other than the Midwest. Many of them opposed any broad-based changes in the Class I pricing system of the orders. Others, however, proposed increases in Class I prices, ranging from changes in Class I differentials for a few orders to Class I differential increases in all orders.

The second point of view reflected in the testimony of most parties from the Midwest also expressed strong support for the Federal order program, but was critical of the system of Class I prices that now operates in all the orders. Their criticisms were based on a belief that the current Class I pricing system discriminates against producers in the Midwest. Many of those who participated in the hearing testified that the Class I prices in the Midwest are too low relative to Class I prices in other areas, particularly in the Northeast and the Southwest. In general, those who expressed this view maintained that the costs of producing milk in the Midwest are not very different from the costs of producing milk in other regions. Many maintained that a Class I pricing system based on a single basing point is obsolete, causes pricing inequities, and needs to be substantially revised to reflect current marketing conditions and technology.

Among the most critical of all groups in this regard was the Upper Midwest Federal Order Coalition (UMFOC). UMFOC witnesses offered extensive

testimony about what is wrong with the Federal order pricing system. The witness who offered a substantial amount of testimony in this regard stated that the current system of Class I price differentials has deficiencies. These were identified as follows: (1) When prices are above competitive free-market levels due to regulation, there will be increased production in those markets where the blend price is substantially greater than the M–W price; (2) When excess milk production occurs, this milk is either moved outside the market or processing capacity is expanded within the market; and (3) This additional manufactured product is sold, which decreases the value of milk used in manufacturing. This is detrimental to those areas where a large percentage of the milk produced goes into manufacturing.

The witness further contended that the purpose of the orders, to establish and maintain orderly marketing conditions, is not currently being met. He claimed that costs of production are about the same across the country while Class I differentials established through single basing point provisions increase as the distance from Eau Claire, Wisconsin, increases. He further contended that Federal order Class I prices do not reflect supply and demand conditions in that excessive production occurs in some regions. This, he maintained, is a detriment to the Upper Midwest. As a result, in his view, the orders now cause inequitable treatment of producers based on location. In this regard, a major concern cited is single basing point pricing, whereby the Class I differentials increase as distance from Eau Claire increases. The witness claimed that single basing point pricing and order requirements for equalizing payments on reconstituted milk create and maintain a system of local markets that hamper competitive market forces. (The issue of pricing reconstituted milk is discussed under issue No. 4.)

According to the witness, there are three implicit assumptions underlying single basing point pricing:

(1) Locally produced milk is preferred over imports and the pricing system thus should encourage local production. In his opinion, this was true once, but is not true under current marketing conditions.

(2) Cost of production varies directly with distance from the Upper Midwest. The witness also said this was once true, but no longer is true.

(3) The Upper Midwest is a primary source of reserve supplies. Here again, he argued that this is no longer the case. He claimed there were at least 12 other Federal orders that had enough milk available on an annual basis to meet the fluid milk needs of all deficit Federal order markets.

For all the reasons cited above, the witness reached the following conclusions:

(1) Single basing point pricing is no longer supportable;

(2) The current Federal order system of Class I pricing is a source of industry conflicts between regions;

(3) Single basing point pricing, combined with restrictions on reconstituted milk, represents protectionism for the higher-price markets;

(4) The current system restricts free movement of milk from low to high-cost-of-production areas;

(5) The pricing system benefits those producers most distant from the Upper Midwest, but such prices are not justified on the basis of costs of providing an adequate supply of milk to consumers;

(6) Markets distant from the Midwest, because of excessively high prices, have expanded production beyond Class I needs, thus putting downward pressure on the price of milk used for manufacturing; and

(7) Upper Midwest farmers are unable to share in the returns that distant dairy farmers enjoy based on their high Class I utilization.

For the reasons cited above, the witness argued that it was time for a new approach to establishing Class I milk prices under the Federal order program. He indicated that proposal A–27 was developed with this in mind.

Numerous other parties from the Midwest also expressed the belief that the Federal order Class I pricing system discriminates against midwestern dairy farmers while encouraging milk production in other areas. They also called for changes to "level the playing field."

Many other hearing participants disagreed with the positions and arguments stated by those from the Midwest. These parties generally opposed any changes in the Federal orders that would lower returns to dairy farmers in their respective areas. Among these were witnesses from the Northeast, Middle Atlantic, Southeast, South Central, Southwest, Far West and Pacific Northwest regions. The testimony of most of these parties presents a strong statement of support for the status quo, as well as a defense of the order program as a stabilizing influence in milk markets.

Testimony of various expert witnesses with many years of milk marketing experience provided the record with a history of the order program and the conditions and market experiences that led to its development. These witnesses described in some detail the nature of milk production and the associated marketing problems that make milk marketing regulation unique. In summary, various witnesses indicated that milk is a unique agricultural product that requires special consideration, and that many of the production and marketing problems that originally gave rise to the Federal order system still exist.

After a review of the testimony and other evidence in the record relating to this issue, it is concluded that the present Class I differentials should remain in place. The underlying basis for the level of Class I prices under the order program is the statutory pricing standard which requires that prices reflect the supply and demand for milk. Within this context, the present Class I differentials appear to be set at a reasonably satisfactory level. Although there might be a basis for some downward adjustments in certain markets, such as in the heavy production areas of the Midwest, it is difficult to determine from this record what the adjustments should be. This is particularly so when the industry has strongly supported over the years a coordinated set of differentials based on fairly constant rates of change from market to market.

In reviewing the adequacy of milk supplies in the regulated markets, the supplies and utilization of producer milk were analyzed, order by order and region by region. For this purpose, the monthly data (taken from Federal Milk Order Statistics) for the years 1987, 1988 and 1989 were selected as being representative of normal market conditions. When the market data are reviewed in light of both Class I and Class II needs, it is clear that there are no large supplies of Class III milk left for shipment to other areas except for the Chicago Regional, Upper Midwest, Pacific Northwest and Idaho markets.

The record indicates that in order to serve the varying needs of a Class I market on a year-round basis, reserve milk supplies equal to about 30 percent of the total milk in the market are needed. The views on this point varied from 15 percent to 40 percent, with a fairly persuasive argument for at least 30 percent. Thus, a reserve milk supply equal to 30 to 35 percent of the total milk in the market appears to be a reasonable reserve requirement.

It is in the fall months of the year when market supplies of milk are reduced. Thus, it is the fall months that must be looked at first to determine whether a given market has adequate

supplies of milk or whether there are inadequate supplies or excessive supplies available. In order to evaluate each market for this purpose, the months of September, October and November for 1988 and 1989 combined were reviewed. Also, monthly data for the years 1987, 1988 and 1989 were combined to depict this information on a year-round basis rather than just the fall months.

It should be noted here that for this analysis, estimates of Class II use were made for those orders that provide, or did provide during the review period, only two classes of utilization. Eight orders fall into that category: the three Florida orders, the three northeastern orders, the Michigan Upper Peninsula order, and the Black Hills order. There is no data available in the record for the Michigan Upper Peninsula order, and the Black Hills order data are combined with data for the Greater Kansas City and Eastern South Dakota orders, all to preserve confidentiality of proprietary information. For the Florida markets, virtually all use other than Class I was considered to be used in the intermediate classification. For the New England, New York-New Jersey and Middle Atlantic orders, published data were used to extract the pounds of milk used to produce the various intermediate class products. However, for the New England order, market data reported condensed milk with butter, so that an appropriate separation of Class II and Class III in that case was not possible from published data.

The New England order, the New York-New Jersey order and the Middle Atlantic order were amended April 1, 1991, to provide three classes of milk use. (Official notice is taken of the Assistant Secretary's order amending orders for the New England, New York-New Jersey and Middle Atlantic Marketing Areas, Docket Numbers AO–14–A62, etc., issued January 31, 1991, published February 11, 1991, 56 FR 5308.) Market data reported by the market administrator for the New England order for April 1991 were used, specifically the pounds of producer milk assigned to Class II, to go back and adjust the earlier estimates in an attempt to better distinguish the amount of producer milk that would have been Class II if the order had been a three-class order.

The numbers developed as described above for the three northeastern markets were considered to be the pounds of producer milk in Class II. Class III pounds were estimated by subtracting the Class I producer milk and the estimated Class II producer milk from total producer milk receipts for each month.

Also, during the hearing, only market data for the month of September 1990 was available for the Carolina order, since the order for that market did not become fully effective until September 1, 1990. Therefore, we are taking Official Notice of data for October, November, and December 1990 in order to have further information for analysis.

Official notice is taken of the following sources of data for the northeast orders and the Carolina order:

1. New England Milk Market Statistics for the years 1986 and 1990; issued by the Market Administrator, P. O. Box 1478, Boston, MA 02205.

2. Monthly Statistical Report for the New England Marketing Area for April 1991, issued by the Market Administrator, P. O. Box 1478, Boston, MA 02205.

3. The Market Administrator's Bulletin for the New York- New Jersey Milk Marketing Area, Quarterly issues A, B, C and D for the years 1986 and 1990 (Volumes 46 and 50), issued by the Market Administrator, 708 Third Avenue, New York, NY 10017.

4. Annual Statistical Report for Federal Order No. 4, the Middle Atlantic Marketing Area, for the years 1986, 1987, 1988, 1989 and 1990, issued by the Market Administrator, P. O. Box 25828, Alexandria, VA 22313.

5. Statistical Summary, for October through December 1990, for the Carolina Milk Marketing Order, issued by the Market Administrator, 3920 Bardstown Road, Louisville, KY 40218.

The simplest way to get an overview of combined Class I and Class II use is to look at Class III use in the various orders. If a reserve of at least 30 percent, and maybe as much as 40 percent, is necessary on an annual basis to supply the Class I market, then any market with 40 percent or less Class III use cannot be considered to be a surplus market.

Analysis of the market data for all the orders on an annual basis reveals three distinct groups of markets, as follows:

(1) The orders in the Southeast (Alabama-West Florida; Georgia; Nashville; Tennessee Valley; Upper Florida; Tampa Bay; Southeastern Florida; Memphis, Tennessee; Central Arkansas; New Orleans-Mississippi; Greater Louisiana; and Carolina) have very high levels of Class I use. These orders have low levels of Class II (soft products & ice cream), and very low Class III utilizations. Some of these markets are deficit markets, that is, they do not produce enough milk to supply the Class I needs, including reserves on a year-round basis.

(2) A group of Midwest and Far West and Northwest markets (Upper Midwest; Chicago Regional; Iowa; Nebraska-Western Iowa; Great Basin; Southwestern Idaho-Eastern Oregon; and Pacific Northwest) that obviously have far more milk available than is needed for Class I and Class II use, plus reserves. Even in the fall months (September, October, November, 1988 and 1989 combined) all the markets in this group had Class III utilizations greater than 45 percent, and only one (Great Basin) was below 50 percent.

(3) The remaining markets exhibit essentially a balance between supply and demand. Within this group there is considerable variation of Class II use, from about four percent for the Central Illinois order to nearly 27 percent for the Middle Atlantic order. Class I use in these markets (three-year average) ranges from 41 percent (New York-New Jersey) to over 77 percent (Paducah). For the combined period of 1987 through 1989, only one market in this group had Class III use of above 40 percent, and that was the Southern Michigan market. However, in the fall months, Class III use in the Southern Michigan market was less than 40 percent, and Class III use was less than 35 percent in most of the other markets.

Based on this analysis, it is concluded that producer milk supplies are not excessive outside of the markets identified in the second group above.

The exception filed by UMFOC mistakenly concluded that supply and demand were analyzed by looking at production and use only in the fall months. This is not correct, since both fall and annual data were reviewed for the years 1987, 1988 and 1989.

Also, UMFOC's exception maintains that too high a reserve requirement was used and that a UMFOC witness was the only one who provided actual calculations for seasonal reserves.

In response, we would only point to the analysis of Class I reserve requirements presented by a witness for the Coalition of Southern Dairy Farmers, in which he concluded that an adequate reserve on an annual basis should be about 32 percent.

As the recommended decision indicated, there was a range of views expressed concerning the reserve supplies needed to serve Class I needs on a year-round basis. When both Class I and Class II needs are considered, we believe the analysis of supply and demand for milk on the various markets and regions is valid.

The exception filed by UMFOC expresses the view that it is inappropriate to measure supply for a market by looking at producer milk and

to measure demand by looking at Class I and Class II use. This argument is based on the fact that producer milk is limited to the milk that is defined by the order as producer milk and does not represent the potential supplies available from outside the local market. The exception suggests that total in-area sales is a more appropriate way to measure demand, and that it is inappropriate to include Class II use.

We disagree with these views. As indicated in the recommended decision, the supply and demand standard set forth in the Act requires that milk prices be set for each order individually. There is no national supply and demand standard for the order program as a whole. That is not to say that a regulated market cannot rely on milk supplies from another area, as is often the case. Nevertheless viewed on an individual market basis, we reaffirm our conclusion that milk supplies available for Class I and Class II uses are adequate, but not excessive in most markets.

Perhaps total in-area sales could be used to measure demand, but that approach has a major shortcoming in that Class II dispositions are not reported by area of disposition. Class II is associated with Class I use, and as explained under issue No. 4 (classification), the products identified as Class II uses of milk are demand-driven. They are not a residual or surplus use of milk. This is the case whether or not the orders include shipping standards and whether or not Class II differentials fully reflect the market value of those products.

The idea of measuring demand involves a basic question of whether demand for milk and its products is best identified by looking at the area of ultimate disposition (which information is not available for Class II products), or by looking at the plant where the product is made (and thus the market where producer milk is pooled). We think the latter approach is preferred since it presents the most complete data to work with.

The exception filed by UMFOC maintains that the Administrator failed to address the question of efficiency in the discussion of the Class I pricing issue.

Marketing efficiency may be viewed from several different perspectives. There may be efficiencies involved in assembling and hauling milk to plants for fluid use. Other efficiencies may be involved in disposing of surplus milk. Efficiencies are involved in looking at where plants are located and the areas where it is feasible to distribute milk in consideration of packaging, handling, and distribution costs.

The exception points to the testimony of one UMFOC witness that it is less costly, from a marketing standpoint, for handlers to obtain other source milk than for producers to increase production to meet additional needs for Class I milk.

In response to the concerns about efficiency, two points are cogent. One is that other actions discussed elsewhere in this decision that deal with the treatment under the orders of concentrated milk and reconstituted milk made from nonfat dry milk may provide a way to achieve greater efficiencies in supplying milk to meet handlers' needs beyond the availability of local producer milk supplies.

It also should be pointed out that the Class I pricing structure does not cover the total cost of moving bulk fluid milk from one area to another. Because of this, it is erroneous to consider the current Class I pricing system to be a single basing point system based on Eau Claire, Wisconsin. If the pricing system were based on the price of milk in Eau Claire, plus the cost of hauling to the other areas, Class I prices in other areas would have to be considerably higher. Thus, although it is true that central Wisconsin is viewed as being the center of an area where large supplies of milk are available for shipment to other areas as supplemental milk, there is no case in the Federal order system where the Class I differential is sufficient to cover the costs of hauling fluid milk to the local market from Central Wisconsin, or from any other alternative source of fluid milk supplies.

Moreover, it is generally true that the costs for hauling bulk milk from one market or region to another are greater than any difference in costs of production. That is why any concept of a flat Class I differential would not reflect the economic conditions which affect market supply and demand for milk in the various marketing areas. If a lower flat Class I differential pricing scheme were adopted, such as in proposal A–27, the lower prices to producers would almost certainly have the effect of reducing production in the southeastern markets. The concept of a lower Class I price in the Southeast initially has appeal because it might appear that fluid milk would thus be available to consumers at lower prices. However, any such lower prices could not last long because eventually more and more of the markets' fluid milk needs would have to be shipped in from other areas, perhaps even from Wisconsin. In terms of fresh fluid milk, it simply is not possible to obtain such milk at prices below the current Class I prices in the southeastern markets when hauling costs are included.

This may be illustrated as follows. Assume that milk is available at Columbus, Ohio, which is about 1,000 miles from Miami Beach, Florida. If the Class I differential at Columbus was $1.80 (as proposed in A–27), and it costs $3.50 per hundredweight to haul bulk milk from Columbus to Miami Beach, the delivered price differential is $3.50 plus $1.80, which is $5.30, or $1.12 higher than the current $4.18 Class I differential for the Southeastern Florida market. But even more to the point is the fact that the $4.18 Class I differential at Miami Beach, Florida is $3.36 below the proposed Class I differential of $1.80 at Eau Claire, Wisconsin, plus a hauling cost of at least $5.74, which totals $7.54. This $7.54 figure is what the Class I differential at Miami Beach would be if that price were based on the Class I price at Eau Claire, Wisconsin, plus hauling. In terms of alternative milk supplies, this example refutes the notion, held by many, that the Federal order Class I price in Florida is too high.

When the hearing in this proceeding was held, the Notice of Hearing included the Lubbock-Plainview, Texas; Texas Panhandle; and Rio Grande Valley orders. On December 6–8, 1989, a hearing was held on a proposal to merge these three orders and to expand the marketing area. On August 14, 1991, the Assistant Secretary issued a Decision to merge the three orders and to expand the marketing area. (Official Notice is taken of the Assistant Secretary's Decision for Rio Grande Valley and Certain Other Marketing Areas, Docket Numbers AO–335–A34, etc., issued August 14, 1991, published August 27, 1991 (56 FR 42240) and the Assistant Secretary's Order Amending Orders, Docket Numbers AO–335–A34, etc; issued October 9, 1991, published October 21, 1991 (56 FR 52446)). The merger became effective December 1, 1991. Accordingly, in this decision, all order language will be in terms prepared for the merged order, which will be the New Mexico-West Texas order (7 CFR part 1138). The merger decision cited above modified the Class I price structure in eastern New Mexico and reduced the Texas order Class I differential by twelve cents per hundredweight. Other conforming location adjustment changes were provided in the Texas and Southwest Plains orders to recognize the pricing structure of the New Mexico-West Texas order.

Several parties offered testimony in the present national hearing concerning milk production costs in New Mexico

and Texas, where milk is produced in New Mexico, and other information concerning plant locations. One purpose of such evidence was to provide a basis for further review of the Class I price relationships in the New Mexico-Texas area. However, that question was previously reviewed in the proceeding that led to the merger and expansion of order territory for the New Mexico-West Texas order, which has already been mentioned. The decision in that proceeding appropriately dealt with the question of price alignment in that region. Accordingly, no action in that regard should be taken on the basis of the record developed in this proceeding.

Gold Star Dairy in their exceptions urged the Secretary to revise the Administrator's decision concerning the appropriate level of Class I prices in New Mexico.

The exception states that in the proceeding that led to a merger of three orders to form the New Mexico-West Texas market, Gold Star urged that the Class I price in eastern New Mexico be reduced rather than increased, based on data about production increases and costs of production. Nevertheless, in the decision on the merger, the Secretary indicated that the record on the issue was insufficient. The exception notes that Gold Star offered to provide additional information, but the hearing was not reopened. Instead, the upcoming hearing in this national proceeding would provide the appropriate forum for considering such data in the context of the national hearing proposals. Gold Star did present detailed data, but the Administrator declined to change the New Mexico price. The exception contends that this amounts to arbitrary and capricious action and urges that the issue be further addressed, or, in the alternative, the Department reopen the southwest merger proceeding for that purpose.

The exception and the motion to reopen the merger hearing are denied. The proposals that were considered at the hearing in this proceeding involved possible changes on at least a regional or multi-order basis, possibly even changing all orders. There was no notice given that the appropriate Class I price level for any individual market would be considered outside the context of price alignment among a group of orders.

If the decision had been made to change Class I prices over a broad area that had included New Mexico, then the evidence offered by Gold Star could have been considered. But that is not the case. As stated earlier, this decision finds that no changes in the Class I pricing system are warranted. Within the context of this decision, a change in the New Mexico price that would result in a different alignment with other nearby markets would be inappropriate.

In its brief, a handler that operates two plants in the Southeast urged that Class I differentials in southern Louisiana under both the New Orleans-Mississippi and Greater Louisiana orders be reduced to recognize that Class I prices under the Texas order had been lowered 12 cents. The brief noted that a regional hearing to consider appropriate location differentials and other issues in the area had been scheduled for December 1990. That hearing has since been postponed indefinitely and the brief concluded that it is now necessary for the Secretary to address the adjustment of Class I prices in southern Louisiana in this proceeding. The brief further maintained that such price adjustments are reasonably within the scope of several proposals included for consideration in this proceeding.

This petition is denied. The alignment of Class I prices in Louisiana and Mississippi and other areas was considered and adjusted based on a regional hearing for that purpose as a result of the changes in Class I differentials established by Congress in the Food Security Act of 1985.

The exception filed on behalf of Anderson-Erickson Dairy Company, Marigold Foods, Inc., and Southern Foods Group (AE, et al.) stated the parties did not disagree with the recommended decision to not change the Class I price structure. Nevertheless, the exception claims the recommended decision's discussion of the Class I pricing issue was too brief to fully address the Class I price proposals and that a full discussion should be part of this decision.

To some extent, some of the responses herein to other exceptions also are responsive to the concerns expressed by AE, et al. However, any additional discussion regarding the individual proposals appears unnecessary. The basic issue is whether a compelling case was made that some other Class I pricing system is needed. After a review of the supply and demand situation in the various markets, it is concluded that no changes are needed. Having concluded that the current Class I pricing system is appropriate and is in accord with the pricing standard in the Act, it is not necessary to then proceed to discuss in detail why each of numerous proposals should not be adopted. The reasoning is basically the same in each instance.

The exception on behalf of AE, et al., also urged that USDA adopt a principle that the proponents of change have the "burden" of proving that such change is essential. The exception further urges that this decision specifically state that UMFOC, as the leading proponents for change, failed to provide such "burden of proof."

In response, it must be noted that the recommended decision found that there was no need to change the Class I pricing system. A finding in a decision that no change is needed is tantamount to declaring that the proponents have failed to meet the so-called burden of proof.

Several exceptions by various parties complained that the recommended decision ignored evidence and therefore wrongfully did not reach the conclusions that those parties believe should have been reached. Stated simply, those parties believe that the Administrator should have found that the Federal milk order program's Class I pricing system is obsolete, unfair, inefficient, and discriminates against producers in the upper midwestern area. These exceptions essentially disregard the testimony of all other parties who expressed strong opinions that the current Class I pricing system has worked and is working well and should be maintained.

The arguments are rejected. These exceptions seem to reflect an expectation that the proposals should have been adopted. That is not how the hearing process works. Rather, all participants are heard and all the evidence is considered. The fact that an interested party submits a proposal and then testifies in support of the proposal does not assure adoption of the proposal.

The exception filed by TAPP expressed that organization's concerns that the recommended decision did not adopt any of the proposals to restructure the Class I pricing system. The exception basically reiterated the positions stated on behalf of TAPP at the hearing in support of its various proposals. Moreover, the exception stated the view that if some major changes are not made, the future of the Federal order program could be endangered.

The exception also suggests that a possible alternative action would be to restore Class I price differentials to the pre-1986 levels, and then argues why adoption of TAPP's proposals would be more desirable. The exception stated that TAPP's proposals concerning a Class I price supply-demand adjuster, seasonal pricing, and uniform transportation credits should be considered on their own merits

separately from the other proposals on Class I price alignment.

As was indicated in the recommended decision, after a full review of the record and extensive analysis of various market data, it was concluded that no changes should be made to the Class I pricing structure as it currently exists. That conclusion has not changed after full consideration of all the exceptions received. Therefore, the exceptions raised by TAPP are denied.

The recommended decision did not specifically address the various proposals for transportation credits because they were specific to Class I or Class II milk. Moreover, the supporting testimony for the proposal by TAPP, and related cross examination, did not specify the source of funds from which the 30-cent transportation credit would be paid for Class I milk.

Whether the source of funding would be a surcharge on the Class I milk price, or a higher Class II milk price, or pooled proceeds prior to calculating the blend price, a transportation credit is related to pricing. Since it was concluded that no changes to Class I and Class II pricing are warranted, the question of transportation credits was not considered further. Even if considered as a separate issue, the record evidence is not compelling that there is a need for transportation credits in all orders. The exception is denied.

With regard to seasonal pricing plans and a supply-demand adjuster, those issues were considered separately. A review of these issues in light of the exceptions (TAPP's and others) does not provide any basis for changing the conclusion reached in the recommended decision.

Other Related Issues

National Pooling

There is no basis in this record for concluding that the returns from Class I milk under the present orders should be pooled under some regional or national arrangement. Although some parties expressed a view that there is now a national market for Class I milk, the record does not support such a conclusion. It is true that some Class I and Class II products are distributed over wide areas. Also, it is clear that there are some overlaps in production areas. Although this information may be an indication that some merging of orders may be warranted, there is not a sufficient basis in this record for taking such action.

Cost of Production

Many witnesses expressed views that costs of producing milk should be a factor in determining prices under the order program. However, no one provided a sound basis for doing so or explained just how Federal order prices should be tied to or established using such data.

The AE, et al., exception urged that costs of production evidence should be declared unsuitable for use as a milk pricing factor. The exception identified a few problems with the data. We agree, but only to the extent that the data provided in this record could not appropriately have been used to establish milk prices under the Federal order program.

Elimination of Grade A and Distance Differentials

The proposals to eliminate Grade A and distance differentials in pricing Class I milk amount, in essence, to proposals to eliminate classified pricing. However, this approach has virtually no support from those who are regulated under Federal orders (handlers) and from producers. Adoption of these proposals would render Federal orders without any basis to recognize the value and service provided by Grade A milk in the marketplace. The record does not provide a persuasive argument for eliminating classified pricing under the order program.

The United States Department of Justice filed exceptions to the fact that the recommended decision did not eliminate or lower significantly the Grade A and distance differentials. The exception maintains that no party offered any facts or arguments that undermined the Justice Department's conclusion that USDA can and should adopt their proposals.

The statements and the briefs and exceptions presented by the Justice Department do not reflect a full understanding of the economics of the milk industry and the inherent characteristics of milk and its production. As the record in this proceeding demonstrates, many of the factors that brought the orders into existence still exist today. While it is true that not all of the marketing conditions of the 1930's exist today, fluid milk is still highly perishable, milk production still varies seasonally (although not to the extent that it once did), and there are still areas that do not produce enough milk locally to meet the consumer demand. Because of these conditions, classified pricing of Grade A milk still serves to help provide a stable and orderly environment within which fluid milk marketing takes place. There is no basis in the record of this proceeding to conclude that Class I differentials should be eliminated or substantially reduced. Either one essentially would eliminate classified pricing, which is the most fundamental element of the Federal marketing order program.

Multiple Basing Points

The orders should not be amended to specify that Class I milk prices will be determined by using several basing points. As noted earlier, it is concluded that the current system of Class I prices is functioning properly and is in accord with the provisions of the Act with regard to establishing milk prices. Thus, no changes in the Class I differentials are adopted.

The record in this proceeding fails to provide sufficient information to provide a sound basis for deciding that multiple basing points should be adopted. Two such proposals were discussed, but in neither case was detailed information provided that would facilitate deciding exactly where basing points should be. One proponent's spokesman indicated that further hearings might be needed to develop more detailed information.

In order to permit a full evaluation of this issue, the record should include a full exploration of those factors that are important in deciding where basing points should be located and how the Class I differential amount at such points should be determined. Additionally, it would be important for the record to provide a basis for properly establishing Class I differentials at locations other than the basing points. This in turn raises questions about location adjustments and price alignment between markets. Although some of these items were touched upon in the record, there nevertheless is a serious lack of information that would be necessary to make a decision that multiple basing points should be adopted and then to follow through with a specific set of order provisions to implement that decision.

Placing a "Floor" Under Federal Order Prices

Several parties supported the concept of placing a "floor" under Federal order prices. The proposals ranged from $10.60 per hundredweight to $14.00 per hundredweight, with adjustments twice a year for inflation. Some proposals would undergird Class I and Class II prices only. One proposal would also specify a minimum Class III price.

Class prices under Federal orders are tied to the M–W price, which currently serves as the "price mover". As the M–W price moves up or down reflecting market forces and competition at work

in the marketplace, so do the Class prices under Federal orders move up or down. This pricing mechanism responds to market changes in the value of milk for manufactured dairy products. This is an important consideration in maintaining a proper relationship between Federal order reserve milk and non-order milk made into the same products. If a floor price were put under the Class III price, this price relationship may not be maintained.

Similarly, the differences in price between Class III uses and Class I and Class II uses state appropriate value differences. Changing such value differences through placing a floor under Class I and Class II prices only could distort these price relationships.

A price floor may be an appropriate mechanism to use if it is necessary to prevent prices from going so low as to jeopardize the adequacy of milk supplies. However, the record evidence in this proceeding does not support a finding that a floor price should be adopted for that purpose. While a price floor could prevent some price fluctuations, it could also isolate Federal order prices from properly responding to changes in market conditions. For these reasons, all proposals to place a "floor" under Federal order minimum prices are denied.

In their exceptions, MMI and SCDF took strong exception to the recommendation that none of the proposals for "floor" pricing should be adopted. The main argument advanced in the exceptions is that a "floor" under Class I and/or Class II prices would provide dairy farmers some assurance that milk prices would not fall to unreasonably low levels that would jeopardize the adequacy of future milk supplies.

The recommended decision recognized that a floor price could serve such a purpose, but it was concluded, nonetheless, that this record did not support a finding that a floor price should be adopted for that purpose. That finding is confirmed and the exceptions are denied.

Supply-demand Adjuster

The orders should not be amended to apply a supply-demand adjuster uniformly to all orders, based on the level of dairy product purchases under the price support program. The proposal would result in Class I prices in all orders being reduced by the same amount. Also, as proposed it would work in only one direction, that is, it would reduce the Class I differentials in response to increases in price support purchases. Thus, milk prices could decline; but no mechanism is proposed to deal with a shortage of milk (which could be a signal that a higher price is needed).

It is not apparent that a supply-demand adjuster should apply to all orders at the same time and in the same amount. We cannot conclude, for example, that the Southeastern Florida Class I price should be decreased because price support purchases are large. It does not appear likely that the Southeastern Florida order contributes at all to higher levels of support purchases.

Balancing Payments

The proposal by Land O'Lakes to provide balancing payments to handlers that dispose of a market's reserve milk supplies should not be adopted on the basis of the record in this proceeding.

The proposed payments would be funded by adding a surcharge to the Class I milk price. Thus, all handlers who use Class I milk would help pay the costs of disposing of reserve milk supplies, and Class I prices would be increased in a given market by the amount estimated by the market administrator to be necessary to cover the expected payments.

It has already been stated that there is no basis in the record of this proceeding to restructure Class I milk prices throughout the order program. Thus, the concept of adding specific amounts to a basic Class I price differential as several proposals would have provided has already been rejected.

Payment for services of marketwide benefit are permitted under revisions to the Act contained in the Food Security Act of 1985. However, the adoption of such provisions should be based on evidence pertaining to the need for them in specific market situations. That kind of evidence is not provided in the record of this proceeding. Moreover, there is no indication of support for adoption of this proposal by cooperatives in other markets outside the area that Land O'Lakes serves. Another shortcoming of this record is that there is not adequate information concerning the costs of providing the balancing services, nor of the equity, or lack of equity, concerning the provision of balancing services in the various markets. Thus, the proposal for balancing payments is denied.

Supplemental Milk Credit

After considering the evidence, it is concluded that the proposal to provide a supplemental milk credit should not be adopted. While there is merit to the argument that handlers who have to pay "give-up" charges to manufacturing plants may have a higher cost of milk than those who do not, we do not agree that the proposal offers an appropriate response.

Part of the concern is that it is not demonstrated that there is uniformity in give-up charges. It seems clear that give-up charges are often made on supplemental milk, but supplemental milk may be obtained from various sources. Also, it would appear that adopting such a credit would "institutionalize" a $3.00 give-up charge, thus tending to insure that such a charge would be applied. It is more appropriate to leave this charge within the context of over-order charges, which are responsive to changes in the competition for milk.

Seasonal Pricing

All of the proposals to provide some form of seasonally varying prices are denied. Evidence submitted in support of those proposals demonstrates that milk production continues to exceed Class I needs in the spring, and often falls short of meeting Class I needs in the fall months. This is a general occurrence, and there are degrees of variation among the orders.

Addressing individual market seasonal production variations is not practicable in a proceeding such as this one that involves all markets. Moreover, the record fails to provide any clear sense that a majority of producers favor one type of plan over another one, or that support for the concept is widespread among producers. Therefore, it is concluded that none of the specific proposals considered in this proceeding should be adopted. If seasonal incentive plans are to be provided, the need for such plans and details of the type of programs desired should be based on local or regional hearings called for that specific purpose.

Advance Announcement of Class I and II Butterfat Differentials

Currently, a single butterfat differential is announced on the fifth day of the month for the previous month. The proposal by MIF and IICA would require the use of one butterfat differential for Class I and Class II and a separate differential for Class III. Each month the producer differential would be the weighted average value for butterfat in all three classes (under actions discussed in Issue No. 3, all orders will have three classes).

The purpose of the proposal is to provide handlers a greater amount of pricing information in advance so that they could more accurately determine their raw product costs.

Even though there was rather broad support for announcing the Class I and Class II butterfat differential in advance, the proposal should not be adopted. There is no question that the proposal would allow handlers, especially those who make Class II items, to more accurately determine their raw product costs. However, there is a consideration in multiple component pricing that overrides this issue. The butterfat differential is a critical factor in determining the value of the component other than the butterfat component in an order with multiple component pricing. In the Great Basin order, the value of protein is established by subtracting from the M–W price the value of butterfat and dividing the remainder by the average percent protein in producer milk. The resulting milk protein price is the same for protein used in both Class II and Class III milk.

It should be noted that, in addition to the multiple component pricing (MCP) plan currently in effect for the Great Basin marketing area, MCP has also been recommended for adoption in the Middle Atlantic order. Additionally, a hearing has been held to consider MCP, for the Indiana, Ohio Valley and Eastern Ohio-Western Pennsylvania orders. (Official notice is taken of the Administrator's recommended decision for the Middle Atlantic Marketing Area, Docket Number AO–160–A65–RO–2, issued May 23, 1991, published May 31, 1991, 56 FR 24746, and the Administrator's Notice of Hearing on proposed amendments to the Ohio Valley, Eastern Ohio-Western Pennsylvania and Indiana order, issued July 25, 1990, published July 31, 1990, 55 FR 31056).

Under the proposal, however, the butterfat differentials for Class II and III would not necessarily be the same. The result would be that the value of butterfat and protein used in Class II would not be the same as that used in Class III. This possibility, and any ramifications that might result with respect to changing product values, was not discussed at the hearing. Thus, a change in the butterfat differential should not be made on the basis of this record.

Several parties took exception to the finding in the recommended decision that the proposals to provide advance announcement of Class I and Class II butterfat differentials should not be adopted. One argued that the reason for denial was not valid, and held that if USDA was concerned about the impacts of the proposal on orders with multiple component pricing systems, then questions should have been raised at the hearing.

One asked that the decision be reconsidered because support for adoption was indicated by most hearing participants. Another held that advance announcement of at least the Class I butterfat differential should be adopted.

The basic reason for denial in the recommended decision remains valid. We maintain that there is no basis in the record of this proceeding to change the Federal order price relationship between butterfat and protein or solids not fat in Class II and Class III in those orders that provide for multiple component pricing.

Moreover, when a single butterfat differential was adopted in most orders (1974), the basic concept underlying that decision was that all Class prices should be adjusted by the same differential. Thus it would seem that if this concept was to be changed, the testimony should address why the concept was no longer appropriate.

Widespread support at the hearing for announcing butterfat differentials in advance is acknowledged. But the primary reason was that handlers want it that way so that they may be better informed about ingredient costs. This desire is certainly understandable. However, the expression of this desire does not address the question of why the single butterfat differential pricing policy adopted many years ago should be changed, or what the impact of such a change on milk pricing would be.

Therefore, despite the fact that these proposals were very popular, the record in this proceeding lacks certain information that would be essential to their adoption. The exceptions must be denied.

2. Class II Milk Pricing and Related Issues

a. *Level of Class II differentials.* The Class II price differentials under the orders should not be changed, except for the two orders that do not have a Class II differential. These are the Michigan Upper Peninsula and Black Hills orders.

Most of the orders have three classes of use. In most cases, the Class II differential is 10 cents. A 15-cent differential applies under the three Florida orders, and a 25-cent differential applies under the Pacific Northwest order (although this latter differential is reduced whenever the Class III price is based on a butter-powder formula price). Under the existing advance pricing arrangement, however, these various differentials, in actuality, have averaged 4 cents higher during the past 10 years. (Advance pricing will be discussed in a later section.)

Five orders—Michigan Upper Peninsula; Black Hills, South Dakota; Southeastern Florida; Tampa Bay; and Upper Florida—have only two use classes. The Florida orders currently have a 15-cent differential over the Minnesota-Wisconsin price. However, under the Michigan Upper Peninsula and Black Hills orders Class II milk is priced at the Minnesota-Wisconsin price (the Black Hills order has a butter-powder snubber). As indicated earlier, all orders would provide for three classes under the changes adopted herein.

At the time of the hearing, the New England, New York-New Jersey, and Middle Atlantic orders also provided for only two use classes. Effective April 1, 1991, these orders were amended on the basis of an earlier hearing to provide for three classes, with the soft products being included in a new middle-priced class (56 FR 5308). The new Class II price for these three orders is the same as under the other three-class orders, except that the price is subject to the same seasonal adjustments that apply to Class III milk under the three orders.

The notice of hearing included five proposals (B–1, B–4, B–5, B–6, and B–7) that would increase the level of the Class II differentials. The predominate support was for setting the differentials at 50 cents. Other proposals were for differentials of $1.00 and $1.20. Another proposal in the hearing notice (B–3), which would have changed the Class II price formula but kept the present 10-cent differential, was modified at the hearing to provide for a 15-cent differential.

In supporting Class II differentials of 50 cents or more, the basic contention of proponents was that milk used in soft products has far more value to Class II processors than is reflected by the current 10-cent differential. Proponents, which included both cooperatives and proprietary handlers, pointed out that processors want a steady supply of high-quality milk for Class II uses and are willing to pay much more than the minimum Class II prices set by the orders. They indicated that over-order prices for Class II milk are common throughout the country, often ranging from 50 cents to $1.00 or more over the Class III price. Proponents also indicated that these higher payments for Class II milk are not disruptive to the marketing of producer milk in that processors find little incentive to seek alternative ingredients for making Class II products, such as Grade B milk or nonfat dry milk.

In supporting a substantially higher Class II price, proponents also claimed that Class II uses should bear, along with fluid milk products, a reasonable part of the cost of attracting a sufficient

supply of high-quality milk to the market. They indicated that this is particularly relevant today since Class II products in many areas now must be made from Grade A milk. In addition, they contended that the cost of moving producer milk to Class II outlets far exceeds the order Class II differentials and that only through over-order prices can milk be attracted away from the more remunerative Class III outlets, which are usually located within the milkshed.

Proponents of substantially higher Class II differentials were not in agreement on the level that should be adopted. Some argued that a differential much higher than 50 cents would provide an economic incentive for processors to substitute alternative ingredients. At the same time, others pointed out that substantially higher over-order prices are being paid without disruption of the marketing of producer milk to Class II outlets.

The cooperative proposing the Class II differential of $1.00 argued that this much higher price level reflects what processors are willing to pay for Class II milk. The cooperative also indicated that this is a more realistic price level in view of the strong position of Class II products in the marketplace. Citing retail and wholesale price indices for Class II products, the cooperative pointed out that Class II products show greater strength and profitability relative to dairy products in general. At the same time, it was argued, producers have not shared appreciably in these returns. According to the proponent, adopting a $1.00 Class II differential would help close the gap between the prices received by producers and the wholesale prices received by Class II processors.

In proposing a Class II differential of 15 cents, the trade associations of milk and ice cream processors argued that the price of Class II milk under the orders should remain essentially unchanged. The proposed 5-cent increase in the Class II differentials, they claimed, is merely to offset the 4-cent per hundredweight price enhancement to producers that the present advance pricing arrangement has provided but which would be eliminated under the processors' proposal to change advance pricing, as discussed later. The associations indicated that it is their desire to make the Class II pricing changes revenue neutral for producers.

In supporting no change in the Class II price level, the trade associations argued basically three points. First, these groups claimed that on the basis of price elasticity studies a much higher differential would result in a significant decline in the consumption of Class II products. Any loss of Class II sales, they noted, would mean an increase in surplus milk, which could drive down all milk prices.

A second concern by processors was that a much higher Class II price for producer milk would result in an economic incentive for processors to use cheaper alternative ingredients. Also, in this same vein, processors are concerned that a higher order price would eventually cause consumers to shift to less expensive nondairy substitutes.

A third concern is the potential inequity that could exist between regulated and unregulated processors if Class II prices are increased under the orders. The processor groups claimed that this situation was recognized by the Secretary when the present 10-cent differential was established in the mid-1970's.

It is clear from the record that the present Class II prices under the orders substantially understate the price that regulated handlers are paying for Class II milk. Although the Class II differential in most markets is 10 cents, handlers in most areas are paying much more than this to get a supply of milk for the soft product uses. Over-order prices for such milk range anywhere from 50 cents to $1.00 or more over the Class III price, depending on the particular marketing conditions in the area.

Although the Class II market usually represents a relatively small part of their business, handlers nevertheless consider the processing of Class II products an important part of their total operation. Handlers want a regular supply of Grade A milk for such uses, which requires essentially all of the costly supply services associated with procuring milk for the Class I market. These include moving the milk long distances from the milkshed to the city processing plants and balancing milk supplies with demand. Handlers also often want milk delivered in a standardized form.

A Class II price that is only 10 cents higher than the Class III price does not cover the cost of these services. Unless a processor is willing to pay more for the milk, the cooperative associations that are supplying the milk find it more profitable to channel the milk into the Class III uses, which do not entail the same costly services.

Most handlers are already having to pay substantial over-order prices to obtain milk for Class II use. Such pay prices in conjunction with Class I prices are generating adequate supplies of Grade A milk for both Class I and Class II uses. As discussed under the Class I pricing issue, an analysis of supply and demand conditions under the orders indicates that there are adequate reserves of Class III milk to balance both Class I and Class II needs under the program. Thus, it is concluded that an increase in Class II differentials under all orders is not needed.

b. *Advance pricing of Class II milk.* The advance pricing procedure that applies under most orders to Class II milk should not be modified.

For most orders, the Class II price is the M-W price for the second preceding month as adjusted by an "updating" product price formula (the basic Class II formula price provision of those orders), plus the amount by which the simple average of the basic formula prices (M-W prices) for the most recent 12-month period, plus 10 cents, exceeds the same 12-month period's average of the basic Class II formula prices. The Class II price is announced by the 15th of the previous month. However, if the announced Class II price for a given month is less than the Class III price for the same month, the difference between these prices is then "added back" in computing the second succeeding month's Class II price.

The purpose of the basic Class II formula price (Section 51a in most orders) is to provide a mechanism for updating the M-W price for the second preceding month so that the Class II price for the current month can be based on this M-W price but still reflect more current marketing conditions that might indicate forthcoming changes in the M-W price. This updating is done by comparing movements of wholesale prices for butter, nonfat dry milk, and Cheddar cheese during the first 15 days of the preceding month with such price movements during the same period a month earlier.

Of the eight Class II price proposals on which there was testimony, all except proposal B–1 proposed, either directly or indirectly, the elimination of the basic Class II formula pricing provisions from the orders. Four of the proposals (B–3, B–4, B–5, and B–7) specifically called instead for the use of a Class II price announcement procedure that would operate in the same manner as for the Class I price, i.e., the Class II price would be the basic formula price for the second preceding month plus a specified differential.

While proposal B–6 did not specifically call for the elimination of the basic Class II formula price provision, testimony by the proponent was clear that the proposed $1.00 per hundredweight Class II differential would operate in the same manner as under proposals B–3, B–4, B–5, and B–

7, leaving no need to retain the basic Class II formula price provisions. Also, proposals B–9, B–10, and B–11, which call, in part, for the establishment of floor prices on Class II milk, would leave the basic Class II formula price with little value in the establishment of a Class II price.

Witnesses supporting a Class II price announcement procedure identical to that used for the Class I price indicated that the revised procedure would better reflect and respond to market conditions. They also testified that it would be simpler for everyone to understand then using the complex basic Class II formula pricing provisions. Witnesses generally indicated that the basic Class II formula price had worked reasonably well when there was price stability in the marketplace, but that this was not the case today.

One proponent testified that because the basic Class II formula price attempts to forecast future M-W prices in arriving at a current Class II price, large M-W price movements often send confusing market signals by having Class I and Class II prices move in opposite directions and with differing magnitude. Another proponent noted that this had occurred nine times in the past three years. Similarly, another testified that because of large milk price swings, there is less reliability in the basic Class II formula price projecting raw milk costs for any given month. This results, according to this proponent, in time-lags in the adjustment of product costs and prices that are burdensome to manufacturers. Another proponent said that this sort of opposite price movement was difficult to explain to customers.

Most proponents for eliminating the basic Class II formula price maintained that Class I and Class II milk prices should move in the same direction. They claimed that Class I and Class II products are closely interrelated and that keeping the basic Class II formula pricing provision would not ensure the desired relationship between Class I and Class II prices.

It would be helpful to handlers to have the Class II price move in the same magnitude and direction as the Class I price. However, with a basic differential of 10 cents it is more important that the Class II price be coordinated with the current month's Class III price, since Class III products can be used as an alternative source of ingredients for Class II use. The updating product price formula is intended to obtain this objective.

In most markets the effective Class II prices are those announced by cooperative associations and they are substantially higher than the minimum order prices. Thus in practice it is not often that the order price is the effective price faced by handlers. On those occasions that it is the effective price, handlers still have the benefit of knowing the price well in advance. Accordingly, it is concluded that the current Class II pricing formula should be continued under the orders.

Numerous parties took exception to the recommended decision to not provide a higher Class II price differential and/or to not provide for advance announcement of the Class II prices. It was pointed out that there was widespread support for both, although there obviously was a divergence of views on how large any increase in the Class II differentials should be. Some of the exceptions noted agreement with the recommendation to not increase the Class II differentials, but expressed a view that the Administrator erred in not providing for advanced announcement of the Class II price. The exceptions charge that the Administrator ignored the record evidence on the advance pricing issue.

Some exceptions expressed the view that the recommended decision was contradictory because it finds in the discussion of milk use classification that Class II items have a high value in the marketplace, but then declines to reflect that higher value through the Class II price orders. One such exception states, "The Secretary should cut to the heart of the issue and increase the Class II differentials to reflect more of this value."

After review of all the arguments raised in exceptions, and for the reasons set forth in the recommended decision, we reaffirm the decision that the existing Class II pricing provisions should not be changed.

c. *The Class II "add-back" provision.* The proponents of proposals B–1 and B–3 believe that if the Class II milk price for a given month is less than the Class III price for the same month, the difference between these prices should not be "added back" in computing the second succeeding month's Class II price, as most orders now provide. However, the proponents of B–4, B–5, and B–6 believe that this difference should be "added-back" in calculating the next month's Class II milk price. This "add-back" provision is an integral part of these proposals.

The proponent of proposal B–3 testified that adding an additional amount to the Class II price in those months when the M-W price increases dramatically and may be greater than the announced Class II price would result over the long-term in a Class II price level that is significantly higher than their proposed Class II differential of 15 cents per hundredweight. A witness who testified in support of proposal B–3 believed that if the Class II price is established by the basic formula price plus a differential, the "add-back" provision is not needed. This witness said that the current basic Class II formula price cannot provide a guarantee that producers will receive at least the Class III value for Class II milk and therefore, the "add-back" provision was justified. Adopting this proposal, said this witness, would eliminate this need because dairy farmers would be assured of receiving no less than the basic formula price plus the Class II differential for Class II sales in two months' time. Similarly, a proponent of proposal B–1 testified that the "add-back" provision results in a Class II price that is higher than the intended amount above the Class III price.

It is important to recognize that since the adoption of the "add-back" provision in the Class II pricing mechanism contained in most Federal orders, the effective Class II differential has averaged 4 cents higher than the intended differential level of 10 cents per hundredweight. The add-back feature was intended to ensure that producers receive not less than the Class III value for Class II milk in the blend price whenever the M-W price exceeds the announced Class II price. Thus, the add-back provision of the Class II price formula should be retained so as not to reduce returns to producers.

d. *Recognizing Class II needs in establishing shipping requirements.* There were proposals to require supply plants to ship milk for Class II uses or otherwise recognize Class II milk needs in the performance standards of the orders. After considering all the evidence, it is concluded that such recognition should not be provided under the orders.

A few handlers expressed concern that the Federal orders no longer function to secure adequate supplies of milk for Class I and Class II uses. They noted, for example, that the present Class II differential does not even cover the cost of moving milk from the farm to the plant where Class II milk is used. Thus, in their view, if a higher Class II price is to be paid, then a part of the increased price should be used to help make milk more available for Class II. It was argued that shipping standards should be increased and that monies generated by the higher Class II differential should be paid out only to those producers who delivered their milk to either Class I or Class II plants.

There was not a large base of support for the concept of requiring additional milk to be delivered to Class I and Class II operations. The CMPC position, for example, was that this matter could be handled outside the order program and so CMPC did not propose shipping requirements to meet Class II needs. Others opposed such a requirement for orders in the Southeast and Southwest. Moreover, without an increase in the Class II differential it is questionable whether proponents would maintain their position on these proposals.

The question of whether or not shipping or other performance standards for pooling milk should be changed cannot be dealt with properly on the basis of this hearing. Pooling standards were not an issue and the testimony and other evidence generated at the hearing are not directed towards this issue. This record provides no basis for determining how performance standards should be changed on an order-by-order basis. This matter should be handled in another proceeding or proceedings, if there is a need to deal with it further.

3. Product Classification

The Federal milk order system should contain uniform classification provisions. The uniform provisions adopted herein would provide for three classes of use, and are based primarily on the present "uniform classification" provisions contained in most orders. The Agricultural Marketing Agreement Act of 1937 requires that milk be classified "in accordance with the form in which or the purpose for which it is used."

Several of the proposals considered in this proceeding under the heading "Product classification" dealt specifically with the need for uniform classification provisions throughout the order system. Although other proposals under the same heading dealt only with the classification of milk used in particular products, the proponents also recognized the importance of having changes in classification considered on a national basis, rather than only in particular orders. There was no support at the hearing for retaining or establishing differing classification provisions for different orders.

The need for uniform classification provisions has grown since 1974 as intermarket movements of milk products have increased due to improved highways and transportation methods. In addition, new technologies and equipment have increased the capacity of milk plants, resulting in fewer and larger plants with wider distribution. In this competitive environment, differences in classification and resulting differences in the prices paid for milk used to process or manufacture dairy products result in competitive inequities between handlers regulated under different orders. The artificial competitive advantage caused by classification differences between orders can also influence handlers' decisions of where to build plants and produce products whose classification is inconsistent between orders. Classification differences can threaten the orderly marketing of milk between orders.

A survey of each order's Class II provisions by one of the hearing participants delineated a significant variation in classification between the orders. According to the witness, the impact of such variation has become greater as movements of Class II products increase as much as 1,000 miles between marketing areas and between regions.

Several proposals considered at the hearing would replace the current 3-class pricing system with a 2-class system. Under these proposals, surplus products and a few of the products currently in Class II would be in the lower-priced class, while all other milk uses would be Class I. Proponents of the adoption of 2 use classes stated that the proposals would increase blend prices to producers by adding products to the higher-priced class, and counteract a long-term decline in the percentage of milk used in Class I.

The record shows no legitimate basis for replacing the current 3-class pricing system with 2 classes. The 3-class pricing system allows for greater differentiation among products based on the form in which and the purpose for which they are used than would a 2-class system. Factors such as the form and function of a product, its perishability, and the manner in which it is packaged and distributed can and should be considered in the determination of its classification. The 3-class pricing system has worked well in most Federal orders for a number of years. Some fine-tuning is necessary to achieve uniformity of classification, but a change to 2 classes would not be an improvement. Although a desire to increase returns to producers is understandable, such a goal would be more appropriately addressed through changes in price rather than changes in classification.

A proposal to establish a new Class II-A for some current Class II uses of milk in the event Class II prices are increased significantly is unnecessary because this decision adopts no Class II price increase. A witness for Darigold, Inc., a large cooperative association operating in the Pacific Northwest marketing area, testified that Darigold supports three classes of use. However, he stated, Darigold would like to see a division of Class III into two parts, with the price for each part based on values returned by the marketplace for the products in that part of Class III. The witness explained that Darigold has experienced problems with a "misalignment" between Federal order Class III prices for butter and nonfat dry milk and the returns the cooperative has been able to realize from the sale of those products. The Darigold witness stated that when returns for one Class III product, such as cheese, are greater than for other Class III products such as butter and powder, plant facilities cannot be changed to manufacture the higher-valued product, in part because the adjustment in the price of the noncompetitive product may be temporary. According to the witness, some highly efficient plants could lose their markets and their place in the industry if the situation is not corrected.

Although it is true that at times the market prices obtainable for butter and powder return less for the milk used in these products than the price of cheese does for milk used in cheese, the record of this proceeding does not support a conclusion that the problem addressed by the Darigold witness is one that should be addressed in this proceeding. There is no indication that the problem is widespread. None of the other witnesses testified with regard to the issue. The hearing record does not contain sufficient basis for evaluating the merits of such a proposal. Accordingly, classification of milk in all of the Federal milk orders should be on the basis of three uniform classes, without subclasses.

Testimony by a number of witnesses, and also post-hearing briefs, addressed the issue of the criteria to be used in establishing the appropriate classification of milk used in various products. Many of those testifying advocated a particular classification for milk used to make a specific product, and therefore identified criteria that best supported the classification they favored. The criteria identified by those testifying on the subject of classification fell into two principal categories: characteristics of particular products, and issues relating to the demand for those products and for the milk needed to produce them.

The characteristics of specific milk uses mentioned by witnesses include the physical characteristics of the products themselves, such as perishability, form, percentage of

moisture and butterfat, similarity to other products, and packaging, and also the location at which products are processed and the area over which they are distributed. Issues raised in the proceeding that relate to the demand for milk used in various products included whether demand by handlers is for a relatively constant supply of high-quality milk and whether it is related to the demand by consumers for the processed product, whether a product represents a surplus or balancing use of milk or its production is driven by consumer demand, the elasticity of demand or price-sensitivity of a particular product, and whether the value returned by the market for a product should be reflected in returns to the dairy farmers who produced the milk ingredients of the product.

Historically, the fluid or beverage uses of milk have been classified in the highest-priced class of use (Class I), and the lowest-priced class (Class III) has been reserved for the hard, or dry, uses. The soft products, those from which some moisture has been removed, have fallen into an intermediate class of use (Class II). Closely related to these classifications on the basis of the physical forms in which products are marketed is the concept of storability versus perishability. The demand by handlers for a readily available supply of high-quality milk for fluid purposes is directly related to the perishability of these fluid products. Consumers expect to find fluid milk products available at all times. Because of the perishable nature of beverage milk products, handlers must be able to replenish stocks in the supermarket dairy case on a fairly constant basis, and have a regular and dependable supply of producer milk from which to process those stocks. Milk supplies that are available for use in fluid products consequently command a higher price than milk supplies used in less perishable products.

Products such as butter, nonfat dry milk and Cheddar cheese, however, are storable for significant periods of time. These products can be made whenever milk supplies are available and held in inventory for some time. In addition, the role played by these products in balancing the supply of and demand for fresh fluid milk is recognized by the dairy price support program of the United States government through its purchases of butter, powder and cheese. As a result, the market value of these products is the foundation upon which prices for the higher use-classifications of milk supplied to handlers are based.

The products included in the intermediate class of use are those that are neither as perishable as fluid products nor perform a balancing function for the market. The milk used in these intermediate products, generally described as "soft" products, is used to process or manufacture products for which handlers know a consumer demand exists. Generally, these products have some of the water content removed from producer milk or contain a high enough butterfat content that they will not be used as beverages. Many Class II products have longer shelf-lives than fluid milk products, while being less storable than the markets' surplus uses for milk.

Class II products traditionally have been processed primarily in the same facilities that process fluid milk products, and therefore require reliable supplies of Grade A milk. It is clear from the record of this proceeding that a number of soft product processing plants are separate from any fluid milk facility, and that not all jurisdictions require that Grade A milk be used in these products. However, the area over which products such as ice cream and cottage cheese are distributed has clearly grown beyond intra-regional and may be, for some centrally located Class II processors, national. At the same time, the availability of Grade B milk has declined, leaving many handlers with no alternative to Grade A supplies. However, even if handlers wished to obtain supplies of Grade B milk for use in Class II products, their inability to sell a product made from non-Grade A milk in many jurisdictions would complicate greatly their ability to distribute that product across broad regions of the country.

The primary distinction between Class II products and the truly surplus milk uses of the market is existing consumer demand. Handlers do not process milk into perishable or semi-perishable dairy products if they do not have a consumer market for those products. Similarly, commercial food processing establishments do not buy milk or intermediate dairy products to use as ingredients in other food products if there is no commercial market for the finished products. Although the argument can be made that a commercial market exists for cheese, nonfat dry milk and butter, all of these products, at the time of their manufacture, are in the position of having to successfully compete in the commercial market or being taken off the market by the government as surplus. These surplus products are manufactured as a means of storing non-perishable milk products for later use. Their potential for storage is the manner in which these products perform their balancing role.

The concept of elasticity of demand, or price sensitivity, often is raised by economists in questions of classification. Some claim that the inelastic nature of demand for fluid milk products has been used as a basis for pricing Class I milk above the level of other dairy products. The demand for Class II and Class III dairy products, on the other hand, has been viewed as being more price elastic. Although testimony was received in this proceeding that cited price sensitivity as a basis for determining the appropriate classification of milk used to produce specific products, the record contains no actual data on the relative price elasticities of the demand for various dairy products. Therefore, there is insufficient basis in the record of this proceeding for using elasticity as a criterion for classification decisions about specific products.

The "form" and "use" requirements of the Act provide most of the needed criteria for classifying milk used in various products. When combined with consideration of types of packaging and recognition of the ability of some dairy products to compete with, or substitute for, others that clearly belong within a certain class, these criteria should make the classification of most products relatively easy to determine.

The new uniform classification provisions for the orders will necessitate new "fluid milk product" and "fluid cream product" definitions that are uniform throughout the orders. In addition, the format of several orders that were not included in the 1974 uniform classification decisions should be changed so that provisions dealing with classification will be more uniform between the orders.

The orders that must be amended substantially to change their classification provisions to accommodate three classes instead of two are the Federal orders regulating the handling of milk in the Upper Florida, Tampa Bay, Michigan Upper Peninsula, and Black Hills marketing areas. In addition, the Southeastern Florida order, which currently provides a Class III price only for the butterfat salvaged from milk of which the skim portion is dumped or used for fertilizer or animal feed, should be amended to incorporate uniform classification provisions.

Class I milk should be all skim milk and butterfat contained in milk products that are intended to be consumed in fluid form as beverages. On the basis of exceptions to the recommended decision, the only change made in this decision to the products included in

Class I is in the case of eggnog. The exceptions received and the basis for changing the proposed classification of eggnog are discussed later in this decision. Fluid milk products require dependable supplies of Grade A milk, usually delivered to city locations with rapid access to concentrations of consumers. However, the most salient features of Class I products are that they are fluid in form and used as beverages. Consequently, a hearing proposal to classify kefir as Class II because it competes with liquid, or drinkable, yogurt should be denied. Instead, milk used to make the beverage form of yogurt should be Class I. Both of these cultured products clearly are intended to be consumed as beverages, and are packaged as beverage milk products.

Comments opposing the Class I classification of liquid yogurt were filed by MIF and IICA and by Lifeway Foods, Inc., a manufacturer of kefir. MIF/IICA objected that there had been no industry request or support for reclassification of liquid yogurt, and that the yogurt market is different from the fluid market in production, distribution and usage. MIF/IICA stated that because of limited markets and compositional differences, liquid yogurt is not competitive with fluid milk, and that sales of the product are far more price-sensitive than those of fluid milk.

The handler group pointed out that liquid yogurt is specialized in a small number of plants, and distributed over far greater distances than fluid milk products. According to MIF/IICA, the widespread pattern of distribution would seriously challenge the ability of market administrators to administer the pricing of milk used to make liquid yogurt. Combined with the projected reduction in sales due to higher product cost, the organizations claimed, enforcement difficulties and costs resulting from the reclassification of liquid yogurt to Class I would offset any appreciable additional revenue for producers.

Lifeway Foods, Inc., a manufacturer of kefir, objected to the Class I classification of both liquid yogurt and kefir. According to the Lifeway comments, kefir differs from yogurt only in the cultures used to produce the products, and is marketed with yogurt, not milk or buttermilk. Lifeway stated that both products are made drinkable by breaking the curd formed in the manufacturing process.

Lifeway's comments protested that a decision making some yogurt Class I and some Class II has no support in the hearing record, which, the handler claims, supported making all forms of yogurt and kefir Class II. The handler stated that if liquid yogurt is priced higher than yogurt, consumers will purchase the lower-price product.

According to Lifeway, the "form" of kefir, liquid yogurt and yogurt is the same, made from the same milk ingredients, while the "use" is as dietary health products, purchased by consumers to improve dietary goals, not quench thirst. Lifeway's comments stated that nothing in the record explains what is "spoonable" as opposed to "drinkable".

Lifeway complained that the decision fails to account for competition from unregulated and California plants with lower costs, while Federal order-regulated plants have to pay Federal order prices plus, in the Chicago area, the Central Milk Producers Cooperative premium. According to Lifeway, the difference in regulation results in a price for producer milk that is 90 cents higher at Chicago than the price Alta-Dena Dairy (in Southern California) has to pay.

Lifeway noted that kefir is marketed outside of Chicago, and compared an announced co-op price of $19.26 for Class I milk in Miami, Florida, in December 1991, with a Northern California Class II price of $11.77. As a result of such price differences, Lifeway claimed, the decision would result in giving up all liquid yogurt and kefir sales to plants outside the Federal order system. Lifeway observed that in another proceeding USDA used the price of California milk used to make nonfat dry milk in its justification for amending the Pacific Northwest order to include a Class III-A.

Because of their characteristics as beverage milk products, kefir and liquid yogurt should be considered Class I. There is no reason to believe that the demand for these products is so elastic that the difference between the Class I and Class II prices (3 cents per quart in Chicago) will result in any significant reduction in demand for liquid yogurt, or that persons wanting a cultured milk beverage will consider spoonable Class II yogurt an acceptable substitute.

There is no indication in the record what the extent of the difference between kefir and cultured buttermilk might be, but it seems difficult to justify any difference in the classification of these two cultured fluid products. Although the differences between "drinkable" and "spoonable" are not spelled out, such descriptive criteria should differentiate more clearly between the form and use of products than such criteria as percentages of milk solids or milkfat.

Kefir may be marketed outside Chicago, but there is no indication that it is being processed in Miami, or that Lifeway is processing it there. Therefore, price comparisons between the two locations are irrelevant. Price is determined only under the order regulating the plant that processes the product. Additionally, in the case of the price comparisons made between Chicago and California, the California price cited by Lifeway is the Class II price for the Northern California marketing area, while Alta-Dena is subject to the higher price effective in the Southern California marketing area, and yogurt (including liquid yogurt), is a Class I product under the California order.

Milk used to make milkshake drink beverage products should also be Class I, without specifying a maximum nonfat solids content or a butterfat content less than 9 percent, at which point fluid products are considered "fluid cream products." Specifically (but not exclusively), milkshake drinks that are sold in the dairy case in single-serving containers (pints and smaller) should be considered fluid milk products. Some of these products may contain previously processed and priced skim milk and butterfat, such as ice cream mix. In such case, only the fluid skim milk and butterfat used in the beverage (not the ice cream mix) should be considered Class I.

Several proprietary fluid milk handlers and organizations representing such businesses filed exceptions to the decision to consider milkshake drinks as fluid milk products. In addition to stating that milkshake drinks are low-volume specialty items that do not compete with other fluid products, would be at a competitive disadvantage to substitute dairy products and frozen dessert items if reclassified, and are generally consumed in smaller serving sizes than fluid milk products, those filing comments argued that consumer use of such products has not changed or expanded since the 1974 decision was issued. Exceptors argued that Class I classification of milkshake drinks and their resulting higher prices could lead to a decline in sales. The most extensive comments filed, by the Milk Industry Association/International Ice Cream Association (MIF/IICA), stated that the products have local or very limited regional distribution.

MIF/IICA urged that the 20% maximum nonfat solids standard be retained for the fluid milk product definition, stating that heavier drink products are functionally different than beverages, and are positioned differently with consumers. The comments stated that milkshake drinks, because they are more viscous than fluid milk products,

usually require some alterations to make them more palatable, such as being shaken to incorporate air.

In response to the recommended decision's explanation that ice cream mix added to fluid milk to make milkshake drinks would retain its Class II classification, comments filed by H. P. Hood, Inc., stated that milkshake drinks are not made by adding milk to mix, but are processed in one operation, making it difficult to separate and account for the portion of the product that would have gone into mix if mix had been used separately from fluid milk. Of course, if none of the milk used in such products is manufactured first into ice cream mix, all of it would be classified as Class I.

Several of the comments urged that the 20% total solids criterion be retained for distinguishing Class I products from Class II because the difference can be easily ascertained. However, the total solids standard allows products that meet the form and use criteria of a beverage milk product to be engineered easily to meet the definition of a nonfluid product solely for the purpose of being classified in a lower-priced class.

Similarly, products such as lowfat sour creams, that resemble and compete with traditional cream products, have been developed recently to meet consumer preferences for less fat. The long-standing criterion of fat content to distinguish between fluid milk and cream products (and thus between Class I and Class II) must be modified in such cases to assure that the product is classified in accordance with its form and use, rather than according to its butterfat or solids content.

Comments filed by the Upper Midwest Federal Order Coalition requested clarification of the classification of milkshake drink items sold in half-gallons and delivered to grocery stores for retail sale and for use in in-store soft-serve dispensers, or sold at warehouse club stores frequented by small ice cream shop owners as well as the public. It seems reasonable to assume that such products sold in containers such as half-gallons, that are larger than single-serving sizes, would be intended for use in small ice cream freezers, rather than for beverage purposes, while milkshake drink products sold in containers of one pint or less are clearly intended for beverage use.

Comments filed on behalf of a number of fluid milk handlers, including the Milk Industry Foundation and International Ice Cream Association (MIF/IICA), excepted to the findings of the recommended decision that would have made eggnog a fluid milk product. Many of the comments argued that there was no proposal in the hearing notice to change the classification of eggnog from Class II to Class I, nor any testimony supporting such a change.

The comments stated that the proposed change in classification would increase the cost of processing eggnog by $.20–$.30 per gallon, when the cost of dairy ingredients in eggnog is already greater than the cost of the dairy ingredients in packaged whole milk (because of its high butterfat content), even in the markets with the highest Class I differentials. Exceptions filed on behalf of six proprietary handlers noted that the Class II cost of the milk ingredients in eggnog under the Southeastern Florida order is higher than the cost of whole milk under that order's Class I price. To support their position, the handlers requested that official notice be taken of the Southeastern Florida Class prices and butterfat differential for November 1991. According to those commenting, the result of increasing the cost of eggnog by changing its classification would be to reduce sales and make fresh eggnog noncompetitive with unregulated canned products made from non-priced milk or substitutes.

Those opposing Class I classification of milk used in eggnog argued that eggnog does not fit the category of fluid table milk because it is not prepared for regular and ordinary beverage use, its production and use is highly seasonal, and it is used in such small volumes that it is not competitive with fluid milk. The comments stated that eggnog contains significantly higher solids than fluid table milk, is generally consumed in smaller serving sizes because of its rich taste and heavier body, and has a relatively longer shelf life.

Several exceptions noted that the number of substitutes for eggnog has grown dramatically since the 1974 decision, in which it was estimated, "on the basis of a limited survey", that 35% to 45% of the eggnog market consisted of substitute products. Exceptors failed to estimate the current percentage of the eggnog market consisting of substitute products, and there is no such estimate in the record. Comments also noted that eggnog competes with other bottled and canned mixes designed for use with alcoholic beverages, and with the soft drink market.

Although it is apparent that eggnog is a beverage milk product, eggnog, as defined by FDA as having a butterfat content of more than 6%, has specifically been classified as a Class II manufactured product for some time, there was no proposal in the notice of this proceeding to change that classification, and no testimony in the record about eggnog. Further, the adopted changes in the fluid milk product definition would not necessarily result in any change in the Class II classification of eggnog. Although eggnog clearly meets many of the criteria for being considered a fluid milk product, such classification should be based on another hearing record. Therefore, the findings of the recommended decision that would have resulted in a change of classification for milk used to produce eggnog containing between 6% and 9% butterfat from Class II to Class I are reversed.

A proposal that the classification of packaged fluid milk products in inventory at the end of each month be classified as Class I instead of Class III should be adopted. Testimony by a proponent witness representing Milk Marketing, Inc., stated that such a change would result in less administrative difficulty in adjusting inventory values in the following month, when the products are actually distributed. In addition, he stated, exclusion of Class I milk from component pricing provisions would result in very complex adjustments in the following month if the fluid milk products in inventory were originally priced on a component basis in Class III.

The post-hearing brief filed on behalf of the National Farmers Organization stated that Class III classification of packaged fluid milk products in inventory at the end of the month allows handlers a 30-day lag in payment for use of milk in Class I, and increases the market administrator's administrative and bookkeeping burden in having to make an adjustment to the handler's obligation in the following month. Although the representative of a group of midwestern cooperative associations indicated that the group was taking no position on the proposal because some members of the group opposed it, there was no testimony in opposition to the proposal.

The proposal should be adopted because it is reasonable to require handlers to pay for the milk used in fluid products for the month in which they used it. Furthermore, adoption of the proposal will assure that handlers ceasing operation at the end of a month will pay the appropriate price for any milk left in inventory. For the markets which have incorporated, or will incorporate, component pricing provisions in their orders, adoption of this proposal will simplify the pricing of fluid milk products in inventory.

A provision is needed in each order where the classification of ending inventory of packaged fluid milk

products is being changed from Class III to Class I to specify in the allocation section that in the first month this change is effective, beginning inventory should be subtracted from the skim milk and butterfat remaining in each class, in series beginning with Class III. Beginning with the second month, such beginning inventory would be subtracted from Class I. This procedure will avoid the assignment to Class I without an upcharge of inventory that was classified the previous month in Class III.

Class II milk should be all skim milk and butterfat contained in fluid cream products; used to produce soft, or "spoonable," dairy products regardless of butterfat content; used to produce intermediate dairy products for further processing; and used as ingredients in other food products or other food ingredients. These uses of milk are all governed by consumer demand for the milk components, either as dairy products or as other food products that use milk as an ingredient. Classifying any of these uses as surplus would result in undervaluing the milk produced by dairy farmers. Further, the cost of making Class II products from alternative ingredients, such as nonfat dry milk or condensed milk, would be greater than the cost of using milk priced as Class III to make such products because of the processing or manufacturing costs involved in making the alternative ingredients.

The "fluid cream product" definition now in most orders should be amended to remove sour cream as an item which must be accounted for as disposed of instead of on a used-to-produce basis and to incorporate a standard minimum butterfat content for fluid cream products of 9 percent. The new fluid cream product definition should also be included in those orders without such a definition.

Most products included in Class II as a result of the 1974 uniform classification decisions should continue to be classified as Class II, including frozen desserts, yogurt and cottage cheese, and products that resemble these products in form and use. These products cannot, in the form in which they are acquired by consumers, be consumed as beverages and generally must be eaten with spoons. Frozen desserts should include ice cream, ice milk, frozen yogurt, and milkshake mixes that are disposed of for use in soft-serve form, such as for use in fast-food restaurant dispensers. Milkshake drinks that are disposed of in single-serving consumer-type packaging, such as those sold in supermarket dairy cases as beverages, should be considered fluid milk products and classified in Class I regardless of their solids content.

The amended orders should specify that a Class II classification of milk used to produce formulas especially prepared for infant feeding or dietary use should apply only to formulas that constitute replacements for meals, rather than merely having some added vitamins and minerals.

Dean Foods Company (Dean), H.P. Hood, Inc. (Hood), Ross Laboratories, and the Upper Midwest Federal Order Coalition filed comments regarding the proposed classification of milk used to produce meal replacement products and infant formula. Dean and Hood excepted to Class I classification of meal replacement products packaged in consumer-sized cartons and distributed in refrigerated or frozen form, stating that such products compete directly with similar products packaged in hermetically-sealed containers that are classified as Class II under the recommended decision.

Dean observed that the products packaged in hermetically-sealed containers were granted a price advantage under the decision, while already enjoying the advantages of needing no refrigeration, having an extended shelf life, and allowing shipments over greater distances without damage or leakers.

Hood's comments stated that the company's ultra-pasteurized dairy shake nutrient supplement has superior taste and convenience compared with similar products packaged in hermetically-sealed sterile containers, or with dry supplements that may also contain vegetable proteins and fats instead of dairy components. Hood complained that the proposed classification would make their better-tasting and more-nutritious product uncompetitive with lower-cost dry products.

Ross Laboratories (Ross) excepted to the Class II classification of milk used to produce infant formula. Ross described itself as the largest manufacturer of infant formula in the United States, obtaining more than 50 percent of its milk supply under Federal Orders 33, 36 and 40 in Ohio and Michigan, where milk used to produce infant formula is Class III. Consequently, Ross explained, at least 25 percent of the infant formula produced in the U.S. is produced from milk pooled under these three orders, and complained that a change in the classification of milk in such uses would increase Ross' cost by $1–4 million per year. According to the Ross comments, their increased cost of production would have the potential of increasing the cost of infant formula to the Supplemental Food Program for Women, Infants and Children (WIC) and create a competitive advantage for companies producing infant formula from whey.

The Upper Midwest Federal Order Coalition (the Coalition) commented that the recommended decision implies that beverage meal replacement drinks would be Class I if packaged in regular consumer cartons and sold in fresh dairy case, but Class II if packaged in hermetically-sealed containers. The Coalition argued that the product should be Class I in either case because it is a beverage and is intended to be used as such. The Coalition urged that the issue be clarified.

The Coalition's assessment of the recommended decision is correct. The intent of the proposed provisions is to classify fresh fluid milk beverages in regular consumer cartons that are sold in the fresh dairy case as Class I, while classifying sterilized products packaged in hermetically-sealed containers as Class II. As noted by Hood, the fresh product has taste, nutrition, and convenience advantages over other products with which it may compete. In addition, the cost of extra packaging, and the Class II attributes of having an extended shelf-life and being distributed over a wider area justify Class II classification for hermetically sealed packaging, while fresh product with limited shelf-life should be Class I.

The use of a product in government nutrition programs should not affect its classification. The use of producer milk for infant formula is clearly demand-driven, and there is no suggestion in the hearing record that prices to producers for other commodities purchased under the WIC program are kept at an artificially low level. For instance, the classification of fluid dairy products included in the program will remain Class I. Also, there is no indication in the hearing record of the percentage of infant formula that is purchased with the help of the WIC program. Downward reclassification of all of the milk used in a product of which only a minor portion is covered by a government nutrition program would not be an equitable solution.

A considerable amount of the testimony dealing with classification involved handlers advocating Class III classification for specific uses of milk that have been, or will be, classified as Class II. A handler representative testified that buttermilk biscuit mix is a very price-sensitive product, that it is distributed over a much wider area than are fluid milk products, and that Class II classification of milk used in the product would make it very susceptible

to substitution by dry milk products. Other witnesses stressed the importance of classifying buttermilk biscuit mix uniformly under all of the orders. Several parties expressed the opinion that buttermilk biscuit mix and similar products should be Class II.

Biscuit and pancake mixes, like other batter-type products such as coatings, are sold in a form that allows them to be poured, but certainly are not used or intended for use as beverages. At the same time, their production is driven by demand for the products in which they are used. These uses are in no way surplus uses of milk. Since the production of these products uses a fluid milk product as an ingredient in another product for which there is a specific market demand, it is only equitable that dairy farmers share in the market value of those products by having the milk used in those products priced above the surplus level.

Several witnesses testified that milk disposed of to commercial food processing establishments or used to make sweetened condensed milk sold to commercial food processing establishments should be classified as Class III. One witness stated that Class III classification of milk in such uses would affect only one percent of total milk pooled, and therefore would have little effect on producer returns. A Wisconsin handler who processes sweetened condensed milk testified that the product fits the description of a Class III product in that it has a long shelf life without special packaging or processing, it is manufactured close to the milkshed rather than close to the end users of the product, and that it is not processed or distributed in the same channels as fluid milk products. According to the witness, 75 percent of the sweetened condensed product sold by the handler is processed to meet customers' proprietary formulas, and the product is sold by Wisconsin handlers to locations as far away as Florida, Texas and California. The witness claimed that any Class II price differential would result in a price disadvantage three times the differential for sweetened condensed milk versus nonfat milk powder because the sweetened condensed product is condensed to one-third of its original volume.

The Central Milk Producers Cooperative (CMPC) pointed out that the classification order language contains no specification of sweetened condensed milk in Class II, and asked if it should fit (or be covered in) § .40(b)(4)(vi) of the orders. CMPC also stated that sweetened condensed milk should be defined by name and classified as Class II, or, like concentrated milk, should be defined by name and classified as Class II unless used to produce a Class I or Class III product, stating that they preferred the latter.

Sweetened condensed should be specified in the classification section as a Class II product in § .40(b)(4)(vi). It is used primarily as an ingredient in other food products.

During the five years preceding the hearing, the Minnesota-Wisconsin, or Class III, price ranged from slightly over $10 to almost $15 per hundred weight. The largest percentage by which the Class II price could have exceeded the Class III price during this period, using an average 15-cent Class II price differential, would have been 1.5 percent. The smallest percentage difference between the two prices would have been approximately 1 percent. During the same time period, sweetened condensed milk formulated to meet customers' proprietary formulas was apparently moved to Florida, Texas and California, among other destinations, at costs per hundredweight for transportation that represented 10–25% of the Class III price of the milk from which the product was made. (The cost of transportation was computed by dividing the 3.83 cents/ hundredweight/ 10 miles hauling rate established in the record by a factor of 3 to adjust for condensation of the product, and multiplying the resulting 1.3-cent rate by the mileage to St. Petersburg, Florida (1301 miles); Dallas, Texas (1078 miles); and San Francisco, California (2196 miles) from a location approximately 175 miles north of Chicago, as described by the witness.)

Comments by the National Cheese Institute and Kraft General Foods, Inc., were critical of the decision's use of the Class II differential in describing the difference between the Class II and Class III prices. According to the comments, the method of announcing the Class II and Class III prices affects the magnitude of the differential in a seasonal pattern, resulting in price differences that often greatly exceed the amount of the Class II differential during the months of January through June.

The Cheese Institute stated that the monthly and seasonal differences clearly place milk used by commercial food processors in direct competition with milk used in Class III surplus products that may be used as alternative ingredients by commercial food processors.

For the years 1987, 1988 and 1989, the average difference between the Class II and Class III prices in most markets averaged, respectively, 19 cents, 9 cents and 13 cents. The Class II-Class III price differences cited by the Institute and Kraft are for 1990, however, over the course of which the Class III price declined from $14.93 in December 1989 to $10.19 in December 1990 with only a few minor upward movements during the year. During 1990, the Class II price averaged 61 cents over the Class III price, but also included 3 months in which the Class III price exceeded the Class II price, once by as much as $1.42.

Although Class II prices can exceed Class III prices by much more than intended by the pricing provisions, it is clear that during most years the average difference between the prices of the two classes is approximately the value intended under the orders.

Given the price differential effective in most years, it is not logical that a differential of less than 2 percent over the Class III price would persuade food processors who are already paying a significant cost for a product custom-tailored to their needs to be delivered over a considerable distance to change their ingredient use from sweetened condensed to powder. The product purchased by the food processors is not a standardized surplus product, but one that is made specifically for their purposes according to their specifications. In addition, the processors apparently are willing to pay significantly more than the raw product cost for the ingredient product they are purchasing. Accordingly, milk used to make sweetened condensed milk should be classified as Class II.

Arguments advanced to classify milk moved to commercial food processors as Class III instead of Class II also are not persuasive. A witness representing the Trade Association of Proprietary Plants (TAPP), a proponent of such a classification change, stated that Class II classification of milk disposed of to a commercial food processor represents unnecessary regulation and government intrusion into the business of unregulated plants. TAPP's brief stated that enhancement of the value of the marketwide pool and the relative value of end products sold by a commercial food processor are not appropriate reasons for extending pricing, accounting and regulation to non-fluid uses of milk. The brief also argued that milk disposed of to commercial food processors does not meet the criteria of competing with or following the same channels of commerce as fluid milk products.

A brief filed by Kraft, another proponent of Class III classification of milk disposed of to commercial food processors, stated that products

produced by such facilities are more similar to Class III uses than to Class II. The brief concluded that the milk used to make such products should be classified as Class III or followed through the facility and prorated to its ultimate use, as is done in milk plants. A Kraft witness had testified at the hearing that milk delivered to a commercial food processing establishment in Wisconsin for use in a cheese powder product is Class II, while milk used to make the same product at a nonpool cheese plant in Missouri is classified as Class III. The witness advocated adoption of a size criterion to distinguish between true commercial food processing establishments, such as small bakery operations, and true processing plants. Milk delivered to commercial food processors would be Class II, and milk moved to processing plants would be Class III.

Exceptions filed in response to the recommended decision by the Trade Association of Proprietary Plants (TAPP), the National Cheese Institute (the Institute), and Kraft General Foods, Inc., opposed the Class II classification of milk used by commercial food processors. The Trade Association of Proprietary Plants (TAPP) opposed Class II pricing for sales to commercial food processing plants, especially candy manufacturers, and the Class II classification of soft cheeses, i.e. ricotta. TAPP's comments contended that Federal order pricing is intended only for fluid and associated uses, such as products manufactured in the same plants or handled in the same distribution channels as fluid milk products, and claimed that Class II classification of sales to food processing firms needlessly extends regulation and adds value to pool.

The TAPP comments stated that the criterion used to determine Class III classification apparently is whether the milk is manufactured into nonperishable products for potential government storage at a later time. TAPP's arguments against the criterion of commercial market demand and use vs. potential government surplus storage use included the statement that Federal orders were intended to regulate and enhance pricing of milk for fluid uses only. The comments also stated that the decision unnecessarily extends Federal order pricing into non-fluid use, and auditing into unregulated plants. TAPP further argued that the government's consideration of butter, powder and cheese as surplus is arbitrary, and that CCC could start purchasing milk chocolate.

The TAPP comments went on to state that if there were no government support program, the criteria used for distinguishing between Class II and Class III would be invalid. Therefore, according to TAPP, the criteria used in the decision to determine the difference between Class II and Class III products are meaningless. The criteria TAPP would use are whether the distinction is necessary to the purposes and objectives of the Act, the product competes directly with fluid products or products associated with fluid products, and whether the product is normally manufactured or distributed by Class I handlers.

TAPP's comments argued that candy doesn't compete with Class I and II products, and is not classified as an essential food. Further, TAPP stated, pricing milk used for candy is unnecessary for the orderly marketing of dairy products, and Class III classification of condensed used in candy is more appropriate than the present classification of condensed in hermetically sealed cans.

TAPP requested that in lieu of classifying all sales to commercial food processors as Class III, sales to candy manufacturers should be classified as Class III rather than as Class II.

The desire of cooperatives and handlers to maintain the pool status of producer milk to retain their milk supplies is the principal reason for regulating the prices of milk moved to CFPEs. If milk is to be pooled, the value assigned to its use should reflect the added value attributed by the market over the value of surplus uses. Products such as ice cream and cottage cheese, although often processed in nonpool plants, compete with the same products processed in plants operated by regulated handlers who pay order prices for milk. One possible solution would be to pool only milk received at distributing plants. No such proposal was considered at the hearing, nor was any testimony received to support such an approach.

Nonfluid milk values are determined by the marketplace, rather than by Federal orders, and the prices determined by the marketplace are reflected in the M-W price series, as a result of what manufacturers are willing to pay for milk to use in the products they sell in the market. The classification of milk used in products processed by CFPEs is not just a question of whether the food products compete with fluid or Class II milk products, but rather that CFPEs compete with fluid and soft product processors for a milk supply.

Comments filed on behalf of the National Cheese Institute stated that monthly and seasonal differences between Class II and Class III prices clearly place milk moved to CFPEs in direct competition with milk going to Class III surplus products that are used as alternative ingredients to fresh milk, such as nonfat dry milk or dry whole milk powder. The Institute argued that the conclusion reached in the decision, that milk moved to CFPEs has greater value than milk used in production of cheese, butter or powder, is not supported by any evidence in record. In fact, the Institute's remarks stated, there is little evidence on that issue at all.

The Institute also found in the decision no consideration of the final competitive market for processed food products that incorporate cheese as an ingredient with the substitutes with which such products compete. According to the Institute's comments, reclassification of milk going into processed food products without extensive market impact analysis would jeopardize the competitive position of a vast array of finished products that offer significant uses for producer milk.

It is unclear how the classification of milk moved to commercial food processors is any more of a government intrusion than classification of milk used in a pool plant, or how Class II classification differs in this regard from classification in any other class. The potential of Class II classification in such uses for enhancing the value of marketwide pools is an effect of Class II classification, and not the cause. The ingredient use of milk or its components in any food products of which the manufacture is driven by consumer demand is one basis for determining that Class II classification is appropriate. Dairy farmers should share in the value of their product when its value as an ingredient in other food products is recognized in the marketplace. Many consumers rely on the nutritional value, as well as the convenience, of processed food products, and the contribution of milk to that value should not be understated by pricing ingredient-use milk as if it were surplus to the requirements of the market. The criterion of following the same channels of commerce as fluid milk products is one of the characteristics descriptive of Class II use, but not the only one.

Use of milk, or its components, as an ingredient in other food products is a Class II use. Therefore, milk disposed of to a commercial food processor does not have to be followed through the facility to its end use to determine classification. Although some products produced by commercial food processors may, in some respects, resemble Class III products, they cannot be classified as Class III because they are

not surplus uses of milk and do not compete directly with such uses. In addition, milk used in food products that may be processed in milk plants, pool or nonpool, should be classified as Class II. Milk used in the cheese powder products such as those discussed by Kraft should be classified as Class II wherever the product is processed. The cheese used in making the powder has already been priced as Class III and should not be affected, but the condensed fluid milk products used to make the powder represent milk used to process another food product. A description of the dry milk products that should be considered Class III is contained in the later discussion of milk to be classified as Class III.

The comments filed by Kraft General Foods, Inc. included a thorough discussion of the amount by which the Class II price has exceeded the Class III price for specific selected months, with the seasonal pattern of the spread. The comments argued that there is no substantial evidence that milk processed in CFPEs commands greater value than milk used to produce cheese, butter, or powder, and that the amount paid for sweetened condensed above product cost is for transportation, not a function of value of milk used in sweetened condensed at the point of manufacture. Kraft agreed that dairy farmers should share in the enhanced value of a product when the value of milk as an ingredient is recognized in marketplace, but stated that the record does not establish a premium value in the market for milk used by CFPEs, especially those making non-standardized cheese powder and candy.

Kraft's exceptions argued that although cheese powder is a product of milk, it is not a standardized milk product, and thus does not fit the definition of "any milk product in dry form". Instead, Kraft argued, cheese powder meets the use, form, function and manufacturing characteristics of Class III, and listed twelve characteristics of cheese powder that characterize Class III products. Kraft described the cheese powder product as being in dry, powder form with very low moisture content; storable for long periods, allowing it to be produced when milk is available and held for future use in the absence of consumer demand; competing with and used by consumers in the same way as natural cheeses in cooking; processed at country plants and marketed in a national market, like other cheeses; packaged unlike other Class II products; and using non-grade A condensed in its manufacture.

Kraft stated that the use of milk for powdered cheese is highly sensitive to price, and noted that when the Class II price effective at the Kraft plant in Wisconsin became too high, Kraft moved its production of powdered cheese to a Missouri nonpool plant where milk used to process the product would be classified as Class III. Kraft explained that it can readily substitute part-reconstituted powder for milk used in powdered cheese, depending upon prices and projections for the month and season, and stated that the same arguments apply to candy manufacture.

The powdered cheese product processed by Kraft is a consumer convenience product produced to meet market demand, and not to utilize surplus supplies of producer milk. Only the fresh milk used to produce the product is to be classified as Class II, not the cheese that has already been made from milk classified as Class III. If there is no reason to use fresh milk in the cheese powder manufacturing process, Kraft's best interests would dictate the use of dry milk powder, since it can be purchased at a seasonally low price and used at any time. Contrary to Kraft's assertions, dairy farmers would not lose a market for their milk if Kraft uses powder instead of fresh milk, since the powder would have to be made from milk. At the same time, there would be no difference in the financial impact on dairy farmers between the use of Class III milk and the use of already-manufactured powder.

Competing products made solely from dehydrated cheese solids, or a combination of such solids and nonfat dry milk have no competitive advantage over the Kraft product, since the milk from which the solids are derived would all have been classified as Class III, as is the milk used to make the cheese used in Kraft's product. Any difference in cost is due solely to Kraft's preference for a manufacturing process using fresh milk, which presumably results in a product with greater consumer appeal.

The National Cheese Institute argued that classifying all "skim milk and butterfat * * * used to produce intermediate dairy products for further processing and used as ingredients in other food products that use milk as an ingredient" opens the door for administrative interpretations to reclassifying all products moving through commercial food processing establishments (CFPEs) to Class II, even mozzarella cheese used for pizza or dry cheese powder in prepackaged macaroni and cheese. The comments complained that the decision is too ambiguous and vague, providing the Department with great discretionary powers to reclassify major portion of dairy products from Class III to Class II.

Only fluid milk used by CFPEs would be Class II. The milk used to make already-manufactured products such as mozzarella and other cheeses has already been classified. The decision leaves very little discretion with the Department, or with individual market administrators, to reclassify any products, whether named in proposed order language or not.

No distinctions between commercial food processing establishments and processing plants should be made on the basis of size. Adoption of such a distinction would result in small candy makers disadvantaged by the cost of their ingredients in relation to large candy manufacturers, who already enjoy advantages in regard to economies of scale. Other small food product processors would be similarly disadvantaged on the basis of the size of their operations.

The orders should be amended to allow diversions of producer milk directly from farms to commercial food processors. A number of hearing participants testified in favor of such a change on the basis that it would result in transportation efficiencies. No reasons were given, and none is apparent, for limiting milk receipts at commercial food processors to those which come through pool plants. Such a change will improve the efficiency with which milk can be moved from producers' farms to where it will be used. Therefore, the minor amendments necessary to effect such a change should be made.

Based on the above determinations that milk used as an ingredient in other food products should be Class II, it very clearly follows that milk used in the manufacture of milk chocolate and of a "dairy protein-based fat substitute" should be Class II. Extensive arguments supporting the Class III classification of milk used to make milk chocolate were offered on behalf of Hershey and Nestle, two well-known chocolate manufacturers. However, the witnesses' many comparisons of the properties of chocolate crumb, an intermediate product of the milk chocolate-manufacturing process, with those of Class III products overlooked the fact that chocolate crumb is not a surplus dairy product and, in fact, is not a dairy product at all. In milk chocolate, milk is used as a necessary ingredient of a product whose production is driven by consumer demand and not, as implied by proponents, by the availability of milk during the spring months.

In exceptions filed in response to the recommended decision, Hershey argued that the recommended decision failed to consider adequately record evidence in four key areas. The comments stated that the record of this proceeding establishes that milk chocolate manufacturers should be treated the same whether they use fluid milk or whole milk powder, and demonstrates that classifying milk used to make milk chocolate as Class II will create further inequities with California chocolate producers, increasing the incentive to shift milk chocolate production to California or substitute whole milk powder from California for local Federal order milk.

The exceptions argued that the record shows milk used to make milk chocolate has the same characteristics as Class III products in that it plays a significant role in balancing the market; its use in the Spring does not reflect current consumer demand for the product, which is greatest in the Fall; it is not produced near market centers; and it can be stored for long periods. In addition, Kraft stated that milk used to make milk chocolate is similar to Class III uses in that manufacturers do not require advance pricing for the milk, the product is not an integral part of fluid milk operation, and manufacturers can use manufacturing grade whole milk or whole milk powder in the manufacture of milk chocolate.

Hershey and Nestle may, as they claimed, be able to replace their fresh fluid milk receipts with less expensive sources of whole milk powder, or with other sources of fresh milk. However, if such replacement were easily accessible or significantly less expensive, it is unlikely that handlers in Wisconsin would be able to market sweetened condensed milk to Florida, Texas and California for use in candy-making, as the record indicates they are able to do. The manufacturing process described by Hershey that results in a higher cost of production than would a process using whole milk powder is the result of manufacturing decisions made by Hershey that without doubt have a major effect on the company's ability to market a product of the quality it desires. However, there is no reason for dairy farmers to, in effect, pay the additional costs associated with Hershey's preferred manufacturing process. If the use of whole milk powder gives handlers a large competitive advantage over those using Class II whole milk, processors should probably use whole milk powder.

Further, the use of powder to make products is more common in Class II products such as ice cream and cottage cheese than in Class III products. Chocolate manufacture is not primarily a dairy plant operation, but is a use of milk as an ingredient in another food product, like soup or bakery operations.

In response to other issues raised by Hershey, milk chocolate is not a surplus dairy product, and thus cannot be considered a Class III use. It is produced for a consumer market which the manufacturer anticipates will buy all of the product produced.

A witness for NutraSweet testified that milk used to produce a new product manufactured by that company, a "dairy protein-based fat substitute," should be Class III because it can also be made from egg whites or from whey protein concentrate, and will compete with vegetable oils and cellulose gel. The witness stated that the product has been approved for use in frozen desserts, but should be seen as an opportunity for the dairy industry to maintain its share of the food market and sell more dairy protein rather than as a substitute for butterfat.

A trade group of handlers supported Class III classification for milk used to make any new fat-substitute products on the basis that dairy-based ingredients should not be priced higher than non-dairy ingredients used for the same purpose. Two cooperative association spokesmen argued that milk used to make the fat substitute product should be classified and priced according to the classification of the product in which it is used as a substitute for milkfat.

The dairy protein-based fat substitute is very likely only one of the first to be made from milk components, and it is important to assure that the milk used to produce such products is not priced as if these were surplus uses. Milk and its components have unique and valuable nutritive qualities, and they should not be undervalued, either by those who would use them to produce new products desired by consumers or by the dairy farmers who produce the raw materials. Consequently, milk used to produce new products that cannot be clearly identified as belonging in either Class I or in Class III should be classified as Class II. An attempt has been made to describe in order language the types of products that are intended to be included in each class of use, so that classification of new products will be more clear-cut than at present. New products for which the appropriate classification is not readily apparent should be classified in Class II until the proper classification is established through another proceeding.

Comments opposing the Class II classification of milk used to make fat substitutes and the Class II classification of milk used to make products not readily identifiable as Class I or Class III under the proposed uniform classification were filed by the NutraSweet Company and the National Cheese Institute. The NutraSweet Company opposed Class II classification of milk used to make dairy protein-based fat substitutes only if the Class II differential were increased significantly. The comments stated that such products present the first opportunity for the dairy industry to offset losses in sales of milkfat since dietary fat and cholesterol became an issue. As such, NutraSweet claimed, increasing the cost of dairy protein-based fat substitutes significantly would be highly detrimental to the industry.

The National Cheese Institute (the Institute) argued that the decision ignores the existence of alternative ingredients and systems to produce fat substitutes, stating that the category is a processing system which can use a number of nondairy ingredients to replace fat in processed food products. According to the Institute, Class II classification of such milk uses would make milk a noncompetitive ingredient in such products.

The Institute expressed a desire to retain Class III classification of new products and those without a standard of identity, stating that the Class III classification of such products is an established practice. The Institute also argued that Class III products made with fat substitutes should not lose their Class III classification, and cited proposed regulations by the Food and Drug Administration providing that products may be modified by reducing fat content and still retain the name of the food.

According to the Institute, Class II classification would inhibit the development of new uses for milk in the face of new technology that provides unlimited potential for the development of an increasing number of new products. The Institute stated that potential new products allow dairy to be competitive in the future, and that Class II classification will hurt the dairy industry's competitiveness in the long run.

It was not the intent of the recommended decision to classify as Class II such products as cheese made with artificial fat derived from milk protein, but rather to assure that milk used to manufacture the artificial fat used in such products receives a Class II classification. Cheese made with artificial fat and skim milk could be expected to command a significant premium in the marketplace, and there is no reason to entirely exclude dairy

farmers from any share in that premium. However, at the present time, when there is no data or experience in the marketing of such products, it would seem proper to classify the skim milk used to make such cheese as Class III. It may be necessary in the future to revisit the issue of classification of all of the milk used in products containing artificial fat. The production of such products certainly must be considered demand-driven.

The development of new Class III products will do little to improve the economic situation of dairy farmers. Given the costs of much of the advanced technology brought to bear in developing new products, the difference between the Class II and Class III prices is surely a negligible factor in developing and marketing new products, with or without artificial fat. In addition, it must be assumed that the production of new products developed with the aid of advanced technology would be generated by consumer demand, and not merely by the availability of surplus milk supplies. If such production is based only on the availability of surplus milk, a hearing would have to be held to determine the proper classification of the new product.

A proposal to classify mozzarella and other Italian cheeses as Class II instead of Class III should be denied. Although testimony that the manufacture of these cheeses is demand-generated and that Mozzarella has a relatively short shelf-life appears to be accurate, the form in which Mozzarella and some of the other Italian cheeses are sold is like that of Cheddar cheese. Although Mozzarella is considered a soft cheese and has a higher moisture content (52–60 percent) than Cheddar (maximum 39% moisture), it maintains its shape in a block and is sold to consumers in the same packaging and form (sliced, shredded) as cheddar. (Official notice is taken of the publication Cheese Varieties and Descriptions, U.S. Department of Agriculture, Agricultural Handbook Number 54, Prepared by Agricultural Research Service, Issued December 1953, Slightly revised January 1978; Reprinted by National Cheese Institute, 699 Prince Street, Alexandria, Virginia). The moisture content of Provolone is just a little higher than that of Cheddar, and Parmesan cheese contains less moisture, at 32%, than any of the others. In terms of "form", all of the cheeses mentioned so far exist in a solid form and, when shredded or grated, the small pieces of cheese remain separate without flowing back together. Although Mozzarella is not customarily eaten as an hors d'oeuvre with crackers, it and the other "hard" Italian cheeses are often used similarly to Cheddar, as sprinkled toppings and additives to food for the purpose of enhancing flavor. Therefore, milk used in manufacturing these Italian cheeses should be classified with Cheddar cheese as Class III.

Although the proponent for classifying Italian cheese as Class II considered Italian cheeses as a group, it is clear that Ricotta cheese differs significantly from the others. Ricotta has a moisture content of 68–73 percent, comparable to that of cottage cheese (70–72 percent). Ricotta is packaged in cup form, similar to the packaging of cottage cheese and yogurt, does not hold a solid form, and cannot be shredded or grated into pieces that remain distinct. Ricotta and cottage cheese can be used as substitutes in some prepared foods. Although whey is a major ingredient in the manufacture of Ricotta cheese, the whey constituents would already have been priced (as Class II or Class III) as part of the milk used to make cottage cheese or cheese. Therefore, only the fresh skim milk and butterfat used to make Ricotta should be classified and priced as Class II.

Ten proprietary cheesemakers, including Kraft, Inc., and six associations of such businesses filed exceptions to the classification of ricotta and similar cheeses in Class II. According to the comments, ricotta does not have be to made from Grade A milk, and may be made with whey, as well as Grade B milk.

The comments stated that Federal order Class II classification of ricotta would result in unfair competition with handlers in the upper midwest who have ready access to Grade B sources of milk, and with handlers in California and Western New York who are subject to prices lower than Federal order prices. Handlers located in the Northeast stated that reclassification of milk used to produce ricotta would favor manufacturers in the midwest and California, eliminating the market for eastern producers and creating further imbalances in U.S. milk production, while an Ohio cheese manufacturer argued that the market for midwest producer milk would be eliminated.

According to exceptors, ricotta is almost always manufactured as a secondary product in an Italian cheese facility because its manufacture requires fresh sweet whey available from Italian or Swiss cheese manufacture, not the acid whey resulting from cottage or cheddar cheese.

Several of those filing comments stated that ricotta is manufactured in both low- and high-moisture styles and is not similar to cottage cheese due to its extended shelf life, extensive area of distribution, and the large volume of the product going into processed pasta food products. According to the exceptions, ricotta is not used as a substitute for cottage cheese, and cottage cheese is used only infrequently as a substitute for ricotta, in ingredient use. The exceptions filed stated that ricotta and cream cheese are more likely to be used as substitutes, in bakery products and toppings. The comments argued that ricotta is not made in Class I and Class II Grade A facilities, and is not distributed with, marketed in the same channels, or used by consumers in the same way as fluid or Class II products.

Exceptors raised the likelihood of encountering problems in accounting for milk used in Class II and Class III in the same plant, where present measuring systems do not distinguish between milk pumped to ricotta production from Class III uses in the same plant. According to these comments, Class II classification of ricotta would require upgraded pumping and measuring systems, and additional recordkeeping, reporting, reconciling, and general accounting.

Comments filed by Kraft, Inc., stated that the decision is unclear regarding the classification of cheeses containing moisture contents lower than the specified high-moisture cheeses, but which are not hard, shreddable, or gratable. The comments pointed out that soft spreadable cheeses have moisture contents up to 65%, while that of ricotta is 68–73%. Kraft stated that the difference between Class II and Class III cheeses could be clarified by specifying a maximum moisture percentage for Class III cheeses, but that Kraft opposes any expansion of the category of Class II cheeses.

Kraft argued that the proposed reclassification would reflect a major change in the product classification policy of the Department, and therefore must be supported by substantial record evidence. The comments stated that the record provides no evidence of milk used in high-moisture cheeses having a greater value of commanding higher prices than milk used in hard cheeses, and that the bases for a change in the classification of high-moisture non-cottage cheeses cited in the decision do not provide economic justification without further evidence and explanation.

A manufacturer of "farmer" cheese stated that the hearing record contains no evidence regarding the physical form and use of that product, or its competitiveness or substitutability for other cheese products. The comments argue that the decision was made in a

factual vacuum, and therefore is not supported by record evidence. The handler requested that the hearing be reopened for the purpose of obtaining more evidence if the decision is not reversed.

Reliance on the form and use of dairy products for the determination of the proper classification of the milk used to produce them necessitates that high-moisture cheeses that resemble cottage cheese, are packaged like cottage cheese, and are sold in the same area of the supermarket as cottage cheese should be classified in the same class.

In this instance, using an objective standard such as percent of moisture contained in the product may make sense, since that would be one of the primary determinants of the form taken by the product. Apparently, a 65% maximum moisture content for Class III would assure that spreadable cheeses and cheeses that can be crumbled into separate pieces would be classified as Class III, while other, more liquid products would be Class II. However, a slight adjustment to the order language including spreadable cheeses and cheeses that can be crumbled into separate pieces in the Class III order language should be sufficient to assure the proper classification of these products.

It is not necessary to re-open the hearing to deal with the classification issue in more detail. Although the scope of the hearing was very broad and focussed primarily on pricing issues, the hearing notice was fully adequate to alert participants that a complete reconsideration of the classification issue was at least a strong possibility. Basing classification on the "form" and "use" criteria specified in the Act does not require as much detail in the hearing record as would be required if some other criteria were used.

In the three Northeastern orders, whey is currently included as a by-product with cottage cheese as a Class II product and with cheese as a Class III product. None of the other orders mentions the classification of skim milk and butterfat used to produce whey, as it is considered a by-product of cottage cheese and cheese manufacture. There is no need to continue to specify under any order a classification for whey in the classification section. Although whey often is converted to a powdered product, dried whey is not considered a milk product. The production of whey is incidental to the manufacture of cottage cheese and cheese, and all of the skim milk and butterfat used to produce such products should be classified in the same class as the product which is intended to be manufactured.

Class III milk should be all skim milk and butterfat used to make hard cheeses, of types that can be grated or shredded; butter and other spreads such as cream cheese, and alternative forms in which milkfat or butterfat can be stored for later use such as butteroil, anhydrous milkfat and plastic cream; and nonfat dry milk and other forms of dry milk that can be reconstituted as fluid milk products. Evaporated or condensed products in consumer packaging should also be included in Class III because of their highly storable nature and because those products, too, can be reconstituted as fluid products by consumers. In addition, fluid milk products and Class II products that are dumped or sold as livestock feed for reasons beyond a handler's control (such as spoilage or failure to form cottage cheese curd, for instance) or lost in accidents, should be Class III. The portion of nonfluid milk products used to fortify fluid milk products with nonfat solids that do not represent an increase in the volume of fluid milk products should be Class III, as should skim milk and butterfat in shrinkage or plant loss up to the limit determined in the shrinkage provision.

In exceptions filed by the Upper Midwest F.O. Coalition, the Coalition inquired as to the reason for classifying numerous varietal cheeses in Class III, when they are not true surplus products. The Coalition questioned why Class III classification was not limited to only butter, powder and cheese.

Even though many of the products classified as Class III, such as hard Italian cheeses and cream cheese, are not true surplus products, they do compete with, have the same uses, and are purchased in the same forms as butter, powder and cheese. In a classification system based on the form and use of dairy products, milk used in products with the same form and uses as the truly surplus products must be classified in the same class.

In determining the appropriate products to be included in Class III use the form and purpose of the primary surplus products must be considered, as well as the forms and purposes of products that may be used as substitutes or are similar in form and/or purpose. The basic surplus products are Cheddar cheese, butter and nonfat dry milk. These are the products purchased by the United States government in the operation of the price support program. The primary purpose of these three products is as a means of storing milk solids in non-perishable form when milk production exceeds the market's immediate needs. A common physical characteristic of the products is that they are in a solid form, in that they hold their shape at room temperature.

A witness representing Central Milk Producers Cooperative supported a change in the classification of anhydrous milk fat, plastic cream and butteroil from Class II to Class III by explaining that these products are used to store fat for later use, and are marketed largely for export for reconstitution purposes. The witness stated that the butterfat content of these products makes them very much like butter, and that plastic cream is stiff and moisture-reduced. A Kraft representative testified that anhydrous milk fat is used for balancing the fat content of processed cheese, and a brief filed on behalf of Kraft asserted that none of these products meets the criteria of Class II use, that they all contain less skim milk than butter does, and that they are storable for longer periods.

According to USDA General Specifications for Approved Dairy Plants and Standards for Grades of Dairy Products, plastic cream contains approximately 80 percent milkfat, equivalent to the milkfat content of butter; and anhydrous milkfat and butteroil both contain over 99 percent fat and less than .3 percent moisture. (Official notice is taken of the specifications, issued October 2, 1975; published October 10, 1975; 40 FR 47925.) It is apparent that these products do represent a means of storing milkfat for later use, and are distributed not only on a national basis, but in international commerce as well. Accordingly, their classification should be in Class III.

Cream cheese, although a soft cheese with a high moisture content, is sold in a brick form, like harder cheeses. Although its physical form does not lend itself to grating or shredding, cream cheese is used as a substitute for butter in that product's function as a spread. Consequently, milk used to produce cream cheese should be classified as Class III.

Nonfat dry milk and other dry milk products such as whole milk powder and buttermilk powder that can be reconstituted as fluid milk products should be classified as Class III. These products exist in dry powdered form, and serve the function of storing milk solids for later use in a variety of fluid products, Class II dairy products, and other food products, in place of fresh fluid milk. Although testimony in the record indicates that whole milk powder has a much shorter shelf life than skim milk powder, both products take the same form and are used for somewhat the same purposes. In addition, national market prices for

whole milk powder are reported along with those for butter, Cheddar cheese and nonfat dry milk. (Official notice is taken of Dairy Market News, Volume 58, Report 22, page 9, for the week of May 27–31, 1991).

The Class III milk uses which are not discussed in this decision represent no change from the current Class III classification provisions resulting from the 1974 uniform classification decisions. In several orders, provisions closely related to the actual classification language, including shrinkage, will be changed so that the orders will be more uniform.

In view of the accommodations of Class II diversions to commercial food processors and the change in the classification of unspecified products as Class II rather than Class III, the classification of transfers and diversions to nonpool plants from fully regulated plants should be amended to give priority assignment to Class II over Class III. Products processed at nonpool plants often compete with products processed by commercial food processors.

Kraft filed exceptions to the proposed changes in classification of milk transferred from pool plants to nonpool plants. According to Kraft, the recommended changes would create significant advantages for pool manufacturing plants over unregulated nonpool plants. The Kraft exceptions stated that currently, pool and nonpool manufacturing plants with the same mix of Class II and Class III uses and the same mix of pool and nonpool milk receipts will have comparable allocation of milk from regulated sources to classes of use at the plant. Kraft explained that milk moved to pool plants is classified first to Class III (if so requested), and receipts at nonpool plants are similarly assigned. According to Kraft, the recommended changes could make a substantial difference in the competitiveness of nonpool versus pool plants, especially if the definition of Class II cheeses is expanded.

Kraft argued that the orders should allocate and classify pool milk moved to regulated and unregulated plants in the same way. Otherwise, according to the comments, when the price difference between Classes II and III widens in late winter and early spring, the proposal could create a substantial disadvantage for unregulated plants competing with pool plants. Kraft's comments included an arithmetical example comparing how milk used for manufacturing is now allocated uniformly at pool plants and at nonpool plants with the manner in which Kraft claims a higher proportion of milk delivered to nonpool plants will be allocated to Class II than at pool plants under the recommended decision.

The example provided by Kraft is incorrect. It shows pool milk allocated to Class III at pool plants before unregulated receipts are allocated. In practice, pool receipts are allocated in the next-to-last allocation step, just before overage and after any receipts from unregulated sources. According to Kraft's example of the classification of pool milk moved to nonpool plants under the recommended language, the recommended change would produce the same result for nonpool plants as is currently the case for pool plants.

As stated by Kraft, it is important that pool plants and nonpool plants manufacturing the same product incur essentially the same costs for pool milk. Currently, a distributing plant manufacturing cottage cheese would settle with the pool at the Class II price for the milk used to produce cottage cheese. At a nonpool plant manufacturing both cottage cheese and Class III products and receiving both pooled and unregulated milk, the pooled milk would be assigned first to Class III use, while the unregulated milk would be assigned to any remaining Class III use and then to Class II use. The nonpool plant would then settle with the pool plant from which it received the pooled milk at the Class III price, and also pay the Class III price for the unregulated milk. As a result, the nonpool plant would be paying the Class III price for milk used in cottage cheese, while the pool plant would be paying the Class II price, giving the nonpool plant a cost advantage in the processing of cottage cheese. The changes adopted in this decision will remedy such inequities.

The portion of the recommended decision dealing with classification was criticized as containing no discussion or relevant economic arguments to document any change in competitive markets and consumer usage of products for which the classification was changed by this decision to counter the '74 decision and justify changing the classification of these products as Class II. The exceptions stated that enforcement of the classification of those products reclassified by the decision would be difficult and would provide no significant additional revenue to producers. In fact, they stated, the decision would result in no benefit to any segment of the industry and would have a negative impact on consumers.

It was agreed in exceptions that the proposed amendatory language provides USDA unprecedented discretion in interpretation and application of the orders. Specifically, they objected to the phrase "intended to be used as beverages" as subjective, leaving interpretation open to USDA. The comments also described the decision's Class II criteria as vague, containing no clear objective definition of "spoonable". The decision's approach to classification was termed "unprecedented", in that the Department was described as relying historically only on specifically and technically defined criteria with no room for agency interpretation, and no opening for applications that could result in market inequities or distortions. The "20-percent total solids" criterion was praised as precise and measurable, allowing definitive classification, unlike the new criteria, which are subjective.

According to those excepting to the decision, it does nothing to enhance or clarify uniform classification, and is without any practical basis. The classification criteria used in the decision are described as vague, providing tremendous latitude and discretion to the Department in interpretation and application, and allowing for the reclassification of a broad base of dairy products. Exceptors stated that reclassification should be based on specific proposals, and objective criteria should be retained.

Kraft General Foods, Inc. and U.S. Cheesemakers argued that the substantial evidence standard imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate.

The Upper Midwest Federal Order Coalition, Pennsylvania Farmers' Association, Eastern Milk Producers (and Dairylea and affiliates), Milk Marketing, Inc., NFO and Dean Foods all supported the idea of uniform classification. In addition, comments by the Coalition, Eastern, MMI and NFO praised the discussion of principles of classification and the factors distinguishing products in various classes as salutary. The Coalition singled out reliance on intended use and competition, and marketplace value, as useful criteria for determining classification.

The use of objective standards for determining classification may result in inequities in regard to such products as lowfat sour cream, which competes with the Class II product sour cream rather than with fluid milk products. However, under the current objective basis of butterfat percentage, lowfat sour cream is clearly a Class I product. Many products have a similar potential of being processed to fall just outside Class

I criteria, such as products containing just over 20 percent solids, in the case of milkshake drinks, solely for the purpose of being classified in a lower-priced class even though they compete with and are sold to consumers in the same form as beverage fluid milk products. The standards cited in the decision, although not objective, have the desirable characteristic of allowing classification to be determined on the basis of form and use, as specified in the Act. Such classification determination will be subject to review by the Dairy Division, as is currently the case, and leaves no room for arbitrary decisions made on the basis of an individual's whim, as implied by exceptors.

The objections to the recommended decision made on the basis of potential difficulties of accounting and enforcement are not persuasive. The market administrators of many Federal orders currently manage quite well to track the distribution of packaged fluid milk products that are sold over a wide area, and to audit the records of plants that manufacture a wide variety of products in different classes.

Minor corrections to the order language published with the recommended decision have had to be made in several orders to conform with the classification changes adopted in this decision. The amendatory language of Orders 2, 6, 12, 33, 36 and 40 has been affected by such changes.

4. Pricing of Concentrated and Reconstituted Milk

All orders should be amended to define concentrated milk that contains less than 50 percent total milk solids as a fluid milk product. As a result, the classification of receipts of concentrated milk will be determined on the basis of use but in a different manner than was provided for in the recommended decision. Concentrated milk will encompass "condensed milk", which is an accepted alternative name for "concentrated milk", but will not include other concentrated forms of milk that are distinguishable products, such as "sweetened condensed milk" and "evaporated milk." In order to reduce confusion, the term "condensed milk" would be eliminated from all orders.

Current regulatory provisions that apply to reconstituted milk made from nonfluid milk ingredients, such as nonfat dry milk, should be modified. Any payment obligation that currently applies to reconstituted fluid milk products made from such ingredients should be reduced by $1.00 per hundredweight. Also, an additional option is provided that allows for the Class I value of reconstituted milk to be passed back to the Federal order market that provides the nonfluid milk ingredients. These modifications will apply if labeled reconstituted products are distributed. Furthermore, receipts of nonfat dry milk should be allocated to Class I use on pro rata basis the same as receipts of concentrated milk.

A number of proposals were considered that concerned regulatory changes to deal with intermediate concentrated milk products, such as concentrated milk and nonfat dry milk, that are reconstituted and disposed of as fluid milk products. Concentrated milk products were referred to collectively throughout the hearing as those milk products from which water has been removed by evaporation and drying processes or the use of reverse osmosis (RO) technology. Most hearing participants contended that new technology, such as RO, could increase marketing efficiencies if current regulatory provisions were revised. The overlying basis of most of the proposals is the potential for increased marketing efficiency that could result from reduced hauling costs obtained by shipping concentrated milk products long distances to supply or supplement the fluid milk needs of deficit markets.

Under the current provisions of most orders, milk that is used to produce nonfat dry milk is priced as a Class III use. Milk that is used to produce concentrated milk that is disposed of in bulk form is priced in Class II, unless the handler can establish a Class III use. However, any beverage reconstituted milk which is made by combining water with nonfat dry milk or a concentrated milk product is defined as a fluid milk product and is a Class I use.

In order to provide uniform pricing among handlers for milk in Class I use, the orders provide a procedure for recognizing any conversion of lower-priced nonfluid milk products into the higher-priced fluid uses. This is accomplished by allocating a handler's receipts of nonfluid milk products to the lowest-priced class (referred to as down allocation) and then in sequence to the higher-priced classes of milk. If any of the nonfluid receipts are allocated to Class I, then a charge on such receipts equal to the difference between the Class I and Class III prices is applied (referred to as a compensatory payment).

Most of the parties advancing changes in the pricing of reconstituted milk contend that the current regulatory treatment inhibits the use of these concentrated milk ingredients as an alternative to bulk fluid milk. Also, others contend that the payment at the Class I price for nonfat dry milk that is reconstituted is excessive since no recognition is given to the extra manufacturing costs involved in the initial processing of the nonfat dry milk. Most of the industry proposals would preserve classified pricing as a necessary element to stabilize marketing conditions by pricing the milk used in concentrated ingredients (when used in fluid milk products) as a Class I use in some manner although proposals that would eliminate any Class I pricing were also considered. Elimination of Class I pricing for reconstituted nonfat dry milk was proposed as a first step in the elimination of Federal milk order regulation by the Antitrust Division of the Department of Justice (DOJ).

The major issue raised by the DOJ is that Federal milk orders are no longer necessary in view of a number of changes that have occurred in the milk industry. On the other hand, other hearing participants testified that inherently unstable marketing conditions continue to exist because of a number of unique features that are associated with the production and marketing of milk.

The recommended decision did not deal with the basic issue of whether a government-enforced classified pricing plan continues to be necessary to promote the orderly marketing of milk. Instead, it dealt only with proposed changes to the treatment of concentrated milk ingredients and reconstituted milk in the context of the current regulatory plan.

The DOJ filed exceptions to the recommended decision claiming that the recommended changes do not go far enough in revising the current system of Federal order regulation. DOJ continues to argue that concentrated ingredients that are reconstituted should not be subject to classified pricing.

The DOJ proposal would essentially provide that a surplus class use product could be converted into a fluid use without any payment obligation and be distributed in competition with fluid milk products that are purchased by handlers at not less than minimum Class I prices. Such a situation would establish a contradiction within the regulatory framework by undercutting the very purpose of an enforced classified pricing plan to stabilize marketing conditions. Elimination of classified pricing basically means the elimination of milk orders.

Federal orders were authorized to help minimize the ruinous effects of destructive competition among handlers financed in large part by dairy farmer suppliers. Inherently unstable marketing conditions continue to exist because of

the unique features of milk marketing. Milk production is a high fixed cost enterprise where the production assets cannot readily be transferred to other enterprises. Milk production is a daily and continuous function that involves the marketing of a highly perishable and bulky commodity over a broad area. Milk is produced by a relatively large number of producers and marketed to fewer and larger processing plants. Technological improvements, by and large, have intensified competition both among producers for outlets and among handlers for supplies and sales over broader areas. Consequently, it cannot be concluded that changes in the milk industry have eliminated the inherently unsettling conditions that led to the issuance of orders to provide a minimum framework of regulations within which competitive forces are free to operate without destructive consequences. Furthermore, the basic framework of Federal milk order regulation is to rely on market forces to establish prices for milk. Prices that are established by and are free to respond to supply and demand conditions are enforced as minimum prices. The marketplace, rather than Federal orders, establish the basic level of and monthly changes in minimum prices that are applicable to handlers as well as blend prices that are payable to producers.

The other remaining proposals would maintain classified pricing by pricing concentrated milk ingredients (both concentrated milk and powder) in the same manner as fluid milk receipts are now priced. The obvious intent of the proposals is to provide for the minimum order pricing of concentrated ingredients in the source market or plant on the basis of the classification in the destination plant or market. The first step necessary to accomplish this objective would be to expand the fluid milk product definition to include concentrated ingredients. Such a definitional change would automatically result in the application of the order provisions concerning the classification of bulk fluid milk products, including the provisions that apply to the classification of transfers of such products.

Provisions to classify transfers of bulk fluid milk products are necessary to determine a handler's complete utilization of the total amount of milk that is received. Also, the purpose of the provisions concerning the classification of producer milk that are commonly referred to as allocation provisions is to determine how a handler's different types of receipts have been used. The end result is the amount of producer milk used in each class that is subject to Class prices. The relationship between the two sets of provisions is that bulk fluid milk that is transferred is classified in accordance with the manner in which it is allocated to uses in the transferee plant or market.

The regulatory treatment of nonfluid milk products is significantly different from the treatment accorded to fluid milk products. For example, the amount of milk that is used to produce nonfat dry milk is priced in Class III under the order regulating the initial receipt of milk. If the nonfat dry milk is supplied to an other order plant, that order allocates the receipts of milk (the nonfat dry milk plus the water originally associated with such product) to a plant's uses of milk. Any Class I use allocation is retained in such market without affecting the original obligation under the source order.

The provisions concerning the classification of transfers and producer milk in most orders are based on the regulatory treatment provided by the uniform classification decisions issued February 19, 1974 (39 FR 8202, 8452, 8712 and 9012) and decisions issued June 19, 1964 concerning the manner of integrating into the regulatory plan milk that is not subject to classified pricing (29 FR 9002, 9110 and 9214).

The consensus of opinion among hearing participants is that the use of concentrated ingredients provides a potential for substantial marketing efficiencies because of reduced hauling costs. However, actual marketing experience with the use of such ingredients is extremely limited. There has been some use of nonfat dry milk for reconstitution of certain fluid milk products in milk shortage situations in southern areas of the country. However, there is no marketing experience with the use of concentrated milk for fluid products. This is despite the fact that concentrated milk is already defined as a fluid milk product in the three Florida orders which have had the need to import substantial quantities of supplemental supplies of bulk fluid milk from distant areas.

Despite the lack of marketing experience, the conclusion that there is a potential for substantially reducing hauling costs is logical in view of the weight-reduction associated with the removal of water from milk. The record identifies the substantial amounts of milk that have been shipped from surplus to deficit areas over a number of years. The removal of one-half to two-thirds of the water from milk obviously has the potential to greatly reduce the number of loads of milk that would need to be shipped to meet fluid milk demand. As a result, concentrated milk should be defined as a fluid milk product to provide the potential to take advantage of weight-reducing technology in supplying fluid milk needs. However, nonfat dry milk should not be so defined.

Nonfat dry milk is a storable product that is marketed through different channels than fresh fluid milk, including concentrated milk. Fluid milk is priced in the month in which it is marketed, including milk that is used to produce nonfat dry milk which is a Class III, surplus use product. The conversion of nonfat dry milk to a fluid use, and the time delay between its initial production and the conversion to fluid use, presents a host of technical, administrative, and equity problems in determining the appropriate Class I value to associate with nonfat dry milk if it were to be defined and treated as a fluid milk product.

In addition to other areas of concern, questions were raised as to which Class I price should apply, i.e., the price that applied during the month the nonfat dry milk was made or the price during the month that the nonfat dry milk is reconstituted. In order to provide for uniform Class I pricing, it would appear that the month of reconstitution would be the appropriate basis for Class I pricing. The application of such price would then require a payment by the handler that originally processed the milk to make the nonfat dry milk. With the time lag involved, the plant making the nonfat dry milk may not be a pool plant, or may not even be operating, in the month of reconstitution. Thus, the issue of the uniform treatment of regulated versus unregulated milk as potential sources of nonfat dry milk is also presented. Even if the original plant is identifiable and regulated in the month of reconstitution, such Class I pricing after the fact has implications to the original value of the nonfat dry milk. On the other hand, pricing the milk at the Class I value during the month that the nonfat dry milk is processed obviously would have an immediate impact on the price of nonfat dry milk. It is questionable as to why a manufacturer would be willing to pay the Class I price for milk used to make nonfat dry milk when it is not known if it will eventually be used in fluid milk products.

It is obvious that the processing, storing and marketing of nonfat dry milk does not lend itself to including such dry milk ingredients within the fluid milk product definition. Such concerns are not evident with respect to concentrated milk which, in its fresh fluid form, is marketed over a short period of time. Although nonfat dry

milk should not be treated as a fluid milk product, reconstituted milk made from nonfluid milk ingredients should continue to be defined as a fluid milk product as is currently provided under orders. However, some pricing and allocation changes should be made to the current process that recognizes the conversion from a nonfluid to a fluid use, as discussed later.

Concentrated milk that contains less than 50 percent total milk solids should be defined as a fluid milk product. The use of the 50 percent milk solids standard was generally proposed and referred to in testimony. However, there was no significant testimony relating directly to the use of such standard. In this regard, it is noted that the process of removing up to two-thirds of the water contained in milk or skim milk would result in a product that contains substantially less than 50 percent total milk solids. Thus, the use of such a standard to distinguish between fluid and nonfluid products would accommodate the objectives that are sought.

Defining concentrated milk as a fluid milk product would automatically result in the application of different provisions to establish the classification of receipts of such milk, as previously mentioned. Without other changes the provisions applicable to the classification of bulk fluid milk would be applied to concentrated milk. Currently, bulk fluid milk that is transferred between orders is priced in the transferor order on the basis of the classification in the transferee order. Such milk can be classified as Class II or Class III to the extent that such use is available if the operators of both plants agree on such uses. Otherwise, such transfers are prorated to Class uses on the basis of the receiving plant's or market's Class I use, whichever is lower. Bulk fluid milk transfers between plants regulated under the same order are assigned to Class I, unless the operators of both plants request the same classification in another class, but are limited to the pounds of butterfat and skim milk remaining in each class.

Although most of the testimony concerning the potential benefits of shipping concentrated milk dealt with intermarket shipments, the definitional change would also result in fundamental changes to intramarket shipments of such milk which could also result in reduced hauling costs. Furthermore, such milk may also be received from unregulated supply plants. Such movements should likewise be accommodated under the regulatory provisions, but with some modification from current provisions.

The removal of water from milk to make a concentrated milk product obviously creates some administrative and accountability difficulties. A handler who concentrates milk that is received from producers is obligated to pay for the amount of milk that was originally received. Thus, it is necessary to account for the original volume of water that was associated with the producer milk. In addition, accountability is further complicated since the classification of the concentrated milk that is transferred to another market will be determined on the basis of its allocation to uses in the second market. A handler who reconstitutes concentrated milk must likewise account for the water that was originally associated with the producer milk. Otherwise, fluid milk disposition would exceed the receipts of milk. A full accounting of the milk solids content of milk received is not conducted since virtually all orders provide for only butterfat and skim milk accounting.

In view of possible accounting problems, some hearing participants suggested that it might be necessary to account for milk on the basis of both the butterfat and nonfat milk solids content of milk. On the other hand, order provisions currently recognize the potential problem by requiring that a handler must account for an equivalent amount of water originally associated with nonfat milk solids that are ultimately disposed of by the handler. Conversion factors are generally used to determine a full accounting of milk receipts. For example, nonfat dry milk is converted to its fluid skim equivalent by multiplying the pounds of nonfat dry milk by a factor of 11. Other factors are applied for lesser concentrations of milk solids. In addition, the marketing of concentrated milk would generally reflect the pounds of product marketed as well as the butterfat and solids content. Such information, in conjunction with standard conversion factors, would appear to accommodate the marketing of concentrated milk for fluid use. In the event that actual marketing experience with concentrated milk indicates accountability problems, further rule making proceedings are available to deal with such actual problems that may develop. Until such time as any further precision is necessary, the use of available market information and conversion factors appears to be sufficient to account for the marketing of concentrated milk.

Although concentrated milk should be defined as a fluid milk product, such milk should not be classified in exactly the same manner as applies to transfers of bulk fluid milk products. A modification is necessary to further promote marketing efficiency that would not exist if current provisions were applied to concentrated milk. The modification is also consistent with the views of at least one hearing participant who suggested that concentrated milk should be followed to insure that it is used in Class I to provide for a classification in the same manner that applies to bulk fluid milk. The hearing participant contended that simply defining concentrated milk as a fluid milk product would place free standing Class II nonpool plants at a disadvantage in using concentrated ingredients relative to pool distributing plants that have Class II uses.

Absent a modification, concentrated milk that is now shipped from one order to another for other than fluid use would be allocated to some extent to Class I use if the receiving plant has any Class I use. Such milk would then be priced in the transferor market at a lower price than the transferee market if the transfer is from a lower-priced to a higher-priced market. The price difference between the two markets is, in effect, a location adjustment credit that would cover some of the transportation cost. As a result of such a classification, a corresponding amount of producer milk in the transferee market would be assigned to other than Class I use. As a result, the minimum order price for milk in Class I use would be reduced for a distributing plant that has Class II and Class III uses even though the receipt of concentrated milk was intended for a Class II or Class III use. Under these circumstances, there would be no marketing efficiency gain. Fluid milk sales and revenues would be merely transferred from the higher-priced market to the lower-priced market. The potential gain from treating concentrated milk as a fluid milk product only occurs if milk is shipped in its concentrated form for use in fluid milk products.

In order to accomplish the intended objectives, the recommended decision provided that interorder transfers of concentrated milk should be treated the same as transfers of bulk fluid milk products if the transferee plant establishes an actual disposition of a concentrated or labeled reconstituted fluid milk product. Otherwise, any receipts of concentrated milk were to be down allocated. The same requirement was recommended to be applied to receipts of concentrated milk from unregulated supply plants to establish a uniform treatment for such types of shipments.

A number of handlers filed exceptions to the recommended procedure for assigning a handler's receipts of concentrated milk to the uses of such milk. They pointed out that under current provisions receipts of concentrated milk (as a nonfluid milk product) are assigned to Class II use if used in such products. Remaining receipts that are not assigned to Class II use are then subject to down allocation. The exceptions indicate that defining concentrated milk as a fluid milk product would result in such receipts being assigned to classes of use under different provisions than those that apply to nonfluid milk products. Under these provisions, fluid milk that is shipped for Class II use is first assigned to Class III use. Consequently, the change in the allocation of concentrated receipts would result in assignment to Class III use, to the extent that a handler has any Class III uses, rather than Class II uses. To the extent that this occurs, an equivalent amount of producer milk would be assigned to Class II use, rather than Class III use, and result in increasing a handler's obligation by the difference between the Class II and Class III prices on the amount of reassignment that would occur even though there was no change in the handler's operation.

The handlers suggested that such a problem could be rectified by a further modification to the provisions contained in the recommended decision. The modification would extend a Class II utilization to receipts of concentrated milk shipped between handlers on the basis of an agreement between the handlers that the receipts were for Class II uses. It is noted that such a procedure would address the unintended impact on handlers who use concentrated ingredients for Class II use to the extent that such receipts are used during the month of receipt. However, if the receipts are not used and are held as ending inventory, a similar problem occurs since bulk fluid ending inventories are defined as a Class III use and would pass back a Class III use to the shipping market. Currently, a Class II use would be identified in the shipping market.

A number of those filing exceptions also indicated that it was their impression that the amount of concentrated receipts assigned to Class I use would be limited to the amount of fluid milk products that was reconstituted. Otherwise, a handler who reconstitutes a token amount of fluid milk products could have a disproportionate amount of concentrated ingredients assigned to Class I use, even though the receipts were used for other than fluid uses. This would result in a corresponding amount of producer milk being assigned to other than Class I uses.

The recommended decision did not specifically limit the amount of concentrated receipts that could be assigned to Class I use. Nevertheless, the recommended decision specifically recognized that the potential for a marketing efficiency gain would only occur if concentrated receipts were used in reconstituted fluid milk products. It would not be appropriate to reduce returns to producers through the receipt of concentrated milk for use in other than fluid milk products. It is for this reason that the recommended decision provided for the down allocation of concentrated milk in the absence of any demonstration of an actual disposition of a concentrated or properly labeled reconstituted fluid milk product.

The regulatory provisions contained in the recommended decision, in conjunction with the further modifications suggested in exceptions, would provide for assigning concentrated fluid milk receipts to Class II use on the basis of agreements between handlers and initial assignments to Class II use of any concentrated nonfluid receipts. Any remaining concentrated receipts (fluid or nonfluid) would be prorated to remaining uses, if reconstitution occurs, under one of two different steps of the allocation provisions depending upon whether the receipts were from unregulated or regulated sources. In addition to being cumbersome, there is a conceptual problem with a prorata assignment of those concentrated receipts that remain to be assigned to the uses of milk after assignment to Class II use. If some concentrated receipts are initially assigned to Class II use, it is questionable why any remaining concentrated receipts should be prorated to the remaining uses of milk along with receipts of producer milk. In other words, if 100 percent of concentrated receipts are reconstituted, then all of such receipts should be assigned to Class I use rather than being prorated to classes of use on the basis of the rules that apply to receipts of fluid milk products from various sources. Part of the rationale for the pro rata allocation of fluid milk receipts is that it cannot specifically be determined how each category of receipts of milk is utilized in finished products when all of the receipts are commingled in a plant. In this circumstance, the proration rules provide for each source of fluid milk receipts to share in a portion of the Class I use in a plant or market. However, this situation does not exist with respect to concentrated receipts since it is obvious that only concentrated receipts can be reconstituted. Thus, the provisions that are applicable to the assignment of fluid milk receipts are not totally adaptable to receipts of concentrated milk receipts.

As a result of these considerations, the provisions concerning the allocation of concentrated milk receipts have been revised from those contained in the recommended decision. The revised approach begins with the recognition that only concentrated receipts can be reconstituted. Thus, any receipts of concentrated milk ingredients (fluid and nonfluid) should be assigned to Class I use prior to the assignment of any other milk receipts to a handler's uses of milk. In order to qualify for such an assignment, the transferee plant will have to properly label the reconstituted fluid milk products and the amount of receipts assigned to Class I should be limited to the reconstituted volume of the labeled reconstituted fluid milk products.

The recommended decision provided that a handler would have to demonstrate an actual disposition of a concentrated or labeled reconstituted fluid milk product in order to qualify for the assignment provisions that were provided. The distribution of a packaged concentrated fluid milk product has been deleted as a criteria for implementing the priority assignment of concentrated receipts to Class I use. Disposition of a packaged concentrated fluid milk product does not identify a need or a desire by a handler to receive concentrated ingredients. Also, any receipts of fluid milk or concentrated ingredients can be distributed in concentrated form while only concentrated ingredients can be reconstituted. Furthermore, the record does not indicate the disposition of any significant quantities of packaged concentrated fluid milk products. This issue can be dealt with in the future if marketing conditions develop to the point where bulk concentrated milk is received for disposition in packaged form.

A proration of concentrated receipts to reconstituted Class I volume would insure that each source of concentrated receipts (unregulated, other order, same order) would receive a proportionate share of such Class I use. However, any proration should be limited to the extent that a handler is able to establish that certain specific sources of concentrated receipts are in fact used in reconstituted fluid milk products. It may be that a handler may in fact use certain receipts in Class I uses, such as concentrated fluid milk receipts while receipts of

nonfluid milk products are used for other products. In such a situation where a handler can demonstrate the actual fluid use, such receipts should be assigned to Class I use. Absent such a demonstration, all concentrated receipts (fluid and nonfluid) should be prorated to the labeled reconstituted volume since these receipts can be used in reconstituted fluid milk products.

The receipts of concentrated milk products that are not assigned to reconstituted Class I use can be assigned to a handler's remaining uses of milk in the same manner that currently applies to receipts of nonfluid milk products. It will be necessary, however, to prorate the remaining uses among the concentrated receipts to determine the utilization to be passed back to the source market or plant for receipts of concentrated fluid milk products. As with Class I uses such proration of Class II and Class III uses among the concentrated receipts shall apply if the handler cannot demonstrate a specific use for such receipts.

Ending inventories of bulk concentrated fluid milk products should be defined as a Class II use. In the following month, such beginning inventories shall be assigned to a handler's Class II use. This procedure could present some administrative problems in the event that inventories of concentrated fluid milk as ultimately reconstituted for use in fluid milk products. In such a situation, it is intended that such a Class I use will accrue to the source market. These changes, in conjunction with the revised assignment procedure, should recognize and not disrupt the current marketing of concentrated ingredients for other than fluid use. At the same time it will accommodate the potential use of shipments of concentrated ingredients for fluid use by providing for a priority assignment of concentrated receipts to Class I use.

The pricing of intramarket transfers is somewhat different than intermarket shipments where a location adjustment credit automatically applies when milk is transferred from a lower to higher-priced market. Intramarket shipments are assigned to Class I use, unless both handlers agree on a lower classification, but are limited to the pounds of skim milk and butterfat remaining in each class. Milk that is assigned to Class I use is priced at the transferee plant subject to a location adjustment credit that may apply if it is demonstrated that such milk is actually needed for Class I use. This assignment of location adjustment credits is intended to prohibit the needless reduction of pool proceeds by having milk priced at distant, lower-priced areas when it is not demonstrated that it is needed for Class I use.

In order to provide a measure of equal treatment between intramarket and intermarket shipments, the location adjustment credits that now apply under the orders should be applied to the fluid milk equivalent of any concentrated milk shipped between pool plants. A failure to do so, and to base such credits on product pounds shipped, would reduce a supply plant's location adjustment credit and increase the handler's order obligation for Class I milk. Such an increase would partially offset any potential savings that could be realized from lower hauling costs associated with shipping milk in concentrated form.

It is noted that the inclusion of concentrated milk in the fluid milk product definition could affect the regulatory status of any number of plants. Plants that currently ship condensed milk could become regulated plants under other orders as a result of such qualifying shipments of fluid milk products. At the same time, plants that currently receive condensed milk shipments will experience an increase of fluid milk receipts that could jeopardize their regulatory status. Such regulatory issues were not considered at the hearing and, thus, the full impacts of the definitional change cannot be foreseen at this time. Any potential problems will have to be dealt with as circumstances warrant.

With respect to nonfat dry milk, a number of parties expressed the concern that the current procedure results in a total payment for nonfat dry milk that is in excess of fluid milk Class I prices because no recognition is given to the additional cost that is incurred in processing milk into nonfat dry milk. On this basis they contend that nonfat dry milk is prohibited from becoming a viable economic alternative to the use of supplemental supplies of fresh fluid milk for Class I use. Basically, the argument implies that the full Class I price in any market need not be applied to reconstituted milk because the additional processing costs involved offset a portion of the difference between the Class I and Class III prices for fluid milk.

In establishing minimum Class I prices, Federal orders have generally not recognized any processing costs that might be incurred by a fluid milk handler. With minimum raw milk prices being uniform among handlers, the remaining aspects of competition among handlers is the efficiency of their plant processing and distribution activities. Recognition of costs that might be incurred in processing operations, or because of an election by a handler to use nonfluid rather than fluid ingredients, would tend to diminish the economic incentive to minimize operating costs and maximize efficiency. Thus, the types of receipts, and the associated costs of such receipts, have had no bearing on the minimum order price for milk in Class I uses.

A decision by a handler to use nonfat dry milk to reconstitute skim milk would obviously be based on the relative costs of using nonfat dry milk or fluid skim milk. At a minimum, the order Class I price versus the cost of nine pounds of nonfat dry milk plus the difference between the Class I and Class III prices would provide the basis of the comparison.

Under the Upper Midwest order, the cost of nine pounds of Grade A nonfat dry milk exceeded the average Class I price for skim milk (with the value of all butterfat removed) by 71 cents and $1.89 per hundredweight for 1988 and 1989, respectively. With the application of a compensatory payment to reflect the difference between the minimum order Class I and Class III prices, the average cost per hundredweight of reconstituted skim milk versus fresh skim milk would have increased to $1.74 and $2.68 per hundredweight for 1988 and 1989. Such cost differences do not reflect any reconstituting costs.

Under the Southeastern Florida order, where the Class I price is substantially higher, the cost of fresh fluid Class I skim milk exceeded the cost of nine pounds of nonfat dry milk by $2.31 and $1.09 per hundredweight for 1988 and 1989. Such comparison excludes any transportation cost for Grade A nonfat dry milk. With a compensatory payment, the cost of a hundredweight of reconstituted skim milk would have exceeded the cost of Class I skim milk by the same amounts as under the Upper Midwest order.

In view of the increasing cost of nonfat dry milk over the years, it no longer appears necessary to apply an additional payment at the full difference between an order's Class I and Class III prices to maintain an effective classified pricing plan. The basic reason for such a conclusion is that the cost of processing milk into nonfat dry milk, as reflected in the prices of nonfat dry milk, has increased substantially while Class I differentials have increased little, except for increases mandated by the 1985 Farm Bill.

A number of parties referred to the margin between the Price Support level for manufacturing grade milk and the CCC purchase prices for butter and

nonfat dry milk of $1.22 per hundredweight as an indication of the cost of manufacturing nonfat dry milk. Other parties referred to processing costs in the range of $1.00 or more per hundredweight. Furthermore, a September 1989 Cornell University study on manufacturing costs in butter/powder plants concluded that the average cost per pound of manufacturing nonfat dry milk was 13.29 cents. Such cost averaged 7.89 cents per pound of nonfat dry milk if manufacturing operations were projected to 100 percent capacity. (Official Notice was taken of Manufacturing Costs in Ten Butter/Powder Processing Plants, by Mark W. Stephenson and Andrew Novakovic, Department of Agricultural Economics, Cornell University Agricultural Experiment Station, A. E. Res. 89–15, September 1989.) Such costs per pound of powder result in different costs per hundredweight of milk to process powder depending on the yield of powder from milk. However, since nine pounds of nonfat dry milk are necessary to produce one hundredweight of reconstituted milk, the processing cost per hundredweight would be in the area of $1.20 to 71 cents for the high and low costs per pound of powder indicated above.

As a result, the compensatory payment for converting a Class III use to a Class I use should be reduced by $1.00 per hundredweight, provided that the difference between the Class I and Class III prices is not less than $1.00. Such a reduction will preserve a classified pricing plan and also facilitate the potential use of nonfat dry milk to reconstitute fluid milk products. However, in order to qualify for the payment reduction, a handler will have to demonstrate a disposition of a labeled reconstituted milk product. Otherwise, there would be no basis to demonstrate that a payment reduction is in fact warranted. The application of the assignment provisions under orders can result in the assignment of receipts of nonfat dry milk to Class I when no reconstitution takes place. For example, if a handler fails to account for receipts of producer milk that is used in Class I, other source milk receipts could end up being assigned to such Class I use. Obviously, producers should receive the full Class I value of such Class I use. Moreover, sales of unlabeled reconstituted milk in competition with that which is appropriately labeled could result in unfair methods of competition among handlers, since the unlabeled product could be mistaken as a fresh milk product which is likely to command a higher price than a labeled reconstituted product. Also, in the absence of a different treatment of the unlabeled product the orders would fail to protect the interest of consumers by their not being informed that the product is other than a fresh milk product.

A number of exceptions indicated that it is not proper for Federal milk orders to enforce labeling requirements. Other exceptions indicated that the labeling requirement should be extended to include the source and content of any reconstituted fluid milk product.

The major reason for adopting the changes included herein is the potential to take advantage of lower hauling costs that may result from using concentrated ingredients for fluid use. As pointed out elsewhere in this decision, the potential gain can only occur if the ingredients are in fact used in fluid milk products. The existence of a label that identifies a fluid product as being reconstituted is an easy way to provide some measure of assurance that the concentrated ingredients are actually being used for fluid purposes. In the absence of such a requirement, concentrated ingredients that are now shipped great distances for Class II use could be assigned to a handler's Class I uses which would result in an unwarranted lowering of returns to producers whose milk is actually being used in fluid milk products.

Although the regulatory treatment varies depending on the existence of a label, the provisions contained herein do not require that a reconstituted fluid milk product be labeled as such. In the absence of a label, nonfluid milk ingredients would be treated in the same manner as under current provisions. Receipts of concentrated fluid milk ingredients would be subject to down allocation but would not be subject to a charge at the difference between the Class I and Class III prices if allocated to Class I uses. However, any such receipts assigned to Class I would be a Class I use at the source plant or market, the same as other receipts of fluid milk products. The difference in the regulatory treatment is consistent with section 608(c)(7)(A) of the Act which provides for terms and conditions prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

In addition, a further option should be provided that may be elected by a handler that distributes labeled reconstituted fluid milk products made from nonfat dry milk. This option will provide for a regulatory treatment that is similar to that being provided for concentrated milk, i.e., where the fluid milk value can be passed back to the market of origin.

Under this option, a handler can elect to be a partially regulated pool plant with respect to sales of reconstituted fluid milk products made from nonfat dry milk. Under this option, a handler will have the opportunity to make a pool obligation payment to the order under which the producer milk was priced that was used to produce the nonfat dry milk used for reconstituted milk. This essentially provides that the full Class I value accrues to the source market.

The regulatory language that accompanied the recommended decision did not provide sufficient guidelines as to which Federal order pool payments could be made. As pointed out in exceptions, nonfat dry milk could originate from manufacturing plants that are not regulated under any order, but which may receive milk for manufacturing that is regulated under a number of orders. As a result, additional guidelines are necessary to implement this payment option.

First of all, the provisions are modified to prohibit the application of the pricing option if a majority of the milk received at the manufacturing plant is not priced under Federal order markets. Since the objective is to allow for the compensation of Federal order producers that supply the milk for the nonfluid ingredients used in reconstituted milk, the option should not be provided if the manufacturing plant has a limited association with Federal order markets. If a plant demonstrates a substantial association with regulated markets there is a sufficient basis to conclude that Federal order priced milk has been used to manufacture the ingredients for later use in fluid milk products. Thus, if more than 50 percent of the milk is priced under Federal orders, then payment may be made to the Federal order pool that priced the largest quantity of milk that was used in the plant to produce the nonfat dry milk. The producers who supply the Federal order market that has the greatest amount of milk in the manufacturing plant should receive the benefit of any fluid milk sales that might result.

The recommended decision was drafted in terms of the potential use of nonfat dry milk for use in reconstituted fluid milk products. Most of the testimony was also presented in terms of nonfat dry milk since it is a product that has current limited use for reconstitution and is the product that is most likely to be used. However, since other nonfluid products, such as dry

whole milk, could be used to reconstitute fluid milk products, the regulatory language should not be restricted to the use of nonfat dry milk. The broader term, "nonfluid milk products" is used in the accompanying language to accommodate other nonfluid milk products that may be used for the reconstitution of fluid milk products.

The recommended decision provided that nonfat dry milk (i.e. nonfluid milk products) should be prorated to classes of use in the same manner as provided for concentrated milk rather than being subject to down allocation. The revised procedure, as previously explained, carries out this concept by assigning all concentrated receipts (fluid and nonfluid) to the volume of labeled reconstituted fluid milk products prior to any other assignment of receipts to uses.

A number of exceptions were filed in opposition to any changes to the regulatory treatment of concentrated milk ingredients. More were directed towards the treatment of nonfluid milk products although some were also directed towards the treatment of concentrated fluid milk products. Basically, it was contended in the exceptions that the recommended allocation and pricing changes are not supported by record evidence and that such changes would result in nonuniform costs to handlers. As a result, the exceptions contend that differences in costs among handlers could lead to a displacement of producer milk with concentrated ingredients being used for fluid use. The exceptions contend that concentrated ingredients would only be used in fluid products if the cost of the ingredients was less than the cost of producer milk. If any reconstitution occurs because of lower costs, competition would force other handlers to also use concentrated ingredients. The exceptions contend that available supplies of producer milk would then have to be processed into storable manufactured products. Such a displacement of milk supplies that are already available is contended to represent disorderly marketing conditions. In addition, some exceptions indicate that the provisions should not be adopted under marketing orders that have sufficient supplies of milk available, but, should be restricted to deficit milk producing areas. These exceptions contend that the primary basis for adopting the provisions is to take advantage of hauling efficiencies in supplying fluid milk needs in deficit markets. If such conditions do not exist, the exceptions contend that the provisions should not be adopted.

The changes in the regulatory provisions contained herein are intended to provide greater potential for the industry to take advantage of hauling efficiencies that can be obtained by hauling milk in concentrated form. It is obviously more economical to haul milk ingredients than to haul all of the water originally contained in fluid milk. The greatest potential for cost savings would probably occur for those deficit markets that receive substantial quantities of milk from distant sources to meet fluid milk needs. However, the potential for cost savings is not intended to apply to only deficit markets. Even in surplus milk producing areas, milk is often hauled long distances to plants for fluid use. The use of concentrated ingredients basically has the potential to reduce hauling costs in all areas.

The regulatory changes for concentrated fluid milk result in pricing bulk receipts of such milk in the source plant or market rather than the destination plant or market. This is the same pricing that occurs with respect to receipts of bulk fluid milk. If concentrated milk, or bulk fluid milk, can be delivered for a lesser cost than local milk supplies, it means that local milk supplies are being priced at a level that is in excess of alternative supplies of milk. However, as pointed out elsewhere in this decision, Class I prices need not be adjusted in view of the supply and demand conditions that currently exist. Such supply and demand conditions are partly a function of the Class I price relationships that currently exist under Federal orders. Thus, the contention that lower costs for concentrated milk would result in disorderly marketing by displacing producer milk seems to be unfounded. This is also the case with respect to nonfluid milk receipts, such as nonfat dry milk, which, under one option, will effectively be priced at its Class I value in the source market if used in reconstituted fluid milk products. Furthermore, the $1.00 per hundredweight reduction in the compensatory payment is justified in view of the substantial increases in manufacturing costs relative to fluid milk price increases. A payment at the full difference between Class I and Class III prices is no longer necessary to carry out an effective classified pricing plan.

The Act requires that orders establish minimum prices for each use classification of milk that are to be uniform as to all handlers, subject to certain adjustments. Under the provisions adopted herein, all milk and milk ingredients that are used in fluid milk products will continue to be subject to minimum Class I pricing. The only exception is the $1.00 per hundredweight reduction in the payment that may be applied to reconstituted nonfluid milk ingredients. As previously stated, such reduction is more than offset by the cost of processing milk to obtain such ingredients.

This does not mean, however, that all handlers will be subject to the same total ingredient costs for milk under all situations. This is not possible and is not attained even under current order provisions. For example, handlers that may use nonfat dry milk to reconstitute fluid milk products may have substantially higher costs than handlers that use producer milk in fluid milk products under current provisions, as previously set forth in this decision. On the other hand, handlers that use nonfat dry milk to reconstitute fluid milk products may have substantially lower costs than handlers that utilize producer milk. The differences in costs would depend on the changes in the prices of ingredients (nonfat dry milk and producer milk) that have varied substantially in recent years. For example, nonfat dry milk purchased in February 1989, plus the application of the current compensatory payment would have resulted in an ingredient cost that would have been less than the Class I price for skim milk during the following September through December period under all Federal orders. Changes in milk and product prices, and the storability of nonfluid ingredients make it impossible to obtain a complete equalization of costs at all times in all cases. Furthermore, if total costs were equal, there would be no potential value to be gained from the use of concentrated milk ingredients in fluid milk products.

Other exceptions requested that the regulatory provisions concerning the treatment of partially regulated distributing plants under the New York-New Jersey order (order 2) be modified to provide a regulatory option that is provided under most other orders. Basically, the exceptions requested that the order be modified to provide a partially regulated distributing plant with the option of paying at least as much for its milk supplies as it would have to pay if it were fully regulated under the order.

The differences in regulatory options for partially regulated distributing plants is beyond the scope of this proceeding. The decision provides a mechanism for recognizing the potential use of concentrated ingredients for fluid use at partially regulated distributing plants within the context of current regulations that apply to such plants.

However, the differences in the current regulations among orders that deal with such plants was simply a matter that was not addressed in the proceeding.

Conforming Changes

As proposed in the Notice of Hearing, conforming changes are provided wherever necessary to assure that all the provisions of the orders will function as intended. For example, in connection with providing three uniform classes of utilization, in orders currently having only two classes of utilization, it is necessary, in addition to all the changes in sections of the orders dealing with classification, to also provide for a Class III price. Changes such as this, and numerous others, have been made for the purpose stated above.

For a different reason, numerous non-substantive changes also are being made in the Ohio Valley (part 1033) and the Black Hills, South Dakota (part 1075) orders. These changes are made to bring the overall format of these two orders to more nearly conform with the format of most of the other orders. These changes will not have any bearing upon the classification and pricing of milk under these two orders.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the New England and Other Marketing Area orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the orders regulating the handling of milk in the New England and Other marketing areas, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register**.

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agents

It is hereby directed that referendums be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300–311), to determine whether the issuance of the attached orders as amended and as hereby proposed to be amended, regulating the handling of milk in the New York-New Jersey, Eastern Ohio-Western Pennsylvania, Louisville-Lexington-Evansville, Alabama-West Florida, Greater Louisiana, Memphis, Tennessee, Nashville, Tennessee, and Paducah, Kentucky marketing areas is approved or favored by producers, as defined under the terms of each of the orders, as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the respective marketing areas.

The representative period for the conduct of such referendum is hereby determined to be April 1992.

The agent of the Secretary to conduct such referendums are hereby designated to be Ronald C. Pearce (New York-New Jersey), Marvin A Baumer (Eastern Ohio-Western Pennsylvania), Arnold M. Stallings (Louisville-Lexington-Evansville, and Nashville, Tennessee), Paul W. Halnon (Alabama-West Florida and Greater Louisiana), Richard E. Arnold (Memphis, Tennessee) and Donald R. Nicholson (Paducah, Kentucky).

Determination of Producer Approval and Representative Period

April 1992 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the orders, as amended and as hereby proposed to be amended, regulating the handling of milk in the aforesaid marketing areas except the New York-New Jersey, Eastern Ohio-Western Pennsylvania, Louisville-Lexington-Evansville, Alabama-West Florida, Greater Louisiana, Memphis, Tennessee, Nashville, Tennessee, and Paducah, Kentucky marketing areas is approved or favored by producers, as defined under the terms of each of the orders (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the respective marketing areas.

List of Subjects in 7 CFR Parts 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1097, 1098, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, 1139

Milk marketing orders.

Signed at Washington, DC, on February 5, 1993.

Kenneth C. Clayton,

Acting Assistant Secretary, Marketing and Inspection Services.

Order Amending the Orders Regulating the Handling of Milk in the Certain Specified Marketing Areas

(This order shall not become effective unless and until the requirements of

§ 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas; and the minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders as hereby amended regulate the handling of milk in the same manner as, and are applicable only to persons in the respective classes of industrial or commercial activity specified in, marketing agreements upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered that on and after the effective date hereof, the handling of milk in each of the specified marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby amended, as follows: The provisions of the proposed marketing agreements and order amending the orders contained in the recommended decision issued by the Deputy Administrator, Agricultural Marketing Service, on November 6, 1991 and published in the **Federal Register** on November 22, 1991 (56 FR 58972), as modified herein, shall be and are the terms and provisions of this order, amending the orders, and are set forth in full herein.

1. The authority citation for 7 CFR parts 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1097, 1098, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, 1139 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA

1. Section 1001.17 is revised to read as follows:

§ 1001.17 Fluid milk product.

(a) Except as provided in paragraph (b) of this section fluid milk product means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term fluid milk product shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1001.18 is revised to read as follows:

§ 1001.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1001.22 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1001.22 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1001.15, 1001.41 and 1001.52.

4. Section 1001.40 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1001.40 Classes of utilization.

* * * * *

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form, except nonfat dry milk;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1001.17 and the fluid cream product definition pursuant to § 1001.18; and

(7) In shrinkage assigned pursuant to § 1001.41(a) to the receipts specified in § 1001.41(a)(2) and in shrinkage specified in § 1001.41(b) and (c).

* * * * *

5. Section 1001.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1001.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1001.43 is amended by adding a new paragraph (g) to read as follows:

§ 1001.43 General classification rules.

* * * * *

(g) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1001.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1001.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1001.44 is amended by revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6) and (a)(7)(i), to read as follows:

§ 1001.44 Classification of producer milk.

* * * * *

(a) * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1001.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1001.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1001.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1001.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

8. Section 1001.45 is amended by revising paragraph (b) to read as follows:

§ 1001.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the

class to which such receipts are allocated pursuant to § 1001.43(g) and § 1001.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1001.53 is amended by revising paragraph (h)(1) to read as follows:

§ 1001.53 Determination of applicable zone locations for pricing purposes.

* * * * *

(h) * * *

(1) After the allocation step of § 1001.44(a)(12) for the transferee-plant, multiply the remaining pounds of Class I skim milk and Class I butterfat, plus the pounds of skim milk and butterfat in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, by 110 percent and 150 percent, respectively;

* * * * *

10. Section 1001.60 is amended by revising paragraphs (d), (f), and (g) and adding new paragraphs (h) and (i) to read as follows:

§ 1001.60 Handler's value of milk for computing basic blended price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1001.43(g) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1001.44(a)(7)(i) through (iv), (vii), and (viii) and the corresponding step of § 1001.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1001.43(g) and § 1001.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1001.44 (a)(11) and the corresponding steps of § 1001.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1001.43(g);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1001.61(e); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1001.61 is amended by redesignating paragraph (c) as paragraph (d), revising paragraphs (a) and (d), and adding new paragraphs (c) and (e) to read as follows:

§ 1001.61 Partially regulated distributing plant operator's value of milk for computing basic blended price.

* * * * *

(a) Subtract from the quantity of route disposition, except reconstituted milk products, distributed in the marketing area by the partially regulated distributing plant operator the quantity of fluid milk products (except reconstituted milk products and those described in paragraph (b) of this section) received at the plant during the month that is classified and priced as Class I milk or the equivalent thereof under any marketwide pool Federal order and that is not used to offset route disposition in any other marketing area, and multiply the result by the applicable Class I price;

* * * * *

(c) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant. Add the amount obtained from multiplying the pounds of labeled reconstituted milk included previously in this paragraph by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(d) Add the values pursuant to paragraphs (a) through (c) of this section.

(e) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1001.43(g). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the

order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

PART 1002—MILK IN THE NEW YORK-NEW JERSEY MARKETING AREA

1. Section 1002.15 is revised to read as follows:

§ 1002.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1002.18 is revised to read as follows:

§ 1002.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1002.20 is added under the undesignated centerheading "General provisions and definitions" to read as follows:

§ 1002.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages.

4. Section § 1002.22 is amended by adding a new paragraph (e) to read as follows:

§ 1002.22 Additional duties of the market administrator.

* * * * *

(e) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to §§ 1002.40(c) and 1002.45 on the basis of such report (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

5. Section § 1002.40 is revised to read as follows:

§ 1002.40 General classification rules.

All skim milk and butterfat required to be reported by each handler pursuant to §§ 1002.30 and 1002.32 shall be classified each month pursuant to the provisions of §§ 1002.41 through 1002.46, subject to the following conditions:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1002.30, including the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1002.40 through 1002.44;

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk used or disposed of in such product shall be considered to be an amount equivalent to the nonfat milk solids contained in such products plus all the water originally associated with such solids; and

(c) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1002.45. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1002.45 on a pro rata basis, unless a specific use of such receipts is established by the handler.

6. Section 1002.41 is amended by revising paragraphs (c) and (d) to read as follows:

§ 1002.41 Classes of utilization.

* * * * *

(c) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (d) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (c)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(d) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:
(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (c)(4)(i) of this section;
(ii) Butter, plastic cream, anhydrous milkfat and butteroil;
(iii) Any milk product in dry form;
(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and
(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (c)(1) of this section in bulk form;
(3) In fluid milk products, products specified in paragraph (c)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (c)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;
(4) In fluid milk products, products specified in paragraph (c)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (c)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;
(5) In fluid milk products and products specified in paragraph (c)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;
(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (c)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1002.15 and the fluid cream product definition pursuant to § 1002.18; and
(7) In shrinkage assigned pursuant to § 1002.42(a) to the receipts specified in § 1002.42(a)(2) and in shrinkage specified in § 1002.42(b) and (c).

7. Section 1002.44 is amended by revising the introductory text of paragraph (a), adding the following sentence to the text of paragraph (a)(1), and revising the introductory text of paragraph (d), to read as follows:

§ 1002.44 Transfers.

* * * * *

(a) *Transfers to pool plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant or a pool unit to another pool plant shall be classified as Class I-A milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:
(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;
* * * * *

(d) *Transfers to other nonpool plants.* Skim milk or butterfat transferred in the following forms from a pool plant or a pool unit to a nonpool plant that is not an other order plant or a producer-handler plant shall be classified:
* * * * *

8. Section 1002.45 is amended by revising the first sentence of paragraph (a)(6) and revising paragraphs (a)(7) and (a)(8)(i), to read as follows:

§ 1002.45 Allocation of skim milk and butterfat classified.

* * * * *

(a) * * *
(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1002.41(c)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *
* * * * *

(7) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1002.41(c) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1002.41(d)(6)), but not in excess of the pounds of skim milk remaining in Class II.
(8) * * *
(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(6) of this section applies, packaged inventory at the beginning of the month of products specified in § 1002.40(c)(1) that was not subtracted pursuant to paragraphs (a)(5), (a)(6) and (a)(7) of this section;
* * * * *

9. Section 1002.60 is amended by revising paragraph (d)(2), redesignating paragraphs (d)(3) and (d)(4) as paragraphs (d)(5) and (d)(6), adding new paragraphs (d)(3) and (d)(4), redesignating paragraph (e) as paragraph (f) and adding a new paragraph (e), to read as follows:

§ 1002.60 Net pool obligation of handlers.

* * * * *

(d) * * *
(2) Multiply the pounds of skim milk and butterfat in receipts of nonfluid milk products subtracted from Class I-A pursuant to § 1002.45(a)(8)(i) and the corresponding step of § 1002.45(b) and the pounds of skim milk and butterfat specified in § 1002.44(d)(3)(vii) by the difference between the Class I-A and Class III prices, each adjusted by the applicable differential pursuant to § 1002.52;
(3) Multiply the pounds of skim milk and butterfat in receipts of nonfluid milk products assigned to Class I pursuant to § 1002.40(c) by the difference between the Class I price less $1.00 (but not to be less than the Class III price) and the Class III price, both adjusted by the applicable differential pursuant to § 1002.52. Alternatively, the handler may, with respect to such receipts of nonfluid milk products processed from producer milk regulated under another Federal order, elect to make payment to the producer-settlement fund of the other order at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk products were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk products is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk products. This payment option shall not apply if the source of the nonfluid milk products used in reconstituted fluid milk products cannot be determined by the market administrator;
(4) Multiply the quantity of skim milk and butterfat in receipts of concentrated fluid milk products from plants other than those defined in § 1002.8(b) or (d)

or as a producer-handler and which are assigned to Class I pursuant to § 1002.40(c) or which are subtracted from Class I–A pursuant to § 1002.45(a)(8)(i) and the corresponding step of § 1002.45(b) by the Class I price, adjusted by the applicable differential pursuant to § 1002.52.

* * * * *

(e) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

* * * * *

10. Section 1002.61 is amended by revising paragraphs (g) and (h) to read as follows:

§ 1002.61 Computation of the uniform price.

* * * * *

(g) Subtract an amount equal to not less than 8 cents nor more than 9 cents per hundredweight of pool milk and receipts of concentrated fluid milk products for which a payment obligation is computed pursuant to § 1002.60(d)(4) to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers; and

(h) Divide the result obtained in paragraph (g) of this section by the total pounds of pool milk delivered by dairy farmers and the total pounds of concentrated fluid milk products for which a payment obligation is computed pursuant to § 1002.60(d)(4). The result shall be known as the uniform price.

11. Section 1002.74 is amended by deleting the word "and" at the end of paragraph (a)(1), replacing the period at the end of paragraph (a)(2) with a semicolon, and adding a new paragraph (a)(3) to read as follows:

§ 1002.74 Handler's pool debit or credit.

* * * * *

(a) * * *

(3) Multiply the quantity of concentrated fluid milk products for which a payment obligation is computed pursuant to § 1002.60(d)(4) by the uniform price.

* * * * *

12. Section 1002.85 is amended by changing the reference "§ 1002.60(d)(2)" to "§ 1002.60(d)(2), (d)(3) and (d)(4)".

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. Section 1004.15 is revised to read as follows:

§ 1004.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1004.16 is revised to read as follows:

§ 1004.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1004.22 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1004.22 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1004.12, 1004.13, and 1004.41.

4. Section 1004.40 paragraphs (b) and (c) are revised to read as follows:

§ 1004.40 Classes of utilization.

* * * * *

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form, except nonfat dry milk;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1004.15 and the fluid cream product definition pursuant to § 1004.16; and

(7) In shrinkage assigned pursuant to § 1004.41(a) to the receipts specified in § 1004.41(a)(2) and in shrinkage specified in § 1004.41(b) and (c).

* * * * *

5. Section 1004.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1004.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1004.43 is amended by adding a new paragraph (e) to read as follows:

§ 1004.43 General classification rules.

* * * * *

(e) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1004.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1004.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1004.44 is amended by revising the first sentence of paragraph (a)(6) and revising paragraphs (a)(7) and (a)(8)(i), to read as follows:

§ 1004.44 Classification of producer milk.

* * * * *

(a) * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1004.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(7) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1004.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1004.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(8) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(6) of this section applies, packaged inventory at the beginning of the month of products specified in § 1004.40(b)(1) that was not subtracted pursuant to paragraphs (a)(5), (a)(6) and (a)(7) of this section;

* * * * *

8. Section 1004.45 is amended by revising paragraph (c) to read as follows:

§ 1004.45 Market administrator's reports and announcements concerning classification.

* * * * *

(c) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1004.43(e) and § 1004.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1004.60 is amended by revising paragraphs (f) and (h), and adding new paragraphs (l), (m) and (n) to read as follows:

§ 1004.60 Handler's value of milk for computing uniform price.

* * * * *

(f) The value of the product pounds, skim milk and butterfat assigned to Class I pursuant to § 1004.43(e) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(8)(i) through (iv), and the corresponding step of § 1004.44(b), excluding receipts of bulk fluid cream products from another order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants, applicable at the location of the pool plant at the current month's Class I–Class III price difference;

* * * * *

(h) The value of the product pounds, skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1004.43(e) and § 1004.44(a)(8)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(12) and the corresponding steps of § 1004.44(b), excluding such hundredweight in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent quantity disposed of to such plant by handlers fully regulated by any Federal order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order, applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received at the current month's Class I–Class III price difference;

* * * * *

(l) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1004.43(e);

(m) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1004.76(b)(5) or (c); and

(n) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1004.74 is amended by removing paragraph (a)(2)(iii) and redesignating paragraphs (a)(2)(iv) and (a)(2)(v) as paragraphs (a)(2)(iii) and (a)(2)(iv) respectively.

11. Section 1004.76 is amended by revising paragraphs (b)(3) and (b)(5) and adding a new paragraph (c) to read as follows:

§ 1004.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Deduct the quantity of reconstituted milk that are made from nonfluid milk products and which are then disposed of on routes in the marketing area from the partially regulated distributing plant;

* * * * *

(5) From the value of such milk at the Class I price, subtract its value at the uniform price computed pursuant to § 1004.62, and add for the quantity of labeled reconstituted skim milk specified in paragraph (b)(3) of this section its value computed at the Class I price less $1.00 (but not to be less than the Class III price) and the value of such milk at the Class III price (except that the Class I price and the uniform price shall be adjusted for the location of the nonpool plant and shall not be less than the Class III price). For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1004.43(e). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1004.85 is amended by revising paragraph (a) to read as follows:

§ 1004.85 Assessment for order administration.

* * * * *

(a) Each handler (excluding a cooperative association in its capacity as a handler pursuant to § 1004.9(c), and a cooperative association as the operator of a pool plant with respect to milk transferred in bulk to a pool plant) with respect to the handler's receipts of producer milk (including such handler's own-farm production, milk received from a cooperative association pursuant to § 1004.9(c), and milk transferred in bulk from a pool plant owned and operated by a cooperative association) and receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1004.43(e) and other source milk allocated to Class I pursuant to § 1004.44(a)(8) and (a)(12) and the corresponding step of § 1004.44(b), except such other source milk that is excluded from the computations pursuant to § 1004.60(f) and (h);

* * * * *

PART 1005—MILK IN THE CAROLINA MARKETING AREA

1. Section 1005.15 is revised to read as follows:

§ 1005.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1005.16 is revised to read as follows:

§ 1005.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. Section 1005.19 is revised to read as follows:

§ 1005.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1005.13, 1005.41 and 1005.53.

4. Section 1005.40 is revised to read as follows:

§ 1005.40 Classes of utilization.

Except as provided in § 1005.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1005.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1005.15 and the fluid cream product definition pursuant to § 1005.16; and

(7) In shrinkage assigned pursuant to § 1005.41(a) to the receipts specified in § 1005.41(a)(2) and in shrinkage specified in § 1005.41(b) and (c).

5. Section 1005.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1005.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1005.43 is amended by adding a new paragraph (d) to read as follows:

§ 1005.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1005.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1005.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1005.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1005.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1005.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1005.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1005.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1005.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1005.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1005.45 is amended by revising paragraph (b) to read as follows:

§ 1005.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1005.43(d) and § 1005.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1005.53 is amended by revising paragraph (b)(1) to read as follows:

§ 1005.53 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1005.44(a)(12) and the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, an amount equal to:

* * * * *

10. Section 1005.60 is amended by revising paragraphs (d) and (f), and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1005.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1005.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1005.44(a)(7)(i) through (iv) and the corresponding step of § 1005.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid

milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1005.43(d) and § 1005.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1005.44(a)(11) and the corresponding steps of § 1005.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1005.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1005.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1005.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1005.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1005.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1005.85 is amended by revising paragraph (c) to read as follows:

§ 1005.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1005.43(d) and other source milk allocated to Class I pursuant to § 1005.44(a)(7) and (a)(11) and the corresponding steps of § 1005.44(b), except such other source milk that is excluded from the computations pursuant to § 1005.60(d) and (f); and

* * * * *

PART 1006—MILK IN THE UPPER FLORIDA MARKETING AREA

1. Section 1006.15 is revised to read as follows:

§ 1006.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1006.16 is revised to read as follows:

§ 1006.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1006.21 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1006.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1006.13, 1006.41 and 1006.52.

4. Section 1006.40 is revised to read as follows:

§ 1006.40 Classes of utilization.

Except as provided in § 1006.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1006.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1006.15 and the fluid cream product definition pursuant to § 1006.16; and

(7) In shrinkage assigned pursuant to § 1006.41(a) to the receipts specified in § 1006.41(a)(2) and in shrinkage specified in § 1006.41 (b) and (c).

5. Section 1006.42 is revised to read as follows:

§ 1006.42 Classification of transfers and diversions.

(a) *Transfers to pool plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1006.44(a)(12) and the corresponding step of § 1006.44(b). The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1006.44(a)(7) or the corresponding step of § 1006.44(b), the skim milk or butterfat

so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1006.44(a)(11) or (a)(12) or the corresponding steps of § 1006.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1), (b)(2), or (b)(3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1006.40.

(c) *Transfers to producer-handlers and to exempt distributing plants.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order or to an exempt distributing plant shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant, an exempt distributing plant, or a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i)(A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2)(ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1006.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool

plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

6. Section 1006.43 is amended by revising paragraph (a) and adding new paragraphs (c) and (d), to read as follows:

§ 1006.43 General classification rules.

* * * * *

(a) Each month, the market administrator shall correct for mathematical and other obvious errors, the reports submitted by each handler pursuant to § 1006.30 and compute the total pounds of skim milk and butterfat, respectively, in each class at each pool plant.

* * * * *

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1006.9(b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association.

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1006.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1006.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1006.44 is revised to read as follows:

§ 1006.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1006.9(a) for each of the handler's pool plants separately and of each handler described in § 1006.9(b) and (c) by allocating the handler's receipts of skim milk and butterfat to such handler's utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1006.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I the remainder of such receipts.

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1006.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1006.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(5) or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1006.40(b), (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1006.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1006.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order and from an exempt distributing plant;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2)(i) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant.

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined

exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk unconcentrated fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1006.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5), and (a)(7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11)(i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12)(ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1006.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the

computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1006.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as *overage*;

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

8. Section 1006.45 is amended by changing the reference "§ 1006.44(a)(9)" to "§ 1006.44(a)(12)" in paragraph (a) and revising paragraph (b) to read as follows:

§ 1006.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1006.43(d) and § 1006.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1006.50 is amended by adding a new paragraph (c) to read as follows:

§ 1006.50 Class prices.

* * * * *

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

10. Section 1006.60 is revised to read as follows:

§ 1006.60 Handler's value of milk for computing the uniform price.

For the purpose of computing the uniform price the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1006(b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1006.44(a) by the applicable class prices and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1006.44(a)(14) and the corresponding step of § 1006.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1006.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1006.44(a)(9) and the corresponding step of § 1006.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1006.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1006.44(a)(7)(i) through (iv) and the corresponding step of § 1006.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1006.44(a)(7)(v) and (vi) and the corresponding step of § 1006.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1006.43(d) and § 1006.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1006.44(a)(11) and the corresponding steps of § 1006.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1006.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1006.76(b)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1006.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows: § 1006.76 Payments by a

handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Deduct from any remainder the pounds of reconstituted milk made from nonfluid milk products, and milk or skim milk contained in receipts from producer-handlers and exempt plants defined in any order, which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location, and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1006.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1006.85 is amended by revising paragraph (b) to read as follows:

§ 1006.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1006.43(d) and other source milk allocated to Class I pursuant to § 1006.44(a)(7) and (a)(11) and the corresponding steps of § 1006.44(b), except such other source milk that is excluded from the computations pursuant to § 1006.60(d) and (f); and

* * * * *

PART 1007—MILK IN THE GEORGIA MARKETING AREA

1. Section 1007.15 is revised to read as follows:

§ 1007.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1007.16 is revised to read as follows:

§ 1007.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1007.21 is added under the undesignated center heading "Definitions" to read as follows:

§ 1007.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1007.13, 1007.41 and 1007.52.

4. Section 1007.40 is revised to read as follows:

§ 1007.40 Classes of utilization.

Except as provided in § 1007.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1007.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded or grated and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1007.15 and the fluid cream product definition pursuant to § 1007.16; and

(7) In shrinkage assigned pursuant to § 1007.41(a) to the receipts specified in § 1007.41(a)(2) and in shrinkage specified in § 1007.41(b) and (c).

5. Section 1007.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1007.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1007.43 is amended by adding a new paragraph (d) to read as follows:

§ 1007.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1007.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1007.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1007.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1007.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1007.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1007.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1007.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1007.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1007.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1007.45 is amended by revising paragraph (b) to read as follows:

§ 1007.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1007.43(d) and § 1007.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1007.60 is amended by revising paragraphs (d), (f), and (g), and adding new paragraphs (h) and (i) to read as follows:

§ 1007.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1007.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1007.44(a)(7)(i) through (iv) and the corresponding step of § 1007.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1007.43(d) and § 1007.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1007.44(a)(11) and the corresponding steps of § 1007.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1007.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order § 1007.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1007.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1007.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk

products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1007.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1007.85 is amended by revising paragraph (b) to read as follows:

§ 1007.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1007.43(d) and other source milk allocated to Class I pursuant to § 1007.44(a)(7) and (a)(11) and the corresponding steps of § 1007.44(b), except such other source milk that is excluded from the computations pursuant to § 1007.60 (d) and (f); and

* * * * *

PART 1011—MILK IN THE TENNESSEE VALLEY MARKETING AREA

1. Section 1011.15 is revised to read as follows:

§ 1011.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1011.16 is revised to read as follows:

§ 1011.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. Section 1011.19 is revised to read as follows:

§ 1011.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1011.13, 1011.41 and 1011.52.

4. Section 1011.40 is revised to read as follows:

§ 1011.40 Classes of utilization.

Except as provided in § 1011.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1011.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) Class II milk. Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1011.15 and the fluid cream product definition pursuant to § 1011.16; and

(7) In shrinkage assigned pursuant to § 1011.41(a) to the receipts specified in § 1011.41(a)(2) and in shrinkage specified in § 1011.41(b) and (c).

5. Section 1011.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1011.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1011.43 is amended by adding a new paragraph (d) to read as follows:

§ 1011.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1011.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1011.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1011.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i), and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1011.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1011.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1011.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1011.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1011.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1011.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1011.45 is amended by revising paragraph (b) to read as follows:

§ 1011.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1011.43(d) and § 1011.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1011.52 is amended by revising paragraph (b)(1) introductory text to read as follows:

§ 1011.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1011.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, an amount equal to:

* * * * *

10. Section 1011.60 is amended by revising paragraphs (d), (f) and (g), and adding new paragraphs (h) and (i) to read as follows:

§ 1011.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1011.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1011.44(a)(7)(i) through (iv) and the corresponding step of § 1011.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1011.43(d) and § 1011.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1011.44(a)(11) and the corresponding steps of § 1011.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1011.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1011.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1011.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1011.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1011.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1011.85 is amended by revising paragraph (c) to read as follows:

§ 1011.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1011.43(d) and other source milk allocated to Class I pursuant to § 1011.44(a)(7) and (a)(11) and the corresponding steps of § 1011.44(b), except such other source milk that is excluded from the computations pursuant to § 1011.60(d) and (f); and

* * * * *

PART 1012—MILK IN THE TAMPA BAY MARKETING AREA

1. Section 1012.15 is revised to read as follows:

§ 1012.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1012.16 is revised to read as follows:

§ 1012.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1012.20 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1012.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1012.13, 1012.41 and 1012.52.

4. Section 1012.40 is revised to read as follows:

§ 1012.40 Classes of utilization.

Except as provided in § 1012.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1012.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler

must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1012.15 and the fluid cream product definition pursuant to § 1012.16; and

(7) In shrinkage assigned pursuant to § 1012.41(a) to the receipts specified in § 1012.41(a)(2) and in shrinkage specified in § 1012.41 (b) and (c).

5. Section 1012.42 is revised to read as follows:

§ 1012.42 Classification of transfers and diversions.

(a) *Transfers to pool plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1012.44(a)(12) and the corresponding step of § 1012.44(b). The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1012.44(a)(7) or the corresponding step of § 1012.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1012.44(a)(11) or (a)(12) or the corresponding steps of § 1012.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1), (b)(2), or (b)(3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1012.40.

(c) *Transfers to producer-handlers.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant or a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i) (A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2) (ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1012.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

6. Section 1012.43 is amended by revising paragraph (a) and adding new paragraphs (c) and (d), to read as follows:

§ 1012.43 General classification rules.

* * * * *

(a) Each month, the market administrator shall correct for mathematical and other obvious errors, the reports submitted by each handler pursuant to § 1012.30 and compute the total pounds of skim milk and butterfat, respectively, in each class at each pool plant.

* * * * *

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1012.9 (b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association.

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1012.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1012.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1012.44 is revised to read as follows:

§ 1012.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1012.9(a) for each of the handler's pool plants separately and of each handler described in § 1012.9 (b) and (c) by allocating the handler's receipts of skim milk and butterfat to such handler's utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1012.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I the remainder of such receipts.

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1012.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1012.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(5) or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1012.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1012.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II; and

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form

of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1012.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2)(i) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant.

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk unconcentrated fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1012.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever

of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1012.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler):

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1012.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as *overage;*

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

8. Section 1012.45 is amended by changing the reference "§ 1012.44(a)(9)" to "§ 1012.44(a)(12)" in paragraph (a) and revising paragraph (b) to read as follows:

§ 1012.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1012.43(d) and § 1012.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1012.50 is amended by adding a new paragraph (c) to read as follows:

§ 1012.50 Class prices.

* * * * *

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

9. Section 1012.60 is revised to read as follows:

§ 1012.60 Handler's value of milk for computing the uniform price.

For the purpose of computing the uniform price the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1012.9 (b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1012.44(c) by the applicable class prices and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1012.44(a)(14) and the corresponding step of § 1012.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1012.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1012.44(a)(9) and the corresponding step of § 1012.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1012.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1012.44(a)(7)(i) through (iv) and the corresponding step of § 1012.44(b), excluding receipts of bulk fluid cream products from another order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1012.44(a)(7)(v) and (vi) and the corresponding step of § 1012.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1012.43(d) and § 1012.44(a)(7)(i) and the pounds of skim milk and butterfat

subtracted from Class I pursuant to § 1012.44(a)(11) and the corresponding steps of § 1012.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1012.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1012.76(b)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1012.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows:

§ 1012.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant and milk or skim milk contained in receipts from producer-handlers and exempt plants defined in any order disposed of as route disposition in the marketing area;

* * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location, and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less then the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1012.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1012.85 is amended by revising paragraph (b) to read as follows:

§ 1012.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1012.43(d) and other source milk allocated to Class I pursuant to § 1012.44 (a)(7) and (a)(11) and the corresponding steps of § 1012.44(b), except such other source milk that is excluded from the computations pursuant to § 1012.60 (d) and (f); and

* * * * *

PART 1013—MILK IN THE SOUTHEASTERN FLORIDA MARKETING AREA

1. Section 1013.15 is revised to read as follows:

§ 1013.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1013.16 is revised to read as follows:

§ 1013.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat.

with or without the addition of other ingredients.

3. A new § 1013.20 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1013.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1013.13, 1013 41 and 1013.52.

4. Section 1013.40 is revised to read as follows:

§ 1013.40 Classes of utilization.

Except as provided in § 1013.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1013.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat.

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1013.15 and the fluid cream product definition pursuant to § 1013.16; and

(7) In shrinkage assigned pursuant to § 1013.41(a) to the receipts specified in § 1013.41(a)(2) and in shrinkage specified in § 1013.41 (b) and (c).

5. Section 1013.42 is revised to read as follows:

§ 1013.42 Classification of transfers and diversions.

(a) *Transfers to pool plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1013.44(a)(12) and the corresponding step of § 1013.44(b). The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1013.44(a)(7) or the corresponding step of § 1013.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to

be allocated pursuant to § 1013.44 (a)(11) or (a)(12) or the corresponding steps of § 1013.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1), (b)(2), or (b)(3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1013.40.

(c) *Transfers to producer-handlers.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant or a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i)(A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2)(ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1013.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

6. Section 1013.43 is amended by adding new paragraphs (c) and (d), to read as follows:

§ 1013.43 General classification rules.

* * * * *

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1013.9 (b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association.

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1013.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1013 44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1013.44 is revised to read as follows:

§ 1013.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1013.9(a) for each of the handler's pool plants separately and of each handler described in § 1013.9 (b) and (c) by allocating the handler's receipts of skim milk and butterfat to such handler's utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1013 41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I the remainder of such receipts.

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1013.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1013.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(5) or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1013.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1013.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1013.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2)(i) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant.

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk unconcentrated fluid milk products from an other order plant that are in excess of bulk unconcentrated fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1013.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1013.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler):

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest

plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1013.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as *overage;*

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

8. Section 1013.45 is amended by changing the reference "§ 1013.44(a)(10)" to "§ 1013.44(a)(12)" in paragraph (a) and revising paragraph (b) to read as follows:

§ 1013.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1013.43(d) and § 1013.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1013.50 is amended by revising paragraph (c) to read as follows:

§ 1013.50 Class prices.

* * * * *

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

10. Section 1013.60 is revised to read as follows:

§ 1013.60 Handler's value of milk for computing the uniform price.

For the purpose of computing the uniform price the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1013.9 (b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1013.44(c) by the applicable class prices and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1013.44(a)(14) and the corresponding step of § 1013.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1013.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1013.44(a)(9) and the corresponding step of § 1013.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1013.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1013.44(a)(7) (i) through (iv) and the corresponding step of § 1013.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1013.44(a)(7) (v) and (vi) and the corresponding step of § 1013.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1013.43(d) and § 1013.44(a)(7) (i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1013.44(a) (11) and the corresponding steps of § 1013.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1013.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1013.76(b)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1013.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows:

§ 1013.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Deduct from any remainder the pounds of reconstituted milk that are made from nonfluid milk products and milk or skim milk contained in receipts from producer-handlers and exempt plants defined in any other order, which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location, and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1013.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1013.85 is amended by revising paragraph (a)(2) to read as follows:

§ 1013.85 Assessment for order administration.

(a) * * *

(2) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1013.43(d) and other source milk allocated to Class I pursuant to § 1013.44(a)(6), (a)(7) and (a)(11) and the corresponding steps of § 1013.44(b), except such other source milk that is excluded from the computations pursuant to § 1013.60(d) and (f); and

* * * * *

PART 1030—MILK IN THE CHICAGO REGIONAL MARKETING AREA

1. Section 1030.15 is revised to read as follows:

§ 1030.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1030.16 is revised to read as follows:

§ 1030.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1030.21 is added under the heading "Definitions" to read as follows:

§ 1030.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1030.13, 1030.41 and 1030.52.

4. Section 1030.40 is revised to read as follows:

§ 1030.40 Classes of utilization.

Except as provided in § 1030.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1030.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta

cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1030.15 and the fluid cream product definition pursuant to § 1030.16; and

(7) In shrinkage assigned pursuant to § 1030.41(a) to the receipts specified in § 1030.41(a)(2) and in shrinkage specified in § 1030.41 (b) and (c).

5. Section 1030.42 is amended by adding the following sentence at the end of paragraph (a), and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1030.42 Classification of transfers and diversions.

* * * * *

(a) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1030.43 is amended by adding a new paragraph (d) to read as follows:

§ 1030.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1030.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1030.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1030.44 is amended by adding a new paragraph (a)(2)(iii); revising the first sentence of paragraph (a)(5); revising paragraphs (a)(6) and (a)(7)(i); redesignating (a)(8)(i) (*a*) and (*b*) as (A) and (B) and revising newly designated (a)(8)(i)(B) and (a)(9), to read as follows:

§ 1030.44 Classification of producer milk.

* * * * *

(a) * * *

(2) * * *

(iii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1030 40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1030.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1030.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1030.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(8) * * *

(i) * * *

(B) Which are in excess of the pounds of skim milk determined by multiplying the pounds of skim milk remaining in Class I (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler) by 1.25 and subtracting the sum of the pounds of skim milk in receipts of producer milk, fluid milk products from other pool plants, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(iv) of this section; and

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1030.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(iii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1030.45 is amended by revising paragraph (b) to read as follows:

§ 1030.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1030.43(d) and § 1030.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1030.52 is amended by revising paragraphs (c)(1) and (c)(5), to read as follows:

§ 1030.52 Plant location adjustments for handlers.

* * * * *

(c) * * *

(1) Determine the aggregate quantity of Class I milk, excluding beginning inventory of packaged fluid milk products, at such plant (or all pool plants of such handler for which the handler's total receipts are allocated for all such handler's pool plants combined pursuant to §§ 1030.43(d) and 1030.44 after eliminating duplication for transfer between such plants);

* * * * *

(5) Subtract the quantity of bulk fluid milk products received at the handler's pool plant(s) from other order plants and unregulated supply plants that are assigned to Class I pursuant to §§ 1030.43(d) and 1030.44;

* * * * *

10. Section 1030.60 is amended by revising paragraphs (d) and (f), removing "and" after the semicolon in paragraph (g), replacing the period after paragraph (h) with a semicolon, and adding new paragraphs (i), (j) and (k) to read as follows:

§ 1030.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1030.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1030.44(a)(7)(i) through (iv), (vii), and (viii) and the corresponding step of § 1030.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1030.43(d) and § 1030.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1030.44(a)(11) and the corresponding steps of § 1030.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

(i) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1030.43(d);

(j) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1030.76(a)(5) or (c); and

(k) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1030.76 is amended by revising paragraphs (a)(3) and (a)(5) and adding a new paragraph (c) to read as follows:

§ 1030.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the

order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1030.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1030.85 is amended by revising paragraph (b) to read as follows:

§ 1030.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1030.43(d) and other source milk allocated to Class I pursuant to § 1030.44(a)(7) and (a)(11) and the corresponding steps of § 1030.44(b), except such other source milk that is excluded from the computations pursuant to § 1030.60 (d) and (f); and

* * * * *

Part 1032—Milk in the Southern Illinois-Eastern Missouri Marketing Area

1. Section 1032.15 is revised to read as follows:

§ 1032.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1032.16 is revised to read as follows:

§ 1032.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. Section § 1032.19 is revised to read as follows:

§ 1032.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1032.13, 1032.41 and 1032.52.

4. Section 1032.40 is revised to read as follows:

§ 1032.40 Classes of utilization.

Except as provided in § 1032.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1032.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1032.15 and the fluid cream product definition pursuant to § 1032.16; and

(7) In shrinkage assigned pursuant to § 1032.41(a) to the receipts specified in § 1032.41(a)(2) and in shrinkage specified in § 1032.41(b) and (c).

5. Section 1032.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1032.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1032.43 is amended by adding a new paragraph (d) to read as follows:

§ 1032.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1032.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1032.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1032.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1032.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1032.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1032.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1032.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1032.40(b)(1) that was not

subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1032.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1032.45 is amended by revising paragraph (b) to read as follows:

§ 1032.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1032.43(d) and § 1032.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1032.60 is amended by revising paragraphs (d), (f), and (g) and adding new paragraphs (h) and (i) to read as follows:

§ 1032.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1032.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1032.44(a)(7) (i) through (iv) and the corresponding step of § 1032.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1032.43(d) and § 1032.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1032.44(a)(11) and the corresponding steps of § 1032.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1032.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1032.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1032.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1032.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1032.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1032.85 is amended by revising paragraph (b) to read as follows:

§ 1032.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1032.43(d) and other source milk allocated to Class I pursuant to § 1032.44(a)(7) and (a)(11) and the corresponding steps of § 1032.44(b), except such other source milk that is excluded from the computations pursuant to § 1032.60(d) and (f); and

* * * * *

1. The table of contents of part 1033 is revised to read as follows:

PART 1033—MILK IN THE OHIO VALLEY MARKETING AREA

General Provisions

1033.1 General provisions.

Definitions

1033.2 Ohio Valley marketing area.
1033.3 Route disposition.
1033.4 Plant.
1033.5 Distributing plant.
1033.6 Supply plant.
1033.7 Pool plant.
1033.8 Nonpool plant.
1033.9 Handler.
1033.10 Producer-handler.
1033.12 Producer.
1033.13 Producer milk.
1033.14 Other source milk.
1033.15 Fluid milk product.
1033.16 Fluid cream product.
1033.17 Filled milk.
1033.19 Cooperative association.
1033.20 Product prices.
1033.21 Commercial food processing establishment.

Handler Reports

1033.30 Reports of receipts and utilization.
1033.31 Payroll reports.
1033.32 Other reports.

Classification of Milk

1033.40 Classes of utilization.
1033.41 Shrinkage.
1033.42 Classification of transfers and diversions.
1033.43 General classification rules.
1033.44 Classification of producer milk.
1033.45 Market administrator's reports and announcements concerning classification.

Class Prices

1033.50 Class prices
1033.51 Basic formula prices.
1033.52 Plant location adjustments for handlers.
1033.53 Announcement of class prices.
1033.54 Use of equivalent prices.

Uniform Price

1033.60 Handler's value of milk for computing uniform price.
1033.61 Computation of the uniform price.

Payments for Milk

1033.70 Producer-settlement fund.
1033.71 Payments to the market administrator.
1033.72 Payments to producers and to cooperative associations.
1033.73 Butterfat differential.
1033.74 Plant location adjustments for producers and on nonpool milk.
1033.76 Payments by handler operating a partially regulated distributing plant.
1033.77 Correction of errors.
1033.78 Charges on overdue accounts.

Administrative Assessment and Marketing Service Deduction

1033.85 Assessment for order administration.
1033.86 Deduction for marketing services.

Authority: Secs. 1–19, 48 Stat. 31, as amended 7 U.S.C. 601–674.

§ 1033.6 [Redesignated as § 1033.2.]

2. Section 1033.6 is re-designated as § 1033.2.

§ 1033.8 [Redesignated as § 1033.3.]

3. Section 1033.8 is re-designated as § 1033.3, and amended by changing the reference "§ 1033.41(a)" to "§ 1033.40(a)".

§ 1033.9 [Redesignated as § 1033.4.]

4. Section 1033.9 is re-designated as § 1033.4.

§ 1033.19 [Removed]

§ 1033.5 [Redesignated as § 1033.19.]

5. Section 1033.19 is removed, and § 1033.5 is re-designated as § 1033.19.

§ 1033.10 [Redesignated as § 1033.5.]

6. Section 1033.10 is re-designated as § 1033.5.

§ 1033.11 [Redesignated as § 1033.6.]

7. Section 1033.11 is re-designated as § 1033.6.

§ 1033.13 [Redesignated as § 1033.8.]

8. Section 1033.13 is re-designated as § 1033.8.

§ 1033.16 [Redesignated as § 1033.9.]

9. Section 1033.16 is re-designated as § 1033.9 and amended by changing the reference "§ 1033.15" in paragraph (b) to "§ 1033.13", the reference "§ 1033.17" in paragraph (e) to "§ 1033.10" and the reference "§ 1033.56" in paragraph (f) to "§ 1033.7(d)".

§ 1033.17 [Redesignated as § 1033.10.]

10. Section 1033.17 is re-designated as § 1033.10.

§ 1033.15 [Redesignated as § 1033.13.]

11. Section 1033.15 is re-designated as § 1033.13, and amended by changing all references to "§ 1033.16" to "§ 1033.9".

§ 1033.7 [Redesignated as § 1033.15.]

12. Section 1033.7 is re-designated as § 1033.15, and revised to read as follows:

§ 1033.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

§ 1033.12 [Redesignated as § 1033.7.]

13. Section 1033.12 is re-designated as § 1033.7 and amended in the introductory text by changing the reference "§ 1033.56" to "paragraph (d) of this section", in paragraph (b) introductory text by changing the reference "§ 1033.16(c)" to "§ 1033.9(c)" and adding a new paragraph (d) to read as follows:

§ 1033.7 Pool plant.

* * * * *

(d) The term *pool plant* shall not apply to the following plants:

(1) A producer-handler plant;

(2) A plant subject to the classification and pricing provisions of another order issued pursuant to the Act, unless the plant is qualified as a pool plant pursuant to paragraph (a) or (b) of this section during the current month and the immediately preceding month and a greater volume of fluid milk products, except filled milk, is disposed of in each such month from such plant as route disposition in the Ohio Valley marketing area than is disposed of from such plant as route disposition in the

marketing area regulated pursuant to the other order and to plants qualified as fully regulated plants under such other order on the basis of route disposition in the marketing area;

(3) A plant qualified pursuant to § 1033.7(a) which also meets the requirements of a fully regulated plant pursuant to the provisions of another Federal order on the basis of distribution in such other marketing area and from which the Secretary determines route disposition, except filled milk, during the month in this marketing area is greater than route disposition in such other marketing area but which plant is, nevertheless, fully regulated under such other Federal order.

§ 1033.14 [Redesignated as § 1033.12.]

14. Section 1033.14 is re-designated as § 1033.12, and amended by changing the following references:

a. In paragraph (a)(2), the reference "§ 1033.16(c)" is changed to "§ 1033.9(c)";

b. In paragraph (a)(3), the reference "§ 1033.15" is changed to "§ 1033.13"; and

c. In paragraph (b)(2), the reference "§ 1033.46(a)(8)(ii) and the corresponding step of § 1033.46(b)" is changed to "§ 1033.44(a)(8)(ii) and the corresponding step of § 1033.44(b)".

§ 1033.18 [Redesignated as § 1033.14.]

15. Section 1033.18 is re-designated as § 1033.14, and amended in paragraph (b) by changing the reference "§ 1033.41(b)(1) and (b)(3)" to "§ 1033.40(b)(1) and (b)(4)".

16. A new § 1033.16 is added to read as follows:

§ 1033.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

17. Section 1033.20 is re-designated as § 1033.17.

18. Section 1033.21 is re-designated as § 1033.20 and amended in the introductory text by changing the reference "§ 1033.51a" to "§ 1033.51(b)".

19. A new § 1033.21 is added to read as follows:

§ 1033.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1033.13, 1033.41 and 1033.52.

§ 1033.27 [Removed.]

20. Section 1033.27 is removed.

§ 1033.30 [Amended.]

21. Section 1033.30 is amended by changing the following references:

a. In paragraphs (a)(1)(iv) and (a)(2), the reference "§ 1033.41(b)(1)" is changed to "§ 1033.40(b)(1)";

b. In paragraph (b)(1) introductory text, the reference "§ 1033.16(b) or (c)" is changed to "§ 1033.9(b) or (c)"; and

c. In paragraph (b)(2) introductory text, the reference "§ 1033.15(b)" is changed to "§ 1033.13(b)".

§§ 1033.31, 1033.32 [Redesignated as §§ 1033.32 and 1033.31.]

22. Section 1033.31 is re-designated as § 1033.32, and § 1033.32 is re-designated as § 1033.31. Re-designated § 1033.31 is amended by changing the reference "§ 1033.57(a)" in paragraph (b) to "§ 1033.76(a)"; and re-designated § 1033.32 is amended by changing the references "§ 1033.16(c)" in paragraphs (c)(4), (d)(3) and (e)(4) to "§ 1033.9(c)", and the reference "§ 1033.32" in paragraph (g) to "§ 1033.31".

§ 1033.40 [Removed.]

§ 1033.41 [Redesignated as § 1033.40.]

23. Section 1033.40 is removed and § 1033.41 is redesignated as § 1033.40, and revised to read as follows:

§ 1033.40 Classes of utilization.

Except as provided in § 1033.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1033.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butter oil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk

products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1033.15 and the fluid cream product definition pursuant to § 1033.16; and

(7) In shrinkage assigned pursuant to § 1033.41(a) to the receipts specified in § 1033.41(a)(2) and in shrinkage specified in § 1033.41 (b) and (c).

§ 1033.42 [Redesignated as § 1033.41.]

24. Section 1033.42 is re-designated as § 1033.41, and revised to read as follows:

§ 1033.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1033.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b) (1) through (6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraphs (b) (1) through (6) of this section which was received in bulk fluid form;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1033.9(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1033.9(c) and in milk diverted to such plant from another pool plant, except that, in either case, if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph (b)(2) shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraphs (b)(1), (b)(2), (b)(4), (b)(5), and (b)(6) of this section; and

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1033.9 (b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1033.43 [Redesignated as § 1033.42.]

25. Section 1033.43 is re-designated as § 1033.42, and revised to read as follows:

§ 1033.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant or divertee-plant after the computations pursuant to § 1033.44(a)(12) and the corresponding step of § 1033.44(b). The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

(2) If the transferor-plant or divertor-plant received during the month other source milk to be allocated pursuant to § 1033.44(a)(7) or the corresponding step of § 1033.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler or divertor-handler received during the month other source milk to be allocated pursuant to § 1033.44(a) (11) or (12) or the corresponding steps of § 1033.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater

extent than would be the case if the other source milk had been received at the transferee-plant or divertee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b) (1), (2), or (3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1033.40.

(c) *Transfers to producer-handlers.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.*

Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant or a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i)(A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2)(ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1033.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of

the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

§ 1033.45 [Redesignated as § 1033.43]

26. Section 1033.45 is re-designated as § 1033.43, and revised to read as follows:

§ 1033.43 General classification rules.

In determining the classification of producer milk pursuant to § 1033.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1033.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1033.9(b) or (c) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1033.40, 1033.41, and 1033.42;

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids;

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1033.9(b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association;

(d) Bulk fluid milk products transferred or diverted from a pool plant operated by a cooperative association to another pool plant shall be classified in accordance with the rules set forth in § 1033.42(a) and the value thereof at class prices (applicable at the location of the transferee-plant) shall be used to compute the receiving handler's pool obligation for such milk pursuant to § 1033.60; and

(e) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1033.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1033.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

27. A new § 1033.44 is added to read as follows:

§ 1033.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1033.9(a) for each of its pool plants separately and of each handler described in § 1033.9(b) and (c) by allocating the handler's receipts of skim milk and butterfat to its utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1033.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order; and

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk in fluid milk products received in packaged form from another order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1033.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1033.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1033.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1033.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1033.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) and bulk cream for which bottling grade certification is not established;

(iii) Receipts of fluid milk products and bulk cream from unidentified sources;

(iv) Receipts of fluid milk products and bulk cream from a producer-handler, as defined under this or any other Federal order;

(v) Receipts of reconstituted skim milk in filled milk from unregulated supply plants that were not subtracted pursuant to paragraph (a)(2)(i) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant.

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests classification other than Class I, but not

in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step (exclusive of transfers between pool plants of the same handler) at all pool plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants remaining at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) Receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1033.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (5) and (7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11)(i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (7)(v), and (8)(i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12)(ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1033.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler):

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such

excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1033.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as overage;

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

28. A new § 1033.45 is added to read as follows:

§ 1033.45 Market administrator's reports and announcements concerning classification.

The market administrator shall make the following reports and announcements concerning classification:

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1033.44(a)(12) and the corresponding step of § 1033.44(b), estimate and publicly announce on or before the 10th day of the month the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose;

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1033.43(a) and § 1033.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and, thereafter, any change in such allocation required to correct errors disclosed in the verification of such report; and

(c) Furnish to each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to an other order plant, the class to which such shipments were allocated by the market administrator of the other order on the basis of the report of the receiving handler and, as necessary, any changes in such allocation arising from the verification of such report.

(d) On or before the 14th day after the end of each month, report to each cooperative association, upon request by such association, the percentage of the milk caused to be delivered by the cooperative association or its members which was utilized in each class at each pool plant receiving such milk. For the purpose of this report, the milk so received shall be allocated to each class at each pool plant in the same ratio as all producer milk received at such plant during the month.

§ 1033.46 [Removed]

29. Section 1033.46 is removed.

§ 1033.50 [Removed]

30. Section 1033.50 is removed.

§ 1033.51 [Redesignated as § 1033.50]

31. Section 1033.51 is re-designated as § 1033.50 and amended by changing the reference "§ 1033.53" in the introductory language to "§ 1033.52", the reference "§ 1033.51a" in paragraph (b) introductory text to "§ 1033.51(b)", the reference "§ 1033.50" in paragraph (b)(1) to "§ 1033.50(a)", and the reference "§ 1033.51a" in paragraph (b)(2) to "§ 1033.51(b)".

32. A new § 1033.51 is added to read as follows:

§ 1033.51 Basic formula prices.

(a) The *basic formula price* shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1033.73 shall be used.

(b) The *basic Class II formula price for* the month shall be the basic formula price determined pursuant to § 1033.51(a) for the second preceding month plus or minus the amount computed pursuant to paragraphs (b)(1) through (4) of this section:

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1033.20 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(i) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(A) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(B) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(C) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(ii) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(A) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(B) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(2) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(3) Compute weighting factors to be applied to the changes in gross values

determined pursuant to paragraph (b)(2) of this section by determining the relative proportion that the data included in each of the following subparagraphs is of the total of the data represented in paragraphs (b)(3)(i) and (ii) of this section:

(i) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b)(2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

§ 1033.51a [Removed]

33. Section 1033.51a is removed.

§ 1033.53 [Redesigned as § 1033.52]

34. Section 1033.53 is re-designated as § 1033.52, and amended by changing the reference "§ 1033.51(a)" in paragraph (a) introductory text to "§ 1033.50(a)", the reference "§ 1033.6" in paragraph (a)(1) to "§ 1033.2", and by revising paragraph (b), to read as follows:

§ 1033.52 Plant location adjustments for handlers.

* * * * *

(b) For the purpose of determining the quantity of Class I producer milk on which a location adjustment shall apply under paragraph (a) of this section, the quantity of fluid milk products transferred as Class I milk from pool plants to a pool distributing plant at which the Class I price is greater than the Class I price at the transferor plant shall be assigned pro rata with the receipts of producer milk at the transferee plant to the Class I milk remaining at such transferee plant after the assignments pursuant to § 1033.44(a)(1) through (a)(12) and the corresponding steps of § 1033.44(b) plus the pounds of skim milk and butterfat in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use. The Class I utilization so assigned to the transferred fluid milk products then shall be allocated first to receipts from plants at which the Class I price is not less than the Class I price at the transferee plant, and then to receipts from plants with lower Class I prices, in sequence beginning with the plant having the highest Class I price.

* * * * *

35. A new § 1033.53 is added to read as follows:

§ 1033.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month, the Class III price for the preceding month, and on or before the 15th day of each month the Class II price for the following month computed pursuant to § 1033.50(b).

§ 1033.56 [Removed]

36. Section 1033.56 is removed.

37. Section 1033.60 is revised to read as follows:

§ 1033.60 Handler's value of milk for computing uniform price.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk for each pool plant of each handler and for each handler pursuant to § 1033.9(b) and (c) as follows:

(a) Multiply the pounds of producer milk in each class as determined pursuant to § 1033.44(c) and the pounds of bulk fluid milk products received from a pool plant operated by a cooperative association pursuant to § 1033.43(d) in each class as determined pursuant to § 1033.42(a) by the applicable class price and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage deducted from each class pursuant to § 1033.44(a)(14) and the corresponding step of § 1033.44(b) by the applicable class price, as adjusted by the butterfat differential specified in § 1033.73;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I or Class II price for the current month, as the case may be, by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1033.44(a)(9) and the corresponding step of § 1033.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price at the pool plant and Class III price, both for the current month, by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1033.43(e) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to 1033.44(a)(7)(i) through (iv) and the corresponding steps of § 1033.44(b) excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants, and unregulated supply plants, except that for receipts of fluid milk products assigned to Class I pursuant to § 1033.44(a)(7)(v) and (vi) and the corresponding steps of § 1033.44(b) the Class I price shall be adjusted to the location of the transferor plant (but not to be less than the Class III price);

(e) Add the amount obtained from multiplying the Class I price adjusted for the location of the nearest unregulated supply plants from which an equivalent volume was received, but not to be less than the Class III price, by the hundredweight of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1033.43(e) and § 1033.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1033.44(a)(11) and the corresponding steps of § 1033.44(b), excluding such skim milk or butterfat in bulk receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers under this or any other order issued pursuant to the Act is classified and priced as Class I milk and is not used as an offset on any other payment obligation under this or any other order;

(f) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1033.43(e);

(g) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1033.76(b)(5) or (c); and

(h) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per

hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

§ 1033.61 [Amended]

38. Section 1033.61 is amended by changing the reference "§ 1033.60(g)" in paragraph (f)(2) to "§ 1033.60(e)".

39. In § 1033.70, paragraph (c) is removed and paragraph (a) is revised and paragraph (b) is added to read as follows:

§ 1033.70 Producer-Settlement fund.

(a) All payments made by handlers pursuant to §§ 1033.71, 1033.76, and 1033.77 shall be deposited in this fund, and all payments made pursuant to §§ 1033.72 and 1033.77 shall be made out of this fund;

(b) The difference between the amount added pursuant to § 1033.61(e) and the amount resulting from the subtraction pursuant to § 1033.61(g) shall be deposited in, or withdrawn from, this fund, as the case may be.

40. Section 1033.71 is amended by changing the reference "paragraph (c)" in paragraph (a) and the introductory text of paragraph (b) to "paragraph (d)", changing the references "§ 1033.60(g)" in paragraph (b) introductory text and paragraph (b)(1) to "§ 1033.60(e)", redesignating paragraph (c) as paragraph (d), adding a new paragraph (c) and revising the introductory text of redesignated paragraph (d) to read as follows:

§ 1033.71 Payments to the market administrator.

* * * * *

(c) Subject to paragraph (d) of this section, each handler operating a distributing plant that is subject to the classification and pricing provisions of another order which provides for individual handler pooling shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month an amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk disposed of as route disposition in the marketing area which was allocated to Class I at such other order plant. If reconstituted skim milk in filled milk is disposed of from such plant as route disposition in marketing areas regulated by two or more marketwide pool orders, the reconstituted skim milk assigned to Class I shall be prorated according to the route disposition in each marketing area; and

(2) Compute the value of the quantity of reconstituted skim milk assigned in paragraph (b)(1) of this section to route disposition in this marketing area at the Class I price under this part applicable at the location of the other order plant (not to be less than the Class III price) and subtract its value at the Class III price.

(d) The following conditions shall apply with respect to the payments prescribed in paragraphs (a), (b) and (c) of this section:

* * * * *

§ 1033.72 [Amended]

41. Section 1033.72 is amended by changing the reference "§ 1033.75" in paragraph (b)(2) to "§ 1033.86" and the reference "§ 1033.71(c)(2)" in paragraph (e)(2) to "§ 1033.71(d)(2)".

42. Section 1033.74 is revised to read as follows:

§ 1033.74 Plant location adjustments for producers and on nonpool milk.

(a) The uniform price for producer milk at a plant outside the Central Zone shall be the Central Zone uniform price adjusted according to the location of the plant at the rates set forth in § 1033.52(a); and

(b) For the purpose of computations pursuant to § 1033.71(b)(1), the weighted average price shall be adjusted at the rate set forth in § 1033.52(a) that is applicable at the location of the nonpool plant from which other source milk was received.

§ 1033.75 [Redesignated as § 1033.86]

43. Section 1033.75 is re-designated as § 1033.86 and the title of re-designated § 1033.86 is revised to "Deduction for marketing services."

§ 1033.76 [Redesignated as § 1033.85]

44. Section 1033.76 is re-designated as § 1033.85, the title of re-designated § 1033.85 is revised to "Assessment for order administration.", re-designated § 1033.85 is amended by changing the following references: in paragraph (a), the reference "§ 1033.16(c)" is changed to "§ 1033.9(c)"; in paragraphs (a) and (b), the reference "§ 1033.45(d)" is changed to "§ 1033.43(d)"; in paragraph (d)(2), the reference "§ 1033.57(b)(2)(ii)" is changed to "§ 1033.76(b)(2)(ii)"; and by revising paragraph (c) to read as follows:

§ 1033.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1033.43(e) and other source milk allocated to Class I pursuant to § 1033.44 (a)(7) and (a)(11) and the corresponding steps of § 1033.44(b), except such other source milk that is excluded from the computations pursuant to § 1033.60 (d) and (e); and

* * * * *

§ 1033.57 [Redesignated as § 1033.76]

45. Section 1033.57 is re-designated as § 1033.76, and re-designated § 1033.76 is amended by revising the section heading changing the reference "§ 1033.32(b)" in the introductory text and in paragraph (a)(1)(ii) to "§ 1033.31(b)", the reference "§ 1033.60(g)" in paragraph (a)(1)(i) to "§ 1033.60(e)", and the reference "§ 1033.12(b)" in paragraph (a)(1)(ii) to "§ 1033.7(b)"; revising paragraphs (b)(3) and (b)(5) and adding a new paragraph (c) to read as follows:

§ 1033.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) From the value of such milk at the Class I price applicable at the location of the nonpool plant (not to be less than the Class III price) subtract its value at the weighted average price applicable at such location (not to be less than the Class III price), and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than

the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1033.43(e). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

46. The center headings in part 1033 would be removed and new center headings would be added to proceed the redesignated sections as follows:

a. Preceding § 1033.1, "General Provisions";

b. Preceding § 1033.2, "Definitions";

c. Preceding § 1033.30, "Handler Reports";

d. Preceding § 1033.40, "Classification of Milk";

e. Preceding § 1033.50, "Class Prices";

f. Preceding § 1033.60, "Uniform Price";

g. Preceding § 1033.70, "Payments for Milk"; and

h. Preceding § 1033.85, "Administrative Assessment and Marketing Service Deduction".

PART 1036—MILK IN THE EASTERN OHIO-WESTERN PENNSYLVANIA MARKETING AREA

1. Section 1036.15 is revised to read as follows:

§ 1036.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, (concentrated to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1036.16 is revised to read as follows:

§ 1036.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1036.21 is added under the undesignated centered heading "Definitions" to read as follows:

§ 1036.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1036.13, 1036.41 and 1036.52.

4. Section 1036.40 is revised to read as follows:

§ 1036.40 Classes of utilization.

Except as provided in § 1036.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1036.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the

public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)-(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)-(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1036.15 and the fluid cream product definition pursuant to § 1036.16; and

(7) In shrinkage assigned pursuant to § 1036.41(a) to the receipts specified in § 1036.41(a)(2) and in shrinkage specified in § 1036.41(b) and (c).

5. Section 1036.41 is revised to read as follows:

§ 1036.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1036.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b)(1) through (b)(6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraphs (b)(1) through (b)(6) of this section which was received in bulk fluid form;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1036.9(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1036.9(c) and in milk diverted to such plant from another pool plant, except that, in either case, if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph (b)(2) shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraphs (b)(1), (b)(2), (b)(4), (b)(5), and (b)(6) of this section; and

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1036.9(b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

6. Section 1036.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraph (c)(3)(iv) to read as follows:

§ 1036.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(c) * * *

(3) * * *

(iv) To the extent that Class I utilization is not so assigned to it, the skim milk and butterfat so transferred or diverted shall be classified as Class II milk to the extent Class II utilization is available and the remainder as Class III milk; and;

* * * * *

7. Section 1036.43 is revised to read as follows:

§ 1036.43 General classification rules.

In determining the classification of producer milk pursuant to § 1036.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1036.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1036.9 (b) or (c) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1036.40, 1036.41, and 1036.42;

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids;

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1036.9 (b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association; and

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1036.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1036.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

8. Section 1036.44 is amended as follows:

a. Revising paragraphs (a)(1) and (a)(2);

b. Revising paragraph (a)(3)(i);

c. Revising paragraph (a)(5);

d. Revising paragraph (a)(6);

e. Revising paragraph (a)(7)(i);

f. Changing the reference "(a)(2) in paragraph (a)(7)(iv) to "(a)(2)(i)";

g. Revising paragraphs (a)(8) through (a)(15);

h. Removing paragraph (a)(16);

i. Changing the reference "§ 1036.44(a)(16)" in paragraph (c) to "§ 1036.44(a)(15)";

The revisions as set forth above, read as follows:

§ 1036.44 Classification of producer milk.

* * * * *

(a) * * *

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk classified as Class III milk pursuant to § 1036.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) * * *

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in fluid cream products in packaged form and in bulk concentrated fluid milk products that are in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1036.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1036.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1036.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (7)(iv) of this section for which the handler requests classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(iv) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step (exclusive of transfers between pool plants of the same handler) at all pool plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(v) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants remaining at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) Receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(v) of this section, if Class II or Class III classification is

requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1036.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(iv), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(v) and (a)(8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1036.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler):

(ii) Should the proportion pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1036.42(a);

(14) Subtract from the pounds of skim milk remaining in each class, pro rata to such quantities, the pounds of skim milk in receipts of milk from a handler defined in § 1036.9(c) that also operates a pool plant;

(15) If the pounds of skim milk remaining exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

* * * * *

Section 1036.45 is amended by revising paragraph (b) to read as follows:

§ 1036.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received

from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1036.43(d) and § 1036.44 on the basis of such report (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1036.60 is amended by revising paragraphs (d), (e), and (f), and adding new paragraphs (g) and (h) to read as follows:

§ 1036.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price at the pool plant and the Class III price, both for the current month, by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1036.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1036.44 (a)(7) and (a)(8) and the corresponding steps of § 1036.44(b) (excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants), except that for receipts of fluid milk products assigned to Class I pursuant to § 1036.44(a)(7) (iv) and (v) and the corresponding step of § 1036.44(b) the Class I price shall be adjusted to the location of the transferor plant;

(e) Add the amount obtained from multiplying the Class I price adjusted for the location of the nearest nonpool plants from which an equivalent volume was received by the hundredweight of skim milk and butter in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1036.43(d) and § 1036.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1036.44(a)(11) and the corresponding steps of § 1036.44(b), excluding such skim milk or butterfat in bulk receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under this or any other order issued pursuant to the act is classified and priced as Class I milk and is not used as an offset on any other payment obligation under this or any other order.

(f) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1036.43(d);

(g) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1036.76 (b)(5) or (c); and

(h) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1036.76 is amended by revising paragraphs (b)(3) and (b)(5) and by adding a new paragraph (c) to read as follows:

§ 1036.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1036.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1036.85 is amended by revising paragraph (a) to read as follows:

§ 1036.85 Assessment for order administration.

* * * * *

(a) Each handler with respect to his receipts of producer milk (including such handler's own-farm production and milk recieved from a cooperative association pursuant to § 1036.9(c)), fluid milk products transferred or diverted in bulk from a pool plant operated by a cooperative association and receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1036.43(d) and other source milk allocated to Class I pursuant to § 1036.44 (a)(7) and (a)(11) and the corresponding steps of § 1036.44(b),

except such other source milk that is excluded from the computations pursuant to § 1036.60 (d) and (e); and

* * * * *

PART 1040—MILK IN THE SOUTHERN MICHIGAN MARKETING AREA

1. Section 1040.15 is revised to read as follows:

§ 1040.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1040.16 is revised to read as follows:

§ 1040.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1040.19 is added to read as follows:

§ 1040.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1040.13, 1040.41 and 1040.52.

4. Section 1040.40 is revised to read as follows:

§ 1040.40 Classes of utilization.

Except as provided in § 1040.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1040.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1040.15 and the fluid cream product definition pursuant to § 1040.16; and

(7) In shrinkage assigned pursuant to § 1040.41(a) to the receipts specified in § 1040.41(a)(2) and in shrinkage specified in § 1040.41(b) and (c).

5. Section 1040.41 is amended by revising paragraph (a)(2) to read as follows:

§ 1040.41 Shrinkage.

* * * * *

(a) * * *

(2) In other source milk not specified in paragraphs (b)(1) through (6) of this section which was received in bulk fluid form;

* * * * *

6. Section 1040.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1040.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

7. Section 1040.43 is amended by adding a new paragraph (e) to read as follows:

§ 1040.43 General classification rules.

* * * * *

(e) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1040.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1040.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

8. Section 1040.44 is amended as follows:

a. Revising paragraph (a)(2);

b. Revising paragraphs (a)(5) and (a)(6);

c. Revising paragraphs (a)(7)(i) through (a)(7)(iv);

d. Changing the reference "(a)(2)" in paragraphs (a)(7)(v) and (a)(8)(i) to "(a)(2)(i)";

e. Revising paragraph (a)(8)(ii);

f. Revising paragraph (a)(9);

g. Revising paragraph (a)(11);

h. Changing the reference "(a)(12)(i)" in paragraph (a)(12)(i) introductory text to "(a)(12) (ii), (iii) and (iv)";

i. Revising paragraphs (a)(12)(i)(B) and (a)(12)(ii);

j. Adding new paragraphs (a)(12) (iii) and (iv);

The additions and revisions as set forth above, read as follows:

§ 1040.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Except for the first month that a pool plant is subject to this paragraph, subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1040.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1040.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1040.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1040.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) and bulk cream for which Grade A certification is not established;

(iii) Receipts of fluid milk products and bulk cream from unidentified sources;

(iv) Receipts of fluid milk products and bulk cream from a producer-handler, as defined under this or any other Federal order;

* * * * *

(8) * * *

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (7)(v), and (8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like

amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step (exclusive of transfers between pool plants of the same handler) at all pool plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants remaining at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1040.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs 1040.44(a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) * * *

(i) * * *

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler):

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

* * * * *

9. Section 1040.45 is amended by revising paragraph (b) to read as follows:

§ 1040.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1040.43(e) and § 1040.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

10. Section 1040.60 is amended by revising paragraphs (d), (f), (g) and (h) and adding a new paragraph (i) to read as follows:

§ 1040.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1040.43(e) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1040.44(a)(7) (i) through (iv) and the corresponding step of § 1040.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1040.43(e) and § 1040.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1040.44(a)(11) and the corresponding steps of § 1040.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1040.43(e);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1040.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1040.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1040.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1040.43(e). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1040.85 is amended by revising paragraph (b) to read as follows:

§ 1040.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1040.43(e) and other source milk allocated to Class I pursuant to § 1040.44(a)(7) and (a)(11) and the corresponding steps of § 1040.44(b), except such other source milk that is excluded from the computations pursuant to § 1040.60(d) and (f); and

* * * * *

PART 1044—MILK IN THE MICHIGAN UPPER PENINSULA MARKETING AREA

1. Section 1044.6 is revised to read as follows:

§ 1044.6 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary

use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. A new § 1044.18 is added to read as follows:

§ 1044.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1044.20 is added under "General provisions and definitions" to read as follows:

§ 1044.20 Product prices.

The following product prices shall be used in calculating the basic Class II formula price pursuant to § 1044.51(b):

(a) *Butter price.* "Butter price" means the simple average, for the first 15 days of the month, of the daily prices per pound of Grade A (92-score) butter. The prices used shall be those of the Chicago Mercantile Exchange as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday, except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week shall be the last price that was established.

(b) *Cheddar cheese price.* "Cheddar cheese price" means the simple average, for the first 15 days of the month, of the daily prices per pound of cheddar cheese in 40-pound blocks. The prices used shall be those of the National Cheese Exchange (Green Bay, WI), as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week shall be the last price that was established.

(c) *Nonfat dry milk price.* "Nonfat dry milk price" means the simple average, for the first 15 days of the month, of the daily prices per pound of nonfat dry milk, which average shall be computed by the Director of the Dairy Division as follows:

(1) The prices used shall be the prices (using the midpoint of any price range as one price) of high heat, low heat and Grade A nonfat dry milk, respectively, for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service.

(2) For each week, determine the simple average of the prices reported for the three types of nonfat dry milk. Such average shall be the daily price for the day that such prices are reported and for each preceding work-day until the day such prices were previously reported. A work-day is each Monday through Friday except national holidays.

(3) Add the prices determined in paragraph (c)(2) of this section for the first 15 days of the month and divide by the number of days for which there is a daily price.

(d) *Edible whey price.* "Edible whey price" means the simple price average, for the first 15 days of the month, of the daily prices per pound of edible whey powder (nonhygroscopic). The prices used shall be the prices (using the midpoint of any price range as one price) of edible whey powder for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each preceding work-day until the day such price was previously reported. A work-day is each Monday through Friday except national holidays.

4. A new § 1044.21 is added under the heading "General provisions and definitions" to read as follows:

§ 1044.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1044.14, 1044.41 and 1044.53.

5. Section 1044.22 is amended by revising paragraphs (i)(1)(iii), adding a new paragraph (i)(3), and revising paragraph (l), to read as follows:

§ 1044.22 Additional duties of the market administrator.

* * * * *

(i) * * *

(1) * * *

(iii) The Class III price for the preceding month; and

* * * * *

(3) On or before the 15th day of each month the Class II price for the following month computed pursuant to § 1044.50(b).

* * * * *

(l) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1044.43(e) and § 1044.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

6. Section 1044.40 is removed and Section 1044.41 is redesignated as § 1044.40, and revised to read as follows:

§ 1044.40 Classes of utilization.

Except as provided in § 1044.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1044.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1044.6 and the fluid cream product definition pursuant to § 1044.18; and

(7) In shrinkage assigned pursuant to § 1044.41(a) to the receipts specified in § 1044.41(a)(2) and in shrinkage specified in § 1044.41(b) and (c).

§ 1044.42 [Redesignated as § 1044.41]

7. Section 1044.42 is re-designated as § 1044.41 and revised to read as follows:

§ 1044.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1044.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each fluid milk plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b)(1) through (b)(6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraphs (b)(1) through (b)(6) of this section which was received in bulk fluid form;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1044.10(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1044.10(c) and in milk diverted to such plant from another fluid milk plant, except that, in either case, if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph (b)(2) shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other fluid milk plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraphs (b)(1), (b)(2), (b)(4), (b)(5), and (b)(6) of this section; and

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1044.10(c) or (d), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1044.43 [Redesignated as § 1044.42]

8. Section 1044.43 is redesignated as § 1044.42, and revised to read as follows:

§ 1044.42 Classification of transfers.

(a) *Transfers to fluid milk plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a fluid milk plant to another fluid milk plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1044.44 (a)(11) and the corresponding step of § 1044.44(b). The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1044.44(a)(7) or the corresponding step of § 1044.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1044.44(a)(11) or the corresponding steps of § 1044.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

(b) *Transfers to other order plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a fluid milk plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the fluid milk plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1), (b)(2), or (b)(3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1044.40.

(c) *Transfers to producer-handlers and to exempt plants.* Skim milk or butterfat in the following forms that is transferred from a fluid milk plant to a producer-handler under this or any other Federal order or to an exempt plant shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonfluid milk plants.* Skim milk or butterfat transferred or diverted in the following forms from a fluid milk plant to a nonfluid milk plant that is not an other order plant, a producer-handler plant or an exempt plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i)(A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonfluid milk plant's utilization to its receipts as set forth in paragraphs (d)(2)(ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1044.30 for the month within which such transaction occurred; and

(B) The nonfluid milk plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonfluid milk plant and transfers of packaged fluid milk products from such nonfluid milk plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonfluid milk plant from fluid milk plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonfluid milk plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonfluid milk plant from fluid milk plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonfluid milk plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonfluid milk plant shall be

assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonfluid milk plant from fluid milk plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonfluid milk plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonfluid milk plant from fluid milk plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonfluid milk plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonfluid milk plant shall be assigned to the extent possible in the following sequence:

(A) To such nonfluid milk plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonfluid milk plant; and

(B) To such nonfluid milk plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonfluid milk plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonfluid milk plant from fluid milk plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonfluid milk plant;

(vii) Receipts of bulk fluid cream products at the nonfluid milk plant from fluid milk plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonfluid milk plant; and

(viii) In determining the nonfluid milk plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonfluid milk plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

§ 1044.45 [Redesignated as § 1044.43]

9. Section 1044.45 is re-designated as § 1044.43, and revised to read as follows:

§ 1044.43 General classification rules.

In determining the classification of producer milk pursuant to § 1044.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1044.30 and shall compute separately for each fluid milk plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1044.10(c) or (d) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1044.40, 1044.41, and 1044.42;

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids;

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1044.10(c) or (d) shall be determined separately from the operations of any fluid milk plant operated by such cooperative association;

(d) Bulk fluid milk products transferred or diverted from a fluid milk plant operated by a cooperative association to another fluid milk plant shall be classified in accordance with the rules set forth in § 1044.42(a) and the value thereof at class prices (applicable at the location of the transferee-plant) shall be used to compute the receiving handler's net obligation for such milk pursuant to § 1044.60; and

(e) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1044.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1044.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

§ 1044.46 [Redesignated as § 1044.44]

10. Section 1044.46 is re-designated as § 1044.44 and revised to read as follows:

§ 1044.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk at each fluid milk plant described in § 1044.10(a) by allocating the plant's receipts of skim milk and butterfat to its utilization pursuant to paragraphs (a) through (c) of this section.

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1044.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order; and

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the fluid milk plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1044.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1044.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. This paragraph

(a)(5) shall apply only if the fluid milk plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1044.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1044.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1044.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order;

(v) Receipts of reconstituted skim milk in filled milk from unregulated supply plants that were not subtracted pursuant to paragraph (a)(2)(i) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant.

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other fluid milk plant of the handler, and then at each successively more distant fluid milk plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other fluid milk plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step (exclusive of transfers between fluid milk plants of the same handler) at all fluid milk plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all fluid milk plants of the handler of producer milk, fluid milk products from fluid milk plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants remaining at this fluid milk plant is of all such receipts remaining at this allocation step at all fluid milk plants of the handler; and

(iii) Receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1044.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subtract from the pounds of skim milk remaining in each class, pro rata to the total pounds of skim milk remaining in each class in all fluid milk plants of the receiving handler:

(i) The pounds of skim milk in receipts of fluid milk products from unregulated supply plants that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(i) and (ii) of this section; and

(ii) (A) The pounds of skim milk in receipts of fluid milk products in bulk from an other order plant(s), in excess in each case of similar transfers to the same plant, that were not subtracted pursuant to paragraph (a)(8)(iii) of this section;

(B) Should such proration result in the amount to be subtracted from any class exceeding the pounds of skim milk remaining in such class in the fluid milk plant at which such skim milk was received, the pounds of skim milk in such class shall be increased to the amount to be subtracted and the pounds of skim milk in the other class shall be decreased a like amount. In such case the utilization of milk at other fluid milk plant(s) of such handler shall be adjusted in the reverse direction by an identical amount in sequence beginning with the nearest other fluid milk plant of such handler at which such adjustment can be made;

(12) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from other fluid milk plants according to the classification of such products pursuant to § 1044.42(a); and

(13) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as *overage*;

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph

(a)(13) of this section and the corresponding step of paragraph (b) of this section.

§ 1044.50 [Removed]

11. Section 1044.50 is removed.

§ 1044.51 [Redesignated as § 1044.50]

12. Section 1044.51 is re-designated as § 1044.50 and is amended by changing the reference "§ 1044.52" in the introductory text to "§ 1044.53", revising paragraph (b), and by adding a new paragraph (c) to read as follows:

§ 1044.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1044.51(b) for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (b)(1) and (b)(2) of this section, was less than the Class III price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1044.51(a) and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1044.51(b).

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

13. A new § 1044.51 is added to read as follows:

§ 1044.51 Basic formula prices.

(a) The *basic formula price* shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1044.62 shall be used.

(b) The *basic Class II formula price* for the month shall be the basic formula price determined pursuant to § 1044.51(a) for the second preceding month plus or minus the amount computed pursuant to paragraphs (b)(1) through (4) of this section:

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1044.20 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(i) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(A) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(B) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(C) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(ii) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(A) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(B) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(2) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(3) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b)(2) of this section by determining the relative proportion that the data included in each of the following subparagraphs is of the total of the data represented in paragraphs (b)(3)(i) and (ii) of this section:

(i) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

§ 1044.60 [Amended]

14. Section 1044.60 is amended by changing the words "Class II" in paragraph (c) introductory text and paragraph (c)(2) to "Class III", and by changing references as follows:

a. In paragraph (a), the reference "§ 1044.46(c)" is changed to read "§ 1044.44(c)".

b. In paragraph (b), the reference "§ 1044.46(a)(9)" is changed to read "§ 1044.44(a)(13)", and the reference "§ 1044.46(b)" is changed to read "§ 1044.44(b)".

c. In paragraph (c)(1), the reference "§ 1044.46(a)(5) and the corresponding step of § 1044.46(b)" is changed to read "§ 1044.44(a)(9) and the corresponding step of § 1044.44(b)."

d. In paragraph (c)(2), the reference "§ 1044.46(a)(7)(i) and the corresponding step of § 1044.46(b)" is changed to read "§ 1044.44(a)(11)(i) and the corresponding step of § 1044.44(b)."

§ 1044.63 [Amended]

15. Section 1044.63 is amended by changing the reference "§ 1044.51" to "§ 1044.50".

16. Section 1044.71 is revised to read as follows:

§ 1044.71 Expense of administration.

For the pro rata share of the expense of administration of the order, each handler shall pay to the market administrator on or before the 13th day after the end of the month five cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to:

(a) Producer milk (including such handler's own production); and

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1044.43(e) and other source milk allocated to Class I pursuant

to § 1044.44(a)(7) and (a)(11)(i) and the corresponding steps of § 1044.44(b).

PART 1046—MILK IN THE LOUISVILLE-LEXINGTON-EVANSVILLE MARKETING AREA

1. Section 1046.15 is revised to read as follows:

§ 1046.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1046.16 is revised to read as follows:

§ 1046.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1046.19 is added to read as follows:

§ 1046.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1046.13, 1046.41 and 1046.52.

4. Section 1046.40 is revised to read as follows:

§ 1046.40 Classes of utilization.

Except as provided in § 1046.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1046.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1046.15 and the fluid cream product definition pursuant to § 1046.16; and

(7) In shrinkage assigned pursuant to § 1046.41(a) to the receipts specified in § 1046.41(a)(2) and in shrinkage specified in § 1046.41 (b) and (c).

5. Section 1046.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1046.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1046.43 is amended by adding a new paragraph (d) to read as follows:

§ 1046.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1046.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1046.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1046.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii) introductory text, and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1046.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1046.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1046.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1046.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1046.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1046.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1046.45 is amended by revising paragraph (b) to read as follows:

§ 1046.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1046.43(d) and § 1046.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1046.60 is amended by revising paragraphs (d), (f) and (g) and by adding new paragraphs (h) and (i) to read as follows:

§ 1046.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1046.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1046.44(a)(7)(i) through (iv) and (vii) and the corresponding step of § 1046.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat

in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1046.43(d) and § 1046.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1046.44(a)(11) and the corresponding steps of § 1046.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1046.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1046.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1046.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1046.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1046.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1046.85 is amended by revising paragraph (b) to read as follows:

§ 1046.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1046.43(d) and other source milk allocated to Class I pursuant to § 1046.44(a)(7) and (a)(11) and the corresponding steps of § 1046.44(b), except such other source milk that is excluded from the computations pursuant to § 1046.60(d) and (f); and

* * * * *

PART 1049—MILK IN THE INDIANA MARKETING AREA

1. Section 1049.15 is revised to read as follows:

§ 1049.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1049.16 is revised to read as follows:

§ 1049.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1049.19 is added to read as follows:

§ 1049.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1049.13, 1049.41 and 1049.52.

4. Section 1049.40 is revised to read as follows:

§ 1049.40 Classes of utilization.

Except as provided in § 1049.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1049.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes, distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1049.15 and the fluid cream product definition pursuant to § 1049.16; and

(7) In shrinkage assigned pursuant to § 1049.41(a) to the receipts specified in § 1049.41(a)(2) and in shrinkage specified in § 1049.41(b) and (c).

5. Section 1049.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1049.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1049.43 is amended by adding a new paragraph (d) to read as follows:

§ 1049.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1049.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1049.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1049.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii) introductory text, and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1049.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1049.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1049.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1049.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1049.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1049.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1049.45 is amended by revising paragraph (b) to read as follows:

§ 1049.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1049.43(d) and § 1049.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1049.60 is amended by revising paragraphs (d) and (f) and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1049.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1049.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1049.44(a)(7)(i) through (iv) and the corresponding step of § 1049.44(b), excluding receipts of bulk fluid cream products from another order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1049.43(d) and § 1049.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1049.44(a)(11) and the corresponding steps of § 1049.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1049.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1049.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1049.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1049.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1049.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1049.85 is amended by revising paragraph (b) to read as follows:

§ 1049.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1049.43(d) and other source milk allocated to Class I pursuant to § 1049.44(a)(7) and (a)(11) and the corresponding steps of § 1049.44(b), except such other source milk that is excluded from the computations pursuant to § 1049.60(d) and (f); and

* * * * *

PART 1050—MILK IN THE CENTRAL ILLINOIS MARKETING AREA

1. Section 1050.15 is revised to read as follows:

§ 1050.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1050.16 is revised to read as follows:

§ 1050.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1050.19 is added to read as follows:

§ 1050.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1050.13, 1050.41 and 1050.52.

4. Section 1050.40 is revised to read as follows:

§ 1050.40 Classes of utilization.

Except as provided in § 1050.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1050.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of

verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1050.15 and the fluid cream product definition pursuant to § 1050.16; and

(7) In shrinkage assigned pursuant to § 1050.41(a) to the receipts specified in § 1050.41(a)(2) and in shrinkage specified in § 1050.41(b) and (c).

5. Section 1050.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1050.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1050.43 is amended by adding a new paragraph (d) to read as follows:

§ 1050.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1050.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1050.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1050.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii) introductory text, and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1050.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1050.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1050.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1050.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1050.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1050.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1050.45 is amended by revising paragraph (b) to read as follows:

§ 1050.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1050.43(d) and § 1050.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1050.60 is amended by revising paragraphs (d), (f) and (g) and adding new paragraphs (h) and (i) to read as follows:

§ 1050.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1050.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1050.44(a)(7)(i) through (iv) and the corresponding step of § 1050.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1050.43(d) and § 1050.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1050.44(a)(11) and the corresponding steps of § 1050.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1050.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1050.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1050.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1050.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1050.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the

nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1050.85 is amended by revising paragraph (b) to read as follows:

§ 1050.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1050.43(d) and other source milk allocated to Class I pursuant to § 1050.44(a)(7) and (a)(11) and the corresponding steps of § 1050.44(b), except such other source milk that is excluded from the computations pursuant to § 1050.60(d) and (f); and

* * * * *

PART 1064—MILK IN THE GREATER KANSAS CITY MARKETING AREA

1. Section 1064.15 is revised to read as follows:

§ 1064.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1064.16 is revised to read as follows:

§ 1064.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1064.19 is added to read as follows:

§ 1064.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1064.13, 1064.41 and 1064.52.

4. Section 1064.40 is revised to read as follows:

§ 1064.40 Classes of utilization.

Except as provided in § 1064.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1064.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1064.15 and the fluid cream product definition pursuant to § 1064.16; and

(7) In shrinkage assigned pursuant to § 1064.41(a) to the receipts specified in § 1064.41(a)(2) and in shrinkage specified in § 1064.41 (b) and (c)

5. Section 1064.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1064.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6 Section 1064.43 is amended by adding a new paragraph (d) to read as follows

§ 1064.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1064.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1064.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1064.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii) introductory text, and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1064.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1064.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1064.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1064.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1064.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1064.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1064.45 is amended by revising paragraph (b) to read as follows:

§ 1064.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1064.43(d) and § 1064.44 on the basis of such report (including any reclassification of inventories of bulk concentrated fluid

milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1064.60 is amended by revising paragraphs (d) and (f) and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1064.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1064.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1064.44(a)(7) (i) through (iv) and the corresponding step of § 1064.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1064.43(d) and § 1064.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1064.44(a)(11) and the corresponding steps of § 1064.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1064.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1064.76 (a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1064.76 is amended by revising paragraphs (a)(3) and (a)(5) and adding a new paragraph (c) to read as follows:

§ 1064.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1064.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1064.85 is amended by revising paragraph (b) to read as follows:

§ 1064.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1064.43(d) and other source milk allocated to Class I pursuant to § 1064.44 (a)(7) and (a)(11) and the corresponding steps of § 1064.44(b), except such other source milk that is excluded from the computations pursuant to § 1064.60 (d) and (f); and

* * * * *

PART 1065—MILK IN THE NEBRASKA-WESTERN IOWA MARKETING AREA

1. Section 1065.15 is revised to read as follows:

§ 1065.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are

flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1065.16 is revised to read as follows:

§ 1065.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1065.19 is added to read as follows:

§ 1065.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1065.13, 1065.41 and 1065.52.

4. Section 1065.40 is revised to read as follows:

§ 1065.40 Classes of utilization.

Except as provided in § 1065.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1065.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1065.15 and the fluid cream product definition pursuant to § 1065.16; and

(7) In shrinkage assigned pursuant to § 1065.41(a) to the receipts specified in § 1065.41(a)(2) and in shrinkage specified in § 1065.41(b) and (c).

5. Section 1065.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1065.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1065.43 is amended by adding a new paragraph (d) to read as follows:

§ 1065.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1065.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1065.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1065.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii) introductory text, and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1065.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1065.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1065.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1065.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1065.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1065.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1065.45 is amended by revising paragraph (b) to read as follows:

§ 1065.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1065.43(d) and § 1065.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1065.52 is amended by revising paragraph (d)(1) to read as follows:

§ 1065.52 Plant location adjustments for handlers.

* * * * *

(d) * * *

(1) Subtract from the pounds of Class I remaining at the transferee-plant after the computations pursuant to § 1065.44(a)(12) and (b) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, the pounds of packaged fluid milk products from other pool plants;

* * * * *

10. Section 1065.60 is amended by revising paragraphs (d) and (f) and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1065.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1065.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1065.44(a)(7)(i) through (iv) and the corresponding step of § 1065.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by

the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1065.43(d) and § 1065.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1065.44(a)(11) and the corresponding steps of § 1065.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1065.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1065.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1065.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1065.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1065.44(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1065.85 is amended by revising paragraph (b) to read as follows:

§ 1065.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1065.43(d) and other source milk allocated to Class I pursuant to § 1065.44(a)(7) and (a)(11) and the corresponding steps of § 1065.44(b), except such other source milk that is excluded from the computations pursuant to § 1065.60(d) and (f); and

* * * * *

PART 1068—MILK IN THE UPPER MIDWEST MARKETING AREA

1. Section 1068.15 is revised to read as follows:

§ 1068.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1068.16 is revised to read as follows:

§ 1068.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1068.19 is added to read as follows:

§ 1068.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1068.13, 1068.41 and 1068.52.

4. Section 1068.40 is revised to read as follows:

§ 1068.40 Classes of utilization.

Except as provided in § 1068.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1068.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semisolid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1068.15 and the fluid cream product definition pursuant to § 1068.16; and

(7) In shrinkage assigned pursuant to § 1068.41(a) to the receipts specified in § 1068.41(a)(2) and in shrinkage specified in § 1068.41(b) and (c).

5. Section 1068.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1068.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1068.43 is amended by adding a new paragraph (e) to read as follows:

§ 1068.43 General classification rules.

* * * * *

(e) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1068.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1068.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1068.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii) introductory text, and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1068.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1068.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1068.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1068.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1068.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1068.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1068.45 is amended by revising paragraph (b) to read as follows:

§ 1068.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1068.43(e) and § 1068.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1068.60 is amended by revising paragraphs (d) and (f), replacing the period after paragraph (g) with a semicolon, and adding new paragraphs (h), (i) and (j) to read as follows:

§ 1068.60 Handler's value of milk for determining pool obligation.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1068.43(e) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1068.44(a)(7)(i) through (iv) and the corresponding step of § 1068.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1068.43(e) and § 1068.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1068.44(a)(11) and the corresponding steps of § 1068.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1068.43(e);

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1068.76(a)(5) or (c); and

(j) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk

products received at the plant during the prior month.

10. Section 1068.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1068.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1068.43(e). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1068.85 is amended by revising paragraph (d) to read as follows:

§ 1068.85 Assessment for order administration.

* * * * *

(d) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1068.43(e) and other source milk allocated to Class I pursuant to § 1068.44(a)(7) and (a)(11) and the corresponding steps of § 1068.44(b), except such other source milk that is excluded from the computations pursuant to § 1068.60 (d) and (f); and

* * * * *

1. The table of contents is revised to read as follows:

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General Provisions

1075.1 General provisions.

Definitions

1075.2 Black Hills, South Dakota marketing area.
1075.3 Route disposition.
1075.5 Distributing plant.
1075.6 Supply plant.
1075.7 Pool plant.
1075.8 Nonpool plant.
1075.9 Handler.
1075.10 Producer-handler.
1075.12 Producer.
1075.13 Producer milk.
1075.14 Other source milk.
1075.15 Fluid milk product.
1075.16 Fluid cream product.
1075.17 Filled milk.
1075.18 Cooperative association.
1075.19 Commercial food processing establishment.
1075.20 Product prices.

Handler Reports

1075.30 Reports of receipts and utilization.
1075.31 Payroll reports.
1075.32 Other reports.

Classification of Milk

1075.40 Classes of utilization.
1075.41 Shrinkage.
1075.42 Classification of transfers and diversions.
1075.43 General classification rules.
1075.44 Classification of producer milk.
1075.45 Market administrator's reports and announcements concerning classification.

Class Prices

1075.50 Class prices.
1075.51 Basic formula prices.
1075.52 Plant location adjustments for handlers.
1075.53 Announcement of class prices.
1075.54 Use of equivalent prices.

Uniform Price

1075.60 Handler's value of milk for computing uniform price.
1075.61 Computation of uniform price (including weighted average price).
1075.62 Announcement of uniform price and butterfat differential.

Payments for Milk

1075.70 Producer-settlement fund.
1075.71 Payments to the producer-settlement fund.
1075.72 Payments from the producer-settlement fund.
1075.73 Payments to producers and to cooperative associations.
1075.74 Butterfat differential.
1075.75 Plant location adjustments for producers and on nonpool milk.
1075.76 Payments by handler operating a partially regulated distributing plant.
1075.77 Adjustment of accounts.

Administrative Assessment

1075.85 Assessment for order administration.

§ 1075.6 [Redesignated as § 1075.2]

2. Section 1075.6 is re-designated as § 1075.2.

§ 1075.20 [Redesignated as § 1075.3]

3. Section 1075.20 is re-designated as § 1075.3 and amended by changing the reference "§ 1075.41(a)" to "§ 1075.40(a)".

§ 1075.10 [Redesignated as § 1075.6]

4. Section 1075.10 is re-designated as § 1075.6 and amended by changing the reference "§ 1075.12" to "§ 1075.7(b)".

§ 1075.15 [Redesignated as § 1075.10]

5. Section 1075.15 is re-designated as § 1075.10.

§ 1075.18 [Redesignated as § 1075.15]

6. Section 1075.18 is re-designated as § 1075.15 and revised to read as follows:

§ 1075.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products

include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

§ 1075.5 [Redesignated as § 1075.18]

7. Section 1075.5 is re-designated as § 1075.18.

§ 1075.9 [Redesignated as § 1075.5]

8. Section 1075.9 is re-designated as § 1075.5.

§ 1075.14 [Redesignated as § 1075.9]

9. Section 1075.14 is re-designated as § 1075.9.

§ 1075.19 [Redesignated as § 1075.14]

10. Section 1075.19 is re-designated as § 1075.14 and revised to read as follows:

§ 1075.14 Other source milk.

Other source milk means all skim milk and butterfat contained in or represented by:

(a) Receipts of fluid milk products and bulk products specified in § 1075.40(b)(1) from any source other than producers, or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1075.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1075.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1075.40(b)(1)) for which the handler fails to establish a disposition.

§ 1075.7 [Removed]

§ 1075.12 [Redesignated as § 1075.7]

11. Section 1075.7 is removed and § 1075.12 is re-designated as § 1075.7, and a new paragraph (c) is added to read as follows:

§ 1075.7 Pool plant.

* * * * *

(c) The term *pool plant* shall not apply to the following plants:

(1) A producer-handler;

(2) A plant qualified pursuant to paragraph (a) of this section from which a lesser volume of fluid milk products, except filled milk, is disposed of from such plant to retail or wholesale outlets in the Black Hills marketing area and to pool plants under this part than is disposed of in the marketing area and to pool plants regulated pursuant to another order.

§ 1075.8 [Redesignated as § 1075.12]

12. Section 1075.8 is re-designated as § 1075.12 and revised to read as follows:

§ 1075.12 Producer.

Producer means any person, except a producer-handler as defined in any order (including this part) issued pursuant to the Act, who produces milk in compliance with the Grade A inspection requirements of a duly constituted health authority, which milk is (a) received at a pool plant, or (b) diverted from a pool plant to a nonpool plant for the account of either the operator of the pool plant or a cooperative association.

§ 1075.13 [Redesignated as § 1075.8]

13. Section 1075.13 is re-designated as § 1075.8.

§ 1075.17 [Redesignated as § 1075.13]

14. Section 1075.17 is re-designated as § 1075.13 and revised to read as follows:

§ 1075.13 Producer milk.

Producer milk means the skim milk and butterfat contained in milk (a) received at a pool plant directly from producers or (b) diverted from a pool plant to a nonpool plant. Provided, that milk diverted pursuant to this section shall be deemed to have been received at the location of the plant from which diverted.

§ 1075.23 [Redesignated as § 1075.17]

15. Section 1075.23 is re-designated as § 1075.17.

§ 1075.11 [Removed]

16. Section 1075.11 is removed.

17. Section 1075.16 is revised to read as follows:

§ 1075.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

§§ 1075.22, 1075.27 [Removed]

18. Sections 1075.22 and 1075.27 are removed.

19. A new § 1075.19 is added to read as follows:

§ 1075.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1075.13, 1075.41 and 1075.52.

20. Section 1075.20 is added to read as follows:

§ 1075.20 Product prices.

The following product prices shall be used in calculating the basic Class II formula price pursuant to § 1075.51(b):

(a) *Butter price.* "Butter price" means the simple average, for the first 15 days of the month, of the daily prices per pound of Grade A (92-score) butter. The prices used shall be those of the Chicago Mercantile Exchange as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday, except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week shall be the last price that was established.

(b) *Cheddar cheese price.* "Cheddar cheese price" means the simple average, for the first 15 days of the month, of the daily prices per pound of cheddar cheese in 40-pound blocks. The prices used shall be those of the National Cheese Exchange (Green Bay, WI), as reported and published weekly by the

Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week shall be the last price that was established.

(c) *Nonfat dry milk price.* "Nonfat dry milk price" means the simple average, for the first 15 days of the month, of the daily prices per pound of nonfat dry milk, which average shall be computed by the Director of the Dairy Division as follows:

(1) The prices used shall be the prices (using the midpoint of any price range as one price) of high heat, low heat and Grade A nonfat dry milk, respectively, for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service.

(2) For each week, determine the simple average of the prices reported for the three types of nonfat dry milk. Such average shall be the daily price for the day that such prices are reported and for each preceding work-day until the day such prices were previously reported. A work-day is each Monday through Friday except national holidays.

(3) Add the prices determined in paragraph (c)(2) of this section for the first 15 days of the month and divide by the number of days for which there is a daily price.

(d) *Edible whey price.* "Edible whey price" means the simple average, for the first 15 days of the month, of the daily prices per pound of edible whey powder (nonhygroscopic). The prices used shall be the prices (using the midpoint of any price range as one price) of edible whey powder for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each preceding work-day until the day such price was previously reported. A work-day is each Monday through Friday except national holidays.

21. Section 1075.30 is revised to read as follows:

§ 1075.30 Reports of receipts and utilization.

On or before the 5th day after the end of each month, each handler, except a producer-handler, shall report to the market administrator for such month in detail and on forms prescribed by the market administrator, as follows:

(a) Each handler, with respect to each of such handler's pool plants, shall report the quantities of skim milk and butterfat contained in or represented by:

(1) Receipts of producer milk, including producer milk diverted by the handler from the pool plant to other plants;

(2) Receipts of fluid milk products and bulk fluid cream products received from pool plants;

(3) Receipts of other source milk;

(4) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1075.40(b)(1);

(5) The utilization or disposition of all milk, filled milk and milk products required to be reported pursuant to this paragraph.

(b) Each handler who operates a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports required in paragraph (a) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. Such report shall show also the quantity of reconstituted skim milk in fluid milk products disposed of on routes in the marketing area.

(c) Each handler described in § 1075.9(b) shall report:

(1) The quantities of all skim milk and butterfat contained in receipts of milk from producers; and

(2) The utilization or disposition of all such receipts.

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to such handler's receipts and utilization of milk, filled milk, and milk products in such manner as the market administrator may prescribe.

22. Section 1075.31 is amended by changing the heading, removing paragraph (a), redesignating paragraph (b) as paragraph (a), changing the reference "§ 1075.62(b)" in re-designated paragraph (a) to "§ 1075.76(a)" and adding a new paragraph (b) to read as follows:

§ 1075.31 Payroll reports.

* * * * *

(b) Each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1075.76(b) shall report for each dairy farmer who would have been a producer if the plant had been fully regulated in the same manner as prescribed for reports required by paragraph (a) of this section.

23. A new § 1075.32 is added to read as follows:

§ 1075.32 Other reports.

(a) In addition to the reports required pursuant to §§ 1075.30 and 1075.31, each handler shall report such other information as the market administrator deems necessary to verify or establish such handler's obligation under the order.

(b) Each producer handler shall make reports to the market administrator at such time and in such manner as the market administrator may prescribe.

24. Section 1075.40 is removed, and § 1075.41 is re-designated as § 1075.40, and revised to read as follows:

§ 1075.40 Classes of utilization.

Except as provided in § 1075.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1075.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1075.15 and the fluid cream product definition pursuant to § 1075.16; and

(7) In shrinkage assigned pursuant to § 1075.41(a) to the receipts specified in § 1075.41(a)(2) and in shrinkage specified in § 1075.41(b) and (c).

§ 1075.42 [Redesignated as § 1075.41]

25. Section 1075.42 is re-designated as § 1075.41 and revised to read as follows:

§ 1075.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1075.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b)(1) through (6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraphs (b)(1) through (b)(6) of this section which was received in the form of a bulk fluid milk product or a bulk fluid cream product;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant);

(2) [Reserved]

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph (b)(3) shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraphs (b)(1), (b)(4), (b)(5), and (b)(6) of this section.

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1075.9(b), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1075.44 [Redesignated as § 1075.42]

26. Section 1075.44 is re-designated as § 1075.42, and revised to read as follows:

§ 1075.42 Classification of transfers and diversions.

(a) *Transfers to pool plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1075.44(a)(12) and the corresponding step of § 1075.44(b). The amount of skim

milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1075.44(a)(7) or the corresponding step of § 1075.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler received during the month other source milk to be allocated pursuant to § 1075.44(a)(11) or (a)(12) or the corresponding steps of § 1075.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

(b) *Transfers to other order plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1), (b)(2), or (b)(3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1075.40.

(c) *Transfers to producer-handlers.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order shall be classified:

(1) As Class I milk, if transferred in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant or a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i)(A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2)(ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1075.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent

possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section. 27. Section 1075.45 is re-designated as § 1075.43, and revised to read as follows:

§ 1075.43 General classification rules.

In determining the classification of producer milk pursuant to § 1075.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1075.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1075.9(b) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1075.40, 1075.41, and 1075.42;

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids; and

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1075.9(b) shall be determined separately from the operations of any pool plant operated by such cooperative association.

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1075.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1075.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

§ 1075.46 [Redesignated as § 1075.44]

28. Section 1075.46 is re-designated as § 1075.44 and revised to read as follows:

§ 1075.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1075.9(a) for each of its pool plants separately and of each handler described in § 1075.9(b) by allocating the handler's receipts of skim milk and butterfat to its utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1075.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1075.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1075.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1075.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1075.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1075.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler, as defined under this or any other Federal order;

(v) Receipts of reconstituted skim milk in filled milk from unregulated supply plants that were not subtracted pursuant to paragraph (a)(2)(i) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant.

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) Receipts of fluid milk products from an unregulated supply plant that

were not subtracted pursuant to paragraphs (a)(2)(i) and (a)(7)(v) of this section for which the handler requests classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) Receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii)(A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler) at all pool plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants remaining at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) Receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1075.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11)(i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), and (a)(8)(i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (a)(8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12)(ii), (a)(12)(iii), and (a)(12)(iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1075.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler):

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing

as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1075.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as *overage*;

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

29. Section 1075.45 is added to read as follows:

§ 1075.45 Market administrator's reports and announcements concerning classification.

The market administrator shall make the following reports and announcements concerning classification:

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1075.44(a)(12) and the corresponding step of § 1075.44(b), estimate and publicly announce on or before the 10th day of the month the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose;

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to § 1075.43(d) and § 1075.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report; and

(c) Furnish to each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to another order plant, the class to which such shipments were allocated by the market administrator of the other order on the basis of the report of the receiving handler and, as necessary, any changes in such allocation arising from the verification of such report.

§ 1075.50 [Removed]

30. Section 1075.50 is removed.

§ 1075.51 Redesignated as § 1075.50]

31. Section 1075.51 is re-designated as § 1075.50 and amended in the introductory text by removing the reference "and § 1075.53", revising paragraph (b), and adding a new paragraph (c) to read as follows:

§ 1075.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1075.51(b) for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (b)(1) and (b)(2) of this section, was less than the Class III price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1075.51(a) and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1075.51(b).

(c) Class III price. The Class III price shall be the basic formula price for the month, but in no event shall the Class III price exceed an amount computed as follows:

(1) Multiply by 4.2 the Chicago butter price;

(2) Multiply by 8.2 the weighted average of carlot prices per pound of spray process nonfat dry milk for human consumption, f.o.b. manufacturing plants in the Chicago area, as published for the period from the 26th day of the immediately preceding month through the 25th day of the current month by the Department; and

(3) From the sum of the results arrived at under paragraphs (c)(1) and (2) of this section subtract 48 cents, and round to the nearest cent.

32. New § 1075.51 is added to read as follows:

§ 1075.51 Basic formula prices.

(a) The *basic formula price* shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1075.74 shall be used.

(b) The *basic Class II formula price* for the month shall be the basic formula price determined pursuant to § 1075.51(a) for the second preceding month plus or minus the amount computed pursuant to paragraphs (b)(1) through (4) of this section:

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1075.20 and yield factors in effect

under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(i) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(A) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(B) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(C) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(ii) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(A) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(B) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(2) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(3) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b)(2) of this section by determining the relative proportion that the data included in each of the following subparagraphs is of the total of the data represented in paragraphs (b)(3) (i) and (ii) of this section:

(i) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the third preceding month, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b)(2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

§ 1075.53 [Redesignated § 1075.52]

33. Section 1075.53 is re-designated as § 1075.52, and revised to read as follows:

§ 1075.52 Plant location adjustments for handlers.

(a) For producer milk received at a pool plant located 100 miles or more by the shortest hard-surfaced highway distance as determined by the market administrator, from the nearest of the Post Offices of Rapid City, Lead, Hot Springs, and Custer, South Dakota; and classified as Class I milk or assigned Class I location adjustment credit pursuant to paragraph (b) of this section and for other source milk for which a location adjustment is applicable, the price computed pursuant to § 1075.50(a) shall be reduced by 15 cents, plus 1.5 cents for each 10 miles or fraction thereof that such distance exceeds 110 miles;

(b) For purposes of calculating such adjustment, transfers between pool plants shall be assigned Class I disposition at the transferee plant, in excess of the sum of receipts at such plant of producer milk, and the volume assigned as Class I to receipts from other order plants and unregulated supply plants, such assignment to be made first to transferor plants at which no location adjustment credit is applicable and then in sequence beginning with the plant at which the least location adjustment would apply.

34. A new § 1075.53 is added to read as follows:

§ 1075.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month, the Class III price for the preceding month, and on or before the 15th day of each month, the Class II price for the following month computed pursuant to § 1075.50(b).

35. Section 1075.60 is removed and § 1075.70 is re-designated as new § 1075.60 and is revised to read as follows:

§ 1075.60 Handler's value of milk for computing uniform price.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1075.9(b) as follows:

(a) Multiply the quantity of producer milk in each class, as computed pursuant to § 1075.44(c), by the applicable class prices adjusted pursuant to § 1075.52;

(b) Add the amount obtained from multiplying the pounds of overage deducted from each class pursuant to § 1075.44(a)(14) and the corresponding step of § 1075.44(b) by the applicable class prices;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1075.44 (a)(9) and the corresponding step of § 1075.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1075.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1075.44 (a)(7)(i) through (a)(7)(iv) and the corresponding step of § 1075.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1075.44 (a)(7)(v) and (a)(7)(vi) and the corresponding step of § 1075.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1075.43(d) and § 1075.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1075.44(a)(11) and the corresponding steps of § 1075.44(b), excluding such

skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1075.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1075.76 (a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

§ 1075.61 [Removed]

§ 1075.72 [Redesignated as § 1075.61]

36. Section 1075.61 is removed and § 1075.72 is re-designated as new § 1075.61 and is revised to read as follows:

§ 1075.61 Computation of uniform price (including weighted average price).

For each month the market administrator shall compute an aggregate value from which to determine the uniform price per hundredweight for producer milk of 3.5 percent butterfat content, f.o.b. plants located within 100 miles of the Post Offices of Rapid City, Lead, Hot Spring, and Custer, South Dakota, as follows:

(a) Combine into one total the value computed pursuant to § 1075.60 for all handlers who filed reports prescribed in § 1075.30 for the month, except those in default of payments required pursuant to § 1075.71 for the preceding month;

(b) Add an amount equal to the sum of the location differential deductions to be made pursuant to § 1075.75;

(c) Add an amount equal to one-half of the unobligated cash balance in the producer-settlement fund.

(d) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1075.60(f); and

(e) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (d) of this section. The result shall be the *weighted average price* or the *uniform price* for producer milk.

§ 1075.62 [Redesignated as § 1075.76]

37. Section 1075.62 is re-designated as § 1075.76, and a new § 1075.62 is added to read as follows:

§ 1075.62 Announcement of uniform price and butterfat differential.

The market administrator shall announce publicly on or before:

(a) The fifth day after the end of each month the butterfat differential for such month; and

(b) The 10th day after the end of each month the uniform price for such month.

§ 1075.83 [Redesignated as § 1075.70]

38. Section 1075.83 is re-designated as § 1075.70 and is revised to read as follows:

§ 1075.70 Producer-settlement fund.

The market administrator shall maintain a separate fund known as the *producer-settlement fund* into which he shall deposit all payments made by handlers pursuant to §§ 1075.71, 1075.76, and 1075.77 and out of which he shall make all payments pursuant to §§ 1075.72 and 1075.77; *Provided*, That the market administrator shall offset the payment due to a handler against payments due from such handler.

§ 1075.71 [Removed]

§ 1075.84 [Redesignated as § 1075.71]

39. Section 1075.71 is removed and § 1075.84 is re-designated as new § 1075.71 and is revised to read as follows:

§ 1075.71 Payments to the producer-settlement fund.

(a) On or before the 10th day after the end of the month each handler shall pay to the market administrator the amount, if any, by which the total amounts specified in paragraph (a)(1) of this section exceed the amounts specified in paragraph (a)(2) of this section:

(1) The total of the net pool obligation computed pursuant to § 1075.60 for such handler; and

(2) The sum of:

(i) The amount of the obligation pursuant to § 1075.73 of each handler for producer milk received during the month; and

(ii) The value at the weighted average price applicable at the location of the plant(s), from which received (not to be less than the value at the Class III price) with respect to other source milk for which a value is computed pursuant to § 1075.60(f).

(b) Each handler operating a distributing plant that is subject to the classification and pricing provisions of another order which provides for individual handler pooling, shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month an amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk disposed of on routes in the marketing area which was allocated to Class I at such other order plant. If reconstituted skim milk in filled milk is disposed of from such plant on routes in marketing areas regulated by two or more marketpool orders, the reconstituted skim milk assigned to Class I shall be prorated according to such disposition in each area.

(2) Compute the value of the quantity assigned in paragraph (1) to Class I disposition in this area, at the Class I price under this part applicable at the location of the other order plant and subtract its value at the Class III price.

§ 1075.85 [Redesignated as § 1075.72]

40. Section 1075.85 is re-designated as § 1075.72 and is revised to read as follows:

§ 1075.72 Payments from the producer-settlement fund.

On or before the 10th day after the end of each month the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1075.71(a)(2) exceeds the amount computed pursuant to § 1075.71(a)(1).

§ 1075.80 [Redesignated as § 1075.73]

41. Section 1075.80 is re-designated as § 1075.73 and amended by changing the heading to "Payments to producers and to cooperative associations"; in paragraph (a), changing the reference "§ 1075.72" to "§ 1075.61" and the

reference "§§ 1075.81 and 1075.82" to "§§ 1075.74 and 1075.75"; and in paragraph (b), changing the word "approved" to "producer" (2 occurrences).

§ 1075.81 [Redesignated as § 1075.74]

42. Section 1075.81 is re-designated as § 1075.74.

§ 1075.82 [Redesignated as § 1075.75]

43. Section 1075.82 is re-designated as § 1075.75 and amended by changing the heading to "Plant location adjustments for producers and on nonpool milk"; in paragraph (a), changing the reference "§ 1075.53" to "§ 1075.52"; and in paragraph (b), changing the reference "§§ 1075.84 and 1075.85" to "§§ 1075.71 and 1075.72" and the reference "§ 1075.53" to "§ 1075.52".

44. New § 1075.76 is added to read as follows:

§ 1075.76 Payments by handler operating a partially regulated distributing plant.

Each handler who operates a partially regulated distributing plant shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month either of the amounts (at the handler's election) calculated pursuant to paragraph (a) or (b) of this section. If the handler fails to report pursuant to §§ 1075.30 and 1075.31 the information necessary to compute the amount specified in paragraph (b) of this section, the handler shall pay the amount computed pursuant to paragraph (a) of this section:

(a) The payment under this paragraph shall be the amount resulting from the following computations:

(1) Determine the pounds of route disposition in the marketing area from the partially regulated distributing plant;

(2) Subtract the pounds of fluid milk products received at the partially regulated distributing plant:

(i) As Class I milk from pool plants and other order plants, except that subtracted under a similar provision of another Federal milk order; and

(ii) From another nonpool plant that is not an other order plant to the extent that an equivalent amount of fluid milk products disposed of to such nonpool plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) Multiply the remaining pounds by the difference between the Class I price and the weighted average price, both prices to be applicable at the location of the partially regulated distributing plant (except that the Class I price and the weighted average price shall not be less than the Class III price); and

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(b) An amount computed as follows:

(1)(i) The obligation that would have been computed pursuant to § 1075.60 at such plant shall be determined as though such plant were a pool plant. For purposes of such computation, receipts at such nonpool plant from a pool plant or an other order plant shall be assigned to the utilization at which classified at the pool plant or other order plant and transfers from such nonpool plant to a pool plant or an other order plant shall be classified as Class III milk if allocated to such class at the pool plant or other order plant and be valued at the weighted average price of the respective order if so allocated to Class I milk, except that reconstituted skim milk in filled milk shall be valued at the Class III price. There shall be included in the obligation so computed a charge in the amount specified in § 1075.60(f) and a credit in the amount specified in § 1075.71(a)(2)(ii) with respect to receipts from an unregulated supply plant, except that the credit for receipts of reconstituted skim milk in filled milk shall be at the Class III price, unless an obligation with respect to such plant is computed as specified in paragraph (b)(1)(ii) of this section; and

(ii) If the operator of the partially regulated distributing plant so requests and provides, with reports filed pursuant to §§ 1075.30 and 1075.31, similar reports with respect to the operations of any other nonpool plant which serves as a supply plant for such partially regulated distributing plant by shipments to such plant during the month equivalent to the requirements of § 1075.7(b) with agreement of the operator of such plant that the market administrator may examine the books and records of such plant for purposes of verification of such reports, there will be added the amount of the obligation computed at such nonpool supply plant in the same manner and subject to the same conditions as for the partially regulated distributing plant.

(2) From this obligation there will be deducted the sum of the gross payments made by such handler for Grade A milk received during the month from dairy farmers at such plant and like payments made by the operator of a supply plant(s) included in the computations pursuant to paragraph (b)(1) of this section, and any payments to the producer-settlement fund of another order under which such plant is also a partially regulated distributing plant.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1075.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

§§ 1075.86, 1075.87 [Removed]

45. Sections 1075.86 and 1075.87 are removed and a new § 1075.77, is added to read as follows:

§ 1075.77 Adjustment of accounts.

(a) Whenever verification by the market administrator of reports or payments of any handler discloses errors in payments to or from the producer-settlement fund pursuant to §§ 1075.71 and 1075.72, the market administrator shall promptly bill such handler for any unpaid amounts and such handler shall, within 5 days of such billing, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, the market administrator shall within 5 days, make such payment to such handler.

(b) Whenever verification by the market administrator of the payments by a handler to any producer or cooperative association, discloses payment of less than is required by § 1075.73 the handler shall make up such payment to the producer or cooperative association not later than the time of making payments next following such disclosure.

§ 1075.88 [Redesignated as § 1075.85]

46. Section 1075.88 is re-designated as § 1075.85 and is revised to read as follows:

§ 1075.85 Assessment for order administration.

For the pro rata share of the expense of administration of the order, each handler shall pay to the market administrator on or before the 15th day after the end of the month five cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to:

(a) Producer milk;

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1075.43(d) and other source milk allocated to Class I pursuant to § 1075.44(a)(7) and (a)(11) and the corresponding steps of § 1075.44(b), except such other source milk that is excluded from the computations pursuant to § 1075.60(d) and (f); and

(c) Class I milk disposed of from a partially regulated distributing plant on routes in the marketing area that exceeds Class I milk received during the month at such plant from pool plants and other order plants.

47. The center headings in part 1075 would be removed and new center headings would be added to precede the redesignated sections as follows:

a. Preceding § 1075.1, "General Provisions";

b. Preceding § 1075.2, "Definitions";

c. Preceding § 1075.30, "Handler Reports";

d. Preceding § 1075.40, "Classification of Milk";

e. Preceding § 1075.50, "Class Prices";

f. Preceding § 1075.60, "Uniform Price";

g. Preceding § 1075.70, "Payments for Milk"; and

h. Preceding § 1075.85, "Administrative Assessment".

PART 1076—MILK IN THE EASTERN SOUTH DAKOTA MARKETING AREA

1. Section 1076.15 is revised to read as follows:

§ 1076.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1076.16 is revised to read as follows:

§ 1076.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1076.19 is added to read as follows:

§ 1076.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1076.13, 1076.41 and 1076.52.

4. Section 1076.40 is revised to read as follows:

§ 1076.40 Classes of utilization.

Except as provided in § 1076.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1076.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen

dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1076.15 and the fluid cream product definition pursuant to § 1076.16; and

(7) In shrinkage assigned pursuant to § 1076.41(a) to the receipts specified in § 1076.41(a)(2) and in shrinkage specified in § 1076.41 (b) and (c).

5. Section 1076.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1076.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1076.43 is amended by adding a new paragraph (d) to read as follows:

§ 1076.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1076.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1076.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1076.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii) introductory text, and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1076.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1076.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1076.40(b) (excluding the quantity of such skim milk that was

classified as Class III milk pursuant to § 1076.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1076.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1076.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1076.45 is amended by revising paragraph (b) to read as follows:

§ 1076.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1076.43(d) and § 1076.44 on the basis of such report (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1076.52 is amended by revising paragraph (b)(1) to read as follows:

§ 1076.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of Class I remaining at the transferee-plant after the computations pursuant to § 1076.44 (a)(12) and (b) plus the pounds of skim milk and butterfat in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, the pounds of packaged fluid milk products from other pool plants;

* * * * *

10. Section 1076.60 is amended by revising paragraphs (d) and (f) and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1076.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1076.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1076.44(a)(7) (i) through (iv) and the corresponding step of § 1076.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1076.43(d) and § 1076.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1076.44(a)(11) and the corresponding steps of § 1076.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1076.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1076.76 (a)(5) or (c); and

(i) For poolplants that transfer bulk concentrated fluid milk products to other poolplants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1076.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1076.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1076.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1076.85 is amended by revising paragraph (b) to read as follows.

§ 1076.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1076.43(d) and other source milk allocated to Class I pursuant to § 1076.44 (a)(7) and (a)(11) and the corresponding steps of § 1076.44(b), except such other source milk that is excluded from the computations pursuant to § 1076.60 (d) and (f); and

* * * * *

PART 1079—MILK IN THE IOWA MARKETING AREA

1. Section 1079.15 is revised to read as follows:

§ 1079.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1079.16 is revised to read as follows:

§ 1079.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1079.19 is added to read as follows:

§ 1079.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1079.13, 1079.41 and 1079.52.

4. Section 1079.40 is revised to read as follows:

§ 1079.40 Classes of utilization.

Except as provided in § 1079.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1079.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened

condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)-(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)-(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1079.15 and the fluid cream product definition pursuant to § 1079.16; and

(7) In shrinkage assigned pursuant to § 1079.41(a) to the receipts specified in § 1079.41(a)(2) and in shrinkage specified in § 1079.41 (b) and (c).

5. Section 1079.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1079.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1079.43 is amended by adding a new paragraph (d) to read as follows:

§ 1079.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1079.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1079.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1079.44 is amended by revising paragraphs (a)(2), (a)(5), (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1079.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) For a pool plant that was subject to § 1079.40(b)(1) or comparable provisions of another Federal order in the immediately preceding month, subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1079.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II.

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1079.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1079.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1079.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1079.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1079.45 is amended by revising paragraph (b) to read as follows:

§ 1079.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible

after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1079.43(d) and § 1079.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1079.52 is amended by revising paragraph (d)(1) to read as follows:

§ 1079.52 Plant location adjustments for handlers.

* * * * *

(d) * * *

(1) Subtract from the pounds of Class I remaining at the transferee-plant after the computations pursuant to § 1079.44 (a)(12) and (b) plus the pounds of skim milk and butterfat in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, the pounds of packaged fluid milk products from other pool plants;

* * * * *

10. Section 1079.60 is amended by revising paragraphs (d) and (f), replacing the period after paragraph (g) with a semicolon, and adding new paragraphs (h), (i) and (j) to read as follows:

§ 1079.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1079.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1079.44(a)(7) (i) through (iv) and the corresponding step of § 1079.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1079.43(d) and § 1079.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1079.44(a)(11) and the corresponding steps of § 1079.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1079.43(d);

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1079.76(a)(5) or (c); and

(j) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1079.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1079.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1079.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1079.85 is amended by revising paragraph (d) to read as follows:

§ 1079.85 Assessment for order administration.

* * * * *

(d) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1079.43(d) and other source milk allocated to Class I pursuant to § 1079.44(a)(7) and (a)(11) and the corresponding steps of § 1079.44(b), except such other source milk that is excluded from the computations pursuant to § 1079.60(d) and (f); and

* * * * *

PART 1093—MILK IN THE ALABAMA-WEST FLORIDA MARKETING AREA

1. Section 1093.15 is revised to read as follows:

§ 1093.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1093.16 is revised to read as follows:

§ 1093.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1093.19 is added to read as follows:

§ 1093.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1093.13, 1093.41 and 1093.52.

4. Section 1093.40 is revised to read as follows:

§ 1093.40 Classes of utilization.

Except as provided in § 1093.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1093.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butter oil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)-(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)-(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler

must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1093.15 and the fluid cream product definition pursuant to § 1093.16; and

(7) In shrinkage assigned pursuant to § 1093.41(a) to the receipts specified in § 1093.41(a)(2) and in shrinkage specified in § 1093.41(b) and (c).

5. Section 1093.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1093.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products.

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1093.43 is amended by adding a new paragraph (d) to read as follows:

§ 1093.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1093.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1093.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1093.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1093.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1093.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1093.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1093.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1093.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1093.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1093.45 is amended by revising paragraph (b) to read as follows:

§ 1093.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1093.43(d) and § 1093.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1093.52 is amended by revising paragraph (b)(1) to read as follows:

§ 1093.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1093.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from

other pool plants that are assigned to Class I use, an amount equal to:

* * * * *

10. Section 1093.60 is amended by revising paragraphs (d), (f) and (g), and adding new paragraphs (h) and (i) to read as follows:

§ 1093.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1093.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1093.44(a)(7)(i) through (iv) and the corresponding step of § 1093.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1093.43(d) and § 1093.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1093.44(a)(11) and the corresponding steps of § 1093.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1093.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1093.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1093.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1093.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1093.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1093.85 is amended by revising paragraph (c) to read as follows:

§ 1093.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1093.43(d) and other source milk allocated to Class I pursuant to § 1093.44(a)(7) and (a)(11) and the corresponding steps of § 1093.44(b), except such other source milk that is excluded from the computations pursuant to § 1093.60(d) and (f); and

* * * * *

PART 1094—MILK IN THE NEW ORLEANS-MISSISSIPPI MARKETING AREA

1. Section 1094.15 is revised to read as follows:

§ 1094.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including

any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1094.16 is revised to read as follows:

§ 1094.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1094.19 is added to read as follows:

§ 1094.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1094.13, 1094.41 and 1094.52.

4. Section 1094.40 is revised to read as follows:

§ 1094.40 Classes of utilization.

Except as provided in § 1094.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1094.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1094.15 and the fluid cream product definition pursuant to § 1094.16; and

(7) In shrinkage assigned pursuant to § 1094.41(a) to the receipts specified in § 1094.41(a)(2) and in shrinkage specified in § 1094.41(b) and (c).

5. Section 1094.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1094.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1094.43 is amended by adding a new paragraph (d) to read as follows:

§ 1094.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1094.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1094.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1094.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), and revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1094.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1094.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1094.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1094.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1094.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1094.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1094.45 is amended by revising paragraph (b) to read as follows:

§ 1094.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1094.43(d) and § 1094.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1094.52 is amended by revising paragraph (b)(1) to read as follows:

§ 1094.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1094.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, an amount equal to:

* * * * *

10. Section 1094.60 is amended by revising paragraphs (d) and (f), replacing the period after paragraph (g) with a semicolon, revising paragraph (h), and adding new paragraphs (i) and (j) to read as follows:

§ 1094.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1094.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1094.44(a)(7)(i) through (iv) and the corresponding step of § 1094.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which

an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1094.43(d) and § 1094.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1094.44(a)(11) and the corresponding steps of § 1094.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1094.43(d);

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1094.76 (a)(5) or (c); and

(j) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1094.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding paragraph (c) to read as follows:

§ 1094.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1094.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1094.85 is amended by revising paragraph (c) to read as follows:

§ 1094.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1094.43(d) and other source milk allocated to Class I pursuant to § 1094.44(a)(7) and (a)(11) and the corresponding steps of § 1094.44(b), except such other source milk that is excluded from the computations pursuant to § 1094.60(d) and (f); and

* * * * *

PART 1096—MILK IN THE GREATER LOUISIANA MARKETING AREA

1. Section 1096.15 is revised to read as follows:

§ 1096.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1096.16 is revised to read as follows:

§ 1096.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1096.19 is added to read as follows:

§ 1096.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1096.13, 1096.41 and 1096.52.

4. Section 1096.40 is revised to read as follows:

§ 1096.40 Classes of utilization.

Except as provided in § 1096.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1096.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1096.15 and the fluid cream product definition pursuant to § 1096.16; and

(7) In shrinkage assigned pursuant to § 1096.41(a) to the receipts specified in § 1096.41(a)(2) and in shrinkage specified in § 1096.41 (b) and (c).

5. Section 1096.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1096.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1096.43 is amended by adding a new paragraph (d) to read as follows:

§ 1096.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1096.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1096.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1096.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1096.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1096.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1096.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1096.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1096.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1096.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1096.45 is amended by revising paragraph (b) to read as follows:

§ 1096.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1096.43(d) and § 1096.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1096.52 is amended by revising paragraph (b)(1) to read as follows:

§ 1096.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) From the pounds of skim milk remaining in Class I at the transferee plant after the computations are made pursuant to § 1096.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, subtract the pounds of skim milk in receipts of milk at the transferee-plant from producers and handlers described in § 1096.9(c);

* * * * *

10. Section 1096.60 is amended by revising paragraphs (d), (f) and (g), and adding new paragraphs (h) and (i) to read as follows:

§ 1096.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1096.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1096.44(a)(7)(i) through (iv) and the corresponding step of § 1096.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1096.43(d) and § 1096.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1096.44(a)(11) and the corresponding steps of § 1096.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1096.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which

payments are made to the producer-settlement fund of another order under § 1096.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1096.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1096.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1096.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1096.85 is amended by revising paragraph (a) to read as follows:

§ 1096.85 Assessment for order administration.

* * * * *

(a) Each pool handler with respect to:

(1) All receipts of producer milk including such handler's own production; and

(2) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1096.43(d) and other source milk allocated to Class I pursuant to § 1096.44(a)(7) and (a)(11) and the corresponding steps of § 1096.44(b), except such other source milk that is excluded from the computations pursuant to § 1096.60 (d) and (f); and

* * * * *

PART 1097—MILK IN THE MEMPHIS, TENNESSEE MARKETING AREA

1. Section 1097.15 is revised to read as follows:

§ 1097.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1097.16 is revised to read as follows:

§ 1097.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1097.19 is added to read as follows:

§ 1097.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1097.12, 1097.41 and 1097.52.

4. Section 1097.40 is revised to read as follows:

§ 1097.40 Classes of utilization.

Except as provided in § 1097.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1097.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1097.15 and the fluid cream product definition pursuant to § 1097.16; and

(7) In shrinkage assigned pursuant to § 1097.41(a) to the receipts specified in § 1097.41(a)(2) and in shrinkage specified in § 1097.41 (b) and (c).

5. Section 1097.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1097.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1097.43 is amended by adding a new paragraph (d) to read as follows:

§ 1097.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1097.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1097.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1097.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1097.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1097.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1097.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1097.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1097.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1097.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1097.45 is amended by revising paragraph (a) to read as follows:

§ 1097.45 Market administrator's reports concerning classification.

* * * * *

(a) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to § 1097.43(d) and § 1097.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1097.85 is amended by revising paragraph (b) to read as follows:

§ 1097.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1097.43(d) and other source milk allocated to Class I pursuant to § 1097.44 (a)(7) and (a)(11) and the corresponding steps of § 1097.44(b).

* * * * *

PART 1098—MILK IN THE NASHVILLE, TENNESSEE MARKETING AREA

1. Section 1098.15 is revised to read as follows:

§ 1098.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1098.16 is revised to read as follows:

§ 1098.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1098.19 is added to read as follows:

§ 1098.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1098.13, 1098.41 and 1098.52.

4. Section 1098.40 is revised to read as follows:

§ 1098.40 Classes of utilization.

Except as provided in § 1098.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1098.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1098.15 and the fluid cream product definition pursuant to § 1098.16; and

(7) In shrinkage assigned pursuant to § 1098.41(a) to the receipts specified in § 1098.41(a)(2) and in shrinkage specified in § 1098.41 (b) and (c).

5. Section 1098.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1098.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1098.43 is amended by adding a new paragraph (d) to read as follows:

§ 1098.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1098.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1098.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1098.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1098.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the

pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1098.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1098.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1098.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1098.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1098.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1098.45 is amended by revising paragraph (b) to read as follows:

§ 1098.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to § 1098.43(d) and § 1098.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1098.60 is amended by revising paragraphs (d) and (f) and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1098.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1098.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1098.44(a)(7) (i) through (iv) and (vii), and the corresponding step of § 1098.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1098.43(d) and § 1098.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1098.44(a)(11) and the corresponding steps of § 1098.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1098.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1098.76 (a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1098.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1098.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order

pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1098.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1098.85 is amended by revising paragraph (b) to read as follows:

§ 1098.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1098.43(d) and other source milk allocated to Class I pursuant to § 1098.44 (a)(7) and (a)(11) and the corresponding steps of § 1098.44(b), except such other source milk that is excluded from the computations pursuant to § 1098.60 (d) and (f); and

* * * * *

PART 1099—MILK IN THE PADUCAH, KENTUCKY MARKETING AREA

1. Section 1099.15 is revised to read as follows:

§ 1099.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1099.16 is revised to read as follows:

§ 1099.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1099.19 is added to read as follows:

§ 1099.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1099.13, 1099.41 and 1099.52.

4. Section 1099.40 is revised to read as follows:

§ 1099.40 Classes of utilization.

Except as provided in § 1099.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1099.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that

may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1099.15 and the fluid cream product definition pursuant to § 1099.16; and

(7) In shrinkage assigned pursuant to § 1099.41(a) to the receipts specified in § 1099.41(a)(2) and in shrinkage specified in § 1099.41 (b) and (c).

5. Section 1099.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1099.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1099.43 is amended by adding a new paragraph (d) to read as follows:

§ 1099.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1099.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1099.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1099.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1099.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1099.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1099.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1099.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1099.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1099.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1099.45 is amended by revising paragraph (b) to read as follows:

§ 1099.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1099.43(d) and § 1099.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1099.60 is amended by revising paragraphs (d), (f) and (g), and adding new paragraphs (h) and (i) to read as follows:

§ 1099.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1099.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1099.44(a)(7) (i) through (iv) and the corresponding step of § 1099.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1099.43(d) and § 1099.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1099.44(a)(11) and the corresponding step of § 1099.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1099.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1099.76 (a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any Class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1099.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1099.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1099.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1099.85 is amended by revising paragraph (b) to read as follows:

§ 1099.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1099.43(d) and other source milk allocated to Class I pursuant to § 1099.44(a)(7) and (a)(11) and the corresponding steps of § 1099.44(b), except such other source milk that is excluded from the computations pursuant to § 1099.60(d) and (f); and

* * * * *

PART 1106—MILK IN THE SOUTHWEST PLAINS MARKETING AREA

1. Section 1106.15 is revised to read as follows:

§ 1106.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1106.16 is revised to read as follows:

§ 1106.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1106.19 is added to read as follows:

§ 1106.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1106.13, 1106.41 and 1106.52.

4. Section 1106.40 is revised to read as follows:

§ 1106.40 Classes of utilization.

Except as provided in § 1106.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1106.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity

of skim milk in such product that was included within the fluid milk product definition pursuant to § 1106.15 and the fluid cream product definition pursuant to § 1106.16, and

(7) In shrinkage assigned pursuant to § 1106.41(a) to the receipts specified in § 1106.41(a)(2) and in shrinkage specified in § 1106.41(b) and (c).

5. Section 1106.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1106.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1106.43 is amended by adding a new paragraph (d) to read as follows:

§ 1106.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1106.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1106.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1106.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1106.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1106.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1106.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1106.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1106.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1106.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1106.45 is amended by revising paragraph (b) to read as follows:

§ 1106.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1106.43(d) and § 1106.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1106.52 is amended by revising paragraph (b)(1) to read as follows:

§ 1106.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1106.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, the pounds of skim milk in receipts of packaged fluid milk products from other pool plants;

* * * * *

10. Section 1106.60 is amended by revising paragraphs (d) and (f), replacing the period after paragraph (g) with a semicolon, and adding new paragraphs (h), (i) and (j) to read as follows:

§ 1106.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location

of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1106.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1106.44(a)(7) (i) through (iv) and (vii), and the corresponding step of § 1106.44(b), excluding receipts of bulk fluid cream products from another order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1106.43(d) and § 1106.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1106.44(a)(11) and the corresponding steps of § 1106.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1106.43(d);

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1106.76(a)(5) or (c); and

(j) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1106.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1106.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1106.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1106.85 is amended by revising paragraph (c) to read as follows:

§ 1106.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1106.43(d) and other source milk allocated to Class I pursuant to § 1106.44(a)(7) and (a)(11) and the corresponding steps of § 1106.44(b), except such other source milk that is excluded from the computations pursuant to § 1106.60(d) and (f); and

* * * * *

PART 1108—MILK IN THE CENTRAL ARKANSAS MARKETING AREA

1. Section 1108.15 is revised to read as follows:

§ 1108.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that

contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1108.16 is revised to read as follows:

§ 1108.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1108.19 is added to read as follows:

§ 1108.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1108.13, 1108.41 and 1108.52.

4. Section 1108.40 is revised to read as follows:

§ 1108.40 Classes of utilization.

Except as provided in § 1108.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1108.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1108.15 and the fluid cream product definition pursuant to § 1108.16; and

(7) In shrinkage assigned pursuant to § 1108.41(a) to the receipts specified in § 1108.41(a)(2) and in shrinkage specified in § 1108.41(b) and (c).

5. Section 1108.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1108.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and

other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1108.43 is amended by adding a new paragraph (d) to read as follows:

§ 1108.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1108.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1108.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1108.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1108.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1108.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1108.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1108.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1108.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1108.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1108.45 is amended by revising paragraph (b) to read as follows:

§ 1108.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1108.43(d) and § 1108.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1108.52 is amended by revising paragraph (b)(1) to read as follows:

§ 1108.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee plant after the computations pursuant to § 1108.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, an amount equal to the pounds of skim milk in receipts of milk at the transferee plant from producers and handlers described in § 1108.9(c), and in receipts of packaged fluid milk products from other pool plants;

* * * * *

10. Section 1108.60 is amended by revising paragraphs (d) and (f), replacing the period after paragraph (g) with a semicolon, and adding new paragraphs (h), (i) and (j) to read as follows:

§ 1108.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1108.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1108.44(a)(7)(i) through (iv) and the corresponding step of § 1108.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1108.43(d) and § 1108.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1108.44(a)(11) and the corresponding steps of § 1108.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an

unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1108.43(d);

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1108.76(a)(5) or (c); and

(j) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1108.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1108.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1108.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1108.85 is amended by revising paragraph (c) to read as follows:

§ 1108.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1108.43(d) and other source milk allocated to Class I pursuant to § 1108.44(a)(7) and (a)(11) and the corresponding steps of § 1108.44(b), except such other source milk that is excluded from the computations pursuant to § 1108.60(d) and (f); and

* * * * *

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

1. Section 1124.15 is revised to read as follows:

§ 1124.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1124.16 is revised to read as follows:

§ 1124.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1124.20 is added under the undesignated center heading "Definitions" to read as follows:

§ 1124.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that

uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1124.13, 1124.41 and 1124.52.

4. Section 1124.40 is amended by revising paragraphs a, b, and c, to read as follows:

§ 1124.40 Classes of utilization.

Except as provided in § 1124.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1124.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form, except nonfat dry milk;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1124.15 and the fluid cream product definition pursuant to § 1124.16; and

(7) In shrinkage assigned pursuant to § 1124.41(a) to the receipts specified in § 1124.41(a)(2) and in shrinkage specified in § 1124.41 (b) and (c).

* * * * *

5. Section 1124.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows, and removing paragraph (e):

§ 1124.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1124.43 is amended by adding a new paragraph (f) to read as follows:

§ 1124.43 General classification rules.

* * * * *

(f) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the

reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1124.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1124.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1124.44 is amended by revising the first sentence of paragraph (a)(6) and revising paragraphs (a)(7), (a)(8)(i), and (a)(10), to read as follows:

§ 1124.44 Classification of producer milk.

* * * * *

(a) * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1124.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(7) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1124.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1124.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

* * * * *

(8) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(6) of this section applies, packaged inventory at the beginning of the month of products specified in § 1124.40(b)(1) that was not subtracted pursuant to paragraphs (a)(5), (a)(6) and (a)(7) of this section;

* * * * *

(10) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1124.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(4), (a)(6) and (a)(8)(i) of this section;

* * * * *

8. Section 1124.45 is amended by revising paragraph (b) to read as follows:

§ 1124.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1124.43(f) and § 1124.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1124.52 is amended by revising paragraph (d)(1) to read as follows:

§ 1124.52 Plant location adjustments for handlers.

* * * * *

(d) * * *

(1) Subtract from the pounds of Class I remaining at the transferee-plant after the computations pursuant to § 1124.44(a)(13) and (b) plus the pounds of skim milk and butterfat in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, the pounds of packaged fluid milk products from other pool plants;

* * * * *

10. Section 1124.60 is amended by revising paragraphs (d) and (f), redesignating paragraph (g) as (j) and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1124.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1124.43(f) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1124.44(a)(8)(v) and (vi) and the corresponding step of § 1124.44(b);

* * * * *

(f) Add an amount equal to the value at the Class I price, adjusted for location of the nearest nonpool plant(s) from which an equivalent volume was received, with respect to skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1124.43(f) and § 1124.44(a)(8)(v) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1124.44(a)(12) and the corresponding steps of § 1124.44(b), excluding such skim milk or butterfat in bulk receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by a handler fully regulated under this or any other order issued pursuant to the Act is classified and priced as Class I milk and is not used as an offset on any payment obligation under this or any other order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1124.43(f);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1124.76(b)(4) or (c);

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month; and

* * * * *

11. Section 1124.76 is amended by revising paragraphs (b)(3) and (b)(4) and by adding a new paragraph (c) to read as follows:

§ 1124.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(b) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are

then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location (not to be less than the Class III price), and add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (b)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1124.43(f). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1124.85 is amended by revising paragraph (b) to read as follows:

§ 1124.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1124.43(f) and other source milk allocated to Class I pursuant to § 1124.44(a)(8) and (a)(12) and the corresponding steps of § 1124.44(b), except such other source milk on which no handler obligation applies pursuant to § 1124.60(f); and

* * * * *

PART 1126—MILK IN THE TEXAS MARKETING AREA

1. Section 1126.15 is revised to read as follows:

§ 1126.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1126.16 is revised to read as follows:

§ 1126.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1126.21 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1126.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1126.13, 1126.41 and 1126.52.

4. Section 1126.40 is revised to read as follows:

§ 1126.40 Classes of utilization.

Except as provided in § 1126.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1126.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta

cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1126.15 and the fluid cream product definition pursuant to § 1126.16; and

(7) In shrinkage assigned pursuant to § 1126.41(a) to the receipts specified in § 1126.41(a)(2) and in shrinkage specified in § 1126.41 (b) and (c).

5. Section 1126.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1126.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1126.43 is amended by adding a new paragraph (d) to read as follows:

§ 1126.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1126.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1126.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1126.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1126.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1126.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1126.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1126.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1126.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1126.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1126.45 is amended by revising paragraph (b) to read as follows:

§ 1126.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1126.43(d) and § 1126.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1126.52 is amended by revising paragraph (b)(1) to read as follows:

§ 1126.52 Plant location adjustments for handlers.

* * * * *

(b) * * *

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1126.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, an amount equal to:

* * * * *

10. Section 1126.60 is amended by revising paragraphs (d) and (f), replacing the period after paragraph (g) with a semicolon, replacing the period after paragraph (h) with a semicolon, and adding new paragraphs (i), (j) and (k) to read as follows:

§ 1126.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1126.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1126.44(a)(7)(i) through (iv) and (vii), and the corresponding step of § 1126.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1126.43(d) and § 1126.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1126.44(a)(11) and the corresponding steps of § 1126.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

(i) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1126.43(d);

(j) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1126.76(a)(5) or (c); and

(k) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

11. Section 1126.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows: § 1126.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk

received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1126.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1126.85 is amended by revising paragraph (c) to read as follows:

§ 1126.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1126.43(d) and other source milk allocated to Class I pursuant to § 1126.44(a)(7) and (a)(11) and the corresponding steps of § 1126.44(b), except such other source milk that is excluded from the computations pursuant to § 1126.60 (d) and (f); and

* * * * *

PART 1131—MILK IN THE CENTRAL ARIZONA MARKETING AREA

1. Section 1131.15 is revised to read as follows:

§ 1131.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include: (1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1131.16 is revised to read as follows:

§ 1131.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1131.19 is added to read as follows:

§ 1131.19 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk or associated producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1131.12, 1131.13, 1131.22, 1131.41 and 1131.52.

4. Section 1131.40 is revised to read as follows:

§ 1131.40 Classes of utilization.

Except as provided in § 1131.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1131.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to

be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i)–(iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1131.15 and the fluid cream product definition pursuant to § 1131.16; and

(7) In shrinkage assigned pursuant to § 1131.41(a) to the receipts specified in § 1131.41(a)(2) and in shrinkage specified in § 1131.41(b) and (c).

5. Section 1131.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1131.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant pursuant to § 1131.22 or from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1131.43 is amended by adding a new paragraph (d) to read as follows:

§ 1131.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1131.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1131.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1131.44 is amended by revising paragraph (a)(2); revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1131.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1131.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

* * * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1131.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1131.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1131.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series

beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1131.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1131.45 is amended by revising paragraph (b) to read as follows:

§ 1131.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1131.43(d) and § 1131.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1131.60 is amended by revising paragraphs (d) and (f), and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1131.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1131.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1131.44(a)(7) (i) through (iv) and (vii), and the corresponding step of § 1131.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1131.43(d) and § 1131.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1131.44(a)(11) and the corresponding steps of § 1131.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1131.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1131.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1131.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1131.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1131.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1131.85 is amended by revising paragraph (a)(2) to read as follows:

§ 1131.85 Assessment for order administration.

(a) * * *

(2) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk

products assigned to Class I use pursuant to § 1131.43(d) and other source milk allocated to Class I pursuant to § 1131.44(a)(7) and (a)(11) and the corresponding steps of § 1131.44(b), except such other source milk that is excluded from the computations pursuant to § 1131.60 (d) and (f); and

* * * * *

PART 1134—MILK IN THE WESTERN COLORADO MARKETING AREA

1. Section 1134.15 is revised to read as follows:

§ 1134.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1134.16 is revised to read as follows:

§ 1134.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1134.20 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1134.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1134.12, 1134.13, 1134.41 and 1134.52.

4. Section 1134.40 is revised to read as follows:

§ 1134.40 Classes of utilization.

Except as provided in § 1134.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1134.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semisolid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumertype package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of

this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1134.15 and the fluid cream product definition pursuant to § 1134.16; and

(7) In shrinkage assigned pursuant to § 1134.41(a) to the receipts specified in § 1134.41(a)(2) and in shrinkage specified in § 1134.41 (b) and (c).

5. Section 1134.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1134.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1134.43 is amended by adding a new paragraph (d) to read as follows:

§ 1134.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1134.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1134.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1134.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1134.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1134.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1134.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1134.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1134.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1134.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1134.45 is amended by revising paragraph (b) to read as follows:

§ 1134.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1134.43(d) and § 1134.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1134.60 is amended by revising paragraphs (d), (f) and (g) and adding new paragraphs (h) and (i) to read as follows:

§ 1134.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1134.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1134.44(a)(7) (i) through (iv) and the corresponding step of § 1134.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other

order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1134.43(d) and § 1134.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1134.44(a)(11) and the corresponding steps of § 1134.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1134.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1134.76 (a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1134.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1134.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1134.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1134.85 is amended by revising paragraph (b) to read as follows:

§ 1134.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1134.43(d) and other source milk allocated to Class I pursuant to § 1134.44 (a)(7) and (a)(11) and the corresponding steps of § 1134.44(b), except such other source milk that is excluded from the computations pursuant to § 1134.60 (d) and (f); and

* * * * *

PART 1135—MILK IN THE SOUTHWESTERN IDAHO-EASTERN OREGON MARKETING AREA

1. Section 1135.15 is revised to read as follows:

§ 1135.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1135.16 is revised to read as follows:

§ 1135.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1135.20 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1135.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1135.13, and 1135.41.

4. Section 1135.40 is revised to read as follows:

§ 1135.40 Classes of utilization.

Except as provided in § 1135.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1135.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1135.15 and the fluid cream product definition pursuant to § 1135.16; and

(7) In shrinkage assigned pursuant to § 1135.41(a) to the receipts specified in § 1135.41(a)(2) and in shrinkage specified in § 1135.41 (b) and (c).

5. Section 1135.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1135.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to

the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1135.43 is amended by adding a new paragraph (d) to read as follows:

§ 1135.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1135.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1135.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1135.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1135.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1135.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1135.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1135.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1135.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1135.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1135.45 is amended by revising paragraph (b) to read as follows:

§ 1135.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1135.43(d) and § 1135.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1135.60 is amended by revising paragraphs (d) and (f), and adding new paragraphs (g), (h) and (i) to read as follows:

§ 1135.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1135.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1135.44(a)(7) (i) through (iv) and the corresponding step of § 1135.44(b), excluding receipts of bulk fluid cream products for an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1135.43(d) and § 1135.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1135.44(a)(11) and the corresponding steps of § 1135.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products form an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1135.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1135.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable

class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1135.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1135.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1135.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid milk ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1135.85 is amended by revising paragraph (b) to read as follows:

§ 1135.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1135.43(d) and other source milk allocated to Class I pursuant to § 1135.44(a)(7) and (a)(11) and the corresponding steps of § 1135.44(b), except such other source milk that is excluded from the computations pursuant to § 1135.60 (d) and (f); and

* * * * *

PART 1137—MILK IN THE EASTERN COLORADO MARKETING AREA

1. Section 1137.15 is revised to read as follows:

§ 1137.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1137.16 is revised to read as follows:

§ 1137.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1137.20 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1137.20 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1137.12, 1137.13, 1137.41 and 1137.52.

4. Section 1137.40 is revised to read as follows:

§ 1137.40 Classes of utilization.

Except as provided in § 1137.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1137.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4)(i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1137.15 and the fluid cream product definition pursuant to § 1137.16; and

(7) In shrinkage assigned pursuant to § 1137.41(a) to the receipts specified in § 1137.41(a)(2) and in shrinkage specified in § 1137.41(b) and (c).

5. Section 1137.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2)(vi) and (vii) to read as follows:

§ 1137.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1137.43 is amended by adding a new paragraph (d) to read as follows:

§ 1137.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1137.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1137.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1137.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1137.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the

pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1137.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1137.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1137.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1137.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1137.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1137.45 is amended by revising paragraph (b) to read as follows:

§ 1137.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1137.43(d) and § 1137.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1137.60 is amended by revising paragraphs (d), (f) and (g) and adding new paragraphs (h) and (i) to read as follows:

§ 1137.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1137.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1137.44(a)(7)(i) through (iv) and the corresponding step of § 1137.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1137.43(d) and § 1137.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1137.44(a)(11) and the corresponding steps of § 1137.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1137.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1137.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1137.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1137.76 Payments by the handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to

produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1137.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1137.85 is amended by revising paragraph (b) to read as follows:

§ 1137.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1137.43(d) and other source milk allocated to Class I pursuant to § 1137.44 (a)(7) and (a)(11) and the corresponding steps of § 1137.44(b), except such other source milk that is excluded from the computations pursuant to § 1137.60 (d) and (f); and

* * * * *

PART 1138—MILK IN THE NEW MEXICO-WEST TEXAS MARKETING AREA

1. Section 1138.15 is revised to read as follows:

§ 1138.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1138.16 is revised to read as follows:

§ 1138.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1138.21 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1138.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1138.13, 1138.41 and 1138.53.

4. Section 1138.40 is revised to read as follows:

§ 1138.40 Classes of utilization.

Except as provided in § 1138.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1138.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that

may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1138.15 and the fluid cream product definition pursuant to § 1138.16; and

(7) In shrinkage assigned pursuant to § 1138.41(a) to the receipts specified in § 1138.41(a)(2) and in shrinkage specified in § 1138.41(b) and (c).

5. Section 1138.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1138.42 Classification of transfers and diversions.

* * * * *

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1138.43 is amended by adding a new paragraph (d) to read as follows:

§ 1138.43 General classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1138.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1138.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1138.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1138.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1138.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1138.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1138.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1138.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1138.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1138.45 is amended by revising paragraph (b) to read as follows:

§ 1138.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1138.43(d) and § 1138.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1138.60 is amended by revising paragraphs (d) and (f), replacing the period after paragraph (g) with a semicolon, and adding new paragraphs (h), (i) and (j) to read as follows:

§ 1138.60 Handler's value of milk for computing uniform price.

* * * * *

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1138.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1138.44(a)(7)(i) through (iv) and the corresponding step of § 1138.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants;

* * * * *

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1138.43(d) and § 1138.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1138.44(a)(11) and the corresponding steps of § 1138.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

(h) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1138.43(d);

(i) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1138.76(a)(5) or (c); and

(j) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1138.76 is amended by revising paragraphs (a)(3) and (a)(5) and by adding a new paragraph (c) to read as follows:

§ 1138.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1138.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

11. Section 1138.85 is amended by revising paragraph (c) to read as follows:

§ 1138.85 Assessment for order administration.

* * * * *

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1138.43(d) and other source milk allocated to Class I pursuant to § 1138.44(a)(7) and (a)(11) and the corresponding steps of § 1138.44(b), except such other source milk that is excluded from the computations pursuant to § 1138.60(d) and (f); and

* * * * *

PART 1139—MILK IN THE GREAT BASIN MARKETING AREA

1. Section 1139.15 is revised to read as follows:

§ 1139.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than 9 percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

2. Section 1139.16 is revised to read as follows:

§ 1139.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing 9 percent or more butterfat, with or without the addition of other ingredients.

3. A new § 1139.21 is added under the undesignated centerheading "Definitions" to read as follows:

§ 1139.21 Commercial food processing establishment.

Commercial food processing establishment means any facility other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products and has no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including but not limited to, provisions in §§ 1139.12, 1139.13, 1139.41 and 1139.52.

4. Section 1139.40 is revised to read as follows:

§ 1139.40 Classes of utilization.

Except as provided in § 1139.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1139.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product resembling a Class II product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter, and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use. If advance notification of such dumping is not possible, or if the market administrator so requires, the handler must notify the market administrator on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator;

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity

of skim milk in such product that was included within the fluid milk product definition pursuant to §1139.15 and the fluid cream product definition pursuant to § 1139.16; and

(7) In shrinkage assigned pursuant to § 1139.41(a) to the receipts specified in § 1139.41(a)(2) and in shrinkage specified in § 1139.41 (b) and (c).

5. Section 1139.42 is amended by replacing the semicolon at the end of the text of paragraph (a)(1) with a period and adding the following sentence immediately thereafter, and by revising paragraphs (d)(2) (vi) and (vii) to read as follows:

§ 1139.42 Classification of transfers and diversions.

(a) * * *

(1) * * * The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products;

* * * * *

(d) * * *

(2) * * *

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

* * * * *

6. Section 1139.43 is amended by adding a new paragraph (d) to read as follows:

§ 1139.43 General accounting and classification rules.

* * * * *

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignments under § 1139.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1139.44 on a pro rata basis, unless a specific use of such receipts is established by the handler.

7. Section 1139.44 is amended by revising paragraph (a)(2), revising the first sentence of paragraph (a)(5), revising paragraphs (a)(6), (a)(7)(i) and (a)(9), and by changing the reference "(a)(2)" in paragraphs (a)(7)(v), (a)(8)(i), (a)(8)(ii), and the introductory text of paragraph (a)(11) to "(a)(2)(i)", to read as follows:

§ 1139.44 Classification of producer milk.

* * * * *

(a) * * *

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

* * * * *

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1139.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. * * *

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1139.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1139.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II.

(7) * * *

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1139.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (a)(5) and (a)(6) of this section;

* * * * *

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1139.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5) and (a)(7)(i) of this section;

* * * * *

8. Section 1139.45 is amended by revising paragraph (b) to read as follows:

§ 1139.45 Market administrator's reports and announcements concerning classification.

* * * * *

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1139.43(d) and § 1139.44 on the basis of such report, (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

* * * * *

9. Section 1139.60 is amended by revising paragraphs (e) and (g) and adding new paragraphs (j), (k) and (l) to read as follows:

§ 1139.60 Computation of handlers' obligation to pool.

* * * * *

(e) The value of the product pounds, skim milk and butterfat assigned to Class I pursuant to § 1139.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1139.44(a)(7)(i) through (iv) and (vii), and the corresponding step of § 1139.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants and unregulated supply plants, applicable at the location of the pool plant at the current month's Class I-Class III price difference;

* * * * *

(g) The value of the product pounds, skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to 1139.43(d) and § 1139.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1139.44(a)(11) and the corresponding

steps of § 1139.44(b), excluding such nundredweight in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent quantity disposed of to such plant by handlers fully regulated by any Federal order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order, applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received at the current month's Class I–Class III price difference;

* * * * *

(j) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1139.43(d);

(k) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1139.76(a)(1)(v) or (c); and

(l) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

10. Section 1139.61(a) is amended by changing the reference "(a) through (g)," to read "(a) through (g) and (j) and (k),".

11. Section 1139.76 is amended by revising paragraphs (a)(1)(iii) and (a)(1)(v) and by adding a new paragraph (c) to read as follows:

§ 1139.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(1) * * *

(iii) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

* * * * *

(v) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(1)(iii) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

* * * * *

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1139.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

12. Section 1139.85 is amended by revising paragraph (b) to read as follows:

§ 1139.85 Assessment for order administration.

* * * * *

(b) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1139.43(d) and other source milk allocated to Class I pursuant to § 1139.44 (a)(7) and (a)(11) and the corresponding steps of § 1139.44(b), except such other source milk that is excluded from the computations pursuant to § 1139.60 (e) and (g); and

* * * * *

[Editorial Note: This marketing agreement will not appear in the Code of Federal Regulations.]

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ [1] to all inclusive, of the order regulating the handling of milk in ('Name of order') marketing area (7 CFR part [2]) which is annexed hereto; and

II. The following provisions:

§ [3] Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he handled during the month of April 1992, hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Director, or Acting Director, Dairy Division, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ [3] Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in

[1] First and last sections of order.

[2] Appropriate part number.

[3] Next consecutive section number.

accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

(Signature)

(Seal)

By (Name)

(Title)

(Address)

Attest

[FR Doc. 93–3222 Filed 3–4–93; 8:45 am]

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federal register

Friday
March 5, 1993

Part III

Federal Trade Commission

16 CFR Part 305
Energy Costs and Consumption Information on Consumer Appliances; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Part 305

Rules for Using Energy Costs and Consumption Information Used in Labeling and Advertising of Consumer Appliances Under the Energy Policy and Conservation Act

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: On June 13, 1988, the Commission published a Notice of Proposed Rulemaking ("the NPR") proposing changes to the Appliance Labeling Rule ("the Rule").[1] The Commission initiated this rulemaking because, since the Rule went into effect on May 19, 1980, the Commission has obtained information from diverse sources indicating that modifications to the Rule should be considered. Certain additional amendments being proposed today would result in changes not raised in the NPR and change the form and substance of the EnergyGuide labels.[2] Consequently, before adopting a final amended rule, the Commission invites comment for 45 days on the proposed new label format.

The Commission also is allowing public comment on other proposed amendments. These amendments have been subject to prior comment and they are based on the Commission's analysis of the record to date. Consequently, the Commission requests that any additional comments be in the nature of rebuttal comments identifying analytical flaws or misunderstandings, rather than repetitions of earlier comments.

Finally, in accordance with a statutory directive, the Commission is inviting comment on whether certain of the Rule's provisions should continue requiring compliance in inch-pound terms, or require the use of metric terms only or metric and inch-pound terms together.

DATES: Written comments must be submitted on or before April 19, 1993.

Persons desiring a public hearing on the proposed amendments relating to the revised label format should advise Henry B. Cabell, the Presiding Officer, no later than March 25, 1993. If hearings on the proposed label format revisions are scheduled, the date and time of the hearings, as well as the date for submission of prepared witness statements and exhibits, will be announced in a subsequent Notice.

ADDRESSES: Written comments and requests for public hearings should be submitted to Henry B. Cabell, Presiding Officer, Federal Trade Commission, Washington, DC 20580, 202–326–3642. Written comments should be submitted, when feasible and not burdensome, in five copies.

FOR FURTHER INFORMATION CONTACT: James Mills, Attorney, 202–326–3035, Enforcement Division, FTC, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: In addition to changes suggested by diverse sources since the Rule's promulgation, the Commission received comments during the review of the Rule under the Regulatory Flexibility Act regarding ways to modify the Rule.[3] The NPR invited comment on the suggestions offered during that review as well as on other parts of the Rule that the Commission believed might warrant changes, including the effect of the appliance efficiency standards contained in the National Appliance Energy Conservation Act ("NAECA 87"),[4] and, a proposal to exempt from coverage certain unvented space heaters. Part II below includes discussion of comments filed and Rule revisions proposed as a result of the NPR. Part III below includes further proposals to amend the Rule: To make it current in light of changes in related DOE regulations, to change the energy efficiency descriptor nomenclature, and to adopt a new label format. Sections A through D include instructions to the public for participating in the proceeding. Section E solicits comment on use of metrics in labels, and sections F and G have been included in conformance with the requirements of the Regulatory Flexibility Act and the Paperwork Reduction Act, respectively. The proposed amended rule sections appear in Section H, below.

I. Background

The Energy Policy and Conservation Act of 1975 ("EPCA"),[5] as amended, requires the Commission to prescribe labeling rules for the disclosure of estimated annual energy cost or alternative energy consumption information for the following products:

(1) Refrigerators, refrigerator-freezers, and freezers
(2) Room air conditioners
(3) Central air conditioners and heat pumps
(4) Water heaters
(5) Furnaces
(6) Dishwashers
(7) Clothes washers
(8) Clothes dryers
(9) Direct heating equipment
(10) Kitchen ranges and ovens
(11) Pool heaters
(12) Television sets
(13) Fluorescent lamp ballasts
(14) General service fluorescent lamps and incandescent reflector lamps
(15) Showerheads, except safety shower showerheads
(16) Faucets
(17) Water closets
(18) Urinals
(19) Any other type of product which the Department of Energy (DOE) classifies as a covered product.

EPCA section 322(a), 42 U.S.C. 6292(a). However, no labeling rule need be prescribed until DOE has prescribed test procedures to measure the energy use of a particular covered product. EPCA section 324(b)(3), 42 U.S.C. 6294(b)(3). Moreover, the Commission may exempt from coverage:

(a) Products in categories 1, 2, 4, 6 and 8 through 12 if it determines that labeling is not technologically or economically feasible, EPCA section 324(a)(1), 42 U.S.C. 6294(a)(1); and

(b) Products in categories 3, 5 and 7 if labeling is not technologically or economically feasible or not likely to assist consumers in making purchasing decisions, EPCA section 324(a)(2)(A), 42 U.S.C. 6294(a)(2)(A).

There is an additional exemption provision for lamps that is not pertinent to this analysis. See EPCA section 324(a)(2)(C)(ii), 42 U.S.C. 6294(a)(2)(C)(ii).

Labels shall disclose the estimated annual operating cost of such products, as determined by DOE test procedures, unless DOE determines that disclosure of estimated annual operating costs is not technologically feasible, or the FTC determines that such disclosure is not likely to assist consumers in making

[1] 53 FR 22106.

[2] See discussion in sections II, C and II, D, 4 and III, C, below. The specific changes proposed to the label format are discussed in section III, D, below.

[3] Notice of the Commission's completion of the review of the Appliance Labeling Rule under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) was published in the **Federal Register** on June 13, 1988, at 53 FR 22022.

[4] The National Appliance Energy Conservation Act ("NAECA 87"), Pub. L. 100–12, 101 Stat. 103 (1987).

[5] Pub. L. 94–163, 89 Stat. 871 (1975), as amended by the National Energy Conservation Policy Act, Pub. L. 95–619, 92 Stat. 3258, (1978), the National Appliance Energy Conservation Act, Pub. L. 100–12, 101 Stat 103 (1987), the National Appliance Energy Conservation Amendments of 1988, Pub. L. 100–357, 102 Stat. 671 (1988), and the Energy Policy Act of 1992, Pub. L. 102–486 (October 24, 1992), 42 U.S.C. 6291 *et seq.* The Commission is currently considering whether to include pool heaters as covered products under the Rule. 58 FR 7852 (Feb. 9, 1993). The products in categories (14) through (18), which were only recently added to the list of covered products in EPCA by the Energy Policy Act of 1992, will be added to the Rule's coverage through rulemaking proceedings over the next two years.

purchasing decisions or is not economically feasible. In this event, the Commission shall require disclosure of a different useful measure of energy consumption, again determined in accordance with DOE test procedures. EPCA section 324(c), 42 U.S.C. 6294(c). Labels also shall disclose the range of estimated annual operating costs, or such alternate measure of energy consumption required above, for covered products. EPCA section 324(c)(1)(B), 42 U.S.C. 6294(c)(1)(B).

Regulatory History

On November 19, 1979 the Commission issued a final Rule covering seven appliance categories then covered by DOE test procedures: Refrigerators and refrigerator freezers, freezers, dishwashers, water heaters, clothes washers, room air conditioners and furnaces.[6] The Rule was subsequently amended to cover central air conditioners and air conditioning heat pumps, and fluorescent lamp ballasts.[7] For most product categories, the Rule requires that annual operating costs in dollars, and related information, be disclosed on labels and in retail sales catalogues. For three categories (room air conditioners, furnaces, central air conditioners) where usage cycles depend on disparate climate conditions across the U.S., such that "average" energy cost would be irrelevant to many consumers (and therefore not likely to assist in making purchasing decisions) the required disclosure is the energy efficiency rating ("EER").[8] In the case of room and central air conditioners, EERs must be disclosed on labels; in the case of furnaces, EERs must be disclosed on fact sheets. The corresponding cost information must be disclosed on the label for room air conditioners, on fact sheets for furnaces, and on fact sheets or in an industry directory for central air conditioners. In addition, certain point-of-sale promotional materials must disclose the availability of energy cost or energy efficiency rating information.

II. Issues Raised in the NPR

The NPR solicited comments in several areas, discussed at length below: (A) The effect of the implementation of NAECA 87 on the Rule; (B) proposed amendments to furnace requirements; (C) proposed amendments to central air conditioner requirements; (D) proposed amendments to room air conditioner requirements; (E) proposals to change the sub-categories on which ranges of comparability are based, for some products; (F) proposals to change the energy cost descriptor for several products from dollars to an alternate descriptor; (G) proposed changes in label adhesion strength and a suggestion to label only display models in retail outlets; (H) a directory option for water heaters; and (I) a proposal to label certain unvented heaters. In accordance with EPCA section 336(a), 42 U.S.C. 6306(a), the NPR afforded interested persons the opportunity to present their views orally at a public hearing. The Presiding Officer did not receive any requests for an oral presentation, so no hearing was held. During the comment and rebuttal periods, which extended from June 13 through August 18, 1988, comments were received from five appliance manufacturers, four public utilities, four appliance industry trade associations, four utilities trade associations, and The Coalition for Energy Efficient Appliance Labeling, hereinafter "CEEAL", a coalition group consisting of consumer, business, energy efficiency, utility, environmental and public sector organizations.[9] The Commission considered seriously all comments submitted in tentatively resolving the issues raised in this rulemaking, as outlined below.

A. Overall Effect of NAECA 87 on the Commission's Rule

Subsequent to the Commission's original adoption of the Rule, Congress enacted NAECA 87, which establishes minimum efficiency standards for certain categories of appliances, including many subject to the Rule. DOE, which administers the standards, uses its existing test procedures to determine compliance with the efficiency standards. The standards have effective dates at staggered intervals by appliance type from January 1, 1988, through January 1, 1993. See EPCA section 325, 42 U.S.C. 6295.[10] The NPR asked whether NAECA 87's implementation would result in narrowing of the energy usage ranges of comparable products to the point that labeling would no longer be useful, and whether, for this reason or any other, NAECA 87's adoption warranted modification of the Rule was warranted.[11]

Nine comments addressed this issue. Four suggested that the Rule would no longer be necessary after the standards set by NAECA 87 became effective, although each comment made constructive suggestions for improvements to the Rule in light of NAECA 87 if the Rule were to continue in effect.[12] Two comments stated that the Commission should wait and see how NAECA 87 actually affects the usefulness of the Rule (each also made constructive suggestions for improvements in the meantime),[13] and three favored keeping the Rule but improving it in specific ways, contending that the effects of NAECA 87 on the Rule would not justify its elimination.[14]

The commenters contending that the Rule would become useless argued that a substantial number of non-complying

[6] 16 CFR part 305. The Statement of Basis and Purpose ("SBP") for the Rule describes why the Commission exempted the other categories of covered products. 44 FR at 66467–69.

[7] 52 FR 46888 (Dec. 10, 1987) (air conditioners and heat pumps); 54 FR 28031 (July 5, 1989) (lamp ballasts; note that the statute that mandates the Commission labeling rule for these products, the National Appliance Energy Conservation Amendments of 1988, requires that they simply bear a capital letter "E" to show that they meet the statute's minimum energy efficiency standards.)

[8] When promulgating the test procedures, DOE, as required by EPCA, developed two measures of energy consumption for each appliance category: (1) estimated dollar cost of operation, and (2) the energy factor, a measure of the useful output of an appliance's services divided by the energy input. For climate control equipment, under the Commission's Rule, the energy factor must be referred to as the "EER" (energy efficiency rating). As discussed in part III, C, below, however, the Commission is proposing to amend the Rule so the acronyms used in the DOE tests and by the industry ("SEER," AFUE," "HSPF," etc.) can be used in advertising and on fact sheets and labels, instead.

[9] The commenters were: Amtrol, Inc. ("Amtrol"), D–3; Ultimate Engineering Corp. ("Ultimate"), D–4; United Technologies Carrier ("Carrier"), D–10; The Peerless Heater Company ("Peerless"), D–15; Whirlpool Corporation ("Whirlpool"), D–16; Ferrellgas, D–7; Alabama Gas Corporation ("Alagasco"), D–9; Atlanta Gas Light Company ("Atlanta Gas"), D–13; West Texas Utilities Company ("WTU"), D–17; The Association of Home Appliance Manufacturers ("AHAM"), D–5; The Hydronics Institute, Inc. ("Hydronics"), D–6; The Gas Appliance Manufacturers Association ("GAMA"), D–8; The Air Conditioning and Refrigeration Institute ("ARI"), D–12; Edison Electric Institute ("Edison"), E–2; The National Rural Electric Cooperative Association ("NRECA"), E–3; The American Gas Association ("AGA"), D–11; The National Propane Gas Association ("NPGA"), D–14; The Coalition for Energy Efficient Appliance Labeling ("CEEAL"), E–1.

[10] After the effective date of a standard, the sale of non-complying products will be prohibited. See 42 U.S.C. 6302(a)(5).

[11] Each manufacturer annually submits to the Commission energy usage data for its various appliance models. The Commission analyzes these data and publishes "ranges" consisting of the highest and lowest energy use figures for each appliance category. The manufacturers disclose the ranges on either end of a bar scale on their Energy Guide labels, and indicate where their appliances fall on the bar. For example, the 1991 range for standard size dishwashers was from $39.00 to $78.00 (when using electrically heated water) and from $22.00 to $41.00 (when heating water with gas). Manufacturers suggested that once efficiency standards were implemented, the range for a given product could be limited (for example, from $39 to $41) to the point that providing that range information would not be very useful.

[12] Hydronics, D–6, 4; GAMA D–8, 1–2, 6–7, 11; ARI, D–12, 4; Whirlpool, D–16, 1–4, 9.

[13] AHAM, D–5, 12–13; Carrier, D–10, 4.

[14] CEEAL, E–1, 8–9; Alagasco, D–9, 2; Atlanta Gas, D–13, 2.

products would be eliminated from the marketplace. They contended the remaining products would be grouped at or slightly above the minimum energy usage standard, with a resultant energy usage spread so narrow that the information on labels would not help consumers make purchasing decisions. Others, however, favored retaining the rule. Alagasco commented, for example, that the range spread for furnaces after NAECA 87 goes into effect will continue to be broad enough (72% to 97%) to justify "more definitive, accessible furnace labeling." [15]

The record does not support the conclusion that new product standards adopted under NAECA 78 warrant elimination of some or all product categories from the Rule. Pursuant to EPCA section 324(a) (1) and (2), 42 U.S.C. 6294(a) (1) and (2), the Commission may exempt a covered product from labeling only if it determines that such labeling is not technologically or economically feasible, or, in the case of central air conditioners, furnaces and clothes washers, that such labeling is not likely to assist purchasing decisions. To date, no such showing has been made. No information has been submitted suggesting that such labeling is technologically or economically infeasible. With respect to the theoretical "narrowing" of energy use ranges, the only standards that have been in effect for sufficient duration for industry response to be evident are those for clothes washers and dishwashers. In those cases, there has been no meaningful change in the number of models available. Moreover, past experience with publishing ranges strongly suggests that competition will produce products that exceed minimum standards and continue to result in a significant spread of energy usage among products, such that publication of range information will continue to assist consumer decision making. Accordingly, at this time it does not appear that the record information supports wholesale modification of the Rule, or elimination of any specific category from coverage. However, the Commission recognizes that this conclusion is reached at any early point in the history of the new efficiency standards.[16] As new minimum efficiency standards become effective, and inventories of products pre-dating the standards' effectiveness are depleted, it may become appropriate to revisit this issue.

Numerous commenters suggested that the Commission adopt product sub-categories that were created or are specified in NAECA 87 and DOE's minimum efficiency standards rule, but not in the Commission's Rule. The commenters contended that the Rule's ranges of comparability, if arranged by these product sub-categories, would help consumers shopping for products with specific features. These suggestions are addressed in the discussion of generic ranges and product categories, in sections II, B, 4 and II, C, below.

In addition, the Commission notes that new definitions for certain products appear in NAECA 87, with the result that the corresponding definitions in the Commission's Rule are no longer accurate. Issues relating to the updating of the Rule's definitions and its internal references to DOE's test procedures, are discussed in part III, B, below.

B. Furnace Amendments

1. Current Furnace Labeling Requirements

Currently, furnaces are required to bear a label containing only general energy-saving tips and referring the consumer to a fact sheet. Section 305.11(a)(5)(ii) and Figure 3.[17] The fact sheets show the various combinations of components available [18] and the overall efficiency of any set of component combinations. In addition, the fact sheets provide costs grids for estimating what the "system" would cost the consumer to operate, depending on geographic location and utility rate structures. Section 305.11(b)(3)(viii). The Rule requires that retailers make the fact sheets available to consumers. Section 305.11(b)(1)(ii).

The NPR proposed the following modifications: (1) To permit the label to direct consumers to either fact sheets or industry directories for detailed cost information, and (2) to require that furnaces bear labels disclosing (a) the specific product's EER, (b) a "generic" range of EER's for all furnaces that use the same fuel as the labeled unit, see section H, proposed § 305.11; and (c) stronger language directing consumers to either fact sheets or a directory for additional information. These proposals, the comments they generated, and the Commission's proposed resolution of the furnace requirements are further discussed below.

2. The Directory Option Amendment

The NPR's proposed directory option amendment for furnace manufacturers is identical to the Rule requirement for central air conditioner manufacturers. Under this option, furnace manufacturers could comply with the Rule's disclosure requirements by listing required information in a trade association directory, rather than on fact sheets. See section H, proposed § 305.11(c). The proposed amendments would require that the directory be distributed to all retailers selling products listed in it and that it be made available to others at cost. See section H, proposed § 305.11(c)(1). Manufacturers who choose not to use the directory option would be required to produce fact sheets for consumer use. See § 305.11(b).

One directory that may be used under the proposal is published in connection with a voluntary certification program the Gas Appliance Manufacturers Association ("GAMA") administers.[19] Under the program, open to all manufacturers of residential-size furnaces,[20] participants submit to GAMA energy efficiency information derived from tests performed by using the DOE test procedures. GAMA conducts verification testing and

[15] D–9, 2. See also CEEAL, E–1, 8–9; and Atlanta Gas, D–13, 2.

[16] Standards for refrigerators, refrigerator-freezers, freezers, water heaters, and room air conditioners became effective on January 1, 1990. Revised standards for refrigerators, refrigerator-freezers and freezers will become effective January 1, 1993. Standards for split-system central air conditioners and most furnaces became effective January 1, 1992. The Commission will not be able to evaluate the effect of the standards on these products until all the products manufactured before the effective date of the standards have worked their way out of the marketplace.

[17] The reasons underlying the Commission's current label and fact sheet disclosures requirements for furnaces are discussed in the SBP at 44 FR 66470–71.

[18] For example, whether the furnace would be available with a vent damper, standby pilot, automatic ignition, etc.

[19] GAMA represents members of the furnace manufacturing industry (which includes manufacturers of boilers). Another industry trade association is the Hydronics Institute, Berkeley Heights, New Jersey. The amendment does not specify that any particular directory must be used. Since the proposal that an industry directory be used as an alternative to fact sheets came from GAMA, this discussion focuses on GAMA's program. However, manufacturers could choose to have their required information published in GAMA's Directory, the Hydronics Institute's Directory, or in any other directory that meets the requirements in proposed § 305.11(c).

[20] GAMA program participants include manufacturers of oil-fired furnaces and boilers as well as manufacturers of gas-fired products. Electric furnace manufacturers have thus far not elected to participate in the program or the directory. ARI, the trade association that represents many electric furnace manufacturers, has suggested that electric furnaces be totally exempted from the Commission's labeling and disclosure requirements because these furnaces are all virtually 100% efficient (see Carrier, D–10, 2, Attachment 2, 1–2). The Commission rejects this proposal because electric furnaces are major users of electricity and information on their cost of operation is useful to consumers trying to decide between them and furnaces using other types of fuels.

maintains an internal enforcement mechanism. GAMA publishes and distributes a Directory listing participating manufacturers along with the DOE test-derived efficiency and annual cost information for each model.

Most comments on the directory option proposal were supportive.[21] GAMA contended that its Directory (and inferentially, the directory option generally) would be superior to the existing fact sheets because it would contain, in one place, information on the majority of models available in the marketplace. The comparability ranges for furnaces would appear in the front of the Directory in the form presently published by the Commission. In addition, the ranges would be broken down for the different furnace types, such as horizontal or outdoor types of furnaces.[22] GAMA also added directions to the Directory that enable consumers to identify where any particular furnace falls on an efficiency range scale provided in the Directory.

Alagasco and AGA opposed the directory option, contending that the GAMA Directory is too complicated for average consumers and not sufficiently available.[23] But, both agreed that the option could be very useful if it were used with product-specific labels (Alagasco); if the Directory were made more generally available to consumers (Alagasco and AGA); and, if the Directory contained cost information (AGA).

The Commission proposes to amend the Rule to include the directory option. See section H, proposed § 305.11(c). A directory is likely to be easier to use than fact sheets and, particularly with the assistance of a salesperson, is likely to be an efficient way for consumers to compare a large number of furnaces. We have addressed the concerns raised by Alagasco and AGA by requiring that any directory complying with the Rule be distributed to substantially all retailers and assemblers of furnaces selling or assembling models listed in the directory, and by requiring that it be made available at cost to all other interested parties.

[21] CEEAL, E–1, 4; Hydronics, D–6, 2; Ferrellgas, D–7, 1; GAMA, D–8, 1, 2–3, 13–14; AGA, M–1, 1–2 (provided some modifications to the GAMA Directory are made); Atlanta Gas, D–13, 1; NPGA, D–14, 3–4; Peerless, D–15, 3 (but without the use of product-specific labels).

[22] GAMA asserts that, if the Commission adopts the NAECA 87 categories for furnaces for range purposes, as discussed in section II, B, 4, below, these categories will be used in the Directory.

[23] D–9, 1–2; D–11, 3–6; but see M–1, 1–2 for AGA's conditional support in its rebuttal comment.

3. The Product-Specific Label Amendment

The present furnace label merely contains general energy-saving tips and refers consumers to the fact sheets for specific energy usage information. See § 305.11(a)(5)(ii). The NPR proposed amending the furnace disclosure requirements to require labels like those now required for central air conditioners. See § 305.11(a)(5)(iii). Under the proposal, each furnace label would show the EER of the specific model to which it is attached. Directly below the EER, the label would contain a "generic" range of EER's for all furnaces that use the type of fuel (gas, oil or electricity) used by the labeled model, rather than the range for models of a similar capacity and fuel type, as the Rule presently requires (on fact sheets). Finally, the labels would contain stronger language referring consumers to fact sheets or directories for further information regarding efficiency and operating costs.[24] The Commission previously chose this scheme for central air conditioners based on evidence that consumers were not being shown fact sheets by dealers under similar circumstances. The product-specific labels ensure that consumers receive at least a minimum amount of energy information if they do not see fact sheets or a directory.[25] The NPR envisioned that the proposed furnace label amendments could have similar advantages. Comments on the proposal to require product-specific labels were divided. Four comments supported the proposal, consisting of two from utilities, one from a utility association and one from CEEAL.[26] Three manufacturers and two trade associations for the furnace industry were opposed.[27]

GAMA's comment is illustrative of those opposing product-specific labels:

> The Commission should not require labels on furnaces and boilers, and especially not product-specific labels. [1] Product-specific labels are not necessary to stimulate consumer demand for more efficient furnaces and boilers. To day, product-specific labels have not been on furnaces and boilers; yet the efficiency of these products in recent years has increased significantly. [2] Also, labels on furnaces and boilers will seldom assist consumers in making purchasing decisions because of the way these products are normally purchased [(either without being seen before purchase or already installed in a new home)]. [3] Further, the mandatory efficiency standards for furnaces and boilers established by NAECA 87 already guarantee much of the energy savings that proponents of labeling these products would otherwise hope to achieve through labeling.[28]

Alagasco, however, commented that "the consumer and the utility would be better served if the present * * * label [for furnaces] was changed to include the furnace AFUE and reference operating cost data directly on the label because it would force contractors to address that information prior to the sale.[29] Moreover, Alagasco contended, a product-specific label permits quick verification by the consumer that the efficiency represented by the seller is the efficiency installed.

The Commission proposes to include product-specific label requirements for furnaces in the amendments to the Rule. See section H, proposed §§ 305.11(a)(5)(ii)(C) through (M). In the Commission's view, the Rule's requirement that energy efficiency be disclosed on fact sheets has been a major factor in the significant increase in the efficiency of furnaces and boilers in recent years. Product-specific labels could further improve the communication of efficiency information and reinforce the trend towards more energy efficient heating products. To the extent that consumers shopping for furnaces may see display models, either in a store or model home, for example, they would always see the minimum information required by EPCA (that is, the EER of the product and range information).[30] Labels on furnaces in new homes may encourage consumers to consider appliance energy usage as a factor in purchasing the home. With this information, an energy-conscious consumer could select one house over another; or, such a consumer could order a more efficient unit, where such a choice was possible. These options would be available to consumers who visit various model homes in new or soon-to-be-built subdivisions because they would be

[24] Current furnace labels suggest that consumers ask for fact sheets, while the proposed amended labels would use the stronger language of the central air conditioner labels:

> Federal law requires the seller or installer of this appliance to make available a fact sheet or directory giving further information regarding the efficiency and operating cost of this equipment. Ask for this information.

[25] See 52 FR 46890–92 (Dec. 10, 1987) for a further discussion of the Commission's reasons for requiring product specific labels for central air conditioners.

[26] CEEAL, E–1, 4; Alagasco, D–9, 1–2; AGA, D–11, 6; Atlanta Gas, D–13, 1.

[27] Ultimate, D–4, 1; Hydronics, D–6, 2–3; GAMA, D–8, 1–2, 4–9, 13–14; Carrier, D–10, 2–3; Peerless, D–15, 1–2.

[28] D–8, 4.

[29] D–9, 2.

[30] In the event that consumers do not see actual furnace units prior to purchase, the amended Rule also would require that the EER and range information appear in fact sheets or directories (as well as on the label).

able to see labels on the major appliances in the model homes. Even if, as GAMA suggests, consumers often do not see the furnace unit they are going to purchase until after they have settlement, the energy usage disclosure program overall seems to raise consumer awareness about the energy usage of these products. Consumers' receipt of energy usage information after consummation of the sale also could, to some extent, encourage builders to install energy efficient furnaces.

GAMA suggested as an alternative that labels should state only the following:[31]

SEE THE RATING PLATE ON THIS UNIT OR ASK YOUR DEALER FOR THE EFFICIENCY RATING.

According to GAMA, the manufacturer would include the AFUE on the rating plate of each furnace and boiler.[32] GAMA contended that this disclosure method, which would be more permanent than a label, would be easier and less costly for manufacturers to implement.[33]

The Commission concludes that this disclosure method falls short of the criterion for accessibility implicit in EPCA. The statute, EPCA section 324(c)(3), 42 U.S.C. 6294(c)(3), states that the Commission's Rule shall require labels to be displayed in a manner that the Commission determines is likely to assist consumers in making purchasing decisions. The Commission has adopted EnergyGuide labels with a distinctive yellow and black appearance and a specified format for providing required information. Rating plates would not be consistent with this standardized format that consumers can associate with government-required energy usage information. Further, rating plates on furnaces may be in locations on the product that are not readily accessible to consumers, especially when the products are installed, as in a model home. Even when they can be seen, the notations on these plates can be difficult to read. For these reasons, the Commission rejects GAMA's suggestion.

[31] D–8, 7–9, Attachments.

[32] Every furnace and boiler has a rating plate permanently affixed to it that discloses the manufacturer's name, the model number of the furnace, its heating capacity and input rating and other information. At present, the AFUE is not included.

[33] GAMA included an estimate from one of its larger members that the cost of affixing product-specific labels to its products would add approximately thirty cents per unit to the cost to the consumer, as opposed to using the rating plate labeling method. According to GAMA, this translates to $900,000 per year for all units sold. However, this means a thirty-cent increase on an item usually costing over one thousand dollars.

Below, the Commission responds to five specific issues pertaining to labeling of furnaces and boilers raised by the commenters.

a. *Different ignition systems.*— Hydronics commented that furnaces have different ignition systems (standby pilot, electric ignition, etc.). Consequently, it believes it would be difficult to know in advance what the AFUE of a given model would be and to label it accurately.[34] However, since the ignition system of a furnace is installed at the manufacturing level, the Commission believes that the manufacturer would know before shipping each unit what type of ignition it had and its AFUE.

b. *Separate jackets.* According to Hydronics, Ultimate, and Peerless, in some cases the inner workings of boilers produced by the boiler manufacturer are shipped separately, with the outer jacket being supplied as a separate unit by a different supplier.[35] The sheet metal enclosures for the units are made by third party vendors and each enclosure can be used on any one of as many as six different models, each with a different rating.[36] The commenters note that the label should be on the jacket but that it is not possible for the jacket manufacturer to know in advance the AFUE of the unit over which the jacket is going to be installed. They fear that adoption of the product-specific label requirement will require a change in this efficient shipment and assembly system.

It is unclear whether this problem would be experienced by a significant proportion of the furnace/boiler industry. However, to address this issue, the Commission has included language in the proposed amended Rule that would require manufacturers of boilers that are shipped without jackets to label their products with hang-tags that also have adhesive backing on them. See section H, proposed § 305.11(a)(5)(ii)(J). This proposed provision of the Rule would enable the retailer/installer to remove the hand-tag label from the boiler itself and attach it to the jacket. The Commission notes that, under EPCA section 332(a)(2), 42 U.S.C. 6302(a)(2), retailers are only required to refrain from removal or obliteration of labels already in place. The Commission suggests, however, that the manufacturer's contract with the retailer could require the retailer to perform this simple task under the above circumstances.

[34] D–6, 2.

[35] D–6, 2; D–4, 1; D–15, 1–2.

[36] D–15, 2.

c. *Furnace vent dampers.* Vent dampers, which control the loss of heat up the exhaust flue, have an effect of up to 10% on the AFUE of the furnace or boiler with which they are installed. Vent dampers have not always been shipped with furnaces. Instead, they have often been installed, as a separate item, in the field. This has made it difficult to know in advance whether a unit would be installed with a vent damper and, therefore, to know the AFUE of the unit and label it properly. As a result of DOE modifications to the furnace test procedure, however, the effect of vent dampers on furnace efficiency is no longer an impediment to accurate labeling. See 54 FR 6062, at 6076 (Feb. 7, 1989).

Under the modified test, furnaces (as distinct from boilers) now must be tested as isolated combustion systems, rather than in a simulated indoor (or outdoor) environment, as previously allowed. The test no longer allows credit to be taken for a damper that closes the vent when the burner is not operating to prevent the updraft from drawing outside air into the test area and adversely affecting AFUE. By their design, products that meet the 1992 efficiency standards, which became effective on January 1, 1992 (for example, induced-draft and induced-draft condensing furnaces) do not require the use of a vent damper. In the near future, labels on furnaces produced before the effective date of the standards that are still working their way through the distribution system will have to disclose AFUEs derived from the modified test (since September 5, 1989), which will not be affected by whether the furnace is installed with a vent damper. Thus, the issue is now moot.

d. *Boiler vent dampers.* As with furnaces, dampers have not usually been shipped with boilers. Boilers cannot meet the minimum efficiency requirements of the January 1, 1992, standards, however, without vent dampers or power dampers. Thus, all boilers manufactured since January 1, 1992, are shipped with dampers to comply with the standards, and this issue, too, is now moot.

e. *Differing input or firing rates.* Hydronics noted that some oil-fired boilers are shipped with three different input nozzles. This enables the installer to determine what nozzle to put with the boiler, which affects the firing rate and, therefore, the AFUE, of the boiler. The manufacturer, in these cases, would not know how to label the boiler at the factory.[37]

[37] D–6, 2.

Hydronics did not specify the amount by which different firing rates (which would not have to be disclosed on the product-specific label) could change the AFUE of a boiler. The Commission has examined specification sheets that were prepared by members of the oil-fired boiler industry and has concluded that typically, different input nozzles (and firing rates) will change a boiler's AFUE by only a point to two and a half points. Consequently, to the extent this problem exists, it is *de minimis*. The Commission proposes to resolve the issue by requiring manufacturers of such boilers to label them with the AFUE of the system when it is set up with the highest firing rate (which results in the lowest AFUE). Consumers would not be harmed by this slight compromise in accuracy, which would make labeling easier and less costly to accomplish. See section H, proposed § 305.11(a)(5)(ii)(K).

f. *Steam versus hot water.* Peerless noted that, in some cases, a boiler could be hooked up to either a steam system or a hot water system. Because the system used affects the AFUE, Peerless contended that the manufacturer cannot accurately label the boiler in advance.[38] To the extent that manufacturers ship out boilers that are not set up as either steam or hot water, the proposed amendments would require them to label the boilers with the AFUE value they derived by conducting the test on the boiler as a hot water unit, which is the more common system in residential settings. See section H, proposed § 305.11(a)(5)(ii)(L). The Commission understands that the difference between the two values is only around one AFUE point (for example, 82% and 83%). As with the firing rate issue, this small compromise in label accuracy would be offset by the benefit of having an easier, and thus less costly, requirement.

4. Generic Ranges and New Sub-Categories for Furnaces

Two comments addressed the generic range aspect of the proposed furnace amendments.[39] Carrier agreed that the existing ranges for furnaces should be simplified to a single range of efficiencies for each fuel type.[40] The Hydronics Institute also agreed that one range per fuel type is a reasonable approach for furnaces because of the similarity of the efficiency figures across the capacity groupings. Hydronics suggested, however, that the Commission break the furnace category into three subcategories: Furnaces; Boilers (except gas-fired steam); and, Gas-fired steam boilers.[41]

Hydronics' suggestion parallels three of the sub-categories established by NAECA 87. The Commission proposes using these three sub-categories, along with two others—small gas furnaces and mobile home furnaces—which also were established by NAECA 87 and incorporated in DOE's minimum efficiency standards.[42] See EPCA section 325(f), 42 U.S.C. 6295(f). This would divide the furnace category into five sub-categories, resulting in nine ranges when broken out by fuel type.[43] See section H, proposed appendices G–1 through G–9.

Using the DOE sub-categories would result in consistency between the ranges required by the Rule and DOE's minimum efficiency standards for these sub-categories and thus help manufacturers. These sub-categories also would help consumers in their shopping efforts. For example, for non-gas-steam boilers, the lowest efficiency permitted by the standards is 80% (75% for gas-steam boilers). The low end of a single range for all gas-fueled boilers (as proposed in the NPR) would be 75%. Using that figure as an end point on the range would inaccurately suggest to a shopper looking for a gas/hot water boiler that a model with an efficiency of 75% would be available, when the least efficient model of that sub-category permitted by the standards would be 80% efficient. Under the system proposed today, with separate ranges for each sub-category, the ranges for boilers (except gas-steam) would show the bottom end of the efficiency range to be at the pertinent minimum efficiency standard of 80%.[44]

5. Conclusion

The conclusions discussed in this section are reflected in the proposed amendments that appear in section H at the end of this Notice. Manufacturers that are members of an industry trade association with a certification program and a directory would have the option of being listed in the directory instead of preparing fact sheets, provided the directory meets the Rule's criteria. See section H, proposed § 305.11(c). Furnaces and boilers would have to bear a label that discloses product-specific information showing the unit's AFUE and a generic range based on the sub-categories in DOE's standards rule. See § 305.11(a)(5)(iii). When the working portions of boilers (or furnaces) are shipped separately from the outer jackets, the units would have to be labeled with hang-tag labels that also have adhesive backing, so the installer could affix the label to the outside of the jacket after the unit is installed. See section H, proposed § 305.11(a)(5)(ii)(J). When boilers are shipped with different nozzles, they would be labeled to show the AFUE of the unit when it is set up with the highest firing rate. See section H, proposed § 305.11(a)(5)(ii)(K). Finally, boilers that are not set up as either steam or hot water units would have to be labeled with the hot water AFUE. See section H, proposed § 305.11(a)(5)(ii)(L).

C. Central Air Conditioner Range Information on Fact Sheets and in Directories

Currently, the Rule requires, for central air conditioners,[45] that range

[38] D–15, 1.

[39] Seventy ranges are currently required—fourteen ranges, according to capacity rating (in Btu's of input per hour), for each of the three fuel types, with furnaces and boilers fueled by natural gas and oil broken out separately. A "generic range" would encompass all sizes within a fuel type (i.e., one range, rather than fourteen ranges based on capacity groupings, for electric furnaces).

[40] D–10, 3.

[41] D–6, 3.

[42] See 54 FR 6062, at 6077 (Feb. 7, 1989). The effective date for the minimum efficiency standards for all furnaces except mobile home furnaces was January 1, 1992. The effective date for mobile home furnaces was January 1, 1990.

[43] The nine "generic" ranges for the furnace category would be: Gas Furnaces, Small Gas Furnaces (Under 45,000 Btu's of input per hour), Electric Furnaces, Oil Furnaces, Mobile Home Furnaces, Gas Boilers (except Steam), Gas Boilers (Steam), Electric Boilers and Oil Boilers.

[44] See the discussion in Hydronics' comment, D–6, 3.

[45] Although the NPR posed no questions on this issue, two comments noted dissatisfaction with the current Rule's requirement that central air conditioners bear product-specific information. Carrier contended that these labels impose an additional burden on manufacturers but have little or no influence on consumer buying decisions, noting that its consumer data indicates that consumers have "little interest or understanding in efficiency matters." D–10, 3. ARI noted that the brief experience so far with product-specific labels for central air conditioners has shown that "it can be very difficult for an assembly line worker to be sure that the proper label is going on each condensing unit." ARI and GAMA suggested a generic label that refers to the efficiency rating located on the unit's rating plate. D–12, 2–3 and Attachments.

The Commission does not propose to modify the product-specific aspect of the central air conditioner label. Carrier's comments appear to reflect dissatisfaction with the EPCA scheme overall, rather than with specific aspects of the Rule. ARI's comment suggests that the Rule is technologically difficult to implement. Under EPCA, however, these products may be exempted from labeling only if labeling is not technologically or economically feasible or not likely to assist consumers in making purchasing decisions. 42 U.S.C. 6294(a)(2)(A). The information submitted does not rise to this level. Moreover, as we noted above in our discussion regarding GAMA's proposal for rating plate disclosures for furnaces, such a labeling system would not appear to provide the needed consumer information regarding the product. Accordingly, the Commission proposes no change to this aspect of the Rule. See, also, part III, A.

information appear only on the label. The NPR proposed to amend the current rule pertaining to central air conditioners to require that the EER and range information appear *both* on the label and in fact sheets or directories. It solicited comments on whether this proposed amendment would provide greater net benefits to consumers than the current requirement.

There was no comment on this proposal. The Commission notes, however, that ARI's current practice is to include the ranges in its Directory. The Commission tentatively concludes that requiring the range information on fact sheets and in directories as well as on labels would be in the public interest and has included it in the proposed amendments. See section H, proposed § 305.11(b)(3)(vi) (fact sheets), and proposed § 305.11(c)(3)(vi) (directories).

D. Generic Ranges and New Sub-Categories for Room Air Conditioners

Currently the Rule establishes for room air conditioners thirty-seven ranges. The NPR proposed amending this provision and establishing a single generic range, such as that proposed for furnaces.

Three commenters addressed this proposal. AHAM and Whirlpool favored reducing the number of ranges from the existing thirty-seven, but opposed having a single range for all room air conditioners.[46] Both recommended adopting the sub-categories for room air conditioners that were created by NAECA 87 and incorporated into the DOE minimum standards regulations. They also recommended adopting the capacity groupings that appear along with the sub-categories.[47] CEEAL noted that, while capacity ranges may not be needed for these products, classifications by features, which are the basis of the DOE sub-categories, are essential.[48]

The energy efficiency range information the Commission's staff has published over the years indicates that the range of efficiencies of room air conditioners is virtually the same for each of the capacity groupings. It thus seemed that reducing the number of ranges from thirty-seven to one would decrease the industry's labeling burden with no loss of information to consumers. However, the comments have persuaded the Commission that because products in the different sub-categories have different features and applications and must (as of January 1, 1990) meet different efficiency standards, consumer confusion could result from adopting a single product category range. A breakdown by capacity grouping is also justified, because NAECA 87 and DOE have set five different minimum EER's among the ten different capacity groupings.[49] The proposed sub-categories and capacity groupings for room air conditioner ranges are in section H, proposed appendix E.

E. Generic Ranges and Product Sub-Categories for Other Products

The NPR also sought comment on whether generic ranges or a reduction in the number of ranges[50] for other product categories would be appropriate, and, if so, whether such a change would reduce the compliance burden of small entities. In addition, the Commission solicited comment on whether any of the Rule's product categories should be modified. This issue was included because of suggestions that the categories for some products be divided into more specific sub-categories.

1. Generic Ranges

No comments requested additional range amendments. Edison and WTU were opposed to generic ranges on any products in favor of the categories established by NAECA 87 and the DOE test procedures.[51] GAMA requested that, if any changes to the range structure for water heaters were to be made, such changes be delayed until final standards for water heaters and a final, revised DOE test procedure are in place. GAMA explained that a switch to generic ranges for water heaters now would penalize larger models because of the way the current DOE test is set up.[52] Because no comments requested additional generic range amendments and the Commission is not otherwise aware of a need for them, the Commission proposes no further amendments regarding generic ranges today.

2. New Sub-Categories for Refrigerators, Refrigerator-Freezers and Freezers

Under the current Rule, there is one range category for refrigerators, one for refrigerator-freezers, and one for freezers. See appendices A–1, A–2 and B of the current Rule. Four comments recommended that the Commission instead adopt for these products the sub-categories established by NAECA 87 and prescribed in DOE's minimum standards rule.[53] All four agreed that grouping these products by defrost systems and door feature configurations would provide consumers with better information about a product category in which significant design advances have been made. As Whirlpool explained:

> Considerable differences in energy consumption for the same size category result from the fact that some units have manual defrost while others have various types of automatic defrost systems. These energy consumption differences are further accentuated by the fact that refrigerators are available with separate freezer compartments in bottom-mount, top-mount and side-by-side configurations. The bottom-mount units tend to use more energy than top-mount refrigerator models because the bottom freezer section is closer to the compressor. Side-by-side models use more energy than top-mount units because they have more gasket length. Similar energy consumption differences exist between chest and vertical freezers. Thus, a new series of product categories is necessary for refrigerators, refrigerator-freezers and freezers. Such product categories should align with current NAECA product categories.[54]

NAECA 87 divides refrigerators and refrigerator-freezers into seven sub-categories, based on the configuration of the doors to the two compartments and whether the defrost systems are manual or automatic.[55] The statute divides freezers into three sub-categories: Two

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[46] AHAM, D–5, 2–4; Whirlpool, D–16, 16–17.

[47] The categories and capacity groupings (making a total of twelve ranges) are as follows:

Without Reverse Cycle and with Louvered Sides: Less than 6,000 Btu; 6,000 to 7,999 Btu; 8,000 to 13,999 Btu; 14,000 to 19,999 Btu; 20,000 and more Btu.

Without Reverse Cycle and without Louvered Sides: Less than 6,000 Btu; 6,000 to 7,999 Btu; 8,000 to 13,999 Btu; 14,000 to 19,999 Btu; 20,000 and more Btu.

With Reverse Cycle and with Louvered Sides (all capacities)

With Reverse Cycle, without Louvered Sides (all capacities)

[48] E–1, 4–5.

[49] The EER's are: 8.0, 8.2, 8.5, 8.8 and 9.0. See 42 U.S.C. 6295(c) and 54 FR 6062, at 6077 (Feb. 7, 1989).

[50] For example, where there are many ranges for a product, whether the two smallest, or two largest, categories should be combined.

[51] E–2, 2; D–17, 1.

[52] D–8, 12. DOE published a final, revised test procedure for water heaters on October 17, 1990 (55 42162), and is in the process of reviewing the minimum efficiency standards for these products and seven others (ANPR published September 28, 1990 (55 FR 39624)).

[53] CEEAL, E–1, 5, 6; NRECA, E–3, 2; AHAM, D–5, 10; Whirlpool, D–16, 18–20.

[54] D–16, 18.

[55] The sub-categories in NAECA 87 (See 42 U.S.C. 6295(b)) and DOE's rule (54 FR 66062, 6077 (Feb. 7, 1989)) are:

Refrigerators and refrigerator-freezers with manual defrost; Refrigerator-freezers with partial automatic defrost; Refrigerator-freezers with automatic defrost with top-mounted freezer without through-the-door ice service; Refrigerator-freezers with automatic defrost with side-mounted freezer without through-the-door ice service; Refrigerator-freezers with automatic defrost with bottom-mounted freezer without through-the-door ice service; Refrigerator-freezers with automatic defrost with top-mounted freezer with through-the-door ice service; Refrigerator-freezers with automatic defrost with side-mounted freezer with through-the-door ice service.

for upright (depending on type of defrost system) and one for chest and all other types of freezers.[56]

The Commission proposes adopting the NAECA 87 refrigerator, refrigerator-freezer and freezer sub-categories. Over time, many have suggested that these categories are too general and all-inclusive, and that consumers would be better served with more specific sub-categories.[57] The NAECA 87 sub-categories would enable a consumer who has decided on a product with certain features and a specific door configuration to see a cost range on the label that includes only models with the same features as the labeled unit.[58] Moreover, each of the seven refrigerator and refrigerator-freezer sub-categories and three freezer sub-categories under NAECA 87 must meet a different minimum efficiency standard (as of January 1, 1990).[59] As noted in the earlier analysis of new range sub-categories for furnaces and room air conditioners, the inclusion, in a single range, of products that must meet different minimum efficiency levels could cause consumer confusion and frustration.

Whirlpool requested that, in addition to the NAECA 87/DOE standards sub-categories, the Commission adopt three other sub-categories to encompass models that Whirlpool produces: "built-in refrigerator-freezers" (in both the bottom-mounted freezer and side-mounted freezer configurations) and "all-refrigerators with automatic defrost."[60] The Commission is not including a sub-category for built-in refrigerator-freezers as this appears unnecessary to avoid consumer confusion. The Commission also notes that DOE rejected built-ins as a separate sub-category in its proposed[61] and final[62] standards rules because it had no information upon which to conclude that built-ins affect energy consumption.

DOE also did not create a separate sub-category for all-refrigerators with automatic defrost. Instead, DOE considered them as either part of the class for refrigerators and refrigerator-freezers with manual defrost or as part of the class for refrigerator-freezers with top-mounted freezer with automatic defrost without through-the-door-ice service (which is where the refrigerator with automatic defrost is included).[63] This is because the standards for these products are based on the adjusted volume of each individual unit. The adjusted volume is the sum of (1) the volume of the refrigerator compartment and (2) the product of the freezer compartment volume multiplied by an adjustment factor. Thus, the adjusted volume of a refrigerator-freezer (which has two external doors) is the equivalent of the unit's volume as if it were a refrigerator (which has one external door). Because both products are the same, from the point of view of adjusted volume, DOE concluded that a separate class was not warranted for standards purposes.

The Commission believes, however, that all-refrigerators with automatic defrost should be given separate treatment for range purposes. A separate range will be useful to those consumers who are looking for such a product (a single-door refrigerator with automatic defrost). Such consumers could be confused if range figures for this type of product were included in either the sub-category for double-door refrigerator-freezers with automatic defrost or the one for double-door refrigerator-freezers and single-door refrigerators with manual defrost. Today's proposed amendments, therefore, contain an eleventh, separate sub-category for all-refrigerators with automatic defrost. See section H, proposed appendix A1.

In addition, as a result of consultations with DOE, the Commission proposes to change the span of the capacity groupings within the sub-categories from two cubic feet to four cubic feet. The four-cubic-foot groupings would encompass a larger number of models than would be included in two-cubic-foot groupings among the eleven sub-categories and would provide consumers with a more meaningful grouping of the models available for comparison.

The proposed amendments in section H, below, thus contain eleven new appendices—appendices A1 through A8 for Refrigerators and Refrigerator-Freezers and appendices B1 through B3 for Freezers—for the new sub-categories and capacity groupings for these products.

3. New Product Sub-Categories for Dishwashers and Clothes Washers

Two comments suggested revised product sub-categories for dishwashers and clothes washers. Whirlpool suggested adding four new sub-categories (based on the water-heating feature) to the Rule's present "compact" and "standard" sub-categories for dishwashers, and four new sub-categories (based on tub capacity, door configuration and features) to the Rule's present "compact" and "standard" sub-categories for clothes washers.[64] AHAM suggested that the Commission consider some mechanism for incorporating future sub-categories that may be created by amendments to NAECA.[65]

The Commission proposes to retain the existing sub-categories ("Standard" and "Compact") for dishwashers and clothes washers. NAECA 87 did not create new sub-categories for these two products. This is because the minimum efficiency standard for the products involves only the mandatory inclusion of an energy-saving feature consisting of an option to dry without heat for dishwashers and an unheated wash option for clothes washers.[66] Moreover, the efficiency standards are the same for all models within the Rule's present sub-categories. So, no change appears appropriate. The Commission also does not propose amending the Rule to include a mechanism for automatically including future sub-categories. If future revisions to the DOE standards appear to warrant a change in the categories for these products, the Commission will consider the issue at that time.

F. Label Adhesion Strength; Labeling of Display Models Only

Section 305.11(a)(4)(i) of the Rule specifies the paper stock and minimum peel adhesion capacity of labels for covered products. In addition to requiring that adhesive labels be applied "so they can be easily removed without use of tools or liquids, other than water," this section requires that the label adhesive must have "a minimum peel adhesion capacity of 24 ounces per inch width." The NPR solicited

[56] *Freezers:*

Upright freezers with manual defrost; Upright freezers with automatic defrost; Chest freezers and all other freezers.

[57] While this information has come primarily from industry sources, especially AHAM, it has also been provided by consumer groups, such as the Consumer Energy Council of America, as well as other sources, such as those represented by CEEAL.

[58] As with the current labels, the proposed labels will identify the category in which the labeled product is grouped.

[59] The standards for these products are expressed as formulae that include the "adjusted volume" of the products as one element in the calculation. There is a different formula—and thus a different standard—for each of the ten subcategories. See 42 U.S.C. 6295(b)(1).

[60] D–16, 19–20. The DOE test procedure for refrigerators and refrigerator-freezers defines "all-refrigerator" as "an electric refrigerator which does not include a compartment for the freezing and long time storage of food at temperatures below 32 degrees F (0.0 degrees C). It may include a compartment of 0.50 cubic capacity (14.2 liters) or less for the freezing and storage of ice." 10 CFR part 430, subpart B, appendix A–1, 1.4 (1991).

[61] 53 FR 48798, 48809 (Dec. 2, 1988).

[62] 54 FR 6062 (Feb. 7, 1989).

[63] 53 FR 48798, 48809, Table 3–1, fn 1 (Dec. 2, 1988).

[64] D–16, 20–22.

[65] D–3, 11.

[66] See 54 FR 6062, 6077 (Feb. 7, 1989). Both standards were prescribed earlier in NAECA 87, however, and became effective on January 1, 1988.

comment on proposals to make the labels easier for consumers to remove.

AHAM and Whirlpool commented that an amendment would be desirable, noting that labels may be especially difficult to remove after products have been stored for an extended period in a hot warehouse.[67] Whirlpool suggested a performance standard alone, but noted that if a specific figure for adhesion capacity were needed, twelve ounces per square inch would be sufficient.[68]

The Commission agrees that the current standard results in excessive label tenacity. Whirlpool's performance standard suggestion appears reasonable. However, to provide the industry with guidance as to a minimum peel adhesion capacity that would be sufficient to meet a performance standard, the Commission proposes changing the figure in the Rule from 24 ounces per inch width to 12 ounces. See section, H, proposed § 305.11(a)(4)(i).

The NPR also requested comment on a proposal, previously urged by The Maytag Company, that the Rule be amended to permit manufacturers of covered products to label only display models in retail outlets, so as to reduce labeling cost while still providing information to the public. The Commission interprets EPCA to require that a label containing the statutorily required energy usage information be affixed to all models of covered products, and accordingly the Rule requires each unit to be labeled.[69] Accordingly, comment was solicited in an effort to determine whether the Commission should submit a special report to Congress, recommending a change in legislation.[70]

The six comments addressing this issue opposed it.[71] The reason most commonly given was that it would be difficult, if not impossible, for manufacturers to keep track of which products were slated for display and would therefore have to be labeled. This would lead either to problems with labeling by manufacturers or with shifting the labeling burden to dealers.[72] CEEAL and Edison noted that consumers would be deprived of the opportunity to preserve labels for future reference if only display models were labeled.[73] AHAM and CEEAL also noted that computerized labeling technology has considerably reduced the burden of labeling.[74] Finally, AHAM noted that Maytag, which had made the suggestion, no longer favors it.[75] Given the commenters' unanimous opposition, the Commission proposes no action on this issue.

G. Directory Option for Water Heaters

Currently water heaters bear product-specific labels. The NPR solicited comments on a proposal to repeal the label requirement for water heaters and to adopt a directory option for providing energy usage information.

Of the six comments regarding this suggestion, only GAMA favored it. GAMA recommended that the Commission accept listing in the GAMA Directory as a complete substitute for labeling the product, contending that labels do not assist consumers in most purchases of water heaters because they are usually bought either as an emergency replacement of a leaking heater or in connection with the purchase of a new home. GAMA further argued that the standards set by NAECA 87 will achieve the level of efficiency that the labeling program was designed to attain and compress the ranges for these products.[76]

Ferrellgas was not opposed to the listing of energy usage information in a trade association directory as long as this information continues to be required on labels too.[77] The other four comments opposed reduced information on labels or complete replacement of labels by listing in a directory.[78] Both the American Gas Association and the Atlanta Gas Light Company contended that consumers use energy labels on water heaters in making their purchasing decisions, especially consumers who purchase water heaters directly from home building supply firms or national retail outlets.[79]

After weighing these comments, the Commission concludes that the Directory Option, as a substitute for labels, may not be appropriate for water heaters. The current water heater labeling requirements are, therefore, unchanged in this regard. GAMA's Directory can, of course, be a useful voluntary supplement to the labels, for those consumers and industry members who use it.

H. Energy Usage Descriptor on Labels

For five categories of appliances, the Rule requires that labels reflect the estimated annual dollar cost of operation for the product and the applicable range of comparable products.[80] This cost information is calculated by using the National Average Representative Unit Costs ("NARUCs") for energy that DOE develops and publishes annually in the **Federal Register**.[81] The Commission publishes ranges for covered products (except fluorescent lamp ballasts) annually in the **Federal Register** if the upper or lower limits change by 15% or more from the previously published ranges. If the ranges do not change, a notice that the prior range is still applicable for the next year is published.

The NPR solicited comment on a proposal to shift to alternate energy descriptors, which would remain constant. It suggested that the labels could reflect kilowatt-hours for electrically fueled products, therms for natural gas products, and gallons for oil-fueled water heaters; in the alternative, an energy factor could be used, similar to the EER for furnaces, room air conditioners and central air conditioners. With a kilowatt-hour, therm or gallon disclosure, the cost of operating the specific product can be calculated when the per kilowatt-hour, therm or gallon cost is known. This information is already contained in the cost grid for products that presently disclose energy usage in the form of an EER.

This Commission's resolution of these issues is discussed below in the context of the affected product categories.

1. Refrigerators, Refrigerator-Freezers and Freezers

The majority of the comments stated that the energy usage descriptor for this appliance category should be changed from annual operating cost to kilowatt-hours used per year (Kwh/yr).[82] AHAM and Whirlpool noted that changes in

[67] AHAM, D–5, 11–12, Whirlpool, D–16, 22–23.

[68] D–16, 22–23.

[69] Section 324(c)(1) (42 U.S.C. 6294(c)(1)) states that "* * * a rule prescribed under this section shall require that *each* covered product in the type or class of covered products to which the rule applies bear a label which discloses * * *." (emphasis added).

[70] This procedure is permitted under section 6(f) of the Federal Trade Commission Act (15 U.S.C. 46(f)).

[71] CEEAL, E–1, 7; Edison; E–2, 2; NRECA, E–3, 2; AHAM, D–5, 12; Peerless, D–15, 2–3; Whirlpool, D–16, 23; WTU, D–17, 1.

[72] CEEAL, E–1, 7; AHAM; D–5, 12; Whirlpool, D–16, 23; WTU, D–17, 1.

[73] E–1, 7; E–2, 2.

[74] D–5, 12; E–1, 7.

[75] D–5, 12.

[76] D–8, 9–11.

[77] D–7, 1.

[78] CEEAL, E–1, 7; Alagasco, D–9, 2; AGA, D–11, 6–8; Atlanta Gas, D–13, 1.

[79] AGA, D–11, 7, Exhibit 1; Atlanta Gas, D–13, 1.

[80] These are refrigerators and refrigerator-freezers, freezers, dishwashers, clothes washers and water heaters.

[81] See section 323(b)(2) of EPCA (42 U.S.C. 6293(b)(2)). These energy cost figures are incorporated into § 305.9 of the Commission's Rule.

[82] AHAM, D-5, 5-8, 5; Whirlpool, D-16, 10–15, 14; see also CEEAL, E-1, 5–6 and NRECA, E-3, 1, 2. Two comments (NPGA, D-14, 1–3; and Alagasco, D-9, 1, 2) opposed changing the energy usage descriptor because they believe that a dollar descriptor is still the most meaningful way for consumers to compare similar appliance products.

DOE's national average energy costs can trigger revisions in the operating costs shown on the labels of certain models when the energy consumption has not changed. This can result in identical appliances having labels showing different costs of operation solely because of when they were manufactured.[83] CEEAL supported a change to energy used per year because, in its view, labels do not always change when NARUCs change. According to CEEAL, "The current average annual cost is simply a bad indicator of efficiency. Prices of fuel always change. Labels rarely change. Therefore, the consumer always has outdated information with which to make choices."[84]

The Commission proposes using KWH per year as the primary energy usage descriptor on labels for refrigerators, refrigerator-freezers and freezers. See proposed § 305.11(a)(5)(i)(E). Pursuant to EPCA, labels may disclose an alternate energy use figure, determined in accordance with DOE tests, if the Commission determines that estimated annual operating cost is not likely to assist consumers in making purchasing decisions or is not economically feasible. EPCA section 324(c)(1)(A)(ii), 42 U.S.C. 6294(c)(1)(A)(ii). For the reasons discussed in the comments and in the NPR,[85] it now appears to the Commission that use of a dollar figure as the primary descriptor of energy usage is not likely to assist consumers in making purchasing decisions, and may adversely affect the value of the labeling program. Although a Kwh/yr energy usage descriptor is more technical, its use would minimize label changes. For those consumers who want to use a dollar cost figure, the labels would still show a cost grid to supplement the KWH energy usage descriptor, which could alone be used for comparing models.

2. Clothes Washers and Dishwashers

Labels for clothes washers and dishwashers currently must contain two energy descriptors—one to show the cost of operation for each water-heating method (electricity or gas).[86] The labels appear more complicated because of these two cost-of-operation figures.

Most comments supported changing the energy usage descriptor for this category of appliances.[87] As with refrigerators, the comments favored changing the descriptor from annual operating cost to kilowatt-hour usage, this time in terms of use per cycle.[88] Whirlpool noted that the energy consumption reflected by a kilowatt-hour per cycle descriptor will allow consumers to make fair energy usage comparisons with less probability for confusion about the accuracy of annual operating costs of the products.[89] AHAM suggested changing the labels to show only the energy usage with electrically heated water, with a footnote showing how to calculate the percentage reduction in operating cost with gas-heated water.[90]

Because use of dollar costs for this product requires two energy use disclosures, and for the reasons discussed in the NPR,[91] the Commission concludes today that use of a dollar cost disclosure for these products is unlikely to assist consumers in making purchase decisions. Moreover, consumers would benefit from simplified labels and the use of alternative energy usage descriptors. Unfortunately, using energy used per cycle would require two disclosures and two sets of ranges, one showing KWH per cycle (to run the machine and heat the water) when an electric water heater is used, and one showing KWH (to run the machine) and therms of gas (to heat the water) per cycle when the product is used with a gas water heater. This approach would require two sets of ranges, as well.

Instead, the Commission proposes using an energy factor[92] as the alternative descriptor because it results in a simpler label with only one energy usage descriptor and range disclosure. See section H, proposed §§ 305.11(a)(5)(i)(E) through (J). The DOE test procedures assume, for purposes of calculating the energy factor, that the water used by the appliances is electrically heated. Accordingly, the procedures yield a single energy factor for a dishwasher or clothes disclosure, instead of two.[93] Below the energy factor comparable product range disclosures, the two cost grids that are on the present labels would be retained: One showing annual cost of operation with electrically heated water, and one for gas-heated water. Thus, this scheme should permit simple comparisons between similar models, and, with the two cost grids, would enable consumers to calculate annual operating costs and compare models on the basis of how their water is heated. Sample dishwasher labels reflecting this change are being published today to solicit comment on their format, as discussed in section III, D, below.

3. Water Heaters

The DOE test procedure for water heaters provides that the alternative energy usage descriptor for this category is an energy factor. The comments relating to water heaters were divided between keeping the estimated annual dollar cost of operation and switching to the energy factor.

CEEAL recommended using the energy factor on the general grounds that average annual cost is a poor indicator of efficiency.[94] GAMA expressed no preference (except for complete elimination of labels for water heaters (see section G, above).[95] Alagasco favored retaining the estimated annual operating cost, because the energy factors for DOE's three product classes of water heaters (gas, electric and oil) are so different that heaters from one class cannot be compared meaningfully with those in another.[96]

[83] AHAM, D-5, 4-8; Whirlpool, D-16, 10–15.

[84] E-1, 5.

[85] The NPR noted that most appliance models change about every three years, whereas the DOE energy costs (NARUCs) change annually because of fuel cost changes. If the change affects the upper or lower limits of the ranges by 15% or more, new labels are required. As a result, a floor model may show an operating cost that is different from the cost noted on a newer unit delivered to a consumer's home (although their features are identical). For the same reason, two identical floor models, manufactured in different years, may display different costs. And, models with different features can have labels based on different cost features, making it unlikely that average consumers can compare their energy usage. When the ranges have changed by less than 15%, consumers who are familiar with energy cost information may think the cost information on the label is inaccurate, and will be unlikely to use the information in making purchasing decisions. Some industry members and consumer groups have reported that consumers are reacting to "out-of-date" labels by not using the information in their purchasing information. NPR, 53 FR 22110.

[86] Although the motors that power clothes washers and dishwashers run on electricity, the source of the energy used to heat the water they use could be either natural gas or electricity. When these products use water heated with natural gas, heating the water accounts for fifty percent of the energy consumed during testing. When they use electrically heated water, eighty percent of the energy used by the product is consumed in heating the water.

[87] AHAM, D–5, 5–8, 5, 6; Whirlpool, D–16, 10–15, 15; see also CEEAL, E–1, 5–6 and NRECA, E–3, 1, 2. One comment, (Alagasco, D–9, 1, 2), suggested that the Commission continue to use the dollar descriptor for this category because of the desirability of continuity in labeling practices.

[88] AHAM, D–5, 4–8; and Whirlpool, D–16, 10–15.

[89] D–16, 15.

[90] D–5, 5–6.

[91] See n. 85 above.

[92] A measure of the useful output of an appliance's services divided by the energy input. See foot note 8.

[93] AHAM also favored a single disclosure, as noted above, although it recommended kilowatt-hours per cycle. D–5, 5–6.

[94] E–1, 5, 7.

[95] D–8, 2, 11–12.

[96] D–9, 2.

For the reasons discussed at length in the NPR,[97] the Commission no longer believes that dollar disclosures of energy cost are likely to assist consumers in making purchasing decisions. See EPCA section 324(c)(1)(A)(ii), 42 U.S.C. 6294(c)(1)(A)(ii). The Commission proposes that the Rule instead require disclosure of the energy factor. The energy factor is already in use within the industry in the GAMA Directory, and is easily converted to estimated annual cost of operation if required.[98] It is true, as Alagasco noted, that use of energy factor alone would make accurate cross-fuel comparisons difficult. The Commission notes, however, that those consumers who wish to make cross-fuel comparisons would be able to do so on the basis of cost information in the simplified cost grids at the bottom of the recommended labels. Similarly, to the extent building contractors cross-fuel compare, they should be familiar with the energy factor disclosures and conversion tables in the GAMA Directory.

I. Proposal To Exempt Certain Unvented Heaters

DOE has published a final test procedure for unvented heaters, or "space heaters," using natural gas, propane and kerosene,[99] and the Commission must consider labeling these products.[100] These products are 100% efficient because they are not vented to the outside and all the heat produced as the result of fuel utilization remains in the area being heated. In addition, they are not major users of energy, compared to the products presently covered by the Rule. Since it appeared that comparative information on energy usage would not be very useful, the Commission requested comment on its proposal to exempt them from labeling.

Two comments addressed this subject. CEEAL supported requiring labels, contending that, even though the efficiency of the products is the same, the actual operating cost is important, and should be disclosed on labels in the form of a cost grid.[101] CEEAL also urged that such labels be required on products in the sub-category of vented space heaters.[102] GAMA contended that unvented gas space heaters should be exempted for the same reasons that the Commission exempted unvented electric space heaters. GAMA stated that, because unvented gas space heaters are all 100% efficient and are not major users of energy, "there are no possible economic benefits from labeling these products that could justify the very significant cost of labeling them."[103]

The Commission may exempt unvented heaters from labeling only if labeling would not be technologically or economically feasible. EPCA sections 324(a)(1) and 324(b)(5), 42 U.S.C. 6294(a)(1) and 6294(b)(5). Because all models are 100% efficient, and because there is no significant difference in operating cost among similarly sized models, labels disclosing costs would not help consumers make purchasing decisions.[104] Without the cost of labeling being offset by any significant benefit to consumers, labeling these products would not be economically feasible. The Commission therefore proposes exempting unvented heaters fueled by natural gas, propane and kerosene from the Rule.

III. Issues Not Raised in the NPR

A. Disclosure Program for Central Air Conditioners

In the course of its comments on other issues, Carrier requested that the Commission repeal the recently adopted requirement for product-specific labels on central air conditioners. Carrier contended that the Commission's original rationale for not requiring product-specific labels on furnaces is still valid for both furnaces and central air conditioners.[105] The Commission's reasoning for requiring product-specific labels for central air conditioners is described in the Statement of Basis and Purpose for the central air conditioner amendments.[106] Carrier's submission does not contain any new information that justifies reconsidering the Rule's requirements in this regard.

B. Minor Revisions To Make the Rule Current

1. Descriptions of Covered Products

Section 305.3 of the Rule—Description of Covered Products to Which this Part Applies—lists the products covered by the Rule along with definitions for them that, with three exceptions, repeat the definitions that appeared in the applicable DOE test procedures at the time the Rule was published in 1979.[107] During the years since the Rule's promulgation, however, there have been numerous technical modifications to DOE's definitions. In addition, there have been substantive changes to the DOE rules due to approval of test procedures for new product categories and adoption of a minimum efficiency standards pursuant to NAECA 87.[108] Because the Commission's Rule and DOE's test procedures and standards work in tandem to regulate the products enumerated in EPCA, the Commission proposes to update the Rule's definitions to establish as much consistency as possible and to avoid confusion and misunderstanding.

DOE's test procedures are found in 10 CFR part 430. Definitions for covered products appear in two areas of part 430. Section 430.2 of subpart A (General Provisions) contains definitions for all products listed in EPCA section 322(a), 42 U.S.C. 6292(a), as well as definitions for other pertinent terms. Most of the amendments proposed today are taken from these subpart A definitions. However, additional definitions appear in the definitions sections in the texts of the test procedures themselves, which are in subpart B. Some of these test procedure definitions are helpful in describing products covered by the Rule, and the Commission has included pertinent ones in today's amendments to the descriptions of covered

[97] See n. 85 above.

[98] See GAMA, D–8, 11–12.

[99] 49 FR 12148 (March 28, 1984).

[100] In the original rulemaking, the Commission considered labeling the sub-category of electric unvented space heaters, for which DOE test procedures were available, and exempted these products. The Commission found that, because they all operate with virtually the same efficiency, the cost incurred by industry to implement a label disclosure requirement could not be economically justified. The cost of testing and labeling was found to be substantial and would increase the products' cost by about 3%. The evidence also did not indicate that labeling would enable consumers to make more informed purchasing decisions, because these products are all essentially 100% efficient in producing heat and operate with little variation in energy costs. 44 FR 66466, at 66468 (Nov. 19, 1979)

[101] CEEAL, E–1, 8.

[102] *Id.* The Commission exempted the category of vented heaters (all fuel types) during the original rulemaking proceeding. The Commission finds that the present record does not contain sufficient justification for reversing that decision. 44 FR 66466, at 66468 (Nov. 19, 1979).

[103] GAMA, D–8, 13.

[104] The Commission assumes that consumers understand that models that provide more heat cost more to operate.

[105] D–10, 2, 3. See, also, the discussion at note 45

[106] 52 FR 46888, 46891–2 (Dec. 10, 1987).

[107] The exceptions are the definitions for central air conditioners, pulse combustion and condensing furnaces and fluorescent lamp ballasts, which were either added or updated in connection with the rulemakings that were held when those products were brought under coverage. Coverage of central air conditioners and pulse combustion and condensing furnaces was announced on December 10, 1987 (52 FR 46888), and coverage of fluorescent lamp ballasts was announced on July 5, 1989 (54 FR 28031).

[108] For example, DOE has developed a test procedure for a new product category added by NAECA 87—pool heaters—and has developed test procedures for two new types of water heaters—instantaneous water heaters and heat pump water heaters. Those products will be addressed in a separate proceeding.

products.[109] The proposed amended sections to the section of the Rule describing covered products are in section H—proposed §§ 305.3 (a), (b), and (e) through (i). The Commission seeks comment on this proposal.

2. Determinations of Energy Usage

Section 305.5 of the Rule establishes references to the appropriate DOE test procedure that manufacturers must follow in determining the energy usage figures to be used in complying with the required disclosures. Because the Commission is proposing that the primary disclosure of energy usage now be in terms of kilowatt-hour use per year or energy factor instead of estimated annual operating cost, the wording in § 305.5 must be changed to reflect this recommendation. To accomplish this, the Commission proposes minor amendments to § 305.5. See section H, proposed § 305.5.

3. Determinations of Capacity

Section 305.7 of the Rule establishes the methodology for determining the capacity, or size, of covered products. This is accomplished by a general definition of capacity for each product followed by a reference to the specific section of the DOE test that contains the procedure for determining the capacity of the product. Because the DOE tests have been modified since these references were published in the Rule, the references are virtually all incorrect. To bring the references in § 305.7 into conformance with the current DOE rule, the Commission proposes amending § 305.7 so that the references are correct. See section H, proposed § 305.7.

C. Energy Efficiency Descriptors

Six comments suggested unsolicited modifications of the Rule's nomenclature for energy efficiency descriptors.[110] Currently, the Rule uses the single term "Energy Efficiency Rating (EER)." This provision was initially adopted so consumers could learn to recognize and associate it with energy efficiency measurement without being confused by a multiplicity of terms. Industry, however, describes the same rating with the terms "Energy Efficiency Ratio (EER)" for room air conditioners, "Annual Fuel Utilization Efficiency (AFUE)" for furnaces, "Seasonal Energy Efficiency Ratio (SEER)" for central air conditioners and the cooling side of heat pumps, and "Heating Seasonal Performance Factor (HSPF)" for the heating side of heat pumps.[111] These terms also are found in the DOE test procedures.

With one exception, the comments proposed changing the Rule's use of a single term, "EER," to the specific terms for each relevant product category used by the industry. Although "EER" is used on labels, fact sheets and in catalogs, industry still uses the other terms extensively, too. Thus, there is a potential for confusion. Moreover, comments suggested that people understand that the terms "AFUE", as used for furnaces,[112] and "SEER" as used for central air conditioners.[113] GAMA and ARI, however, suggested using a new term, "Efficiency Rating (ER)," and noting on labels that it refers to the AFUE or SEER, as appropriate.[114]

Rather than creating a new term, as GAMA and ARI suggest, the Commission proposes permitting disclosure of the descriptors that are commonly used by the industry and referenced in the DOE tests. Thus, the proposed amendments to § 305.2(i) of the Rule allow the use of the product-specific terms.

D. New Energyguide Label Format

1. Background

As discussed in section II, D, 4, above, the NPR sought comment on possible alternatives to dollar energy usage figures on labels, such as kilowatt-hour, therm or gallon usage or energy factor. In preparing sample labels to display the recommended new descriptors, the Commission realized that more changes to the labels would be necessary than it had originally anticipated. For example, explanatory language would have to be included for such terms as "energy factor" and "kilowatt-hours per year." In addition, major adjustments in graphic design would have to be made to accommodate the proposal for a single energy factor descriptor for clothes washers and dishwashers, instead of two separate dollar descriptors (depending on whether a gas or electric water heater is used).

Because even the minimum number of changes that could result from these proposed amendments would require re-designing all current labels, the Commission is taking this opportunity to propose simplifying the presentation of the required information and making the labels more "user-friendly." This change is responsive to consumer research conducted by the Department of Energy in 1984 and 1985 that suggested that the current label format could benefit from simplification.[115]

In consultation with the Department of Energy's Office of Codes and Standards, the Commission enlisted a graphics design professional to prepare prototype labels. The prototypes use three different modes of presentation for the energy usage information required by the Rule—a bar graph, a vertical graph and the current horizontal graph configuration.

2. Consumer Research

The Commission conducted exploratory consumer research on the three alternative modes of energy use presentation for dishwasher labels, to obtain a preliminary indication of which communicated best to consumers. The research project involved 120 shopping mall consumers. The study showed consumers preferred the bar graph format over the other two (as well as over the current format), with the vertical format a fairly close second choice. The Commission has put the results of the study on the rulemaking record so commenters may read them before commenting on the proposed labels.

The study also showed that many consumers, when presented each of the labels, were not sure what the term "energy factor" meant. The labels explain that energy factor means a measure of energy use for dishwashers, and that higher means more efficient. This simple explanation seems sufficient for the labels. In addition, consumers have already become familiar with EER disclosures for climate control equipment, with respect to which "higher is better." However, after the consumer research, the prototype bar format label was revised slightly to make the definition more noticeable. Any further suggestions about how to communicate this information are welcome.

3. Issue Regarding Bar Graph Format

With the horizontal bar label format and the prototype vertical bar label format, the length of the bar that shows the range of comparability is the same on all the labels. With the prototype bar-graph label format (as shown to the consumers at the mall), each end of the range continuum is represented by a separate bar. These two bars are of different heights that are relative to each other and to the third bar representing

[109] See section H, proposed § 305.3(a)(2)—"All-refrigerator", § 305.3(c)—"Water Heating Dishwasher", and §§ 305.3(h) (4) and (5)—"Single package unit" and "Split system".

[110] CEEAL, E–1, 4; Edison, E–2, 1–2; NRECA, E–3, 2; GAMA, D–8, 7; WTU, D–17, 1; and ARI, D–12, 3.

[111] Section 305.2(i).

[112] CEEAL, E–1, 4; NRECA, E–3, 2; Edison, E–2, 1–2; and WTU, D–17, 1.

[113] Edison, E–2, 1–2; WTU, D–17, 1.

[114] GAMA, D–8, 7; ARI, D–12, 3.

[115] The DOE research has been placed on the rulemaking record.

the energy usage of the labeled model. But, the bars do not have a prescribed height. This format leaves room for labels with graphs that show bars of slightly different heights, which could affect the consistency of presentation among manufacturers.

To avoid confusing or misleading presentations, one possibility is to require that the three-bar graph be presented against a grid background, and to require that the high end consistently occupy the full height of the graph and the low end come up only to the first line in the grid. The fourth sample dishwasher label (Sample 4) reflects this proposal as well as the revised location of the energy factor definition. This label is also slightly larger than the presently required labels. The Commission also requests suggestions for other approaches to the bar graph issue and whether the Rule's dimension requirements for labels should be changed.

4. Issues on Which Comment Is Sought

The following four questions request comment on how consumers perceive, understand and use information on energy efficiency. The Commission is particularly interested in how well various formats actually help consumers determine the relative efficiency of particular products. Reports of consumer research studies will be especially helpful.

1. The Commission is proposing that the energy factor be used as the primary energy usage descriptor for dishwashers, clothes washers and water heaters. The Commission seeks comment on how the term "energy factor" would be perceived, understood and used by consumers.

a. Is the explanation of this term on the proposed labels adequate? What different language on the new labels could explain this term better?

b. Should a different term, like, for example, "energy efficiency rating (EER)" or "E-value" be used instead of "energy factor" on labels that disclose the energy factor?

2. The Commission is proposing that kilowatt-hour use per year be used as the primary energy usage descriptor for refrigerators, refrigerator-freezers and freezers. The Commission seeks comment on how the term "kilowatt-hour use per year" is perceived, understood and used by consumers. Should this term be defined or explained on the proposed labels, and, if so, how?

3. The Commission is proposing that labels for refrigerators, refrigerator-freezers and freezers, dishwashers, clothes washers, water heaters, and room air conditioners contain cost grids to enable consumers to determine the estimated annual operating cost of the product. One element of these cost grids would be a range of costs for the fuels used by the product (electricity, natural gas, etc.). The Commission seeks comment on what cost figures and what cost figure intervals would be appropriate for the labels for these various appliances. The Commission is particularly interested in how easy it is for consumers to use the cost grid to compare the relative costs of alternative products.

4. The Commission solicits comment on how well the proposed new labels communicate the required information, how consumers will actually use various formats, whether the cost to industry are justified by the improvement in communication, and any further suggestions for improving their design.

E. Past Effective Dates

Since the Rule was first published in 1979, the effective dates for its requirements have been codified in § 305.18. The effective dates for reporting requirements have also appeared separately in § 305.8(a). Because of various amendments to the Rule over the years, there are now many different effective dates recited in § 305.18 and, to a lesser extent, § 305.8(a). The Commission finds that their continued inclusion in the codified version of the Rule is of questionable value. Commission staff has been informed by legal staff at the offices of the Federal Register that inclusion of these effect dates in the Rule as codified in the Code of Federal Regulations is at the Commission's option, and that their deletion will have no substantive effect on the Rule. The actual effective dates, if of historical interest to anyone, could still be found in the **Federal Register** notices that were issued each time a provision was amended. The Commission proposes, therefore, to delete § 305.18 entirely and to eliminate the effective dates in § 305.8(a), to simplify and reduce printing costs. See section H, proposed §§ 305.8(a), 305.18 and 305.19 (which would be renumbered 305.18).

Section A: Invitation to Comment

All interested persons are hereby notified that they may comment on any issue of fact, law or policy that may have bearing upon the proposed amendments. As all matters discussed in part II previously have been subject to comment, the Commission requests that comments with regard to the matters there discussed be in the nature of rebuttal comments identifying analytical flaws or misunderstandings, rather than repetitions of earlier comments. Written comments should be addressed to Henry B. Cabell, Presiding Officer, Federal Trade Commission, Washington, DC 20580; they will be accepted until April 19, 1993. To assure prompt consideration, comments should be identified as "Appliance Labeling" and furnished, when feasible and not burdensome, in five copies.

All comments should be referenced to either the Commission's questions or the section of the proposed rules being discussed. The Commission requests that commenters provide representative factual data, in lieu of anecdotal experiences. Individual firms' experiences are relevant to the extent they typify industry experience, in general, or that of similar-sized firms.

Comments opposing the proposed rules or specific provisions should, if possible, suggest a specific alternative. Proposals for alternative regulations should include reasons and data that indicate why the alternatives would better serve the purposes of the proposed rules. Comments should be supported by a full discussion of all relevant facts and/or be based directly on firsthand knowledge, personal experience or general understanding of the particular issues addressed by the proposed rules.

Before adopting these proposed rules as final rules, consideration will be given to any written comments timely submitted to the Presiding Officer and, if a hearing is held on the EnergyGuide label format issue discussed in III, D, above, on the record of that hearing, as well. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and Commission Regulations, on normal business days between the hours of 8:30 a.m. to 5 p.m. at the Public Reference Room 130, Federal Trade Commission, 6th and Pennsylvania Ave., NW., Washington, DC 20580.

Section B: Public Hearings

Persons desiring a public hearing on the proposed EnergyGuide label format amendments should notify the Presiding Officer by no later than March 25, 1993. If there is interest in a hearing, it will take place in room 532 of the Federal Trade Commission, Pennsylvania Avenue at Sixth Street, Northwest, Washington, DC., at a time and date that will be announced in a subsequent notice.

If a hearing is held, persons desiring to testify will be required to submit to the Presiding Officer a complete

statement in advance. This will be entered into the record in full. Proposed testimony should be limited to the EnergyGuide label format issue discussed in III, D, above. As a general rule, oral statements should not exceed ten minutes. There will be no opportunity for interested persons to cross-examine witnesses. Further instructions to witnesses will be contained in the notice announcing the hearing.

Section C: Motions or Petitions

Any motions or petitions in connection with this proceeding must be filed with Henry B. Cabell, the Presiding Officer, who is responsible for the orderly conduct of the proceeding and who shall have all powers necessary to that end, including the authority to rule on all motions or petitions filed. Applications for review of a ruling will not be entertained by the Commission prior to its review of the record unless the Presiding Officer certifies in writing to the Commission that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an intermediate review of the ruling may materially advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy.

Section D: Post Comment Period or Hearing Procedures; Communications by Outside Parties to Commissioners or Their Advisors

Interested persons will be afforded 20 days after the close of the hearing, or the close of the comment period if no hearing is held, to file rebuttal submissions, which must be based only upon identified, properly cited matters already in the record. The Presiding Officer will reject all submissions that are essentially additional written comments, rather than rebuttal. If a hearing is held the 20-day rebuttal period will commence when the hearing transcript is placed on the public record by the Presiding Officer. After the rebuttal period, staff will analyze the evidence on the record and submit a recommendation for the final rule.

Pursuant to Commission Rule 1.26(b)(5), communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor during the course of this rulemaking shall be subject to the following treatment. Written communications, including written communications from members of Congress, shall be forwarded promptly to the Secretary for placement on the public record. Oral communications, not including oral communications from members of Congress, are permitted only when such oral communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications. Oral communications from members of Congress shall be transcribed or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications.

Section E: Metric Usage

Section 205b of the Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act,[116] expresses Congressional policy regarding measurement systems. This Act states that the metric measurement system is the preferred system of weights and measures in the United States. It also requires federal agencies to use the metric system of measurement in all procurements, grants and other business-related activities (which include rulemakings), except to the extent that such use is impractical or is likely to cause significant inefficiencies or loss of markets to United States firms. These requirements are expressed in Executive Order 12770 of July 25, 1991.[117]

The Commission has identified three areas of the Rule with respect to which there is a potential for use of metric terms—either in place of or in addition to inch-pound measurements. One is exclusively a Commission requirement. The other two pertain to the Rule's requirements that are dependent on the DOE test procedures.

First, the Rule specifies dimensions for the EnergyGuide label in inches and picas. See § 305.11(a). The Commission solicits comment on whether the Rule should specify the dimensions in metric or dual terms, or remain unchanged.

Second, the required capacity descriptors for some products are currently in inch-pound measurement: Cubic feet for refrigerators, refrigerator-freezers and freezers, Btus for climate control products and first hour rating in gallons for water heaters. Manufacturers of these products are required to submit data annually to the Commission about the energy efficiency or usage of their products categorized in these capacity descriptors. The data reported to the Commission are based on tests conducted according to DOE requirements. These data then form the basis for the EnergyGuides that appear on each covered product. See §§ 305.7 and .8. The Commission solicits comment on whether to leave the present requirements unchanged, or to require these data to be reported to the Commission and/or disclosed on EnergyGuide in metric or in dual terms.

Third, the cost grids on EnergyGuides for clothes washers, dishwashers and water heaters, show, as one factor of the grid, a fuel cost expressed in terms of kilowatt-hours for electricity, therms for natural gas and gallons for heating oil. See appendices C, D and F. The Commission solicits comment on whether to require metric or dual disclosures, or to leave the present requirements unchanged.

Specifically, are the companies that would be affected sophisticated enough in the use of measurement systems that requiring the metric only or dual disclosures discussed above would not be burdensome? Are consumers knowledgeable enough about metric measurement that metric only or dual disclosures would be appropriate or EnergyGuides? Would the use of dual disclosures on EnergyGuides serve an educational function by increasing consumers' knowledge of the metric system? Would the requirement of metric only or dual disclosures be impractical or likely to cause significant inefficiencies or loss of markets to United States firms? Are there other areas of the Rule that could be affected by this requirement?

Section F: Regulatory Flexibility Act

In the NPR, the Commission concluded preliminarily that the provisions of the Regulatory Flexibility Act relating to an initial regulatory analysis[118] were not applicable to the proposed amendments because the amendments, if promulgated, would not have a significant economic impact on a substantial number of small entities.[119] The Commission noted that its conclusion was based on information presently available and requested comment on the subject. No comments were received bearing directly on this issue. The Commission has no reason to believe, therefore, that the amendments proposed today would have a significant

[116] 15 U.S.C. 205b.

[117] 56 FR 35801 (July 29, 1991).

[118] 5 U.S.C. 603–604.

[119] 5 U.S.C. 605.

economic impact on a substantial number of small entities. In fact, the Commission believes, as discussed below, that the amendments would not have a significant economic impact.

The amendments relating to energy usage disclosures for furnaces would not have a significant impact because the two proposed changes are likely to offset each other in terms of cost and burden. To the extent that manufacturers would have to prepare the product-specific labels, instead of the labels presently required, they would incur somewhat greater administrative and printing expenses. This would be offset, to some extent, by the fact that they would be able to avail themselves of the option to disclose required information in an industry directly and not prepare fact sheets. Overall, the Commission expects that there would most likely be a reduction of expense to firms of all sizes, primarily because of lower printing costs.

The amendments relating to the creation of new range subcategories for furnaces, room air conditioners and refrigerators, refrigerator-freezers and freezers would not have a significant impact because the amendments impose few, if any, additional costs and would have the same impact on all affected industry members. In addition, the fact that these products would now be categorized in accordance with the subdivisions in DOE's minimum efficiency standards program would make it administratively easier for the affected organizations because they would not have to arrange compliance with two sets of similar, but inconsistent, regulations.

Finally, the amendments relating to the use of different label format and different energy usage descriptors on labels would not have a significant impact. Although there would be a small initial cost in changing current labels, the cost is likely to be offset in future years became fewer annual label changes are likely to be required with the use of the new descriptors which, unlike dollar descriptors, would not be subject to annual changes.

Because it appears, on the basis of evidence presently available, that these changes, if promulgated, would not be likely to have a significant impact on a substantial number of small entitles within the meaning of the Regulatory Flexibility Act and the rules implementing it, the Commission tentatively concludes that a regulatory analysis is unnecessary. In light of the above, the Commission certifies, under the provisions of section 5 of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed regulations, if promulgated, would not have a significant economic impact on a substantial number of small entities.

The Commission requests, however, information on whether the proposed amendments would have a significant impact on a substantial number of small entities. After reviewing any comments received on this subject, the Commission will decide whether the preparation of a final regulatory flexibility analysis is appropriate.

Section G: Paperwork Reduction Act

In the NPR, the Commission stated that the Rule contains disclosure and reporting requirements that constitute "information collection requirements" as defined by 5 CFR 1320.7(c), the rule implementing the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501–3520. The Commission noted that, because of this, the Rule was reviewed in 1984 by the Office of Management and Budget ("OMB") and assigned OMB Control No. 3084–0069.

Because the changes proposed in the NPR would modify existing labeling requirements, they were submitted to OMB for review as required by § 1320.13 of the PRA rules. The Supporting Statement submitted to OMB estimated that the adoption of the proposed amendments would reduce the paperwork burden of the Rule by 6,500 burden hours, or approximately 5%. This reduction would have been due primarily to allowing furnace manufacturers to use the directory option instead of distributing fact sheets. The NPR solicited comment on the information collection aspects of the proposed amendments. No substantive comments were received on this subject.

Since the NPR was published, however, the Supreme Court issued a decision that limits the application of the concept of information collection in the PRA and rules. In *Dole* v. *Steelworkers*, the Court held that the scope of the terms "information collection request" and "collection of information" in the PRA and rules are limited to reporting and recordkeeping requirements and do not include disclosure requirements.[120] This is a narrower view that that heretofore held by OMB, which has interpreted the terms as including disclosure requirements.

Since the labeling provisions of the Commission's Rule are clearly disclosure requirements, those amendments that affect them will not require OMB review or clearance, as a result of the decision. Moreover, since there are no amendments that affect either the reporting or recordkeeping requirements of the Rule, there is no longer any need to make any submission to OMB in connection with this proceeding.

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

Section H: Proposed Amendments

1. The authority citation for part 305 continues to read as follows:

Authority: Sec. 324 of the Energy Policy and Conservation Act (Pub. L. 94–163) (1975), as amended by the National Energy Conservation Policy Act (Pub. L. 95–619) (1978), the National Appliance Energy Conservation Act (Pub. L. 100–12) (1987), and the National Appliance Energy Conservation Amendments of 1988 (Pub. L. 100–357) 1988, 42 U.S.C. 6294; section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

PART 305—[AMENDED]

2. It is proposed that part 305 of 16 CFR be amended by revising § 305.1(a) to read as follows:

§ 305.1 Scope of the regulations in this part.

* * * * *

(a) Labeling the products with information indicating their operating cost or different useful measure of energy consumption, and related information, or their compliance with applicable standards under section 325 of the Energy Policy and Conservation Act, 42 U.S.C. 6295.

* * * * *

3. Further, it is proposed that § 305.2 (h) through (j) of 16 CFR be revised to read as follows:

§ 305.2 Definitions.

* * * * *

(h) *Energy factor* and *kilowatt-hour use per year.*

(1) *Energy factor* for dishwashers shall be expressed in terms of cycles per kilowatt-hour, as determined in accordance with tests prescribed under section 323 of the Act (42 U.S.C. 6293). "Energy factor" for clothes washers shall be expressed in terms of the cubic foot capacity of the clothes container divided by the energy consumption per cycle, as determined in accordance with tests prescribed under section 323 of the Act (42 U.S.C. 6293). "Energy factor" for

[120] 110 S. Ct. 929 (1990). "If 'reporting and recordkeeping requirement' is understood to be analogous to the examples surrounding it, the phrase would comprise only rules requiring information to be sent or made available to a federal agency, not disclosure rules." *Id.* at 935.

water heaters shall be expressed in terms of the incremental increase of the heat content of the water withdrawn divided by the energy consumed by the water heater, as determined in accordance with tests prescribed under section 323 of the Act (42 U.S.C. 6293).

(2) *Kilowatt-hour use per year* means the energy consumed during a test cycle, expressed in kilowatt-hours, times the prescribed representative annual number of cycles, as determined in accordance with tests prescribed under section 323 of the Act (42 U.S.C. 6293).

(i) *Energy efficiency rating*, in this part, means the following product-specific energy usage descriptors: "Annual fuel utilization efficiency" for furnaces; "energy efficiency ratio" for room air conditioners; "seasonal energy efficiency ratio" for the cooling function of central air conditioners and heat pumps; and, "heating seasonal performance factor" for the heating function of heat pumps, as all four descriptors are determined in accordance with tests prescribed under section 323 of the Act (42 U.S.C. 6293). These product-specific energy usage descriptors may be used in satisfying all the requirements of this part.

(j) *Range of energy factors* or *range of kilowatt-hour uses per year* means the range of energy factors or kilowatt-hour uses per year of all models within a designated range of comparability.

* * * * *

4. Further, it is proposed that § 305.3(a) of 16 CFR be revised to read as follows:

§ 305.3 Description of covered products to which this part applies.

(a) Refrigerators and refrigerator-freezers.

(1) *Electric refrigerator* means a cabinet designed for the refrigerated storage of food at temperatures above 32 °F., and having a source of refrigeration requiring single phase, alternating current electric energy input only. An electric refrigerator may include a compartment for the freezing and storage of food at temperatures below 32 °F., but does not provide a separate low temperature compartment designed for the freezing storage of food at temperatures below 8 °F.

(2) *Electric refrigerator-freezer* means a cabinet which consists of two or more compartments with at least one of the compartments designed for the refrigerated storage of food at temperatures above 32 °F. and with at least one of the compartments designed for the freezing and storage of food at temperatures below 8 °F. which may be adjusted by the user to a temperature of 0 °F. or below. The source of refrigeration requires single phase, alternating current electric energy input only.

(2) *All-refrigerator* means an electric refrigerator which does not include a compartment for the freezing and long time storage of food at temperatures below 32 °F. (0.0 °C.). It may include a compartment of 0.50 cubic capacity (14.2 liters) or less for the freezing and storage of ice.

* * * * *

§ 305.3 [Amended]

5. Further, it is proposed that § 305.3(b) of 16 CFR be revised to read as follows:

* * * * *

(b) *Freezer* means a cabinet designed as a unit for the freezing and storage of food at temperatures of 0 °F. or below, and having a source of refrigeration requiring single phase, alternating current electric energy input only.

* * * * *

§ 305.3 [Amended]

6. Further, it is proposed that § 305.3 of 16 CFR be amended by adding of the following paragraph (c)(1), to read as follows:

* * * * *

(c) * * *

(1) *Water Heating Dishwasher* means a dishwasher which is designed for heating cold inlet water (nominal 50 °F.) or a dishwasher for which the manufacturer recommends operation with a nominal inlet water temperature of 120 °F. and may operate at either of these inlet water temperatures by providing internal water heating to above 120 °F. in at least one wash phase of the normal cycle.

(2) [Reserved]

* * * * *

§ 305.3 [Amended]

7. Further, it is proposed that § 305.3(e) of 16 CFR be revised to read as follows:

* * * * *

(e) *Room air conditioner* means a consumer product, other than a packaged terminal air conditioner, which is powered by a single phase electric current and which is an encased assembly designed as a unit for mounting in a window or through the wall for the purpose of providing delivery of conditioned air to an enclosed space. It includes a prime source of refrigeration and may include a means for ventilating and heating.

* * * * *

§ 305.3 [Amended]

8. Further, it is proposed that § 305.3(f) introductory text of 16 CFR be revised to read as follows:

* * * * *

(f) *Clothes washer* means a consumer product designed to clean clothes, utilizing a water solution of soap and/or detergent and mechanical agitation or other movement, and must be one of the following classes: Automatic clothes washers, semi-automatic clothes washers, and other clothes washers.

* * * * *

§ 305.3 [Amended]

9. Further, it is proposed that § 305.3(g) of 16 CFR be revised to read as follows:

* * * * *

(g) Furnaces.

(1) *Furnace* means a product which utilizes only single-phase electric current, or single-phase electric current or DC current in conjunction with natural gas, propane, or home heating oil, and which—

(i) Is designed to be the principal heating sources for the living space of a residence;

(ii) Is not contained within the same cabinet with a central air conditioner whose rated cooling capacity is above 65,000 Btu per hour;

(iii) Is an electric central furnace, electric boiler, forced-air central furnace, gravity central furnace, or low pressure steam or hot water boiler; and

(iv) Has a heat input rate of less than 300,000 Btu per hour for electric boilers and low pressure steam or hot water boilers and less than 225,000 Btu per hour for forced-air central furnaces, gravity central furnaces, and electric central furnaces.

(2) *Electric central furnace* means a furnace designed to supply heat through a system of ducts with air as the heating medium, in which heat is generated by one or more electric resistance heating elements and the heated air is circulated by means of a fan or blower.

(3) *Forced air central furnace* means a gas or oil burning furnace designed to supply heat through a system of ducts with air as the heating medium. The heat generated by combustion of gas or oil is transferred to the air within a casing by conduction through heat exchange surfaces and is circulated through the duct system by means of a fan or blower.

(4) *Gravity central furnace* means a gas fueled furnace which depends primarily on natural convection for circulation of heated air and which is designed to be used in conjunction with a system of ducts.

(5) *Electric boiler* means an electrically powered furnace designed to supply low pressure steam or hot water for space heating application. A low pressure steam boiler operates at or below 15 pounds per square inch gauge (psig) steam pressure; a hot water boiler operates at or below 160 psig water pressure and 250 °F. water temperature.

(6) *Low pressure steam or hot water boiler* means an electric, gas or oil burning furnace designed to supply low pressure steam or hot water for space heating application. A low pressure steam boiler operates at or below 15 pounds psig steam pressure; a hot water boiler operates at or below 160 psig water pressure and 250 °F. water temperature.

(7) *Outdoor furnace or boiler* is a furnace or boiler normally intended for installation out-of-doors or in an unheated space (such as an attic or a crawl space).

(8) *Weatherized warm air furnace or boiler* means a furnace or boiler designed for installation outdoors, approved for resistance to wind, rain, and snow, and supplied with its own venting system.

* * * * *

§ 305.3 [Amended]

10. Further, it is proposed that § 305.3(h) introductory text and paragraphs (b)(3) through (5) of 16 CFR be revised to read as follows:

* * * * *

(h) *Central air conditioner* means a product, other than a packaged terminal air conditioner, which is powered by single phase electric current, air cooled, rated below 65,000 Btu per hour, not contained within the same cabinet as a furnace, the rated capacity of which is above 225,000 Btu per hour, and is a heat pump or a cooling only unit.

* * * * *

(3) *Evaporator coil* means a component of a central air conditioner which is designed to absorb heat from an enclosed space and transfer the heat to a refrigerant.

(4) *Single package unit* means any central air conditioner in which all the major assemblies are enclosed in one cabinet.

(5) *Split system* means any central air conditioner in which one or more of the major assemblies are separate from the others.

* * * * *

§ 305.3 [Amended]

11. Further, it is proposed that § 305.3(i) of 16 CFR be revised to read as follows:

* * * * *

(i) *Heat pump* means a product, other than a packaged terminal heat pump, which consists of one or more assemblies, powered by single phase electric current, rated below 65,000 Btu per hour, utilizing an indoor conditioning coil, compressor, and refrigerant-to-outdoor air heat exchanger to provide air heating, and may also provide air cooling, dehumidifying, humidifying, circulating, and air cleaning.

* * * * *

12. Further, it is proposed that the introductory text by § 305.5 of 16 CFR be revised to read as follows:

§ 305.5 Determinations of estimated annual operating cost, kilowatt-hour use per year, energy factor, and energy efficiency rating.

Procedures for determining the estimated annual energy costs, the kilowatt-hour use per year, the energy factor, the energy efficiency rating and the power and efficacy factors of covered products are those found in 10 CFR part 430, subpart B, in the following sections:

* * * * *

13. Further, it is proposed that § 305.7 of 16 CFR be revised to read as follows:

§ 305.7 Determinations of capacity.

The capacity of covered products shall be determined as follows:

(a) Refrigerators and refrigerator-freezers. The capacity shall be the adjusted total volume in cubic feet, rounded to the nearest one-tenth of a cubic foot, as determined according to appendix A1 to 10 CFR part 430, subpart B.

(b) Freezers. The capacity shall be the adjusted total volume in cubic feet, rounded to the nearest one-tenth of a cubic foot, as determined according to appendix B1 to 10 CFR part 430, subpart B.

(c) Dishwashers. The capacity shall be the place-setting capacity, determined according to appendix C to 10 CFR part 430, subpart B.

(d) Water heaters. The capacity shall be the first hour rating, as determined according to appendix E to 10 CFR part 430, subpart B.

(e) Room air conditioners. The capacity shall be the cooling capacity in Btu's per hour, as determined according to appendix F to 10 CFR part 430, subpart B, but rounded to the nearest value ending in hundreds that will satisfy the relationship that the value of EER used in representations equals the rounded value of capacity divided by the value of input power in watts. If a value ending in hundreds will not satisfy this relationship, the capacity may be rounded to the nearest value ending in 50 that will.

(f) Clothes washers. The capacity shall be the tub capacity, rounded to the nearest gallon, as determined according to appendix J to 10 CFR part 430, subpart B, in the terms "standard" or "compact" as defined in appendix J.

(g) Furnaces. The capacity shall be the heating capacity in Btu's per hour, rounded to the nearest 1,000 Btu's per hour, as determined according to appendix N to 10 CFR part 430, subpart B.

(h) Central air conditioners, cooling. The capacity shall be the cooling capacity in Btu's per hour, as determined according to appendix M to 10 CFR part 430, subpart B, rounded to the nearest 100 Btu's per hour for capacities less than 20,000 Btu's per hour; to the nearest 200 Btu's per hour for capacities between 20,000 and 37,999 Btu's per hour; and to the nearest 500 Btu's per hour for capacities between 38,000 and 64,999 Btu's per hour.

(i) Central air conditioners, heating. The capacity shall be the heating capacity in Btu's per hour, as determined according to appendix M to 10 CFR part 430, subpart B, rounded to the nearest 100 Btu's per hour for capacities less than 20,000 Btu's per hour; to the nearest 200 Btu's per hour for capacities between 20,000 and 37,999 Btu's per hour; and to the nearest 500 Btu's per hour for capacities between 38,000 and 64,999 Btu's per hour.

(j) Fluorescent lamp ballasts. The capacity shall be the ballast input voltage, as determined according to appendix Q to 10 CFR part 430, subpart B.

14. Further, it is proposed that § 305.8(a) of 16 CFR be revised to read as follows:

§ 305.8 Submission of data.

(a) Each manufacturer of a covered product, except manufacturers of fluorescent lamp ballasts, shall submit annually to the Commission a report listing the kilowatt-hour use per year (for refrigerators, refrigerator-freezers and freezers), the energy factor (for clothes washers, dishwashers and water heaters) or the energy efficiency rating (for room air conditioners, central air conditioners, heat pumps and furnaces) for each basic model in current production, determined according to § 305.5 and statistically verified according to § 305.6. The report must also list, for each basic model in current production: the model numbers for each basic model; the total energy consumption, determined in accordance

with § 305.5, used to calculate the kilowatt-hour per year, energy factor, or energy efficiency rating; the number of tests performed; and, its capacity, determined in accordance with § 305.7. For those models that use more than one energy source or more than one cycle, each separate amount of energy consumption or energy cost, measured in accordance with § 305.5, shall be listed in the report. Appendix J illustrates a suggested reporting format. Starting serial numbers or other numbers identifying the date of manufacture of covered products shall be submitted whenever a new basic model is introduced on the market. Each manufacturer of a covered fluorescent lamp ballast shall submit annually to the Commission a report for each basic model of fluorescent lamp ballast in current production. The report shall contain the following information:

(1) Name and address of manufacturer;

(2) All trade names under which the fluorescent lamp ballast is marketed;

(3) Model number;

(4) Starting serial number, date code or other means of identifying the date of manufacture (date of manufacture information must be included with only the first submission for each basic model);

(5) Nominal input voltage and frequency;

(6) Ballast efficacy factor; and,

(7) Type (F40T12, F96T12 or F96T12HO) and number of lamp or lamps with which the fluorescent lamp ballast is designed to be used.

* * * * *

15. Further, it is proposed that § 305.9(b) of 16 CFR be amended by removing the second sentence.

16. Further, it is proposed that § 305.10 of 16 CFR be revised to read as follows:

§ 305.10 Ranges of energy factors, kilowatt-hour uses per year and energy efficiency ratings.

(a) The range of energy factors, kilowatt-hour uses per year or energy efficiency ratings for each covered product (except fluorescent lamp ballasts) shall be taken from the appropriate appendix to this rule in effect at the time the labels are affixed to the product. The Commission shall publish revised ranges annually in the Federal Register, if appropriate, or a statement that the specific prior ranges are still applicable for the new year. Ranges will be changed if the energy factors, kilowatt-hour uses per year or energy efficiency ratings of the products within the range change in a way that would alter the upper or lower energy factor, kilowatt-hour use per year or energy efficiency rating limits of the range by 15% or more from that previously published. When a range is revised, all information disseminated after 90 days following the publication of the revision shall conform to the revised range. Products that have been labeled prior to the effective date of a modification under this section need not be relabeled.

(b) When the energy factor, kilowatt-hour use per year or energy efficiency rating of a given model of a covered product falls outside the limits of the current range for that product, which could result from the introduction of a new or changed model, the manufacturer shall:

(1) Omit placement of such product on the scale, and

(2) Add one of the three sentences below, as appropriate, in the space just below the scale, as follows:

The energy factor of this model was not available at the time the range was published.

The kilowatt-hour use per year of this model was not available at the time the range was published.

The energy efficiency rating of this model was not available at the time the range was published.

17. Further, it is proposed that § 305.11(a)(2)(i) of 16 CFR be revised to read as follows:

§ 305.11 Labeling for covered products.

(a) * * *

(2) * * *

(i) Numerals indicating "highest" and "lowest" energy factor, kilowatt-hour use per year or energy efficiency rating.

* * * * *

§ 305.11 [Amended]

18. Further, it is proposed that § 305.11(a)(4)(i) of 16 CFR be revised to read as follows:

(a) * * *

(4) Paper stock—(i) *Adhesive labels.* All adhesive labels should be applied so they can be easily removed without the use of tools or liquids, other than water, but should be applied with an adhesive with an adhesion capacity sufficient to prevent their dislodgement during normal handling throughout the chain of distribution to the retailer or consumer. The paper stock for pressure-sensitive or other adhesive labels shall have a basic weight of not less than 58 pounds per 500 sheets (25" x 38") or equivalent, exclusive of the release liner and adhesive. A minimum peel adhesion capacity for the adhesive of 12 ounces per square inch is suggested, but not required, if the adhesive can otherwise meet the above standard. The pressure-sensitive adhesive shall be applied in no fewer than two strips not less than 0.5 inches wide. The strips shall be within 0.25 inches of the opposite edges of the label. For a "flap-tag" label, the pressure-sensitive adhesive shall be applied in one strip not less that 0.5 inches wide. The strip shall be within 0.25 inches of the top edge of the label.

* * * * *

§ 305.11 [Amended]

19. Further, it is proposed that the second sentence of § 305.11(a)(5)(i)(A) of 16 CFR be removed.

§ 305.11 [Amended]

20. Further, it is proposed that §§ 305.11(a)(5)(i)(E) through (H) and (J) of 16 CFR be revised to read as follows:

(a) * * *

(5) * * *

(i) * * *

(E) Energy factor for clothes washers, dishwashers and water heaters, kilowatt-hour use per year for refrigerators, refrigerator-freezers and freezers and energy efficiency ratio for room air conditioners are as determined in accordance with § 305.5.

(F) Ranges of comparability and of energy factors, kilowatt-hour uses per year and energy efficiency ratings, as applicable, are found in section 1 of the appropriate appendices accompanying this part.

(G) Placement of the labeled product on the scale shall be proportionate to the lowest and highest energy factors, kilowatt-hour uses per year or energy efficiency ratings forming the scale.

(H) Yearly Cost text and tables are found in section 2 of the appropriate appendices accompanying this part. Revised appendices will be published by the Commission whenever necessary.

* * * * *

(J) A statement that the energy factors, kilowatt-hour uses per year and energy efficiency ratings, as applicable, are based on U.S. Government standard tests is required on all labels, as indicated in Figures 1 and 2.

* * * * *

§ 305.11 [Amended]

21. Further, it is proposed that §§ 305.11(a)(5)(ii)(C) through (E) of 16 CFR be revised and that §§ 305.11(a)(5)(ii)(F) through (L) be added to read as follows:

(a) * * *

(5) * * *

(ii) * * *

(C) The annual fuel utilization efficiency for furnaces is determined in accordance with § 305.5.

(D) Each furnace label shall contain a generic range consisting of the lowest

and highest annual fuel utilization efficiencies for all furnaces that utilize the same energy source.

(E) Placement of the labeled product or the scale shall be proportionate to the lowest and highest annual fuel utilization efficiency ratings forming the scale.

(F) The following statement shall appear on the label beneath the range(s) in bold print:

Federal law requires the seller or installer of this appliance to make available a fact sheet or directory giving further information regarding the efficiency and operating cost of this equipment. Ask for this information.

(G) A statement that the annual fuel utilization efficiency ratings are based on U.S. Government standard tests is required on all labels.

(H) The following statement shall appear at the bottom of the label:

IMPORTANT: REMOVAL OF THIS LABEL BEFORE CONSUMER PURCHASE IS A VIOLATION OF FEDERAL LAW (42 U.S.C. 6302).

(I) No marks or information other than specified in this part shall appear on or directly adjoining this label except for a part or publication number identification, as desired by the manufacturer. The identification number shall be in the lower right-hand corner of the label, and characters shall be in 6 point type or smaller.

(J) Manufacturers of boilers that are shipped without jackets must label their products with hang-tags that also have adhesive backing on them that complies with the specifications contained in § 305.11(a)(4).

(K) Manufacturers of boilers shipped with more than one input nozzle to be installed in the field must label such boilers with the AFUE of the system when it is set up with the nozzle that results in the lowest annual fuel utilization efficiency rating.

(L) Manufacturers that ship out boilers that are not set up as either steam or hot water units must label the boilers with the AFUE rating derived by conducting the required test on the boiler as a hot water unit.

* * * * *

§ 305.11 [Amended]

22. Further, it is proposed that the first two sentences of § 305.11(a)(5)(iii)(C) of 16 CFR be revised to read as follows:

(a) * * *
(5) * * *
(iii) * * *

(C) The seasonal energy efficiency ratio for the cooling function of central air conditioners is determined in accordance with § 305.5. For the heating function, the heating seasonal performance factor shall be calculated for heating Region IV for the standardized design heating requirement nearest the capacity measured in the High Temperature Test in accordance with § 305.5. * * *

* * * * *

§ 305.11 [Amended]

23. Further, it is proposed that § 305.11(a)(5)(iii)(D) of 16 CFR be revised to read as follows:

(a) * * *
(5) * * *
(iii) * * *

(D)(*1*) Each cooling only central air conditioner label shall contain a generic range consisting of the lowest and highest seasonal energy efficiency ratios for all cooling only central air conditioners.

(*2*) Each heat pump label, except as noted in paragraph (a)(5)(iii)(D)(*3*) of this section, shall contain two generic ranges. The first range shall consist of the lowest and highest seasonal energy efficiency ratios for the cooling side of all heat pumps. The second range shall consist of the lowest and highest heating seasonal performance factors for the heating side of all heat pumps.

(*3*) Each heating only heat pump label shall contain a generic range consisting of the lowest and highest heating seasonal performance factors for all heating only heat pumps.

* * * * *

§ 305.11 [Amended]

24. Further, it is proposed that §§ 305.11(a)(5)(iii)(G)(*1*) through (*3*) of 16 CFR be revised to read as follows:

(a) * * *
(5) * * *
(iii) * * *
(G) * * *

(*1*) For labels disclosing the seasonal energy efficiency ratio for cooling, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating may vary slightly with different coils.

(*2*) For labels disclosing both the seasonal energy efficiency ratio for cooling and the heating seasonal performance factor for heating, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating will vary slightly with different coils and in different geographic regions.

(*3*) For labels disclosing the heating seasonal performance factor for heating, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating will vary slightly with different coils and in different geographic regions.

Central air conditioner labels disclosing the efficiency ratings for specific condenser/coil combinations do not have to contain any of the above three statements. They must contain only the general disclosure that the energy costs and efficiency ratings are based on U.S. Government tests.

* * * * *

§ 305.11 [Amended]

25. Further, it is proposed that § 305.11(b)(3)(vi) of 16 CFR be revised to read as follows:

* * * * *
(b) * * *
(3) * * *

(vi) Ranges of comparability and of energy efficiency ratings are found in Section 1 of the appropriate appendices accompanying this part. This information is required on fact sheets.

* * * * *

§ 305.11 [Amended]

26. Further, it is proposed that §§ 305.11(b)(3)(x) (A) through (C) of 16 CFR be revised to read as follows:

* * * * *
(b) * * *
(3) * * *
(x) * * *

(A) For fact sheets disclosing the seasonal energy efficiency ratio for cooling, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating may vary slightly with different coils.

(B) For fact sheets disclosing both the seasonal energy efficiency ratio for cooling and the heating seasonal performance factor for heating, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating will vary slightly with different coils and in different geographic regions.

(C) For fact sheets disclosing the heating seasonal performance factor for heating, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating will vary slightly with different coils and in different geographic regions.

* * * * *

§ 305.11 [Amended]

27. Further, it is proposed that § 305.11(c), introductory text, and (c)(1) of 16 CFR be revised and (c)(3)(vi) be added to read as follows:

(c) Manufacturers of furnaces and central air conditioners may elect to disseminate information regarding the efficiencies and costs of operation of their products by means of a directory, or similar publication, provided it meets the following criteria:

(1) *Distribution.*

(i) It must be distributed to substantially all retailers and assemblers of central air conditioners and furnaces selling or assembling models listed in the directory.

(ii) It must be made available at cost to all other interested parties.

* * * * *

(3) *Contents.* * * *

(vi) Ranges of comparability and of energy efficiency ratings are found in section 1 of the appropriate appendices accompanying this part.

* * * * *

28. Further, it is proposed that § 305.13(a) of 16 CFR be revised to read as follows:

§ 305.13 Promotional material displayed or distributed at point of sale.

(a) Any manufacturer, distributor, retailer or private labeler who prepares printed material for display or distribution at point of sale concerning a covered product (except fluorescent lamp ballasts) shall clearly and conspicuously include in such printed material the following required disclosure:

Before purchasing this appliance, read important information about its energy factor, kilowatt-hour use per year or energy efficiency rating that is available from your retailer.

* * * * *

29. Further, it is proposed that § 305.14(a) (2) and (4) of 16 CFR be revised to read as follows:

§ 305.14 Catalogs.

(a) * * *

(2) The energy factor for clothes washers, dishwashers and water heaters, and the kilowatt-hour use per year for refrigerators, refrigerator-freezers and freezers.

* * * * *

(4) The range of energy factors, kilowatt-hour uses per year or energy efficiency ratings, which shall be those that are current at the closing date for printing or the printing deadline of the catalog.

* * * * *

30. Further, it is proposed that § 305.15(b) of 16 CFR be revised to read as follows:

§ 305.15 Test data records.

* * * * *

(b) Upon notification by the Commission or its designated representative, a manufacturer or private labeler shall provide, within 30 days of the date of such request, the underlying test data from which the energy factor, kilowatt-hour use per year or energy efficiency rating for each basic model was derived.

31. Further, it is proposed that § 305.16 of 16 CFR be revised to read as follows:

§ 305.16 Required testing by designated laboratory.

Upon notification by the Commission or its designated representative, a manufacturer of a covered product shall supply, at the manufacturer's expense, no more than two of each model of each product to a laboratory, which will be identified by the Commission or its designated representative in the notice, for the purpose of ascertaining whether the energy factor, kilowatt-hour use per year or energy efficiency rating disclosed on the label or fact sheet, or as required by a § 305.14, or the representation made by the encircled "E" label that the product is in compliance with applicable standards in section 325 of the Act, 42 U.S.C. 6295, is accurate. Such a procedure will only be followed after the Commission or its staff has examined the underlying test data provided by the manufacturer as required by § 305.15(b) and after the manufacturer has been afforded the opportunity to reverify test results from which the energy factor, kilowatt-hour use per year or energy efficiency rating for each basic model was derived. A representative designated by the Commission shall be permitted to observe any reverification procedures required by this part, and to inspect the results of such reverification. Charges for testing by designated laboratories will be paid by the Commission.

32. Further, it is proposed that § 305.18 of 16 CFR be removed.

33. Further, it is proposed that § 305.19 of 16 CFR be redesignated as § 305.18.

34. Further, it is proposed that appendices A1 and A2 to 16 CFR be revised; appendices A3 through A8 be added; appendix B be removed; and appendices B1 through B3 be added, to read as follows:

Appendix A1 to Part 305—All Refrigerators With Automatic Defrost

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 2.5		
2.5 to 6.4		
6.5 to 10.4		
10.5 to 14.4		
14.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix A2 to Part 305—Refrigerators and Refrigerator-Freezers With Manual Defrost

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 2.5		
2.5 to 6.4		
6.5 to 10.4		
10.5 to 14.4		
14.5 to 18.4		
18.5 to 22.4		
22.5 to 26.4		
26.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix A3 to Part 305—Refrigerator-Freezers With Partial Automatic Defrost

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 10.5		
10.5 to 14.4		
14.5 to 18.4		
18.5 to 22.4		
22.5 to 26.4		
26.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix A4 to Part 305—Refrigerator-Freezers With Automatic Defrost With Top-Mounted Freezer Without Through-the-Door Ice Service

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 10.5		
10.5 to 14.4		
14.5 to 18.4		
18.5 to 22.4		
22.5 to 26.4		
26.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix A5 to Part 305—Refrigerator-Freezers With Automatic Defrost With Side-Mounted Freezer Without Through-the-Door Ice Service

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 10.5		
10.5 to 14.4		
14.5 to 18.4		
18.5 to 22.4		
22.5 to 26.4		
26.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix A6 to Part 305—Refrigerator-Freezers With Automatic Defrost With Bottom-Mounted Freezer Without Through-the-Door Ice Service

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 10.5		
10.5 to 14.4		
14.5 to 18.4		
18.5 to 22.4		
22.5 to 26.4		
26.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix A7 to Part 305—Refrigerator-Freezers With Automatic Defrost With Top-Mounted Freezer With Through-The-Door Ice Service

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 10.5		
10.5 to 14.4		
14.5 to 18.4		
18.5 to 22.4		
22.5 to 26.4		
26.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix A8 to Part 305—Refrigerator-Freezers With Automatic Defrost With Side-Mounted Freezer With Through-The-Door Ice Service

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 10.5		
10.5 to 14.4		
14.5 to 18.4		
18.5 to 22.4		
22.5 to 26.4		
26.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix B1 to Part 305—Upright Freezers With Manual Defrost

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 5.5		
5.5 to 9.4		
9.5 to 13.4		
13.5 to 17.4		
17.5 to 21.4		
21.5 to 25.4		
25.5 to 29.4		
29.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix B2 to Part 305—Upright Freezers With Automatic Defrost

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 5.5		

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
5.5 to 9.4		
9.5 to 13.4		
13.5 to 17.4		
17.5 to 21.4		
21.5 to 25.4		
25.5 to 29.4		
29.5 and over		

2. Yearly Cost Information—Electricity:

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

Appendix B3 to Part 305—Chest Freezers and All Other Freezers

1. Range Information

Manufacturers' rated total refrigerated volume in cubic feet	Ranges of kilowatt-hour uses per year	
	Low	High
Less than 5.5		
5.5 to 9.4		
9.5 to 13.4		
13.5 to 17.4		
17.5 to 21.4		
21.5 to 25.4		
25.5 to 29.4		
29.5 and over		

2. Yearly Cost Information—Electricity

Cost per kilowatt hour	
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

Beside each cost in the table place the cost estimate for the model being labeled using the table costs in place of the national average rate.

35. Further, it is proposed that appendix E to 16 CFR be revised to read as follows:

Appendix E to Part 305—Room Air Conditioners

1. Range Information

Manufacturers' rated cooling capacity in Btu's/hr.	Ranges of energy efficiency ratings (electricity)	
	Low	High
Without Reverse Cycle and with Louvered Sides:		
Less than 6,000 Btu		
6,000 to 7,999 Btu		
8,000 to 13,999 Btu		
14,000 to 19,999 Btu		
20,000 and more Btu		
Without Reverse Cycle and without Louvered Sides:		
Less than 6,000 Btu		
6,000 to 7,999 Btu		
8,000 to 13,999 Btu		
14,000 to 19,999 Btu		
20,000 and more Btu		
With Reverse Cycle and with Louvered Sides		
With Reverse Cycle, without Louvered Sides		

2. Yearly Cost Information

Cost per kilowatt hour (cents)	Yearly hours of use				
	250	750	1,000	2,000	3,000
2					
4					
6					
8					
10					
12					

Below the appropriate number of yearly hours of use and beside each cost in the table, place the cost estimate for the model being labeled using the table costs and using the yearly hours of use.

36. Further, it is proposed that Appendices G1 through G5 of 16 CFR be revised, and that Appendices G6 through G9 be added to 16 CFR, to read as follows:

Appendix G1 to Part 305—Furnaces—Gas

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (Generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour [1]	Btu heat loss of home (See chart below)
4¢	
6¢	
8¢	
10¢	

COST GRID—Continued

Cost per kilowatt hour[1]	Btu heat loss of home (See chart below)
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢,50¢,55¢,60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G2 to Part 305—Small Furnaces—Gas (Under 45,000 Btu's/hr. Input)

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (Generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour[1]	Btu heat loss of home (See chart below)
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10

HEAT LOSS TABLE—Continued

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G3 to Part 305—Furnances—Electric

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (Generic)	
	Low	High
All capacities	.....	.....

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour [1]	Btu heat loss of home (See chart below)
4¢	.....
6¢	.....
8¢	.....
10¢	.....
12¢	.....
14¢	.....

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost ande using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G4 to Part 305—Furnaces—Oil

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour[1]	Btu heat loss of home (see chart below)
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G5 to Part 305—Mobile Home Furnaces

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (Generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour[1]	Btu heat loss of home (See chart below)
4¢	
6¢	
8¢	
10¢	

COST GRID—Continued

Cost per kilowatt hour[1]	Btu heat loss of home (See chart below)
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G6 to Part 305—Boilers—Gas (Except Gas/Steam)

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour[1]	Btu heat loss of home (See chart below)
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10

HEAT LOSS TABLE—Continued

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G7 to Part 305—Boilers—Gas (Steam)

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour [1]	Btu heat loss of home (see chart below)
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propoane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140 150 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G8 to Part 305—Boilers—Oil

1. Range Information

Manufacturers' Rated Heating Capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour[1]	Btu heat loss of home (see chart below)
4¢	
6¢	
8¢	
10¢	
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

Appendix G9 to Part 305—Boilers—Electric

1. Range Information

Manufacturers' rated heating capacities (Btu's/hr.)	Ranges of annual fuel utilization efficiencies (AFUE's) (generic)	
	Low	High
All capacities		

2. Yearly Cost Information

COST GRID

Cost per kilowatt hour[1]	Btu heat loss of home (see chart below)
4¢	
6¢	
8¢	
10¢	

COST GRID—Continued

Cost per kilowatt hour[1]	Btu heat loss of home (see chart below)
12¢	
14¢	

[1] For charts on natural gas, oil and propane gas, substitute the following cost figures:
a. Cost per therm—10¢, 20¢, 30¢, 40¢, 50¢, 60¢.
b. Cost per gallon (oil)—76¢, 79¢, 82¢, 85¢, 88¢, 91¢, 94¢, 97¢, $1.00.
c. Cost per gallon (propane)—35¢, 40¢, 45¢, 50¢, 55¢, 60¢.

The following table shows the heat loss values (in thousand Btu's/hr.) to be used in the cost grid:

HEAT LOSS TABLE

Manufacturers' rated heat output of model to be labeled (Btu's per hour)	Design heat loss of model to be labeled (1,000 Btu's per hour)	Heat loss values to be used on the grid (1,000 Btu's per hour)
5,000 to 10,000	5	5
11,000 to 16,000	10	5, 10
17,000 to 25,000	15	10, 15
26,000 to 42,000	20	15, 20, 25
43,000 to 59,000	30	25, 30, 35, 40
60,000 to 76,000	40	35, 40, 45, 50
77,000 to 93,000	50	40, 45, 50, 60
94,000 to 110,000	60	50, 60, 70, 80
111,000 to 127,000	70	60, 70, 80, 90
128,000 to 144,000	80	70, 80, 90, 100
145,000 to 161,000	90	80, 90, 100, 110, 120
162,000 to 178,000	100	90, 100, 110, 120, 130
179,000 to 195,000	110	100, 110, 120, 130, 140
196,000 and over	130	120, 130, 140, 150, 160

Beside each cost in the cost grid, and below the appropriate heat loss value taken from the heat loss table, place the cost estimate for the model being labeled using the table costs in place of the national average cost and using the heat loss values in place of the design heat loss used in the table with the national average cost.

37. Further, it is proposed that a new appendix L be added to part 305 of 16 CFR to read as follows:

Appendix L to Part 305—Sample Labels

BILLING CODE 6750-01-M

SAMPLE 1

ENERGYGUIDE

Based on standard U.S. Government tests

How energy efficient is this dishwasher?

THIS MODEL

LEAST EFFICIENT .31 EF

.42 EF

MOST EFFICIENT .46 EF

For ABC Dishwasher, Model 1234, Capacity: Standard

Use this **EnergyGuide** to compare the energy efficiency of this model with other similar models before you buy. **EF stands for "energy factor." Models with higher energy factors are more energy efficient and cost less to operate.** An energy factor is a measure of energy use. Only standard-sized dishwashers are compared on this scale.

How much will this model cost you to run yearly?

Your cost will vary depending on whether you have an electric or gas water heater, your local energy rate, and how many loads of dishes you do per week. Check your utility bill or ask your salesperson for the energy rate (cost per kilowatt hour or therm) in your area.

A kilowatt is a measure of electricity. A therm is a measure of natural gas. Your utility company uses these measurements to compute your bill. If you have a propane or oil water heater, ask for estimated costs.

Yearly Costs
(based on loads of dishes per week)

Using Gas Water Heater

Loads	Cost per therm 40¢	60¢	90¢
4	$15	$19	$24
7	$26	$33	$42

Using Electric Water Heater

Loads	Cost per kilowatt hour 4¢	6¢	10¢
4	$20	$30	$50
7	$35	$52	$87

Important. Removal of this label before consumer purchase is a violation of Federal law (42 U.S.C. 6302).

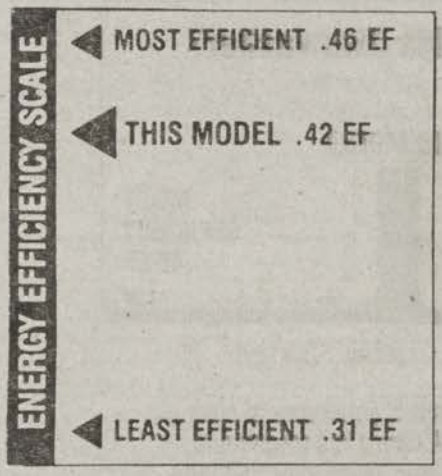
SAMPLE 2

ENERGYGUIDE

Based on standard U.S. Government tests

ABC Dishwasher
Model 1234
Capacity: Standard

Use this **EnergyGuide** to compare the energy efficiency of this model with other similar models before you buy. **EF stands for "energy factor." Models with higher energy factors are more energy efficient and cost less to operate.** An energy factor is a measure of energy use. Only standard-sized dishwashers are compared on this scale.



How much will this model cost you to run yearly?

Your cost will vary depending on whether you have an electric or gas water heater, your local energy rate, and how many loads of dishes you do per week. Check your utility bill or ask your salesperson for the energy rate (cost per kilowatt hour or therm) in your area.

A kilowatt is a measure of electricity. A therm is a measure of natural gas. Your utility company uses these measurements to compute your bill. If you have a propane or oil water heater, ask for estimated costs.

Yearly Costs
(based on loads of dishes per week)

Using Electric Water Heater

Cost per kilowatt hour

Loads	4¢	6¢	10¢
4	$20	$30	$50
7	$35	$52	$87

Using Gas Water Heater

Cost per therm

Loads	40¢	60¢	90¢
4	$15	$19	$24
7	$26	$33	$42

Important: Removal of this label before consumer purchase is a violation of Federal law (42 U.S.C. 6302)

SAMPLE 3

ENERGYGUIDE

Based on standard U.S. Government tests

How energy efficient is this dishwasher?

For ABC Dishwasher, Model 1234, Capacity: Standard

Use this **EnergyGuide** to compare the energy efficiency of this model with other similar models before you buy. **EF stands for "energy factor." Models with higher energy factors are more energy efficient and cost less to operate.** An energy factor is a measure of energy use. Only standard-sized dishwashers are compared on this scale.

How much will this model cost you to run yearly?

Your cost will vary depending on whether you have an electric or gas water heater, your local energy rate, and how many loads of dishes you do per week. Check your utility bill or ask your salesperson for the energy rate (cost per kilowatt hour or therm) in your area.

A kilowatt is a measure of electricity. A therm is a measure of natural gas. Your utility company uses these measurements to compute your bill. If you have a propane or oil water heater, ask for estimated costs.

Yearly Costs
(based on loads of dishes per week)

Using Gas Water Heater

Loads	Cost per therm		
	40¢	60¢	90¢
4	$15	$19	$24
7	$26	$33	$42

Using Electric Water Heater

Loads	Cost per kilowatt hour		
	4¢	6¢	10¢
4	$20	$30	$50
7	$35	$52	$87

Important: Removal of this label before consumer purchase is a violation of Federal law (42 U.S.C. 6302)

SAMPLE 4

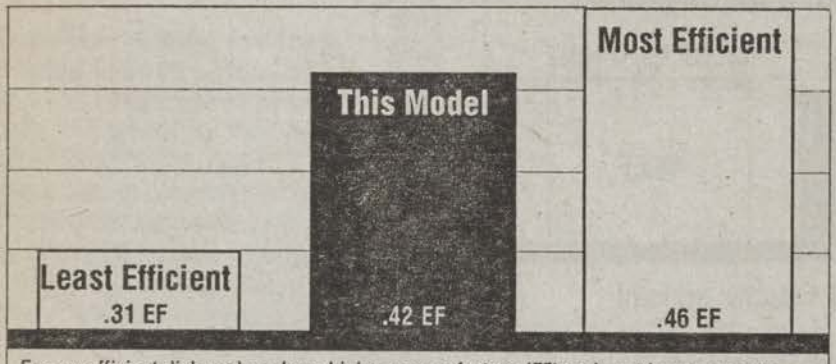
ABC Dishwasher
Model 1234

Capacity: Standard

ENERGYGUIDE

Based on standard U.S. Government tests

How energy efficient is this dishwasher?



Energy efficient dishwashers have higher energy factors (EF) and cost less to operate. An energy factor is a measure of energy use.

Use this **Energy Guide** to compare the energy efficiency of this dishwasher with other similar models before you buy. Only standard-sized dishwashers are compared on this scale.

How much will this model cost you to run yearly?

Your cost will vary depending on whether you have an electric or gas water heater, your local energy rate, and how many loads of dishes you do per week. Check your utility bill or ask your salesperson for the energy rate (cost per kilowatt hour or therm) in your area.

A kilowatt is a measure of electricity
A therm is a measure of natural gas
Your utility company uses these measurements to compute your bill.
If you have a propane or oil water heater, ask for estimated costs.

Yearly Costs
(based on loads of dishes per week)

Using Gas Water Heater

Loads	Cost per therm		
	40¢	60¢	90¢
4	$15	$19	$24
7	$26	$33	$42

Using Electric Water Heater

Loads	Cost per kilowatt hour		
	4¢	6¢	10¢
4	$20	$30	$50
7	$35	$52	$87

Important: Removal of this label before consumer purchase is a violation of Federal Law (42 U.S.C. 6302).

BILLING CODE 6750-01-C

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 93–4651 Filed 3–4–93; 8:45 am]

BILLING CODE 6750–01–M

federal register

Friday
March 5, 1993

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Delta Smelt and the Pacific Coast Population of the Western Snowy Plover; Final Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB66

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Delta Smelt

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) determines threatened status for the delta smelt (*Hypomesus transpacificus*), pursuant to the Endangered Species Act of 1973, as amended (Act). This osmerid fish species occurs only in Suisun Bay and the Sacramento-San Joaquin estuary (known as the Delta) near San Francisco Bay, California. The delta smelt has declined nearly 90 percent over the last 20 years, and is primarily threatened by large freshwater exports from the Sacramento River and San Joaquin River diversions for agriculture and urban use. The prolonged drought, introduced nonindigenous aquatic species, reduction in abundance of key food organisms, and agricultural and industrial chemicals also threaten this species. The final decision on the determination of critical habitat included in the proposed rule is postponed in accordance with section 4(b)(6)(C)(ii) of the Act. This rule implements the protection and recovery provisions afforded by the Act for the delta smelt.

EFFECTIVE DATE: April 5, 1993.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Sacramento Field Office, 2800 Cottage Way, E–1803, Sacramento, California 95825–1846.

FOR FURTHER INFORMATION CONTACT: Nadine R. Kanim (see ADDRESSES section) at 916/978–4866.

SUPPLEMENTARY INFORMATION:

Background

The delta smelt originally was classified as the same species as the pond smelt (*Hypomesus olidus*), but Hamada (1961) and Moyle (1976, 1980) recognized the delta smelt as a distinct species. Hamada retained the name *H. olidus* for the delta smelt and renamed the pond smelt *H. sakhalinus*. In 1963, McAllister renamed the delta smelt from *H. olidus* to *H. transpacificus*, with a Japanese subspecies (*H. t. nipponensis*) and a California subspecies (*H. t. transpacificus*). More recent taxonomic work has shown that these subspecies should be recognized as species, the delta smelt being *H. transpacificus* and the Japanese smelt being *H. nipponensis* (Moyle 1980).

The delta smelt was described as follows by Moyle *et al.* (1989): A slender-bodied fish typically 60–70 mm (2.36–2.76 in) in standard length (SL), although a few may attain 120 mm (4.73 in) SL. Live fish are nearly translucent and have a steely-blue sheen to their sides. Occasionally there may be one chromatophore between the mandibles, but usually none is present. Its mouth is small, with a maxilla that does not extend past the mid-point of the eye. The eyes are relatively large; the orbit width is contained about 3.5–4 times in the head length. Small, pointed teeth are present in the upper and lower jaws. The first gill arch has 27–33 gill rakers and there are 7 branchiostegal rays. There are 9–10 dorsal fin rays, 8 pelvic fin rays, 10–12 pectoral fin rays, and 15–17 anal fin rays. The lateral line is incomplete and has 53–60 scales along it. There are 4–5 pyloric caeca.

From the analysis of length-frequency data, scientists have determined that the delta smelt is primarily a species with a 1-year (annual) life span (Moyle *et al.* 1992). Juvenile delta smelt are 40–50 mm (1.58–1.97 in) fork length (FL) by early August. They become sexually mature adults when 55–70 mm (2.17–2.76 in) FL. Although the largest delta smelt on record is 126 mm (4.96 in) FL, this species rarely grows larger than 80 mm (3.15 in) FL (Stevens *et al.* 1990). By June, delta smelt longer than 50 mm (1.97 in) FL are rare throughout their range, indicating that adult delta smelt die after spawning.

Historically, the delta smelt occurred from Suisun Bay upstream to the city of Sacramento on the Sacramento River and Mossdale on the San Joaquin River (Moyle *et al.* 1992). It is the only smelt endemic to California and the only true native estuarine species found in the Delta (Moyle *et al.* 1989, Stevens *et al.* 1990, and Wang 1986). The delta smelt is a euryhaline species (species adapted to living in fresh and brackish water) that occupies estuarine areas with salinities below 2 grams per liter (parts per thousand, ppt), rarely occurring in estuarine waters with more than 10–12 ppt salinity, about one-third sea water (Ganssle 1966, in Moyle 1976).

Delta smelt historically congregated in upper Suisun Bay and Montezuma Slough (mainly during March to mid-June) when the Sacramento and San Joaquin river flows were high. During very high river outflows some smelt may be washed into San Pablo Bay, but the rapidly restored higher salinities do not allow permanent populations of delta smelt to become established. Because of sustantial human-caused changes in the relative ratios of seasonal freshwater outflows, the center of delta smelt abundance has shifted to the Sacramento River channel in the Delta in the years since 1981 (Moyle *et al.* 1992). Delta smelt are now rare in Suisun Bay, and virtually absent from Suisun Marsh where they once were seasonally common. Even though suitable spawning and nursery habitat conditions occur less frequently in Suisun Bay than previously, when these conditions are present, they provide for increased levels of delta smelt recruitment that augment overall population levels. These suitable conditions occur when the mixing zone between salt water and freshwater is located in Suisun Bay.

Delta smelt have a low fecundity, producing 1,247–2,590 eggs per female (Moyle *et al.* 1992), when compared to two other species of Osmeridae occurring in California that exhibit fecundities from 5,000–25,000 eggs per female (Moyle 1976). Delta smelt spawn in freshwater at temperatures from about 7–15 degrees Celsius (°C) between February and June. Most spawning occurs in the dead-end sloughs and shallow edge-waters of channels in the western Delta; spawning also has been recorded in Montezuma Slough near Suisun Bay and far upstream in the Sacramento River near Rio Vista (Radtke 1966, Wang 1986). The adhesive demersal eggs attach to hard substrates such as rocks, gravel, tree roots, and submerged branches. Based on data for a closely related species, delta smelt eggs probably hatch in 12–14 days. The planktonic larvae are transported downstream to the mixing zone. Within the mixing zone, the pelagic larvae are zooplanktivores and feed on copepods, cladocerans, and amphipods. The primary food for all life stages of the delta smelt are the nauplius, copepodite, copepodid, and adult stages of the euryhaline copepod *Eurytemora affinis*. Adult smelt consume *E. affinis* during all times of the year. The opossum shrimp (*Neomysis mercedis*) is secondarily important as food for adult smelt, and cladocerans (*Daphnia* sp., *Bosmina* sp.) are consumed seasonally by adult smelt.

The decline in the delta smelt population was concurrent with increased human changes to seasonal Delta hydrology, freshwater exports, and the accompanying changes in the temporal, spatial, and relative ratios of water diversions. These deleterious

hydrological effects, coupled with severe drought years, introduced nonindigenous aquatic species, and reduction in abundance of key food organisms, appear to have reduced the species' capacity to recover from natural seasonal fluctuations in hydrology.

Many introduced species adversely affect all life stages of the delta smelt. These introduced species compete for the zooplankton for food, or alter the species composition of the zooplankton community, thereby further decreasing the ability of the delta smelt population to recover.

In 1987, the Service funded an analysis of survey data (Moyle and Herbold 1989). These survey data were collected from Suisun Marsh and the Delta by the University of California, Davis, and the California Department of Fish and Game. The report concluded that: (1) Freshwater flows set an upper limit to delta smelt stock recruitment within the year, (2) other environmental factors (physical and/or biological) may further depress the smelt population; however, the proportion of time when water flows are reversed (upstream flow) in the lower San Joaquin River during the egg and larval stages probably is the major source of density-independent mortality to the delta smelt, and (3) a larger adult smelt population was associated with higher freshwater outflows because these flows produced higher plant and animal biomasses at all aquatic trophic levels.

Previous Service Action

The Service included the delta smelt as a category 1 candidate species in the January 6, 1989, Animal Notice of Review (50 FR 554). Category 1 lists species for which data in the Service's possession are sufficient to support proposals for listing.

On June 29, 1990, the Service received a petition dated June 26, 1990, from Dr. Don C. Erman, President-Elect of the California-Nevada Chapter of the American Fisheries Society, to list the delta smelt as an endangered species with critical habitat. The Service made a 90-day finding that substantial information had been presented indicating that the petitioned action may be warranted, and announced this decision in the **Federal Register** on December 24, 1990 (55 FR 52852). The Service initiated a status review at that time. During the status review, the Service examined the available data on the early life history and ecology of this species. Available data on physiological tolerances and estuarine factors were also examined in relation to actual or potential threats to the delta smelt. Primary sources of information describing the many human factors and projects that may affect the delta smelt are the voluminous expert testimonies presented to the California State Water Resources Control Board's 1987 Water Quality/Water Rights Proceeding on the San Francisco Bay and Sacramento-San Joaquin River Delta. This proceeding is also known as the Bay-Delta Proceeding, Evidentiary Hearing Record, July 7–December 29, 1987. The exhibits and transcripts spanned 54 days of hearings. Comments received by the Service on the petitioned action and the recommendations of an expert review panel were also considered during the status review.

On October 3, 1991, the Service published a proposal to list the delta smelt as a threatened species and requested public comment (56 FR 50075). This proposed rule constituted the 12-month finding that the petitioned action was warranted, in accordance with section 4(b)(3)(B) of the Act. Having considered all the information presented during the comment period, testimony given at the California State Water Resources Control Board's 1992 Water Right Phase of the Bay-Delta Estuary Proceedings, and other relevant information (CDWR 1992, Sweetnam 1992a) the Service now determines the delta smelt to be a threatened species.

Summary of Comments and Recommendations

In the October 3, 1991, proposed rule (56 FR 50075) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. On November 6, 1991, the Service received a written request for a public hearing from Mr. George R. Baumli of the State Water Contractors, Sacramento, California. Sixteen additional requests for public hearings were received within the allowed 45-day time period following publication of the proposed rule (Section 4(b)(5)(E) of the Act (16 U.S.C. 1531 *et seq.*)). As a result, the Service published a notice of public hearing on December 19, 1991 (56 FR 65877). Newspaper notices of the public hearings were published in the Sacramento Bee, Visalia Times Delta, and Fresno Bee on December 16, 1991, and in the Los Angeles Times on December 17, 1992, all of which invited general public comment. Public hearings were conducted in California on January 9, 1991, in Sacramento; on January 14, 1992, in Santa Monica; and on January 16, 1992, in Visalia. At each meeting, testimony was taken from 1 p.m. to 4 p.m. and from 6 p.m. to 9 p.m. A total of 69 individuals testified at the hearings.

During the four-month comment period, the Service received 360 comments (i.e., letters and oral testimony) from 348 individuals. Of the 342 comments that stated a position on listing, 37 (11 percent) supported listing and 305 (89 percent) did not.

Support for the proposed listing was expressed by 1 Federal agency, 2 ichthyologists with expertise in California native fishes, 14 conservation organizations (or branches thereof), 3 sport and commercial fishing organizations and 15 other interested parties.

The California Department of Fish and Game was among 18 commenters that stated no opinion on the proposed listing. The California Department of Fish and Game submitted additional scientific information and expressed continuing concern that the delta smelt population has suffered a 90 percent decline in the past 20 years.

Opposition to the proposed listing was expressed by one elected official, one Federal agency, one State agency, and a number of local government entities. Many local government agencies, water districts, business and trade associations, other private interests, and one Federal agency submitted comments regarding the possible effects that listing, and particularly, designation of critical habitat, might have on planned activities and development.

Because of the complexity of the economic analysis that must accompany the final rule designating critical habitat, the Service has decided to make final only the listing portion of the proposed rule at this time so that immediate protection of the delta smelt will be possible and the likelihood that this species may become endangered or extinct will be reduced. Section 4(b)(6)(C)(ii) of the Act allows the Service to extend the deadline for designating critical habitat for up to 1 year (October 3, 1993, in this case), if critical habitat is not yet determinable and/or immediate protection is needed for the species through a final listing action. As discussed in the Critical Habitat section of this rule, both of these reasons apply in this instance; therefore, the Service is now going forward with this final listing rule. Hence, the comments pertaining to designation of critical habitat or the potential economic impacts of such designation will not be discussed here, but will be addressed when a final decision on

critical habitat is made. Comments addressing the issue of listing this species are responded to here.

Written comments and oral statements obtained during the public hearings and comment periods are combined into general issues and discussed below.

Comment 1: Many commenters requested that the Service delay or not list the delta smelt because the scientific data currently available are insufficient to support such a decision. For example, one population index (fall midwater trawl abundance index) indicated that the number of delta smelt have increased during the past 5 years and are more abundant today than they were 10 years ago. Many of these respondents suggested that the Service follow the recommendation of the California Fish and Game Commission and decline to list the species until additional studies on distribution and abundance have been completed. Conversely, many commenters claimed that the available scientific data (including six other population indices) clearly demonstrate a marked decrease in the abundance of the species over historic levels.

Service Response: Section 4(b)(1)(A) of the Act, requires that a listing determination be based on the best scientific and commercial data available. As discussed in the section of this rule entitled Summary of Factors Affecting the Species, the Service has reviewed the results of several monitoring studies conducted by the California Department of Fish and Game and the University of California, Davis (Moyle and Herbold 1989, Stevens *et al.* 1990, Moyle *et al.* 1992), which demonstrate that after 1981 the delta smelt population has remained at consistently low levels. Seven abundance indices used to record trends in the status of the delta smelt show that this species has not previously suffered as consistently low population levels as those experienced in the last 10 years (Stevens *et al.* 1990). These same indices also show a pronounced decline from historical levels of abundance. The summer tow net abundance index is thought to be one of the more representative indices since data has been collected over a wide geographic area (from San Pablo Bay upstream through most of the Delta) for the longest period of time (since 1959). The summer tow net abundance index measures the abundance and distribution of larval delta smelt and provides data on the recruitment potential of the species. This index declined after 1981 and, except for one year (1986) has remained at extremely low levels since 1982 (*Moyle et al.* 1992). New data for the summer tow net index indicates the 1992 population has not increased from the consistently low levels recorded since 1987 (Sweetnam 1992a).

Results of the second longest running study (since 1967), the fall midwater trawl abundance index, have shown upward movement in the three of the last four years. This index measures the abundance and distribution of adult delta smelt in a large geographic area (San Pablo Bay upstream to Rio Vista on the Sacramento River and Stockton on the San Joaquin River) and provides an indication of their survivorship to the later months of their 1-year life span. The cause of this seemingly anomalous increase in survival of adult delta smelt cannot be determined with any certainty. Because the total number of delta smelt captured in each trawl tow is low compared to previous years, Dr. Moyle (University of California at Davis, *in litt.*, 1992) attributes the recent higher index values to the fact that the entire delta smelt population has been confined to a restricted area in the Sacramento River, from Sherman Island to Rio Vista. The higher index values may be an artifact of the increased probability of capturing schools of fish that are concentrated in a relatively restricted area.

Because this listing determination is based on the results of up to 33 years of long-term monitoring studies, the Service does not agree that additional studies will greatly alter the present findings. Preliminary indices for the months of September and October 1992 indicate that this year's survival of adult delta smelt is consistent with the low levels of abundance recorded since 1987 (Sweetnam 1992a). The September index represents a total of 61 adult delta smelt caught during the month. Most of these fish were collected in the lower Sacramento River. The October index represents a total of two adult delta smelt caught in 80 trawl tows during the entire month (D. Sweetnam, CDFG, pers. comm.). Other than those cited above, the Service has received no new data on the abundance or distribution of the delta smelt. However, if additional data gathered as a result of the California Department of Fish and Game's ongoing studies show that the species should not be listed, the Service is afforded the ability to delist the species (50 CFR 424.11(d)(3)).

Comment 2: One respondent maintained that the best scientific data available indicate that the delta smelt population has been severely underestimated. In an experimental test, the California Department of Fish and Game demonstrated that more smelt could be caught when a midwater trawl with a finer mesh size was used.

Service Response: The findings of this rule are based primarily on the relative abundance of the delta smelt population today as it compares to its abundance throughout the period of record. The manner in which the long-term delta smelt abundance indices are calculated does not allow precise population estimates to be determined. These indices are used for population trend analysis. Any correction factor (as a result of a change in mesh size) applied to current population estimates would have to be applied to historical values as well. When the correction factor is applied to all years of data, the results still show a 90 percent population decline during the past 20 years.

Comment 3: Numerous commenters suggested that the current threats facing the species and the alarming decline in its abundance merit the designation of the delta smelt as an endangered species rather than a threatened species.

Service Response: The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the delta smelt in determining to list this species. The available data indicate a significant population decline over the last 20 years. The current population has remained relatively stable over the last 5 years, although it has done so at low levels. No apparent recovery is occurring. Based on the evaluation of all available information on population dynamics and threats to this species, the preferred action is to list the delta smelt as a threatened species.

Comment 4: Several individuals claimed that the designs of the population monitoring studies were inadequate, and by their nature, bias the interpretation of the data collected with regard to distribution and overall abundance of the species.

Service Response: In the proposed rule, and the discussion in this final rule, under *Summary of Factors Affecting the Species*, the Service recognizes that "* * * much of the available data on the population dynamics of the delta smelt were obtained from studies focused on other fish species, such as striped bass (*Morone saxatilis*) and chinook salmon (*Oncorhynchus tshawytscha*). Consequently, the collection methods used in these studies were not designed to estimate the delta smelt population." Nevertheless, the Service and other scientists contend that the sampling techniques provide a repeatable, consistent measure of delta smelt population trends and distribution over

the last 33 years. Furthermore, the Service is obliged to consider the best scientific and commercial data available in making its listing determination. The best available scientific data on the present and historical distribution and abundance of the delta smelt indicate that the species has experienced a significant decline in number and restriction in distribution in the past 20 years.

Comment 5: A few commenters asserted that no listing determination could be made for the delta smelt because the Service has not demonstrated any statistically significant correlation between the factors suggested in the proposed rule as having contributed to the species' decline and its distribution and abundance. For example, commenters remarked that there is no statistically significant correlation between the location where delta smelt are caught at any one time and areas of 2 ppt salinity. In addition, they contended that there is no statistically significant relationship between delta smelt abundance and the mixing zone location or with the number of days the San Joaquin River's flow is reversed. Because of this perceived lack of statistically significant data, one respondent claimed he was unclear about the source of the data that the Service relied upon to reach its conclusion that the species should be listed. Another commenter argued that the proposed rule was biased because the Service neglected to state that one of the conclusions reached by Stevens *et al.* (1990) was that no evidence exists to link directly the effects of delta water exports with the abundance of the delta smelt. The State Water Contractors suggested that for the reasons listed above, the analysis of factors affecting the species, upon which the Service bases its listing determination, is flawed. Conversely, Dr. Moyle (*in litt.* 1992) expressed his concern that the proposed rule understated the importance of the relationship of the effect of Delta water exports, agricultural diversion, and pumping to the decline in abundance of the species.

Service Response: The Endangered Species Act requires the Service to base listing determinations upon the best available scientific and commercial data. The Service is not required to show statistical significance between each of the causes of decline listed in this and the proposed rule, and the location or abundance of delta smelt collected; and a lack of such statistical significance does not invalidate the analysis of the five factors upon which this listing determination is based. The complexity of the Delta ecosystem and the numerous stated factors contributing in time and space to the species' decline make it highly unlikely that any one factor would show a direct correlation with its distribution or abundance. To show a direct causal link between any of these factors and a measurable or determinable effect on the species, a study would have to be designed such that all other factors besides the one being tested were ruled out. This type of study would have to be conducted under very controlled circumstances such as those found in the laboratory. Another difficulty with determining single factor cause and effect relationships is that the delta smelt is an annual species. Therefore, the effects of a single type of environmental perturbation on one life stage in a given year may not have a direct, measurable effect on other life stages in a subsequent year. The Service acknowledges that each of the conclusions reached by Stevens *et al.* (1990) was not listed in the proposed rule. The context of the subject conclusion was that the California Department of Fish and Game could not directly link Delta water exports to the decline of the delta smelt because the monitoring study has not been specifically designed to test this hypothesis and that sampling and environmental variables are likely to mask any such direct relationships. However, the precipitous decline in delta smelt abundance after 1981 coincides with a proportional increase in fresh water diversion by State and Federal water projects during the months when delta smelt are spawning (Moyle *et al.* 1992) Furthermore, the Service lists species because of threats to their continued existence, even though we may not precisely understand the exact causal relationships leading to the decline.

Comment 6: One respondent maintained that in its discussion of the existing regulatory mechanisms that are now in place to protect the delta smelt, the Service neglected to consider that the California Fish and Game Commission directed the California Department of Fish and Game to initiate a 3-year study designed to determine the status of the delta smelt and reasons for its decline. Furthermore, the California Fish and Game Commission requested that if the California Department of Fish and Game found that the status of the species continued to suffer, that this fact should be brought to the California Fish and Game Commission's attention. Because the California Fish and Game Commission has authority to emergency list a species, this commenter suggested that current regulatory mechanisms are adequate.

Service Response: As stated above, the Service may list a species even though the exact causes of decline are not known. Continuing studies may shed light on the causes of decline, and may lead to recovery or management actions that may be of benefit to the species. However such studies do not result in direct protection of the species. Furthermore, the delta smelt is not listed by the State at this time, and State listing would not provide protection from Federal actions. No legal mechanism exists that affords protection to the delta smelt, per se, or that provides protective measures to ensure the continued existence of the species.

Comment 7: According to one commenter, the proposed rule violates the Regulatory Flexibility Act (5 U.S.C. Section 603) as well as the obligations imposed by Executive Order 12291, and Executive Order 12630.

Service Response: The Department of the Interior has determined that the analyses required by the Regulatory Flexibility Act (5 U.S.C. 603) and Executive Order 12291 are not applicable to listing determinations. The Department has also determined that any analysis performed under Executive Order 12630 may not delay a listing determination. The Act requires that listing decisions be made solely on the basis of biological information. The legislative history to the 1982 amendments of the Act states:

> "The Committee of Conference * * * adopted the House language which requires the Secretary to base determinations regarding the listing or delisting of species "solely" on the basis of the best scientific and commercial data available to him. As noted in the House Report, economic considerations have no relevance to determinations regarding the status of species and the economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, will not apply to any phase of the listing process." H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 20 (1982); *accord.* H.R. Rep. No. 567, 97th Cong., 2d Sess. 12, 19–20 (1982); S. Rep. No. 418, 97th Cong., 2d Sess. 4 (1982).

Comment 8: One respondent alleged that the review panel convened by the Service during the status review stage of the listing process was biased by the composition of members and the documents provided by the Service for review.

Service Response: All four biologists that were asked by the Service to review the status of the delta smelt have a long history of working with western endangered or threatened fishes, expertise in fish ecology, and are

knowledgeable about the Federal listing process. For these reasons, the Service determined that these experts were uniquely qualified to review the available information and make an informed finding regarding the current status of the delta smelt. All information maintained in the Service's files on this subject is available for public review.

Comment 9: A few commenters claimed that listing the delta smelt would have negative environmental effects. Specifically, if Central Valley farmers must depend to a greater extent on groundwater for agricultural production, further overdraft of the groundwater table is likely.

Service Response: Section 4(a)(1) of the Act requires that a decision to list a species as endangered or threatened be based on the five factors described in the section of this final rule entitled Summary of Factors Affecting the Species. These five factors pertain only to the biology and habitat requirements of the species in question. Nevertheless, the Service is aware that replenishment of groundwater overdraft is one of the many uses of water diverted from the Delta. The effects of Delta water diversions and exports on delta smelt habitat is discussed in Factor A of the Summary of Factors section.

Comment 10: Many commenters suggested that the delta smelt should not be listed because of the effect such an action would have on California's economy. Several commenters stated that the proposed rule did not fully address the economic impact incurred in California as a result of the proposed listing.

Service Response: Under section 4(b)(1)(A) of the Act, a listing determination must be based solely on the best scientific and commercial data available. The legislative history of this provision clearly states the intent of Congress to "ensure" that listing decisions are "* * * based solely on biological criteria and to prevent nonbiological considerations from affecting such decisions * * *" H.R. Rep. No. 97–835, 97th Cong., 2d Sess. 19 (1982). As further stated in the legislative history, "* * * economic considerations have no relevance to determinations regarding the status of species * * *" *Id.* at 20. As stated previously, the Service is required to address economic considerations within the context of designating critical habitat. The Service may exclude areas from critical habitat due to economic or other relevant impacts, provided that such exclusion would not lead to the extinction of the species.

Comment 11: One commenter requested a six-month extension of the **Federal Register** publication of this final rule because of substantial disagreement among scientists regarding the sufficiency or accuracy of the scientific data.

Service Response: The Act requires the Secretary of the Interior, within 1 year of publishing a proposed listing, to issue a final rule, withdraw the proposed listing, or publish a notice that the 1-year period is being extended for up to 6 months (16 U.S.C. 1533(b)(6)(A)). The 1-year period may be extended if the Secretary finds "* * * substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned." (16 U.S.C. 1533(b)(6)(B)(i)). This disagreement must be "* * * among scientists knowledgeable about the species * * *" (50 CFR 424.17(a)(1)(iv)). The Service did not find substantial disagreement among knowledgeable scientists during the review of materials pertaining to the status of the delta smelt. The Service received no information indicating that the delta smelt is more widespread or under lesser threats than was previously thought. Therefore, the Service has determined that the date of publication of this final rule cannot be extended.

Comment 12: The Service received a reply that maintained that since there were questions among the scientific community about the validity of the taxonomic classification of the delta smelt (*H. transpacificus*) as a distinct species from the Japanese smelt (*H. nipponensis*), federally listing would be a violation of the Act.

Service Response: There is no uncertainty among the scientific community regarding the validity of the taxonomic classification of the delta smelt. In the Background section of this final rule is a description of the taxonomic revisions that have led to the currently accepted scientific nomenclature for this species.

Comment 13: One respondent attested that recent California Department of Fish and Game fall midwater trawl surveys found the delta smelt to be the most abundant species of fish collected.

Service Response: Northern anchovy (*Engraulis mordax*) represent by far the greatest proportion of the fish species caught in midwater trawl tows in all but 3 years during the period of this monitoring program (Sweetnam 1992b). For those 3 years, longfin smelt (*Spirinchus thaleichthys*) and threadfin shad (*Dorosoma petenense*) were caught in the greatest numbers.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the delta smelt should be classified as a threatened species. Procedures set forth at section 4 of the Endangered Species Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be endangered or threatened because of one or more of the five factors described in section 4(a)(1). These factors and their application to the delta smelt (*Hypomesus transpacificus*) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.

The delta smelt was one of the most common and abundant pelagic fish caught by California Department of Fish and Game trawl surveys in the Delta during the early 1970's (Stevens and Miller 1983, Moyle *et al.* 1989, Stevens *et al.* 1990). Its distribution once ranged from western Suisun Bay upstream to Sacramento on the Sacramento River and to Mossdale on the San Joaquin River (Radtke 1966, Moyle 1976, Moyle *et al.* 1992). Smelt populations fluctuated a great deal in the past, but after 1981 began a precipitous decline. Over the last 20 years, the population has experienced a ten-fold decline in numbers, and since 1982, has remained at extremely low levels. Recent population abundance indices confirm that the species has not shown any significant signs of recovery (Moyle and Herbold 1989, Moyle *et al.* 1989, Stevens *et al.* 1990, Moyle *et al.* 1992, Sweetnam 1992a). This species' pelagic life history, dependence on pelagic microzooplankton, 1-year life span, and low fecundity are characteristics of a fish species that is affected greatly by perturbations to its reproductive habitat or larval nursery areas. Under existing levels of water development, the delta smelt is especially vulnerable during protracted drought periods. Deleterious effects of the present drought period would be exacerbated if additional alterations in hydrology caused by reductions of freshwater inflows to the Delta alter the timing and/or duration of water exports. A weak stock-recruitment relationship (i.e., little evidence of the effect of parent population size on subsequent recruitment) strongly suggests that environmental or habitat factors are severely limiting delta smelt abundance, even during those years

when adults may be abundant (Moyle *et al.* 1992).

Moyle *et al.* (1989) reported multiple and synergistic causes of the delta smelt decline in the following order of importance: (1) Reduced river outflows, primarily in the Sacramento and San Joaquin Rivers, and their tributaries, (2) extremely high river outflows in years with unusually high rainfall, (3) entrainment mortality caused by water diversion, (4) human and natural perturbations to the smelt's food web, (5) presence of toxic substances in the aquatic habitat (e.g., agricultural and industrial chemicals, heavy metals, etc.), and (6) loss of genetic integrity because of a sharply curtailed delta smelt population. This small delta smelt population may become displaced by the wagasaki, or Japanese smelt (*Hypomesus nipponensis*), which was inadvertently introduced into reservoirs of the Sacramento River drainage by the California Department of Fish and Game (Moyle 1976).

Delta water diversions and exports presently total up to about nine million acre-feet per year. State and Federal projects presently export about six million acre-feet per year when there is sufficient water available, and in-Delta agricultural uses result in diversion of about three million additional acre-feet per year. Plans currently being prepared propose to greatly increase exports and diversions in the future. The Service is aware of 21 major Central Valley Project, State Water Project, or private organization proposals that will result in increased water exports from the Delta, reduce water inflow to the Delta, change the timing and volume of Delta inflow, or increase heavy metal contamination into the Delta. These proposed projects or actions include but are not limited to: Los Banos Grandes Reservoir, South Delta Water Management Program, South Delta Water Barriers Project, North Delta Water Management Project, West Delta Water Management Project, Coastal Aqueduct proposal, Delta Wetlands Corporation Water Storage Project, Central Valley Project contract renewals, Los Vaqueros Reservoir, the Central Valley Project and State Water Project wheeling purchase agreement, reactivation of the San Luis Drain, Stanislaus-Calaveras River Basin Water Use Program, Kern Water Bank, Arvin Edison water storage and exchange proposal, and State Water Project Pump additions.

A significant change in in-Delta diversions is unlikely; if anything, a slight decrease in in-Delta agricultural use is probable. The Federal pumping plant has been operated at capacity for many years except for a very few drought years, so increased exports at this plant appear unlikely. The State Water Project pumping plant and the capacity of the State Aqueduct have considerable unused capacity, however. A table of past and projected State Water Project deliveries from Delta sources during the years of 1962 to 2035 are listed in California Department of Water Resources (1992). In the 1980's, deliveries ranged from 1.5 million acre-feet to 2.8 million acre-feet. By 1993, if enough water is available, deliveries could increase to as much as 3.8 million acre-feet. By 2010, deliveries of up to 4.2 million acre-feet are possible.

Since 1983, the proportion of water exported from the Delta during October through March has been higher than in earlier years (Moyle *et al.* 1992). The timing of these proportionally higher exports have coincided with the delta smelt's spawning season. Federal and State water diversion projects in the southern Delta export, by absolute volume, mostly Sacramento River water with some San Joaquin River water. During periods of high export pumping and low to moderate river outflows, however, reaches of the San Joaquin River reverse direction and flow to the pumping plants located in the southern Delta. The State-operated pumping plant presently exports water at rates up to 6,400 cfs. The State is considering proposals to export an additional 3,900 cfs. The Federal pumping plant can export water at rates up to 4,600 cfs. In addition, local private diverters export up to 5,000 cfs from about 1,800 diversions scattered throughout the Delta.

When total diversion rates are high relative to Delta outflow and the lower San Joaquin River and other channels have a net upstream (i.e., reverse or negative) flow, out-migrating larval and juvenile fish of many species become disoriented. Large mortalities occur as a result of entrainment and predation by striped bass at the various pumping plants and other water diversion sites. Net positive riverine flows and estuarine outflows of sufficient magnitude are required for delta smelt larvae to be carried downstream into the upper end of the mixing zone of the estuary rather than upstream to the pumping plants.

In recent years, the number of days of reversed San Joaquin River flow have increased, particularly during the February-June spawning months for delta smelt (Moyle *et al.* 1992). All size classes of delta smelt suffer near total loss when they are entrained by the pumping plants and diversions in the south Delta. Very few are effectively salvaged at the State and Federal pumping plant screens. The few delta smelt that are transported into water project reservoirs or canals fail to reproduce. This species' embryonic, larval, and postlarval mortality rates also will become higher as reduced western Delta flows allow increases in the salinity level and relocation of the mixing zone.

The delta smelt is adapted for life in the mixing zone (brackish water/freshwater interface) of the Sacramento-San Joaquin estuary. The estuary is an ecosystem where the mixing zone and salinity levels are determined by the interaction of river outflow and tidal action. Moyle *et al.* (1992) reported that delta smelt were most abundant in shallow, low salinity water associated with the mixing zone, except when they spawned. Their analysis showed that smelt were collected from water with a mean salinity of 2 ppt with a mean temperature of 15 °C, but were found in salinities ranging from 0–14 ppt at temperatures ranging from 6–23 °C. The larvae require the high microzooplankton densities produced by the mixing zone environment. The best survival and growth of smelt larvae occurs when the mixing zone occupies a large geographic area, including extensive shoal regions that provide suitable spawning substrates within the euphotic zone (depths less than 4 m). Sixty-two percent of delta smelt collected in Suisun Bay occurred at 3 sampling stations with depths less than 4 m; the remaining 38 percent were caught at 6 deeper stations.

During periods of drought and increased water diversions, the mixing zone and associated smelt populations are shifted farther upstream in the Delta. During years prior to 1984, the mixing zone was located in Suisun Bay during October through March (except in months with exceptionally high outflows or during years of extreme drought). From April through September, the mixing zone usually was found upstream in the channels of the rivers. Since 1984, with the exception of the record flood outflows of 1986, the mixing zone has been located primarily in the river channels during the entire year because of increased water exports and diversions. When located upstream, the mixing zone becomes confined to the deep river channels, becomes smaller in total surface area, contains very few shoal areas of suitable spawning substrates, may have swifter, more turbulent water currents, and lacks high zooplankton productivity. Delta smelt reproduction very likely is adversely affected now that the mixing zone is located in the main channels of

the Delta, east of Suisun Bay (Moyle *et al.* 1992). In 1982, the decline of the delta smelt population in response to the shifted location of the mixing zone was significant. In all respects, the upstream river channels are much less favorable for the spawning and survival of the smelt. The decline of the delta smelt population since 1981 has been concurrent with an increasing amount and proportion of freshwater diversions that confine the mixing zone to the narrow, deep, and less productive channels in the lower rivers.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Not known to be applicable; however, the delta smelt may be harvested as a non-target by-catch in commercial bait fisheries for other baitfish species. Some scientific collecting is conducted for the delta smelt; however, these activities do not appear to be adversely affecting this species. Native Americans historically harvested delta smelt for food, but modern Native Americans are not known to be harvesting this fish. No recreational or educational uses of this animal are expected to affect the delta smelt population.

C. Disease or Predation

Not known to be applicable. However, the introduced striped bass may have caused an increase in predation on all size classes of the delta smelt. An effort by the California Department of Fish and Game is underway to compensate for striped bass population mortalities caused by water export projects. The 1991 striped bass stock was very low relative to the population in the 1960's. The striped bass compensation program annually releases 1–2 million juvenile hatchery-reared striped bass in the estuary in an effort to rebuild the population. This year the Director of the California Department of Fish and Game decided not to release striped bass because of the potential harm they would cause to the federally threatened Sacramento River winter-run chinook salmon.

D. The Inadequacy of Existing Regulatory Mechanisms

Regulatory mechanisms currently in effect do not provide adequate protection for the delta smelt or its habitat. This species is not listed by the State of California. The California Fish and Game Commission ruled on August 30, 1990, that a petition to the State to list the species was unwarranted, rejecting the California Department of Fish and Game's recommendation to list the delta smelt as a threatened species under State authority (Stevens *et al.* 1990). State listing would have provided some measure of protection to the species because State agencies would have been required to consult with the California Department to Fish and Game if any project they funded or carried out would adversely affect the delta smelt. However, even if the State of California had listed the delta smelt, the species would not have been protected from the adverse effects of Federal actions.

Suisun Bay is the best known nursery habitat for this species' reproduction and larval survival, but the habitat has been deleteriously altered because of higher salinities in spring. These higher salinities are caused by the large number of freshwater diversions that allow brackish seawater to intrude farther upstream. At present, there are relatively few periods when freshwater outflow volumes through the Delta and Suisun Bay of any significance are mandated for wildlife or fisheries. Federal and State agencies had planned to increase 1991 and probably 1992 water supplies for out-of-stream uses at the expense of environmental protection of estuarine fish and wildlife resources in the fifth and potentially sixth years of drought (Morat 1991). Because of significantly higher than normal precipitation and subsequent higher instream flows during March, 1991, a State agency request for relaxation of Delta water quality standards was withdrawn. It is likely, should the severe California drought continue, that this water quality relaxation action will be requested again in the near future to favor out-of-stream water use over the need to protect aquatic habitats for fish and wildlife.

Present regulatory processes do not ensure that water inflows to Suisun Bay and the western Sacramento-San Joaquin estuary will be adequate to maintain the mixing zone near or in Suisun Bay to benefit delta smelt and other fish and wildlife. The California State Water Resources Control Board (Board) has the authority to condition or require changes in the amount of water inflow and the amount of water exported or diverted from the Delta. At the Board's Water Quality/Water Rights Hearings in 1987, a Service biologist testified that the delta smelt had been recommended for addition to the Federal Animal Notice of Review as a category 1 candidate species (Lorentzen 1987). The Board has not taken regulatory or legal action to protect this animal or its habitat during the 4 years since the Service expressed its concern for several species native to Sacramento-San Joaquin estuary. On December 9, 1992, the Board released a copy of Water Rights Decision 1630 (D–1630), San Francisco Bay/Sacramento-San Joaquin Estuary (California State Water Resources Control Board 1992). A meeting to consider adoption of D–1630 is scheduled for January 25, 1993. In whatever form it is finally adopted by the Board, D–1630 will establish minimum levels of public trust uses of the delta for up to 5 years. Subsequently, long-term standards will be prepared and adopted.

Implementation of the draft decision as prepared would result in improved habitat conditions for the delta smelt. The Service is presently in the process of analyzing the draft terms and conditions to determine to what extent delta smelt will be benefited, if the decision is adopted and implemented. However, even assuming immediate adoption and implementation of these interim terms and conditions, their adequacy as a regulatory mechanism to protect the delta smelt remains in question. The Service is aware that the salinity standards currently in effect (D–1485) are inconsistently implemented and frequently violated due to operational constraints. Institutional guarantees of compliance have been lacking in the past and are needed in the future.

Similarly, the Service is currently analyzing the potential effects on the delta smelt and other fish and wildlife resources in California as a result of the recent enactment of the Central Valley Project Improvement Act (Pub. L. 102–575). Two of the stated purposes of this act are to: "protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California" and "to contribute to the State of California's interim and long-term efforts to protect the San Francisco Bay/Sacramento-San Joaquin Delta Estuary". Section 3406(b)(2) dedicates annually 800,000 acre-feet of Central Valley Project water for various purposes including the benefit of federally listed species. While the Service is reasonably certain that the delta smelt will realize some benefit from implementation of this Act, the magnitude and timeliness of these protections may be inadequate to prevent the endangerment of the delta smelt. For example, many analysts predict that provisions within the Act will take many years for the courts to resolve. Finally, neither adoption of the State Water Resources Control Board's Decision 1630 or the Central Valley Project Improvement Act protect the delta smelt *per se*, or provide mechanisms to ensure the continued existence of the species.

For the reasons stated above, the Service considers the existing regulatory mechanisms inadequate to assure the long-term existence of delta smelt in Suisun Bay and the Delta.

E. Other Natural or Manmade Factors Affecting its Continued Existence

The delta smelt is highly vulnerable to extinction because of its short life span, present small population size, and restricted distribution. The limited gene pool may result in depressed reproductive vigor and loss of genetic variation.

Poor water quality also may be a threat. All major rivers in this species' historic range are exposed to large volumes of agricultural and industrial chemicals that are applied in the California Central Valley watersheds (Nichols *et al.* 1986). Agricultural chemicals and their residues, and chemicals originating in urban runoff, find their way into the rivers and estuary. Toxicology studies of rice field irrigation drain water of the Colusa Basin Drainage Canal documented significant toxicity of drain water to striped bass embryos and larvae, medaka larvae, and the major food organism of the striped bass larvae and juveniles, the opposum shrimp (*Neomysis mercedis*). This drainage canal flows into the Sacramento River just north of the City of Sacramento. The majority of drain water samples collected during April and May 1990 were acutely toxic to striped bass larvae (96-hour exposures), the third consecutive year that the Colusa Basin rice irrigation drain water has been acutely toxic (Bailey *et al.* 1991). Delta smelt may be similarly affected by agricultural and industrial chemical run-off.

Some heavy metal contaminants have been released into the Delta from industrial and mining enterprises. Although the effects of these contaminating compounds on delta smelt larvae and their microzooplankton food resources are not well known, the compounds could potentially adversely affect delta smelt survival. In addition, increases in urban development in the Sacramento Valley will continue to result in concurrent increases in urban runoff. Finally, a proposal to reactivate the San Luis Drain would result in discharge of high levels of selenium from the San Joaquin Valley into the Delta. Selenium has been shown to cause developmental defects in and mortality of wildlife species.

In recent years, untreated discharges of ship ballast water introduced nonindigenous aquatic species to the Sacramento-San Joaquin estuary ecosystem (Carlton *et al.* 1990). Several introduced species adversely affect the delta smelt directly. An asian clam (*Potamocorbula amurensis*), introduced as veliger larvae at the beginning of the present drought, was first discovered in Suisun Bay during October 1986. By June 1987, the asian clam was nearly everywhere in Suisun, San Pablo, and San Francisco Bays irrespective of salinity, water depth, and sediment type at densities greater than 10,000 individuals per square meter. Asian clam densities declined to 4,000 individuals per square meter as the population aged during the year (Carlton *et al.* 1990). Persistently low river outflow and concomitant elevated salinity levels may have contributed to this species population explosion (Carlton *et al.* 1990). The asian clam could potentially play an important role in affecting the phytoplankton dynamics in the estuary. It may have an effect on higher tropic levels by decreasing phytoplankton biomass and by directly consuming *Eurytemora affinis* copepod nauplii, the primary food of delta smelt.

Three non-native species of euryhaline copepods (*Sinocalanus doerrii, Pseudodiaptomus forbesi,* and *Pseudodiaptomus marinus*) became established in the Delta between 1978 and 1987 (Carlton *et al.* 1990) while *Eurytemora affinis* populations, the native euryhaline copepod, have declined since 1980. It is not known if the introduced species have displaced *E. affinis* or whether changes in the estuarine ecosystem now favor *S. doerrii* and the two *Pseudodiaptomus* species (Moyle *et al.* 1989). These introduced copepod species are more efficient at avoiding the predation of larval delta smelt. The introduced copepods also exhibit a different swimming behavior that makes them less attractive to feeding delta smelt larvae. Because of reduced food availability or feeding efficiency causing decreased food ingestion rates, weakened delta smelt larvae are more vulnerable to starvation or predation.

The significantly altered microzooplankton food web now present in the Suisun Bay-Delta estuary may have decreased the gross growth efficiency of delta smelt larvae. Gross growth efficiency is the proportion of weight-specific food ingestion rate that goes to larval fish body growth. When food ingestion rates are low, gross growth efficiency is low. At low gross growth efficiencies, larval fish take much longer to metamorphose to juveniles. Long larval stage durations increase the likelihood that density-dependent mechanisms (e.g., predators, overgrazing of food resources, etc.) and density-dependent mechanisms (e.g., adverse salinities, temperature, absence of zooplankton, water diversion entrainment and impingement mortality, etc.) would develop to adversely affect survival and recruitment. In temperate latitudes, where spawning is temporally and spatially confined, as it is for the delta smelt, both mortality and growth rates tend to be low. Ingestion in temperate species is relatively low compared to tropical species, and larval stage duration is long and potentially highly variable. Under these circumstances, small changes in either mortality rates or growth rates can have significant adverse effects on recruitment potential (Shepherd and Cushing 1980, Houde 1989). Therefore, the timing of spawning and the availability of favorable spawning sites for adults are added critical elements in the recruitment success of the spawned cohort.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in this listing determination. The Service acknowledges that available data on the population dynamics of the delta smelt were collected incidental to other investigations and were not intended to provide a population estimate. The Service believes, however, that these data represent the best available information and support the listing of this species. The available data indicate a significant population decline over the last 20 years. Though the current population has remained relatively stable over the last 5 years, it has done so at very low levels. No apparent recovery is occurring. The delta smelt faces threats from a more frequent upstream shift of its aquatic estuarine habitat, and a reduction of available habitat due to drought, replenishment for groundwater overdraft, and water exports and diversions. The shift in location of the mixing zone, as well as the reduced area available to the smelt, is expected to continue in the future. These factors will continue to adversely affect all life stages of the delta smelt. Because the smelt population is at such low levels, this species' 1-year lifespan is also a factor that threatens the species. The failure of a single reproductive season could significantly affect the ability of this species to survive and recover. Based on the evaluation of all available information on population dynamics and threats to this species, the Service has determined that listing as threatened is appropriate at this time.

Critical Habitat

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. Section 4(b)(6)(C) further indicates that a concurrent critical habitat determination is not required if the Service finds that determination of endangered or threatened status is essential to the conservation of the involved species, or that critical habitat is not then determinable. The Service finds that determination of threatened status for the delta smelt is essential. Without a listing determination, the protections conferred the species pursuant to section 7, through a limitation on the commitment of resources on the part of concerned Federal agencies or applicants for Federal permits, could not be applied. Therefore, to ensure that the full benefits of section 7 and other conservation measures under the Act will apply to the delta smelt, prompt determination of threatened status is essential.

Section 4(b)(2) of the Act requires the Service to consider economic and other impacts of designating a particular area as critical habitat. The Service has contracted for an economic impacts analysis of designating critical habitat for the delta smelt. In addition, the Service is in the process of evaluating the information that was submitted during the comment period on the potential economic impacts of critical habitat designation. However, because of the complexities and extent of the activities being assessed, this evaluation will not be completed until later in 1993. Upon completion of this economic impact analysis, the Service will render a final determination. The decision on designation of critical habitat must be made by October 3, 1993, pursuant to section 4(b)(6)(C)(ii) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat, if any is designated. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service. Federal actions that may affect the delta smelt include U.S. Army Corps of Engineers funding or issuance of permits for water pumping facilities or structures, levee construction or repairs, and channel dredging and dredge spoil disposal projects. Other examples include U.S. Bureau of Reclamation or California Department of Water Resources water export or water management operations or projects, and U.S. Environmental Protection Agency actions pertaining to the water quality standards of Suisun Bay, Suisun Marsh, and the Delta. Measures to protect the listed winter-run chinook salmon, for which the National Marine Fisheries Service has jurisdiction under the Act, also may affect the delta smelt and may require consultation with the Service.

Under section 4 of the Act, listing the delta smelt would provide for the development of a recovery plan, which would bring together Federal, State, and private efforts to develop conservation strategies for the species. The recovery plan would develop a framework of recovery activities, priorities, and funding requirements to accomplish conservation objectives and ensure the survival and recovery of the delta smelt.

The Act and its implementing regulations found at 50 CFR part 17.31 set forth a series of general prohibitions and exceptions that apply to all threatened wildlife not covered by a special rule. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt any such conduct), import or export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any such species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered or threatened wildlife species under certain circumstances. Regulations governing permits are at 50 CFR part 17. Permits for threatened species are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available. For threatened species, permits are lawful for zoological exhibition, educational purposes, or special functions consistent with the purposes of the Act. Further information regarding regulations and requirements for permits may be obtained from the U.S. Fish and Wildlife Service, Office of Management Authority, Permits Branch, 4401 N. Fairfax Drive, room 432, Arlington, Virginia 22203–3507 (703/358–2104).

National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

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Author

The authors of this rule are Nadine R. Kanim and A. Keith Taniguchi, Sacramento Field Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under FISHES, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
FISHES							
*	*	*	*	*	*	*	
Smelt, delta	*Hypomesus transpacificus*	U.S.A. (CA)	Entire	T	492	NA	NA
*	*	*	*	*	*	*	

Dated: January 19, 1993.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 93–5085 Filed 3–4–93; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB 73

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Pacific Coast Population of the Western Snowy Plover

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines threatened status for the Pacific coast population of the western snowy plover (*Charadrius alexandrinus nivosus*), pursuant to the Endangered Species Act of 1973, as amended (Act). The Pacific coast breeding population of the western snowy plover extends from the State of Washington to Baja California, Mexico, with the majority of breeding birds found in California. These plovers winter primarily in coastal California and Mexico. The coastal population of the western snowy plover is threatened throughout its range by loss and disturbance of nesting sites. The final decision on determination of critical habitat is postponed in accordance with section 4(b)(6)(C)(ii) of the Act. This rule implements the Federal protection and recovery provisions afforded by the Act for this species.

EFFECTIVE DATE: April 5, 1993.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 2800 Cottage Way, room E–1803, Sacramento, CA 95825–1846.

FOR FURTHER INFORMATION CONTACT: Karen J. Miller, at the above address (916–978–4866).

SUPPLEMENTARY INFORMATION:

Background

Taxonomy

The snowy plover is a small, pale colored shorebird with dark patches on either side of the upper breast. The species was first described in 1758 by Linnaeus (American Ornithologists' Union 1957). Twelve subspecies of the snowy plover occur worldwide (Rittinghaus 1961 *in* Jacobs 1986).

Two subspecies of the snowy plover are recognized in North America (American Ornithologists' Union 1957). Those are the western snowy plover (*Charadrius alexandrinus nivosus*) and the Cuban snowy plover (*C. a. tenuirostris*). According to the American Ornithologists' Union (1957), the western snowy plover breeds on the Pacific coast from southern Washington to southern Baja California, Mexico, and in interior areas of Oregon, California, Nevada, Utah, New Mexico, Colorado, Kansas, Oklahoma and north-central Texas, as well as coastal areas of extreme southern Texas, and possibly extreme northeastern Mexico. Although previously observed only as a migrant in Arizona, small numbers have bred there in recent years (Monson and Phillips 1981, Davis and Russell 1984 *in* Page *et al.* 1991). The Cuban snowy plover breeds along the Gulf coast from Louisiana to western Florida and south through the Caribbean. The subspecific status of populations breeding east of the Rocky Mountains has been questioned (Johnsgard 1981, Jacobs 1986). These populations are considered to belong more appropriately to the subspecies *tenuirostris*.

The Pacific coast population of the western snowy plover is defined as those individuals that nest adjacent to or near tidal waters, and includes all nesting colonies on the mainland coast, peninsulas, offshore islands, adjacent bays, and estuaries.

The Pacific coast population of the western snowy plover is genetically isolated from western snowy plovers breeding in the interior (Gary Page, Point Reyes Bird Observatory, pers. comm., 1990). Intensive banding and monitoring studies have documented only two instances of intermixing between coastal and interior populations. First, a single banded female hatched at Monterey Bay was observed nesting the following year at Mono Lake, California (Gary Page, *in litt.*, 1989). This one observation was among 1,730 plovers observed at the interior site. Second, a late summer nesting plover at Monterey was observed the following year nesting at a Central Valley site (Gary Page, pers. comm., 1992). Three snowy plovers banded as chicks on the California coast were observed at interior Oregon breeding sites during the breeding season in 1990 (Stern *et al.* 1991a). No nesting, however, was documented. Conversely, no plovers banded at interior sites in Oregon, California, and Utah (1,434 birds) have been observed breeding at any coastal site (Stern *et al.* 1990a; Gary Page, pers comm.). In addition, snowy plovers tend to be site faithful, with the majority of birds returning to the same nesting location in subsequent years (Warriner *et al.* 1986).

Life History

The Pacific coast population of the western snowy plover breeds primarily on coastal beaches from southern Washington to southern Baja California, Mexico. Nesting habitat is unstable and ephemeral as a result of unconsolidated soil characteristics influenced by high winds, storms, wave action, and colonization by plants. Other less common nesting habitat includes salt pans, coastal dredged spoil disposal sites, dry salt ponds, and salt pond levees (Widrig 1980, Wilson 1980, Page and Stenzel 1981). Sand spits, dune-backed beaches, unvegatated beach strands, open areas around estuaries, and beaches at river mouths are the preferred coastal habitats for nesting (Stenzel *et al.* 1981, Wilson 1980).

Based on the most recent surveys, a total of 28 snowy plover breeding sites or areas currently occur on the Pacific Coast of the United States. Two sites occur in southern Washington—one at Leadbetter Point, in Willapa Bay (Widrig 1980), and the other at Damon Point, in Grays Harbor (Anthony 1985). In Oregon, nesting birds were recorded in 6 locations in 1990 with 3 sites (Bayocean Spit, North Spit Coos Bay and spoils, and Bandon State Park-Floras Lake) supporting 81 percent of the total coastal nesting population (Oregon Department of Fish and Wildlife, unpubl. data, 1991). A total of 20 plover breeding areas currently occur in coastal California (Page *et al.* 1991). Eight areas support 78 percent of the California coastal breeding population: San Francisco Bay, Monterey Bay, Morro Bay, the Callendar-Mussel Rock Dunes area, the Point Sal to Point Conception area, the Oxnard lowland, Santa Rosa Island, and San Nicolas Island (Page *et al.* 1991).

Snowy plovers breed in loose colonies with the number of adults at coastal breeding sites ranging from 2 to 318 (Page and Stenzel 1981; Oregon Department of Fish and Wildlife 1990; Eric Cummins, Washington Department of Wildlife, pers. comm., 1991; James Atkinson, U.S. Fish and Wildlife Service, pers. comm., 1991). On the Pacific coast, larger concentrations of breeding birds occur in the south than in the north, suggesting that the center of the plovers' coastal distribution lies closer to the southern boundary of California (Page and Stenzel 1981). The Center of Scientific Investigation and

Higher Education in Ensenada, Baja California, Mexico, observed snowy plovers distributed across 28 sites in Baja California in May, 1991. A total of 314 pairs were counted. The birds were concentrated at six coastal lakes (Dra. Graciela De La Graza Garcia, Director General of Conservation Ecology and Natural Resources, United States of Mexico, *in litt.*, 1992). The Mexican government also reported a small number of sightings of snowy plovers on the mainland coast of Sinaloa in April 1992 (Dra. Graciela De La Graza Garcia, *in litt.*, 1992).

Nest sites typically occur in flat, open areas with sandy or saline substrates; vegetation and driftwood are usually sparse or absent (Widrig 1980, Wilson 1980, Stenzel *et al.* 1981). The majority of snowy plovers are site-faithful, returning to the same breeding site in subsequent breeding seasons. Birds often nest in exactly the same locations as the previous year (Warriner *et al.* 1986).

The breeding season of the coastal population of the western snowy plover extends from mid March through mid September. Nest initiation and egg laying occurs from mid March through mid July (Wilson 1980, Warriner *et al.* 1986). The usual clutch size is three eggs. Incubation averages 27 days (Warriner *et al.* 1986). Both sexes incubate the eggs.

Plover chicks are precocial, leaving the nest within hours after hatching to search for food. Fledging (reaching flying age) requires an average of 31 days (Warriner *et al.* 1986). Broods rarely remain in the nesting territory until fledging (Warriner *et al.* 1986, Stern *et al.* 1990b).

Snowy plovers will renest after loss of a clutch or brood (Wilson 1980, Warriner *et al.* 1986). Double brooding and polygamy (i.e., the female successfully hatches more than one brood in a nesting season with different mates) have been observed in coastal California (Warriner *et al.* 1986) and also may occur in Oregon (Jacobs 1986). After loss of a clutch or brood or successful hatching of a nest, plovers may renest in the same colony site or move, sometimes up to several hundred miles, to other colony sites to nest (Gary Page, pers. comm., 1991; Warriner *et al.* 1986).

Widely varying nest success (percentage of nests hatching at least one egg) and reproductive success (number of young fledged per female, pair, or nest) are reported in the literature. Nest success ranges from 0 to 80 percent for coastal snowy plovers (Widrig 1980, Wilson 1980, Saul 1982, Wilson-Jacobs and Dorsey 1985, Wickham unpubl. data *in* Jacobs 1986, Warriner *et al.* 1986). Instances of low nest success have been attributed to a variety of factors, including predation, human disturbance, and inclement weather conditions. Reproductive success ranges from 0.05 to 2.40 young fledged per female, pair, or nest (Page *et al.* 1977, Widrig 1980, Wilson 1980, Saul 1982, Warriner *et al.* 1986, Page 1988). Page *et al.* (1977) estimated that snowy plovers must fledge 0.8 young per female to maintain a stable population. Reproductive success falls far short of this threshold at many nesting sites (Widrig 1980, Wilson 1980, Warriner *et al.* 1986, Page 1988, Page 1990).

The coastal population of the western snowy plover consists of both resident and migratory birds. Some birds winter in the same areas used for breeding (Warriner *et al.* 1986, Wilson-Jacobs, pers. comm. *in* Page *et al.* 1986). Other birds migrate either north or south to wintering areas (Warriner *et al.* 1986). Plovers occasionally winter in southern coastal Washington (Brittell *et al.* 1976). An average of 68 plovers may winter in Oregon, primarily on 3 beach segments (Oregon Department of Fish and Wildlife 1990 and *in litt.*, 1992). The majority of birds, however, winter south of Bodega Bay, California (Page *et al.* 1986). Wintering plovers occur in widely scattered locations on both coasts of Baja California and significant numbers have been observed on the mainland coast of Mexico at least as far south as San Blas, Nayarit (Page *et al.* 1986). Many interior birds west of the Rocky Mountains winter on the Pacific coast (page *et al.* 1986, Stern *et al.* 1988). Birds winter in habitats similar to those used during the nesting season.

Snowy plovers forage on invertebrates in the wet sand and amongst surf-cast kelp within the intertidal zone; in dry, sandy areas above the high tide; on salt pans; spoil sites; and along the edges of salt marshes and salt ponds. Little quantitative information is available on food habits (Reeder 1951).

Poor reproductive success, resulting from human disturbance, predation, and inclement weather, combined with permanent or long-term loss of nesting habitat to encroachment of introduced European beachgrass (*Ammophila arenaria*) and urban development has led to a decline in active nesting colonies, as well as an overall decline in the breeding and wintering population of the western snowy plover along the Pacific coast of the United States.

Previous Service Action

On March 24, 1988, the Service received a petition from Dr. J.P. Myers of the National Audubon Society to list the Pacific coast population of the western snowy plover as a threatened species under the Act. On November 14, 1988, the Service published a 90-day petition finding (53 FR 45788) that substantial information had been presented indicating the requested action may be warranted. At that time, the Service acknowledged that questions pertaining to the demarcation of the subspecies and significance of interchange between coastal and interior stocks of the subspecies remained to be answered. Public comments were requested on the status of the coastal population of the western snowy plover. A status review of the entire subspecies had been in progress since the Service's December 30, 1982, Vertebrate Notice of Review (47 FR 58454). In that notice, as in subsequent notices of review (September 18, 1985 (50 FR 37958); January 6, 1989 (54 FR 554)), the western snowy plover was included as a category 2 candidate. Category 2 candidates are species for which information now in possession of the Service indicates that proposing to list as endangered or threatened is possibly appropriate, but for which conclusive data on biological vulnerability and threat are not currently available to support proposed rules. The public comment period on the petition was closed on July 11, 1989 (54 FR 26811, June 26, 1989). The Service completed a status report on the western snowy plover in September 1989. Based on the best scientific and commercial data available and other comments submitted during the status review, the Service made a 12-month petition finding on June 25, 1990, that the petitioned action was warranted but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act. On January 14, 1992 (57 FR 1443), the Service published a proposal to list the coastal population of the western snowy plover as a threatened species. With publication of this final rule, the Service now determines the Pacific coast population of the western snowy plover to be a threatened species.

Summary of Comments and Recommendations

In the January 14, 1992, proposed rule (57 FR 1443) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to development of a final listing decision. Appropriate State agencies, county and city governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper

notices were published in the Register Guard, News Times, Daily Astorian, The Oregonian, The Courier, Seaside Signal, The World, Columbia Press, Statesman-Journal, and Headlight Herald on January 30, 1992, the San Francisco Chronicle and Sun Jose Mercury News on February 3, 1992, the Oakland Tribune and Times-Standard on February 4, 1992, the Willapa Harbor Herald on February 5, 1992, the Daily World and Fort Bragg Advocate-News on February 6, 1992, the Triplicate and Chinook Observer on February 11, 1992, and the North Coast News on February 12, 1992, all of which invited public comment.

On March 2, 1992, the Service received a written request for a public hearing from Mr. John Thomas, Jr., a private citizen residing in Monmouth, Oregon. As a result, the Service published a notice of public hearing on August 3, 1992 (57 FR 34100), and reopened the comment period until August 31, 1992. Newspaper notices of the public hearing were published in the Daily Olympian, The Oregonian, the San Francisco Chronicle, and the Los Angeles Times on August 3, 1992, all of which invited general public comment. A public hearing was conducted at the Hatfield Marine Science Center in Newport, Oregon on August 18, 1992. Testimony was taken from 6 p.m. to 7:25 p.m. Six individuals testified at the hearing.

During the comment periods, the Service received 96 comments (i.e., letters and oral testimony) from 80 individuals or agencies. Of the 58 commenters that stated a position, 45 (78 percent) supported listing and 13 (22 percent) did not.

Support for the listing was expressed by one Federal agency, five State agencies, two local agencies, and 37 other interested parties. Of the State agencies responding favorably, the Washington Department of Wildlife, Oregon Department of Fish and Wildlife, and California Department of Parks and Recreation indicated strong support for listing. The Oregon Parks and Recreation Department indicated support for the listing with protection of public access rights. The California Department of Fish and Game indicated a shared interest with the Service in protecting the western snowy plover. Fifteen respondents, including the Oregon Department of Fish and Wildlife, expressed their support for endangered rather than threatened status. The Service also received two informal petitions containing 62 signatures favoring listing of the Pacific coast population of the western snowy plover. The Mexican government expressed an interest in obtaining information that would aid protection of the species in Baja California, Mexico.

Opposition to the listing was expressed by one State assemblyman, three local agencies, and nine other interested parties. Of those respondents indicating no position on the listing, many expressed concern regarding the impact of listing.

Several commenters provided additional information on the threats facing the species. Some agencies provided information on existing actions that are currently underway to help protect the species. These comments have been incorporated into the final rule. A number of commenters suggested particular strategies to help recover the species, commented on the benefits and problems associated with various recovery techniques, made recommendations for the establishment of a recovery team, or generally provided comments on ways to manage the species. Many agencies and organizations requested participation in recovery actions. These comments will be useful to the Service during the recovery planning process and will be fully considered at that time.

Written comments and oral statements obtained during the public hearing and comment periods are combined in the following discussion. Opposing comments and other comments questioning the rule can be placed in 10 general groups based on content. These categories of comment, and the Service's response to each, are listed below.

Issue 1: Critical Habitat

Comment: Several commenters were concerned about the designation of critical habitat. Eight commenters were concerned that critical habitat would not be designated and urged the Service to move forward in this endeavor. One private landowner asked that her property be included as critical habitat. Several commenters felt that enough information is presently available to designate critical habitat. These commenters believed that by stating that critical habitat is not presently determinable, the Service is attempting to exempt itself from the designation of critical habitat. The California Department of Parks and Recreation supported designation of critical habitat and stated that this designation would enable the Department to more effectively control levels of recreation use and removal of exotic plants and animals. Other agencies supporting designation of critical habitat included the Oregon Department of Fish and Wildlife, Washington Department of Wildlife, and the Portland and Seattle Districts of the Corps of Engineers.

Conversely, two respondents recommended against designation of critical habitat, with one in favor of critical habitat designation only on Federal lands.

Service Response: Section 4(a)(3) of the Act requires, to the maximum extent prudent and determinable, that the Secretary designate critical habitat at the time a species is determined to be threatened or endangered. Critical habitat for the coastal population of the western snowy plover is not determinable at this time primarily because additional information is needed to analyze nesting habitat, wintering habitat, and the economic effects of a critical habitat designation. However, when a "not determinable" finding is made under section 4(b)(6)(C)(ii), the Service must to the maximum extent prudent within 2 years of the publication date of the proposed rule designate critical habitat. Any proposal to designate critical habitat would be published in the **Federal Register** including maps and legal descriptions of all areas included in the proposal, and would solicit public comments. The potential economic impacts of critical habitat designation would be evaluated during preparation of the required economic analysis.

While the Service continues to evaluate the appropriateness of designating critical habitat, it will use some of the information provided in response to the proposed rule regarding potential areas of critical habitat. The Service will solicit information from the public on any proposed designation of critical habitat.

Critical habitat, as defined by section 3 of the Act, includes all specific areas occupied by the species at the time of its listing that are essential to its conservation. Areas not presently occupied by the species also may be designated as critical habitat if such areas are essential for the conservation of the species. Substantial habitat for the coastal population of the western snowy plover occurs on State and private lands, particularly in California, where the majority of the nesting population exists. In addition to Federal lands, State, municipal and privately-owned land may be designated as critical habitat, if such designation would benefit the species.

Comment: Several commenters provided information on factors to consider in the designation of critical habitat, such as the spatial arrangement of areas to be designated, size of the areas, and target number of birds to be included in such areas.

Service Response: These comments have been noted and will be considered in the Service's determination on the designation of critical habitat for the species.

Comment: Several commenters provided predictions on the effect of critical habitat designation on the economy, including economic impacts to Coos Bay, Oregon, the San Francisco Bay area, and the activities of the Oregon Department of Transportation. In addition, specific areas were requested to be exempt from critical habitat designation.

Service Response: The Service will fully consider these comments in any designation of critical habitat and in preparation of the accompanying economic analysis.

Issue 2: National Environmental Policy Act

Comment: One commenter stated that the designation of critical habitat and the proposal to list the Pacific coast population of the western snowy plover may fall within the purview of the National Environmental Policy Act (NEPA). This commenter stated that if an environmental analysis had been conducted on the proposal to list the plover, much of the information necessary for the designation of critical habitat would have already been assembled.

Service Response: For the reasons set out in the NEPA section of this document, the Service takes the position that rules issued pursuant to section 4(a) of the Endangered Species Act do not require preparation of an Environmental Assessment or Environmental Impact Statement (EIS). The decision in *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829 (6th Circuit 1981) held that as a matter of law an EIS is not required for listings under the Act. The decision noted that preparing EISs on listing actions would not further the goals of NEPA or the Endangered Species Act.

Issue 3: Economic Effects of Listing

Comment: Several commenters expressed concern about an adverse effect on the economy of listing the Pacific coast population of the western snowy plover, including the effects of the listing on tourism and military training exercises. One commenter recommended that the Service do an economic analysis of the impact of listing the snowy plover as threatened. Several commenters expressed the opinion that people are more important than wildlife. One commenter stated that proposed solutions to protect the snowy plover should not include broad prescriptions against all industrial development. The Portland District of the Corps of Engineers stated that the costs to that agency of listing the species likely would be minimal unless the Corps was directed to develop and fund new nesting areas.

In contrast, one commenter stated that listing of the plover would have a positive effect on the economy. This commenter cited a proposed residential development in Oregon where the developers propose to preserve an area for snowy plovers. The developers have viewed formation of a plover habitat area as a purchasing incentive for homeowners.

Service Response: Under section 4(b)(1)(A) of the Act, a listing determination must be based solely on the best scientific and commercial data available. The legislative history of this provision clearly states the intent of Congress to "ensure' that listing decisions are "* * * based solely on biological criteria and to prevent nonbiological considerations from affecting such decisions * * *" H.R. Rep. No. 97–835, 97th Cong., 2d Sess. 19 (1982). As further stated in the legislative history, "* * * economic considerations have no relevance to determinations regarding the status of species * * *" *Id.* at 20. Because the Service is specifically precluded from considering economic impacts, either positive or negative, in a listing determination, the Service is not responding to comments concerning possible economic consequences of listing the Pacific coast population of the western snowy plover. The Service, however, would be required to prepare an economic analysis in association with designation of critical habitat.

The Service will consider all existing regulatory mechanisms during the recovery planning process, and will consider a range of options in the preparation of a recovery strategy for the species. Comments on the approaches to habitat and species protection will be evaluated at that time.

Comment: Several commenters expressed concern that listing of the coastal population of the western snowy plover would prevent the construction or implementation of various projects. One commenter stated that the listing would hinder the safe operation, maintenance, and development of new facilities at an international airport governed by State and Federal regulation. The commenter requested that the Service consider an exemption procedure for federally-regulated airports. Another commenter stated that Federal agencies should prepare section 7 consultations on actions that would inhibit the continued operation of spoil disposal operations and salt manufacturing because these activities support significant populations of the snowy plover.

Service Response: Section 7 of the Act requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service. If the Service determines, through formal consultation, that a Federal action is likely to jeopardize the continued existence of a listed species, reasonable and prudent alternatives are provided by the Service.

Under section 7(g) of the Act, an applicant for a Federal permit or license can apply to the Secretary of the Interior for an exemption for an agency action if, after consultation with the Service, it is determined that the agency's action would violate section 7(a)(2) of the Act. Exemption procedures are outlined in section 7(g) through 7(p) of the Act.

The airport in question has supported in recent years a nesting colony of the federally endangered California least tern (*Sterna antillarum browni*). Snowy plovers nest in the same area occupied by least terns. The airport has been successful in maintaining and safely operating its facilities despite the presence of an endangered species on the airport. If the Service determined, after consultation, that an action involving the subject airport would be likely to jeopardize the continued existence of the snowy plover and that there was no reasonable and prudent alternative to such action, the Federal agency responsible for regulating the airport's activities could apply for an exemption under section 7(g) of the Act.

Issue 4: Alternate Listing Status Recommended

Comment: Several commenters recommended that the coastal population of the western snowy plover be listed as endangered rather than threatened, primarily because of precipitous declines in the population on the Oregon coast.

Service Response: The Service recognizes that the nesting population of snowy plovers has declined severely on the Oregon and Washington coasts. The majority of the population, however, nests in California where the decline in number of nesting birds has been less dramatic. New data received from the Mexican government during the comment period indicate that a significant number of plovers (about 314

pairs) nest on the Pacific coast of Baja California, Mexico. In addition, the approximate 17 percent population decline documented for the United States coastal population between 1977 and 1989 (Page *et al.* 1991) indicates that the current rate of decline in this population does not suggest the likelihood of extinction within the foreseeable future. For these reasons, the Service maintains that threatened status is warranted for the Pacific coast population of the western snowy plover.

Issue 5: Insufficiency of Scientific Data

Comment: Several commenters stated that the evidence was insufficient to prove that the Pacific coast population of the western snowy plover is distinct from interior western snowy plovers. One commenter requested information on interior population numbers and questioned the Service's authority to designate populations as threatened or endangered species.

Service Response: As stated above in the "Background" section of this rule, evidence of intermixing of coastal and interior populations is limited to two documented instances of banded snowy plovers from the coastal population breeding at interior sites (Gary Page, *in litt.*, 1989, Gary Page, pers. comm., 1992). These observations were among over 1,700 birds observed at interior sites in California and Nevada. More importantly, no banded snowy plovers of the larger interior population have been recorded nesting on the coast (Stern *et al.* 1990a, Gary Page, pers. comm., 1992). Based on these data, the Service has determined that the Pacific coast population of the western snowy plover is distinct from interior populations.

The Service completed a status review on the western snowy plover in 1989. Based on this status report, the Service determined that listing of the interior population of the western snowy plover is possibly appropriate; however, conclusive data on biological vulnerability and threat are not currently available to support a proposed rule. The interior population was designated as a category 2 candidate in the November 21, 1991, Animal Notice of Review (56 FR 58804).

Under section 3 of the Act, a "species" is defined as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Therefore, the Act allows for listing a population of a vertebrate species.

Comment: Several commenters stated that insufficient data were available to warrant listing the coastal population of the western snowy plover as a threatened species. Several commenters indicated that listing of the snowy plover was being done for political, rather than biological reasons.

Service Response: Section 4(b)(1)(A) of the Act, requires that a listing determination be based on the best scientific and commercial data available. The Service bases its determination on data collected over a period of 10 or more years by the Point Reyes Bird Observatory, the Oregon Department of Fish and Wildlife, the Washington Department of Wildlife, and other competent researchers. All data indicate a downward trend in the nesting population and number of nesting sites on the coast. The Service maintains that sufficient data are available to warrant listing the Pacific coast population of the western snowy plover as a threatened species.

Comment: One commenter stated that there is no scientific proof that European beachgrass or horseback riding has had any deleterious effect upon the coastal snowy plover population.

Service Response: European beachgrass, which is found at 50 percent of California snowy plover breeding sites and all of the Oregon and Washington breeding sites, eliminates potential snowy plover nesting habitat. The plant reduces the amount of unvegetated area above the surf line, the area where snowy plovers prefer to nest. As examples, at Willapa National Wildlife Refuge in Washington State, the Service documented between 1984 and 1990 invasion of European beachgrass into former snowy plover nesting areas (James Atkinson, pers. comm., 1992). A decline in the plover breeding population also occurred over this time period. In Oregon, at the Siuslaw National Forest, the U.S. Forest Service reports that European beachgrass has eliminated some of the historically open sand spits where snowy plovers formerly nested or wintered. Remaining birds are forced to use a greatly reduced habitat base (Robert D. Nelson, U.S. Forest Service, *in litt.*, 1992). At the Pajaro River mouth in California, an ongoing decline in the breeding population of snowy plovers coincides with expansion of European beachgrass at this site (David Dixon, California Department of Parks and Recreation *in litt.*, 1991). The Oregon Department of Fish and Wildlife (*in litt.*, 1992) considers European beachgrass to be the primary reason for the decline of snowy plovers on the Oregon coast, with human disturbance a secondary factor in remaining habitat.

Interactions between nesting snowy plovers and horseback riders have been documented at Baker Beach, Oregon, by Woolington (1985), at Salinas River State Beach, California, by Page (1988), and at Morro Bay and Calendar-Mussel Rock Dunes, California, by Philip Persons (Point Reyes Bird Observatory, *in litt.*, 1992). Continuous passage of horseback riders through nesting areas results in direct loss of nests or indirect loss from plovers repeatedly being flushed from their nests.

Issue 6: Species and Habitat Management

Comment: Two commenters stated that the Service should allow natural selection to take place and not interfere with nature's principle of survival of the fittest.

Service Response: The decline of the Pacific coast population of the snowy plover is largely due to unnatural events, such as the human-caused introduction of European beachgrass and the non-native red fox. Other successful predators are attracted to coastal beaches by trash left behind by recreationists. A species may not be able to adapt to modifications in its habitat caused by human-related activities. Adaptation is an evolutionary process requiring considerable time. To follow the principle of "survival of the fittest" and allow threatened or endangered species to go extinct would be contrary to the intent of Congress as stated in the purposes of the Act.

Comment: Several commenters stated that the snowy plover is opportunistic in finding breeding sites, and, therefore, there is no reason to believe that the population of the species will not move to better breeding sites as the environment changes from location to location.

Service Response: Data on the coastal population of the western snowy plover suggest that most birds are site faithful, returning to the same breeding site in subsequent years. In California, the lack of major storms during the recent five-year drought has resulted in an increase in potential dune-backed nesting habitat for plovers on several State beaches. This available habitat, however, has not been explored in all cases (Henry R. Agonia, California Department of Parks and Recreation, *in litt.*, 1991). These data contradict the assertion that coastal nesting birds are opportunistic in locating nesting sites. In addition, because of the constant increase in human-related activities on Pacific coast beaches and the unchecked advancement of European beachgrass on many beaches, it is unlikely that snowy plovers displaced from one breeding site

will be able to find suitable nesting sites at other locations.

Comment: One commenter advised that if predators prove to be the primary problem for plovers at Coos Bay, preservation efforts might be more wisely undertaken at nesting areas adjacent to less populated areas.

Service Response: The Coos Bay nesting colony on the North Spit is the largest remaining nesting colony in the State of Oregon. Predators are recognized as a significant factor in the reduced nesting success of plovers at this site. In response to this threat, the Oregon Department of Fish and Wildlife has been conducting nest enclosures experiments and has found these measures significantly increased nesting success. Because this nesting site is the largest in Oregon and is responding favorably to management, it would be inadvisable at this time to abandon this site in favor of applying management techniques only at nesting sites in less populated areas.

Comment: Many commenters provided advice on how snowy plover nesting areas should be managed, including prohibition or effective and enforceable regulation of foot, horseback, and vehicular traffic, control of cats and dogs, exclusion of researchers, creation of buffer areas adjacent to human activity centers, continuing education, use of nesting enclosures, predator control, beachgrass control and eradication using mechanical techniques and herbicides, removal of stabilization structures, careful placement of dredged spoils, garbage removal, and regular monitoring of bird numbers and distribution. Some of these comments suggested that the above management actions should be undertaken instead of listing the species. One commenter believed that barring vehicle traffic alone, as has been done at many beaches, is not enough to protect snowy plovers.

In contrast, one commenter was concerned that the above management actions were unnatural and did not follow proven science or the tenet of natural selection. Another commenter was concerned that other wildlife would be adversely impacted by management actions to protect snowy plovers.

Service Response: The Service will fully consider these as well as other possible management approaches when consultation and recovery actions are undertaken for the snowy plover. The Service considers the decline in the coastal population of the snowy plover to be primarily related to unnatured factors, including the introduction of non-native vegetation and predators. When a species declines to the point of threatened or endangered status as a result of man-made factors, intensified management is scientifically warranted to reverse this unnatural population decline. The Service recognizes that localized populations of more common wildlife species may decline to a minor degree as a result of actions taken to protect the snowy plover.

Comment: One commenter felt that implementation of a cooperative predator control program in the San Francisco Bay area would be more effective in protecting the snowy plover than listing the species as threatened or endangered. The commenter felt that listing the species would destroy this cooperative spirit and not protect the species.

Service Response: The San Francisco Bay area supports the largest remaining nesting population of snowy plovers in coastal California. Despite the importance of this nesting region, and despite the lack of legal status for the snowy plover, no cooperative predator control programs have been launched to protect this species. Conversely, a cooperative predator control program is currently underway to protect the federally listed endangered California clapper rail (*Rallus longirostris obsoletus*) in the San Francisco Bay area. Based on this experience, the Service's believes that listed species are more likely to be the recipients of cooperative protection ventures than species that are not listed.

Issue 7: Take Regulations

Comment: One commenter recommended that the Service concurrently developed and promulgate regulations are provided in the Act to define "take" of the species.

Service Response: The Service is considering the need to develop a precise definition of "take" for the Pacific coast population of the western snowy plover.

Comment: One commenter suggested that all the Federal land on the west coast be reserved for snowy plovers, and that State, local and privately-owned land be exempt.

Service Response: The Endangered Species Act applies to all people and all lands regardless of ownership. Under section 9 of the Act, the prohibition against "take" of listed species is not based on land ownership. The requirements for Federal agencies under section 7 of the Act are discussed under Issue 3 and under the Available Conservation Measures section of this rule. Under section 10(a) of the Act, private landowners may apply for an incidential take permit and develop a habitat conservation plan for projects that take listed species incidental to otherwise lawful activities. An incidental take permit constitutes an exception to the prohibition against taking. Details of the procedures involved in applying for a section 10(a) permit may be found in 50 CFR 17.32(b). Federal land comprises 34 percent of snowy plover habitat in California, and 50 percent of plover habitat in Oregon and Washington. Because the majority of the nesting plover population occurs in California, protection of only 34 percent of the species' nesting habitat would not provide adequate protection for the coastal population of the western snowy plover.

Issue 8: Sequence of Listing Actions

Comment: Three commenters questioned why the northern spotted owl (*Strix occidentalis caurina*) and the marbled murrelet (*Brachyramphus marmoratus marmoratus)* were listed prior to the western snowy plover when the plover population is smaller than either of these species.

Service Response: The Service was petitioned to list the northern spotted owl in January, 1987, and the marbled murrelet in January, 1988. Both petitions preceded the petition to list the Pacific coast population of the western snowy plover.

In summary, no information was received indicating that the species is more widespread or under lesser threat than was previously thought.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Pacific coast population of the western snowy plover should be classified as a threatened species. Procedures found at section 4 of the Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to the Pacific coast population of the western snowy plover (*Charadrius alexandrinus nivosus*) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Historic records indicate that nesting western snowy plovers were once more widely distributed in coastal California, Oregon, and Washington than they are

currently. In coastal California, snowy plovers bred at 53 locations prior to 1970 (Page and Stenzel 1981). Since that time, no evidence of breeding birds has been found at 33 of these 53 sites, representing a 62 percent decline in breeding sites (Page and Stenzel 1981). The greatest losses of breeding habitat were in southern California, within the central portion of the snowy plover's coastal breeding range. In Oregon, snowy plovers historically nested at 29 locations on the coast (Charles Bruce, Oregon Department of Fish and Wildlife, pers. comm., 1991). In 1990, only six nesting colonies remained, representing a 79 percent decline in active breeding sites. In Washington, snowy plovers formerly nested in at least five sites on the coast (Eric Cummins, pers. comm., 1991). Today only two colony sites remain active, representing, at minimum, a 60 percent decline in breeding sites.

In addition to loss of nesting sites, the plover breeding population in California, Oregon, and Washington has declined 17 percent between 1977 and 1989 (Page *et al.* 1991). Declines in the breeding population have been specifically documented in Oregon and California. Breeding season surveys of the Oregon coast from 1978 to 1992 show that the number of adult snowy plovers has declined significantly at an average annual rate of about 5 percent (calculated from Oregon Department of Fish and Wildlife data). The number of adults has declined from a high of 139 adults in 1981 to a low of 30 adults in 1992 (Oregon Department of Fish and Wildlife 1990, Charles Bruce, pers. comm., 1991, Randy Fisher, Oregon Department of Fish and Wildlife, *in litt.*, 1992). If the current trend continues, breeding snowy plovers could disappear from coastal Oregon by 1999. In 1981, the coastal California breeding population of snowy plovers was estimated to be 1,565 adults (Page and Stenzel 1981). In 1989, surveys revealed 1,386 plovers (Page *et al.* 1991), an 11 percent decline in the breeding population. The population decline in California may be greater than indicated; the 1989 survey results are considered more reliable than the earlier estimates, which may have underestimated the overall population size (Gary Page, pers. comm., 1991).

Although there are no historic data for Washington, it is doubtful that the snowy plover breeding population in Washington was ever very large (Brittell *et al.* 1976). However, loss of nesting sites in this State probably has resulted in a reduction in overall population size. In recent years, fewer than 30 birds have nested on the southern coast of Washington (James Atkinson, pers. comm., 1990; Eric Cummins, pers. comm., 1991). In 1991, there was only one successful brood detected in the State (Tom Juelson, Washington Department of Wildlife, *in litt.*, 1992).

Survey data also indicate a decline in wintering snowy plovers, particularly in southern California. The number of snowy plovers observed during Christmas Bird Counts from 1962 to 1984 significantly decreased in southern California despite an increase in observer participation in the counts (Page *et al.* 1986). This observed decline was not accompanied by a significant loss of wintering habitat over the same time period (Page *et al.* 1986).

The most important form of habitat loss to coastal breeding snowy plovers has been encroachment of European beachgrass (*Ammophila arenaria*). This non-native plant was introduced to the west coast around 1898 to stabilize dunes (Wiedemann 1987). Since then it has spread up and down the coast and now is found from British Columbia to southern California (Ventura County). European beachgrass is currently a major dune plant at about 50 percent of California breeding sites and all of those in Oregon and Washington (J.P. Myers, National Audubon Society, *in litt.*, 1988). Stabilizing sand dunes with European beachgrass has reduced the amount of unvegetated area above the tideline, decreased the width of the beach, and increased its slope. These changes have reduced the amount of potential snowy plover nesting habitat on many beaches and may hamper brood movements. The beachgrass community also provides habitat for snowy plover predators which historically would have been largely precluded by the lack of cover in the dune community. In addition, the presence of beachgrass may adversely affect plover food supplies. The abundance and diversity of sand dune arthropods are markedly depressed in areas dominated by European beachgrass (Slobodchikoff and Doyen 1977).

Urban development also has contributed significantly to the loss of snowy plover breeding sites. The construction of residential and industrial developments, and recreational facilities, including placement of access roads, parking lots, summer homes, and supportive services, have permanently eliminated valuable nesting habitat on beaches in southern Washington (Brittell *et al.* 1976), Oregon (Oregon Department of Fish and Wildlife 1990), and California (Page and Stenzel 1981). Snowy plover use of man-made habitat, such as salt evaporators and dredged spoil sites, apparently has not compensated for loss or degradation of habitat in other areas (Page and Stenzel 1981).

Sand mining operations at numerous locations in California also may be eliminating potential snowy plover habitat by interrupting buildup of the sand profile (David Dixon, *in litt.*, 1991). Stabilization efforts also may interrupt this process, resulting in beach erosion and loss of plover nesting habitat.

In the habitat remaining for snowy plover nesting, human activity (e.g., walking, jogging, running pets, horseback riding, off-road vehicle use, and beach raking) is a key factor in the ongoing decline in snowy plover coastal breeding sites and breeding populations in California, Oregon, and Washington. Snowy plovers also are subjected to similar high levels of human disturbance at nesting sites in Baja California, Mexico (Barbara Massey, Proesteros, pers. comm., 1990; Daniel Anderson, University of California, Davis, pers. comm., 1990). With 81 percent of the Oregon snowy plover population supported at three of six remaining nesting sites and 78 percent of the California population breeding in eight areas, loss of just a few of these sites could dramatically reduce the coastal plover population.

In all of Los Angeles County and parts of Orange County, California, entire beaches are raked on a daily to weekly basis to remove trash and tidal debris. Even if human activity was low on these beaches, grooming activities completely preclude the possibility of successful nesting attempts (Stenzel *et al.* 1981). Plover food availability on raked beaches also may be depressed for both breeding and wintering birds, because surf-cast kelp and associated invertebrates are removed and the upper centimeter of the sand substrate is disturbed (J.P. Myers, *in litt.*, 1988).

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Egg collecting has been observed at several California nesting colonies (Stenzel *et al.* 1981, Warriner *et al.* 1986). The significance of this factor on nesting success is unknown.

C. Disease or Predation

Western snowy plover eggs, chicks, and adults are taken by a variety of avian and mammalian predators. These losses, particularly to avian predators, are exacerbated by human disturbances. Of the many predators, American crows (*Corvus brachyrhynchos*), ravens (*C. corax*), and red fox (*Vulpes vulpes*) have had a significantly adverse effect on

reproductive success at several colony sites. Because crows and ravens, in particular, thrive in urban/agricultural areas, present day coastal populations of these species are probably greater than historic populations. Accumulations of trash at beaches attracts these as well as other predators, including striped skunks (*Mephitis mephitis*), gulls (*Larus* sp.), and raccoons (*Procyon lotor*) (Stern *et al.* 1990b, Hogan 1991). At nesting sites on the Oregon coast, nest losses of up to 68 percent have been attributed to crows and ravens (Wilson-Jacobs and Meslow 1984, Stern *et al.* 1991b). Ravens were also significant predators at a Point Reyes breeding site, destroying 67 to 69 percent of the clutches in 1988 to 1989 (Page 1988, 1990). In recent years, concern has increased regarding loss of snowy plover nests to the introduced eastern red fox. The fox apparently now occurs throughout a significant portion of coastal California, including the Monterey Bay area (John and Jane Warriner, point Reyes Bird Observatory, *in litt.*, 1989), San Francisco Bay (Leora Feeney, Biological Field Services, pers. comm., 1991), Orange County, (Gary Page, *in litt.*, 1988), and Ventura, Los Angeles, and Santa Barbara Counties (Ronald Jurek, California Department of Fish and Game, pers. comm., 1992). At the Marina breeding site in Monterey Bay, red fox destroyed 45 percent of the nests in 1988 (Page 1988). This predator was also the likely cause of nest failures at least three other breeding sites in Monterey Bay in 1989 to 1990 (Page 1990). In the Salinas River area, the number of chicks fledged between 1984 and 1989 was reduced by 75 percent as red fox expanded into the area (John and Jane Warriner, *in litt.*, 1989).

Although predation represents an important mortality factor at several colony sites, the significance of predation on the overall coastal population of the snowy plover is unknown. Nevertheless, this factor remains an issue of concern, particularly as it relates to the non-native red fox, which represents a severe and spreading threat to nesting snowy plovers.

D. The Inadequacy of Existing Regulatory Mechanisms

The western snowy plover is protected by the Federal Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*) and by State law as a nongame species. The plover's breeding habitat, however, receives only limited protection from these laws; e.g., Migratory Bird Treaty Act prohibition against taking "nests." 16 U.S.C. 703.

In the State of Washington, the western snowy plover was listed as an endangered species in 1981 by the Wildlife Commission. This designation, however, does not provide for consultation between the Department of Wildlife and other State agencies regarding impacts of proposed projects on the snowy plover. Preparation of a recovery plan for the snowy plover is required by 1995 under State law. A recovery plan for the snowy plover, however, has not yet been developed. There are also no penalties imposed under Washington law for take of endangered species habitat. At the Damon Point site, the Department of Wildlife has entered into an agreement with other agencies to provide some protection for nesting plovers.

In Oregon, the plover was listed as a threatened species in 1975. The Oregon Threatened and Endangered Species Act of 1987 requires other State agencies to consult with the Department of Fish and Wildlife. The State Act, however, does not provide adequate protection for either the birds or their habitat. A management and recovery plan for the snowy plover in Oregon is currently being developed (Oregon Department of Fish and Wildlife 1990, Martin Nugent, Oregon Department of Fish and Wildlife, pers. comm., 1992). Although protective measures are being implemented on an experimental basis at some nesting sites (Charles Bruce, pers. comm., 1990) and many beaches have been closed to vehicles, a comprehensive conservation program has yet to be implemented in this State. At Coos Bay, an estuary management plan requires no net loss of plover habitat in conjunction with industrial development of the North Spit. In 1993, the Oregon Fish and Wildlife Commission will consider upgrading the snowy plover to endangered status.

In California, where the majority of nesting occurs, the snowy plover is classified as a "Species of Special Concern" (Remsen 1978). This designation provides no special, legally mandated protection. Vehicle closures have been effective in protecting nesting snowy plovers on some State beaches (W. David Shuford, Point Reyes Bird Observatory, *in litt.*, 1989, Henry R. Agonia, California Department of Parks and Recreation, *in litt.*, 1991), but have been ineffective at other beaches because of a lack of enforcement (P. Persons, *in litt.*, 1992). Aside from the Migratory Bird Treaty Act, snowy plovers have no protection status in Mexico.

Section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act are the primary Federal laws that could provide some protection of nesting and wintering habitat of the western snowy plover that is determined by the U.S. Army Corps of Engineers (Corps) to be wetlands or historic navigable waters of the United States. These laws, however, would apply to only a small fraction of the nesting and wintering areas of the western snowy plover on the Pacific coast.

In 1985, the Nongame Program of the Service prepared management guidelines for the western snowy plover (Fish and Wildlife Service 1985), which included strategies to reduce human disturbance at nesting sites, and prevent structural alternation of breeding habitat. Some management actions have been carried out since publication of the guidelines, but major strategies have yet to be implemented.

E. Other Natural or Man-made Factors Affecting its Continued Existence

Human activity, as mentioned previously, is a key factor in the ongoing decline in snowy plover coastal breeding sites and breeding populations. The nesting season of the western snowy plover (mid-March to mid-September) coincides with the season of greatest human use on beaches of the west coast (Memorial Day through Labor Day). Human activities of particular detriment to nesting snowy plovers include unintentional disturbance and trampling of eggs and chicks by people (Stenzel *et al.* 1981, Warriner *et al.* 1986, P. Persons, *in litt.*, 1992); off-road vehicle use (Widrig 1980, Stenzel *et al.* 1981, Anthony 1985, Warriner *et al.* 1986, Page 1988, Philip Persons, *in litt.*, 1992); horse-back riding (Woolington 1985, Page 1988, Philip Persons, *in litt.*, 1992); and beach raking (Stenzel *et al.* 1981). Page *et al.* (1977) found that snowy plovers were disturbed more than twice as often by such human activities than all other natural causes combined.

Intensive beach use by humans results in abandonment of nesting sites or reductions in nesting density or nesting success. In southern California where human activity on beaches is extensive, plover nesting is restricted to managed preserves. The reduction in the number of nesting plovers at South Beach on the Oregon coast may have been related to opening of a new State park adjacent to the beach (Wilson 1980). Nipomo Dunes beach in southern California, which receives high human use, including significant off-road vehicle activity, supported one-fifth the density of plover nests as occurred at Point Purisima beach, within Vandenberg Air Force Base (closed to public use) (Stenzel *et*

al. 1981). This relationship held true even though nesting habitat at Nipomo Dunes was of higher quality than that at Point Purisima. Hatching success was found to be much lower on Zmudowski State Beach in Monterey County, California, than on an undisturbed salt pan just 1 kilometer (km) away (Warriners, unpubl. data *in* Page and Stenzel 1981).

In the few instances where human intrusion into snowy plover nesting areas has been precluded either through area closures or by natural events, nesting success has improved. The average number of young fledglings per nesting pair increased from 0.75 to 2.00 after the nesting site at Leadbetter Point, Washington, was closed to human activities (Saul 1982). Similarly, vehicle closure on a portion of Pismo Beach, California, led to an eight-fold increase in the nesting plover population (W. David Shuford, Point Reyes Bird Observatory, *in litt.*, 1989). Fledgling success increased 16 percent at Moss Landing Beach, California, after beach access was virtually eliminated by the 1989 earthquake (Page 1990).

When beach visitors travel through plover nesting areas, plovers flush repeatedly. Incubating plovers at Point Reyes left their nests in response to human activity 65 to 78 percent of the time when disturbances occurred within 100 meters (m) or less of nests (Page *et al.* 1977). Dogs intimidated plovers even more, with plovers flushing more frequently and remaining off their nests significantly longer when disturbed by people with dogs versus people without dogs (Page *et al.* 1977).

Prolonged absences from the nest and the subsequent longer incubation period increase the likelihood of nest failures by prolonging exposure of eggs and nesting birds to predators (Page *et al.* 1983) and other detrimental factors. Human disturbance also may increase exposure of eggs or chicks to inclement weather. In an attempt to avoid intruders, adult snowy plovers have been observed leaving chicks wet and unattended in the rain (Wilson 1980) and allowing wind blown sand to bury their eggs (Charles Bruce, pers. comm., 1991). Prolonged absences from the nest on sunny days may result in overheating of the eggs.

Researchers also have frequently observed chicks running long distances along beaches as they were unintentionally "herded" by people using the beach (Philip Persons, *in litt.*, 1992). High levels of human disturbance may increase chick mortality by altering chick behavior. Frequently disturbed piping plover chicks fed less often and at a reduced rate (Fleming *et al.* 1988). Fewer chicks survived to 17 days in areas heavily disturbed by humans.

In addition to indirect effects, direct losses of chicks and adults also result form human activities. In the Monterey Bay area, two makes were found run over on their nests (J.P. Myers, *in litt.*, 1988). Chicks and adults are particularly vulnerable because of their habit of crouching in depressions, such as tire tracks or footprints. Vehicle tracks have been noted in nesting areas at a number of beaches, including Damon Point (Anthony 1985) and Leadbetter point (Widrig 1980) in Washington; New River (Wickham 1981) and Coos Bay (Oregon Department of Fish and Wildlife 1990) in Oregon; and Point Reyes (Page 1988), the Pajaro River mouth (Warriner *et al.* 1986), Morro Bay and Calendar-Mussel Rock Dunes (Philip Persons, *in litt.*, 1992) in California. The Mexican government reported observing all terrain vehicle tracks in 15 of 28 breeding sites in Baja California, Mexico (Dra. Graciela De La Graza Garcia, *in litt.*, 1992). On military bases, such as Camp Pendleton in California, plovers are directly and indirectly affected by military training exercises on the beach (Loren Hays, U.S Fish and Wildlife Service, pers. comm., 1991).

Because the majority of snowy plover nesting sites occur in unstable sandy substrates, nest losses caused by weather-related natural phenomena commonly occur. Events such as extreme high tides (Wilson 1980, Stenzel *et al.* 1981, Warriner *et al.* 1986, Page 1988), river flooding (Stenzel *et al.* 1981), and heavy rain (Wilson 1980, Warriner *et al.* 1986, Page 1988) have been reported to destroy or wash away individual nests as well as entire colony sites. Wind driven sand contributes to nest failure by burying eggs (Wilson 1980, Stenzel *et al.* 1981, Warriner *et al.* 1986). The percentage of total nest losses attributed to weather-related phenomenon has varied from 15 to 38 percent (Wilson 1980, Warriner *et al.* 1986, Page 1988). Although natural phenomena contribute significantly to nest failures at some plover breeding sites, the significance of this factor on the overall coastal breeding population is unknown.

Artificial measures have been taken at several nesting sites to improve snowy plover nesting success. In 1991, the California Department of Parks and Recreation and the Service conducted plover nest enclosure studies on National Wildlife Refuge and State property in the Monterey area. Hatching success of plover nests in enclosures was 81 percent as compared to 28 percent for unprotected nests. (Richard G. Rayburn, California Department of Parks and Recreation, *in litt.*, 1992, Elaine Harding-Smith, U.S. Fish and Wildlife Service, pers. comm., 1992). Use of nest enclosures at Coos Bay North Spit resulted in up to 88 percent nesting success, compared to as low as 9 percent success for unprotected nests (Stern *et al.* 1991b, Randy Fisher, *in litt.*, 1992).

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the Pacific coast population of the western snowy plover in determining to make this final rule. Based on this evaluation, the preferred action is to list the Pacific coast population of the western snowy plover (*Charadrius alexandrinus nivosus*) as threatened. This population of the western snowy plover is threatened by loss and modification of nesting habitat resulting from encroachment of European beachgrass, extensive human recreational use of nesting areas, and human development of the coast. Predation, which is often exacerbated by human disturbance, poses a significant threat to a number of nesting colonies. Although only two western snowy plover nesting sites remain in Washington, and population declines in Oregon have been dramatic in recent years, the Service has decided to list the Pacific coast population of the western snowy plover as threatened. This decision is based on the fact that the center of the breeding range of this population is in California where numbers of breeding birds are greater and have not declined as dramatically. However, numerous unchecked threats and an ongoing, rangewide population decline indicate that the coastal population of the western snowy plover is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Critical habitat is not determinable at this time for reasons discussed in the "Critical Habitat" section of this rule.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat concurrently with determining a species to be endangered or threatened. The Service finds that critical habitat is not presently determinable for the Pacific coast population of the western snowy plover. The Service's regulations (50 CFR 424.12(a)(2)) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking or if the biological

needs of the species are not sufficiently known to permit identification of an area of critical habitat. Critical habitat is defined as "specific areas within the geographical area currently occupied by a species * * * on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection * * *" (50 CFR 424.02(d)).

When prompt listing of a species is essential to its conservation, but sufficient information to perform required analyses of the impacts of the critical habitat designation is lacking, the Service may go forward with a final listing decision without designating critical habitat. In the case of the snowy plover, nesting birds (especially in Oregon and Washington) need immediate protection from take. A critical habitat determination, to the maximum extent prudent, must then be completed not later than 2 years from publication of the proposed rule. The Service is continuing to gather information to be used in these analyses.

The Service has received additional information specific to potential areas of snowy plover critical habitat. A study by Stern *et al.* (1990b) indicates that plover broods at several Oregon sites remain relatively close to nesting areas. Additional information is being sought from snowy plover experts, particularly in California, where many of the colony sites have not been studied as extensively.

The relative importance of specific wintering habitat sites to maintenance of the coastal population of the subspecies also may represent an additional consideration.

In addition, to analyze the economic impacts of a critical habitat designation, the Service must obtain information about the costs of such a designation over and above the costs associated with listing. The Service must have information on the possible increased costs associated with restrictions of public access to specific nesting or wintering areas, and associated secondary effects on recreational concessionaires, commercial fisheries, and industrial and residential development. Such information will be gathered by coordinating with the appropriate agencies and individuals.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agencies that may be involved as a result of this listing are the Service, Bureau of Land Management, National Park Service, U.S. Forest Service, Federal Aviation Administration, and the Departments of the Army (including the Corps of Engineers (Corps)), Navy, and Air Force. In California, approximately 34 percent of the breeding plover population occurs on Federal lands (J.P. Myers, *in litt.*, 1988). At least 50 percent of breeding habitat is under Federal agency jurisdiction in Oregon (J.P. Myers, *in litt.*, 1988). In Washington, the breeding site at Leadbetter Point is within a National Wildlife Refuge.

On most Federal land containing active breeding sites, few measures have been implemented specifically to protect snowy plovers. In a few areas in California, including the Marine Corps Base at Camp Pendleton, plovers have benefitted somewhat from protective measures taken for the endangered California least tern (*Sterna antillarum brownii*). At Vandenberg Air Force Base in southern California, beaches are closed to all foot and vehicular traffic during the California least tern nesting season (Donna Brewer, U.S. Fish and Wildlife Service, pers. comm., 1991). Dogs and cattle have been restricted from some beaches at Point Reyes National Seashore (Gary Page, pers. comm., 1991), and some beaches on Federal land in Oregon have been closed to vehicles to protect plovers and other wildlife (Charles Bruce, pers. comm., 1991). Leadbetter Point in Washington (Fish and Wildlife Service), a 5-acre spoil disposal site in Coos Bay (Bureau of Land Management), and a 25-acre spoil disposal site in Coos Bay (Corps of Engineers) are the only nesting sites where human access is restricted specifically for plover nesting. At the Siuslaw National Forest, the Forest Service has established Forest-wide standards and guidelines for the snowy plover. These guidelines include area closures through signing, public education, prohibitions against loss or degradation of habitat, provisions for habitat enhancement, and monitoring. Most other nesting areas on Federal land, with the exception of military bases, have unrestricted human access all year. In Oregon, the Corps of Engineers is proposing two projects to create or improve plover nesting habitat using dredged spoils. Access improvements for recreational purposes are ongoing at several beaches on Federal land. At Coos Bay, Oregon, where the largest coastal Oregon plover colony occurs, several recreational facilities, including off-road vehicle access and campgrounds are proposed on Bureau of Land Management land (Bureau of Land Management 1989). The Bureau of Land Management at Coos Bay also is considering a proposed land exchange that would involve moving a snowy plover nesting site to a new location created with dredged spoils.

Because human disturbance is a primary factor affecting snowy plover reproductive success, any of the above mentioned Federal agencies would be required to consult with the Service if any action they fund, authorize, or carry out may affect the coastal population of the western snowy plover.

As discussed above, some western snowy plover nesting and wintering habitat may be regulated by the Corps of Engineers under section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act. If a proposed project may affect the western snowy plover, the Corps would be required to consult with the Service under section 7 of the Act.

The Act and implementing regulations found at 50 CFR 17.31 set forth a series of general prohibitions and exceptions that apply to all threatened wildlife not covered by a special rule. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt any such conduct), import or

export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving threatened wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.32. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. For threatened species, there are also permits for zoological exhibition, educational purposes, or special purposes consistent with the purposes of the Act.

The Service will review the Pacific coast population of the western snowy plover to determine whether it should be placed upon the Annex of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, which is implemented through section 8(A)(e) of the Act, and whether it should be considered for other appropriate international agreements.

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment or Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available upon request from the Field Supervisor, Sacramento Field Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room E–1803, Sacramento, California 95825–1846.

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List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under Birds, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife

* * * * *

(h) * * *

Species			Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name							
•	•	•	•	•	•	•		
BIRDS								
•	•	•	•	•	•	•		
Plover, Western snowy	*Charadrius nivosus.*	*alexandrinus*	U.S.A. (CA, OR, WA, NV, AZ, UT, CO, NM, TX, OK, KS); Mexico.	U.S.A. (CA, OR, WA); Mexico (BC) (Within 50 miles of the Pacific coast).	T	493	NA	NA
•	•	•	•	•	•	•		

Dated: February 26, 1993.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 93–5086 Filed 3–4–93; 8:45 am]

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