

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

In the Matter of:

**Milk in the Northeast
and Other Marketing Areas**)

**DOCKET No. AO-14-A73
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Fluid Milk Product Definition)

POST-HEARING BRIEF

SUBMITTED BY

THE NATIONAL YOGURT ASSOCIATION

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I. INTRODUCTION

The National Yogurt Association ("NYA") is pleased to submit this post-hearing brief to the U.S. Department of Agriculture's ("USDA") Agricultural Marketing Service ("AMS") regarding proposals to amend the Class I fluid milk product definition of all Federal milk marketing orders.

As an initial matter, NYA would like to clarify its testimony with respect to the scope of yogurt products that should not be included in the fluid milk product definition. In particular, NYA supports excluding from the fluid milk product definition all yogurt-containing products that contain at least 20 percent yogurt that meets the standard of identity ("SOI") for yogurt (hereinafter referred to as "yogurt-containing products").

This 20 percent requirement will ensure that only products that are characterized by yogurt will be excluded from the fluid milk product definition. As such, the 20 percent requirement will serve to protect the fluid milk market from competition from products that contain mostly milk and only a little yogurt or a cultured product like buttermilk or eggnog.

The hearing record ("record") overwhelmingly reflects that yogurt-containing products are fundamentally different in form and use from fluid milk and should be classified as Class II like other yogurt products. These products are produced, marketed, and used by consumers as food, not as beverages, and they neither compete with nor substitute for fluid milk.

An analysis of the various factors AMS has considered over the years when evaluating the fluid milk product definition reveals a wide range of differences between yogurt-containing products and fluid milk. The record also demonstrates that yogurt-containing products contain unique live and active cultures, flavors, and ingredients targeted at particular consumer markets.

Fundamentally, yogurt is the principal or characterizing ingredient in these products. Accordingly, they should be classified based on the fact that they are a yogurt product, not on the fact that fluid milk is used to produce yogurt, nor on the amount of milk proteins any particular yogurt-containing product may contain.

If AMS fails to exclude yogurt-containing products from the Class I fluid milk product definition, AMS should refrain entirely from changing the current fluid milk product definition or the application thereof in any manner, provided that all market administrators should be required to apply the regulations fairly and consistently.

The record contains no evidence whatsoever that inclusion of a protein standard is necessary or that adoption of a protein standard would remedy any problem in the industry. In particular, given the overwhelming evidence in support of making yogurt-containing products Class II, it would be indefensible for AMS to adopt any changes to the fluid milk product definition that result in classifying more yogurt-containing products as Class I.

II. OVERVIEW OF RECORD

The record reflects that the hearing was largely initiated at the request of producer organizations such as the Dairy Farmers of America ("DFA") and the National Milk Producers Federation ("NMPF") primarily to address the issue of carbohydrate free or low carbohydrate milk ("low-carb

milk"). The vast majority of the record focuses on two issues: (1) identifying the appropriate classification of yogurt-containing products; and (2) transforming the fluid milk product definition which currently contains a 6.5 percent nonfat milk solids standard, and excludes whey, into a 2.25 percent all-inclusive protein standard ("Proposal 7").

A review of the record demonstrates that it contains a wide variety of evidence in support of classifying yogurt-containing products as Class II, virtually none of which is contradicted or challenged by any other specific evidence to the contrary in the record. In contrast, the record is decidedly mixed with respect to the need for, and operation of, the proposed protein standard as well as demonstrating that the proposed protein standard would in fact correct any alleged problems with the current definition.

A. Yogurt-Containing Products

The record contains extensive testimony and data demonstrating that yogurt-containing products are fundamentally different in form and use from fluid milk. (Transcript ("Tr") at 647-690, 732-758). For example, Dannon provided extensive testimony discussing how yogurt and fluid milk differ in their production, taste, texture, flavor, packaging, distribution, shelf life, and price elasticity. While fluid milk is an initial ingredient, the milk is fundamentally transformed into yogurt through a complex production process that includes heating, inoculation, and fermentation, among other things. (Tr. at 672-679).

As a result, yogurt-containing products contain unique live and active cultures as well as a variety of ingredients and flavorings. Moreover, each product is formulated to meet specific consumer expectations. (Id.) In short, yogurt is the principal or characterizing ingredient in these products. (Tr. at 678, 824, 828-829).

Moreover, both Dannon and General Mills provided extensive evidence in the form of consumer surveys and independent, objective marketplace data showing that: (1) yogurt-containing products are consumed as a food, not as a beverage; and (2) yogurt-containing products compete with other food products, not with fluid milk. (Tr. at 682-686, 739-748). Even a witness for DFA said that his family "eat[s]" yogurt-containing products. (Tr. at 99).

For example, General Mills provided consumer data showing that fluid milk is used as a complement to a meal, while yogurt-containing products are consumed on their own as a snack or a meal. (Tr. at 739-748). In addition, Dannon and General Mills both testified that the growth of the yogurt-containing product category came at the expense of other yogurt purchases, not fluid milk purchases. (Tr. at 687, 743).

The record does not contain any evidence contradicting the testimony and data of Dannon and General Mills. In particular, while DFA and NMPF claim that yogurt-containing products "presumably" compete with flavored milk, they provide no tangible data or evidence to support their assertions. (Tr. at 301-303). In this regard, NMPF introduced consumer and market data in support of its claim that consumers buy low-carb milk instead of fluid milk, but it did not introduce any such evidence on yogurt-containing products.

USDA submitted data demonstrating that yogurt-containing products currently qualify as a Class I or Class II product, depending on their level of nonfat milk solids. (See Exhibit 12 and Tr. at 29-

32). While supporters of Proposal 7 attempted to portray it as an accounting change that will not result in changes to current product classifications, it is clear from the record that at least one yogurt-containing product would move from Class II to Class I if Proposal 7 is adopted.

B. Protein Standard

The record contains a variety of testimony related to Proposal 7, which seeks to amend the fluid milk product definition in two ways. First, it would convert the 6.5 percent nonfat milk solids standard into a 2.25 percent protein standard. Second, it would eliminate the current exclusion of whey from the 6.5 percent nonfat milk solids standard and include whey in the 2.25 percent protein standard.

As noted above, Proposal 7 is targeted at capturing so-called low-carb milk in the fluid milk product definition, which NMPPF and DFA argue is competing with or substituting for fluid milk, potentially at Class II prices. Low-carb milk is currently classified as Class I. NMPPF introduced two consumer and market studies in support of its claims that there is no "real difference" between fluid milk and low-carb milk, and that consumers use the two products for the same purposes. (Tr. at 157-158, 165).

Supporters of Proposal 7 argue that the current system is not working properly because it prices all nonfat milk solids the same, despite the fact that the solids have different values in the market. They also admit, however, that Proposal 7 would not change how protein or other solids are priced under milk marketing orders. (Tr. at 90-91).

The record is also ambiguous regarding implementation of Proposal 7. For example, it is unclear how wet and dry whey would be handled, how whey from casein production and whey from cheese production would be treated, and how products that meet or exceed the proposed 2.25 percent standard and that contain two or more proteins, one of which is whey protein, would be classified and priced. (Tr. at 267-277, 281-289, 418-420). In short, the manner in which Proposal 7 would be implemented is very uncertain and poorly defined.

Supporters of Proposal 7 also provided inconsistent testimony on Proposal 7's impact on product classification. DFA, for example, testified that some of its products would change classification if Proposal 7 were adopted (Tr. at 93), while NMPPF testified that it did not know of any products that would change classification and attempted to characterize Proposal 7 as "change in the accounting rather than [a] change in the actual level." (Tr. at 251) Other testimony, however, demonstrated that by including whey in the calculation of the protein standard, as well as all other milk proteins, Proposal 7 would broaden the fluid milk product definition and include more products in Class I, including at least one that is currently Class II. (Tr. at 764)

C. Additional Analysis

Many parties, including the Milk Industry Foundation, the American Beverage Association, Fonterra, Tip Tipton, and others, testified to the need for AMS to conduct a study on the alleged problems with the current fluid milk product definition prior to taking action. These parties urged that AMS publish such a study for public review and comment in order to facilitate a better understanding of the market for milk proteins and assess which products, if any, are competing with fluid milk. In fact, many witnesses, ranging from product manufacturers like General Mills and

Dannon, to producers of dairy products and whey, like Leprino and Fonterra, provided testimony suggesting that Proposal 7 could hurt the dairy industry's ability to compete with other proteins by raising costs for manufacturers and consumers or by increasing the risk that products may be classified as Class I. For example, there is evidence that whey proteins are used solely to increase the protein content of some products, and that other protein sources such as soy could be substituted for whey, which lacks the full nutritional profile of nonfat dry milk. (Tr. at 748-750).

In contrast to this call for an objective study that could shed light on these matters, the record could be construed as suggesting that at least one USDA employee has prejudged the outcome of the hearing, when he stated that, with respect to the adoption of a protein standard, "when, I used that word 'when,' as if it is going to happen, but it probably will." (Tr. at 219).

III. AMS DECISIONS MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE AND FOLLOW LONG-STANDING INTERPRETATIONS OF FORM AND USE

In evaluating the record and making decisions about which, if any, proposals to adopt, AMS factual findings must be supported by "substantial evidence," which is "more than a mere scintilla, and must do more than create a suspicion of the fact to be established."¹ AMS decisions must be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"² and the "conceptual, theoretical, and/or hypothetical does not constitute substantial evidence."³ Moreover, in order to justify a departure from long-standing interpretations of laws and regulations, AMS is required to provide adequate data and a reasoned analysis.⁴ As demonstrated below, proponents of Proposal 7 have failed to provide substantial evidence and reasoning to support changing the long-standing fluid milk product definition.

The Agricultural Marketing Agreement Act ("AMAA") requires that milk be classified "in accordance with the form in which or the purpose for which it is used."⁵ AMS has a long history of interpreting this form and use standard in the context of the fluid milk product definition. This must inform AMS' decision-making with respect to the evidence and issues raised in this hearing.

In assessing whether a product is a fluid milk product, AMS has historically evaluated a variety of factors such as: storability; shelf life; serving sizes; percentage of nonfat milk solids; packaging; and the location at which products are processed and the area over which they are distributed. AMS has also looked at other issues like health requirements and price elasticity compared to fluid milk.

More fundamentally, AMS has been guided by the underlying concept that products that "compete with, or substitute for" fluid milk should be Class I and included in the fluid milk product

¹ *Leonards v. Glickman*, 199 F.R.D. 48 (2001), citing *Universal Camera Corp. v. NLRB*, 340 U.S. 359, 366-67 (1998).

² *Sundex Dairy v. Block*, 666 F.2d 158, 162 (1982).

³ *Lehigh Valley Farmers v. Block*, 640 F.Supp. 1497, 1512 (1986).

⁴ *Natural Resources Defense Council v. U.S. EPA*, 790 F.2d 289 (3d Cir. 1986).

⁵ 7 U.S.C. § 608c (5)(a).

definition.⁶ For example, flavored milk, flavored milk drinks, and buttermilk were included as Class I in 1945 because “[these products are disposed of in a form and for a use more nearly similar to the form and use of fluid milk than any other milk product.”⁷ With respect to filled milk in 1969, AMS noted that it is “mainly intended as a beverage substitute” and that it “is clearly marketed for the same use as whole milk, . . . and is, in fact, designed as a substitute for whole milk.”⁸ In 1974, sterilized milk was determined to be Class I because “[sterilized milk products] are generally intended for use in place of their unsterilized counterparts and are competing for the same consumers.”⁹

Similarly, the exclusion of products that contain less than 6.5 percent nonfat milk solids from the definition of fluid milk was established because “. . . fluid products containing only a minimal amount of nonfat milk solids are not considered as being in the competitive sphere of the traditional milk beverages.”¹⁰

AMS considered the classification of yogurt-containing products, which it called “liquid yogurt,” in the early 1990s. AMS classified these products as Class I, stating that they are “drinkable” rather than “spoonable” and “clearly are intended to be consumed as beverages and are packaged as beverage milk products,”¹¹ despite evidence that these products are different from fluid milk and do not compete with fluid milk.

Since that time, there have been a variety of new yogurt-containing products developed, with new technology, more flavors and textures, and increased understanding of consumer markets. Currently, these products are classified in both Class I and Class II, depending on the amount of nonfat milk solids. However, as demonstrated below, there is overwhelming evidence in the record to support classifying all yogurt-containing products as Class II. Thus, assuming *arguendo* that AMS’ treatment of yogurt-containing products is considered to be a long-standing agency precedent, there is more than sufficient data and reasoning in the record to make all of these products Class II.

IV. YOGURT CONTAINING PRODUCTS SHOULD BE CLASS II

The record contains a wide variety of evidence compelling the conclusion that products containing 20 percent yogurt that meets the standard of identity should be excluded from the fluid milk product definition and be considered Class II food products. These yogurt-containing products are fundamentally different than fluid milk and are characterized by the yogurt and its live and active cultures, not by the fact that milk is an ingredient in making yogurt or that they contain milk

⁶ 58 Fed. Reg. 12634, 12658 (March 5, 1993).

⁷ 10 Fed. Reg. 13315, 13321 (October 26, 1945).

⁸ 34 Fed. Reg. 11811 (July 15, 1969).

⁹ 39 Fed. Reg. 9012, 9014-9015 (March 7, 1974).

¹⁰ *Id.* at 9015.

¹¹ 56 Fed. Reg. 58972, 58991 (November 22, 1991).

proteins. They are produced, marketed, and used by consumers as food products, not as beverages, and they neither compete with nor substitute for fluid milk.

There is no specific evidence in the record to contradict or rebut the testimony and data that was submitted in support of classifying yogurt-containing products as Class II. As such, it is difficult to see how any decision other than making these products Class II could be supported by substantial evidence and withstand judicial scrutiny.

A. Yogurt-Containing Products Are Fundamentally Different From Fluid Milk.

As noted above, USDA consistently examines a variety of factors to assess if products should be included in the Class I fluid milk product definition, including shelf life, serving sizes, percentage of nonfat milk solids, packaging, and the location at which products are processed and the area over which they are distributed, among other things. An analysis of these factors based on the evidence in the record demonstrates that yogurt-containing products are fundamentally different from fluid milk.

Not only do yogurt-containing products fail to meet the standard of identity for fluid milk, but the record demonstrates that they have a much longer shelf life than fluid milk, come in different serving sizes and packaging than fluid milk, and they are processed by only a few plants and distributed nationally, unlike fluid milk.

In supermarkets, yogurt-containing products are displayed with other yogurt products, not with fluid milk. Of course, they also contain live and active cultures as well as fruit and other flavorings, and they have a thicker texture, greater viscosity, and different taste profile than fluid milk.

The record also demonstrates that yogurt-containing products are significantly more price sensitive than fluid milk. In fact, Dannon testified that the price elasticity for its products is two to three times as high as fluid milk products.

All of these factors demonstrate that there are "real differences" between fluid milk and yogurt-containing products. Not surprisingly, these products also have a fundamentally different form and use, with fluid milk being used as a beverage, or a complement to a meal, and yogurt-containing products being a stand-alone food product or snack that competes with other food products.

B. Yogurt-Containing Products Are Food Products That Do Not Compete With Or Substitute For Fluid Milk and Should Be Class II

AMS has interpreted the form and use provisions of the AMAA to require that products that compete with or substitute for fluid milk fall within the fluid milk product definition and thus be Class I. The record contains extensive testimony and data demonstrating that yogurt-containing products, while drinkable, are produced as food products, marketed as food products, and used by consumers as food products, not as beverages. They are not used for the same purposes as fluid milk, nor are they competing for the same consumers with fluid milk. Rather, they compete with other food products, and should be classified as such.

According to Dannon and General Mill's testimony, yogurt-containing products do not turn milk drinkers into yogurt eaters. Rather, almost all of the growth in these products comes from other

yogurt products, not from fluid milk. For example, a study conducted at Dannon's request revealed that over 95.5 percent of consumers buying Danimals Drinkable XL (a drinkable yogurt product) were buying it in place of other yogurt purchases. The study revealed that only 1 percent of customers would replace fluid milk purchases with Danimals Drinkable XL. Market research on a different Dannon yogurt-containing product revealed that 86 percent of consumers buy it instead of other yogurt products.

General Mill's consumer surveys similarly revealed that nearly 80 percent of Yoplait Smoothie's consumers would buy another yogurt product as an alternative. For another drinkable yogurt product called Nouriche, less than 1 percent of consumers mentioned fluid milk as a substitute. General Mills also provided consumer data demonstrating that consumers eat yogurt-containing products as a "base dish" (something eaten on its own) nearly 96 percent of the time. Milk is typically consumed on its own less than half the time, and is more often used as a complement to a meal or as an additive or ingredient.

In contrast to the data submitted by General Mills and Dannon, there is no evidence in the record, much less substantial evidence, that yogurt-containing products are similar in form and use to fluid milk, or that yogurt-containing products impact fluid milk sales in any manner whatsoever. Notably, although NMPF provided market studies to support its claim that carbohydrate free or low carbohydrate milk is a market substitute for milk (and is therefore similar in form and use to milk), it provided virtually no evidence to support its claim that yogurt containing products are "similar in form and use . . . to flavored milks, and . . . **presumably** a close market substitute" for flavored milks. (Tr. at 183, emphasis added) However, the conceptual, theoretical, and/or hypothetical does not constitute substantial evidence. There are no consumer surveys, market data, or any other evidence in the record to show that yogurt-containing products compete with or substitute for fluid milk.

Perhaps recognizing that the record lacks any evidence that yogurt-containing products are similar in form and use to fluid milk, counsel for producer cooperatives suggested that AMS could decide yogurt-containing products represent a "higher use value." (Tr. at 317) This claim is just a back-door attempt to get AMS to classify yogurt-containing products as Class I, despite the fact that the record is bereft of any evidence that could justify such a position.¹²

Similarly, counsel also suggested that the lack of substitutability between yogurt-containing products and fluid milk did not preclude the products from being classified as Class I. (Tr. at 318) This is simply an attempt by counsel to encourage AMS to ignore the facts and the law and classify yogurt-containing products as Class I. The evidence in the record cannot be deemed to support this scheme.

AMS has a long and detailed history of applying form and use to mean that products that compete with or substitute for fluid milk be classified as Class I. Indeed, DFA, NMPF, and OATKA all utilize that framework as the basis for their argument that low-carb milk should be Class I. NMPF acknowledges that substitution is "very important" in establishing classification categories (Tr. at

¹² Higher use value is a concept that comes into play after products are classified as a way to maintain producer settlement funds, not as a criterion for establishing an initial classification. Classifications themselves must be driven by form and use, and AMS must follow its longstanding interpretation of those provisions under which yogurt-containing products are appropriately classified as Class II.

336) and states that “[t]hings that are similar in form and use are the first candidates for substitution.” (Tr. at 305)

There is overwhelming evidence in the record that yogurt-containing products are food products that should be classified as such under AMS’s long-standing interpretation of the principles of form and use, and there is virtually no evidence in the record to the contrary. AMS cannot simply ignore this evidence through the invocation of “drinkable” versus “spoonable” or some other conceptual framework that is without substantial evidentiary support in the record.

C. Yogurt-Containing Products Are Characterized By Yogurt, Not By Milk or Milk Proteins

In addition to its unsupported presumption that yogurt-containing products compete with fluid milk, NMPF also implies that the nutritional profiles of yogurt-containing products and fluid milk are relevant to product classification when it claims the products have a similar nutritional profile. (Tr. at 183). As an initial matter, AMS must classify products according to their form and use, not their nutritional profile, and AMS has not historically used the nutritional profile of products as the basis for their classification. If AMS is going to utilize the nutritional profile of products as a basis for classification, then it should conduct another hearing at which a full record can be developed on this approach to product classification, since none of the proposals considered at this hearing addressed this question.

Moreover, since all dairy products start from the same initial source ingredient, fluid milk, many of them have similar nutritional benefits. However, yogurt-containing products, like Nouriche, can have a nutritional profile that is substantially different from fluid milk. More importantly, there are fundamental nutritional differences between yogurt-containing products and fluid milk.

For example, researchers have studied and documented the health benefits associated with live and active cultures in yogurt and other probiotic-containing food products. These studies suggest that certain live and active cultures potentially play an important role in preventing gastrointestinal infections,¹³ fighting certain types of cancer,¹⁴ boosting the body’s immune system,¹⁵ reducing nasal allergies,¹⁶ and partially breaking down the lactose contained in milk thus allowing those who are lactose intolerant or suffer from lactose malabsorption to enjoy the nutritional benefits of dairy

¹³ “Getting to Know Yogurt,” *Food Management*, July 1, 2004 at 65; M. Freitas et al., “Host-pathogens Cross-talk. Indigenous Bacteria and Probiotics Also Play the Game,” *Biol. Cell*, 95: 503-6 (2003).

¹⁴ RK Peters et al., “Diet and Colon Cancer in Los Angeles County,” *Cancer Causes Control*, 3(5): 457-473 (1992) (Results from a study of over 1,400 subjects with colon cancer that sought to determine which foods were associated with a reduced risk of colon cancer indicated that yogurt intake is associated with a significantly decreased risk of colon cancer); O. Adolfsson et al., “Yogurt and Gut Function,” *American Journal of Clinical Nutrition*, 80(2): 245-56 (2004); J. Saikali et al., “Fermented Milks, Probiotic Cultures, and Colon Cancer,” *Nutrition and Cancer*, 49(1): 14-24 (2004).

¹⁵ M. Piaia et al., “Assessment of the Benefits of Live Yogurt: Methods and Markers for in vivo Studies of the Physiological Effects of Yogurt Cultures,” *Microb. Ecol. Health Dis.*, 15: 79-87, 82 (2003).

¹⁶ *Id.*

products, namely yogurt without or with limited side effects like bloating and diarrhea.¹⁷ NYA requests that judicial notice be taken of these studies and review papers.

In addition, even assuming that nutritional profiles are relevant to product classification, the record highlights how the production and manufacture of yogurt-containing products adds value to the fluid milk ingredient and fundamentally transforms it into a yogurt product that is marketed and used as a food product by consumers. Each product has unique cultures, ingredients, flavors and textures, targeted at different consumer markets.

In other words, it is the yogurt that is the principal, characterizing ingredient in these products, not the ingredient “milk”, and certainly not the milk proteins.¹⁸ As such, the yogurt-containing products should drive their classification as Class II food products.

V. If AMS Does Not Exclude Yogurt Containing Products From the Fluid Milk Product Definition, AMS Should Maintain the Status Quo As Proposal 7 Is Not Supported By Substantial Evidence and Adequate Reasoning

If AMS does not exclude yogurt-containing products from the fluid milk product definition, then AMS should simply maintain the status quo. In addition to hurting producers by encouraging manufacturers to use non-dairy ingredients, Proposal 7 would change long-standing regulatory provisions without the support of substantial evidence in the record.

A. Proposal 7 Would Change Long-Standing Regulatory Policy and Is Not Supported By Substantial Evidence in the Record.

Proposal 7 would amend the fluid milk product definition by transforming the 6.5 percent nonfat milk solids standard into a 2.25 percent protein standard. It would also include whey, which is currently not counted in the nonfat milk solids test¹⁹, in the protein calculation. Both the 6.5 percent standard and the exclusion of whey have been in place for over 30 years. Moreover, Proposal 7 would, if adopted, cause at least one (and probably more) existing products to change classification, and increase the likelihood that new products may be classified as Class I.

Thus, despite efforts by proponents of Proposal 7 to characterize it as a mere accounting change, it is clear that Proposal 7 is a fundamental change to long-standing regulatory policy that will broaden the application of the fluid milk product definition. As such, the record must contain substantial evidence and adequate reasoning that supports making such a change to these provisions.

Proponents have plainly failed to make the case that there is a problem with the current regime and that Proposal 7 would, if adopted, fix that problem. The record is full of confusing and

¹⁷ *Id.* at 80; Adolfsson et al., “Yogurt and Gut Function” at 245-56.

¹⁸ NMPF and DFA also claim that it is dairy proteins that give products their desirable characteristics, but they offer no market or consumer survey evidence in support of these assertions. (Tr. at 82-83).

¹⁹ 7 CFR 100.15(b)(1) provides in pertinent part, “[t]he term fluid milk product shall not include:... any product that contains by weight less than 6.5 percent nonfat milk solids, and whey.”

contradictory statements about the need for Proposal 7 and how it would be applied in practice. AMS cannot justify changing a long-standing provision based on this reasoning and data.

For example, NMPF and DFA claim that Proposal 7 is needed because the current system prices all solids the same, despite the fact that they have different values in the market. Proposal 7, however, does not change how any milk solids are priced.

Not only does Proposal 7 not change the pricing of solids, the alleged problem with the current system, the low-carb products that are the impetus for the entire proceeding, are already priced as Class I. Moreover, these products are a tiny, and declining portion of the overall market. Even assuming *arguendo* that NMPF and DFA are correct that these low-carb products compete with fluid milk, the mere fear that such products could be considered Class II at some future date and could be produced on a mass basis that undermines the fluid milk market is insufficient to justify changing such a longstanding regulatory provision, particularly since it will impact all other products, not just low-carb milk.

It is also unclear from the record how Proposal 7 would be implemented, if adopted. Instead of the current, relatively uniform system for classification, it would create an elaborate patchwork of regulations and calculations with respect to milk proteins. For example, it is unclear how dry and wet whey would be calculated for purposes of upcharges, and how whey from cheese production versus whey from casein production would be treated. Proteins used for fortification would apparently not be upcharged, but it is unclear how that calculation of fortification and upcharging would be made for products with multiple sources of protein.

NYA does not take a position with respect to the proper classification of low-carb milk. However, proponents are not simply attempting to ensure that this product is captured by the fluid milk product definition. That is to say, supporters of Proposal 7 could have addressed the issue of low-carb milk by simply proposing to include these products as a class in the Class I fluid milk definition, but they did not do so. Rather, they are proposing a substantive revision to the existing classification system, and they have plainly failed to meet their burden to present substantial evidence and reasoning to support such a change.

B. Expansion of the Fluid Milk Product Definition Would Hurt Producers By Increasing Manufacturing Costs and Forcing Product Substitution.

The proposals to broaden the Class I fluid milk definition appear to be an attempt to increase producer revenue. The record, however, shows that efforts to change the fluid milk product definition may end up hurting dairy producers in the end, as increased costs and the risk of regulation lead manufacturers to use alternative ingredients in their products.

The record is replete with evidence of competition between dairy proteins and other protein sources, including the loss of potential markets due to the cost and regulatory complexity of the current system and the proposed change represented by Proposal 7. With respect to yogurt-containing products, the record contains evidence that soy proteins are being used in products that were once-considered dairy only, and it is also clear that whey is being used as a replaceable protein substance that lacks many of the nutritional benefits of nonfat dry milk. With these two facts in mind, it is plain to see that increasing the cost of products by including whey in the protein calculation, even though the whey itself is not upcharged, and increasing the risk of Class I

regulation, will lead manufacturers to look for and use alternatives to whey and other dairy proteins wherever possible.

California produces one-fifth of the nation's milk supply and classifies all yogurt-containing products as Class II. Classifying yogurt-containing products as Class II in federal orders will maintain consistency and remove any incentive to move production out of federal order areas. In the end, the level of complexity and cost associated with broadening the Class I definition does not merit the potential and questionable increased revenue to producers.

C. AMS Should Retain the Status Quo

NYA strongly believes that the record compels the exclusion of yogurt-containing products from the Class I fluid milk product definition. If USDA refuses to accept this conclusion, then NYA believes it is impossible for USDA to conclude that there is substantial evidence in the record to support any change to either the long-standing 6.5 percent nonfat milk solids standard or the exclusion of whey contained in the existing fluid milk product definition, or the application thereof to yogurt-containing products.

In other words, if AMS finds that there is not substantial evidence in the record to exclude yogurt-containing products from the fluid milk product definition, it is simply inconceivable that AMS could decide that there is substantial evidence in the record to justify changing the 6.5 percent standard or the exclusion of whey, particularly since doing so would change the classification of at least one yogurt-containing product. Thus, NYA believes that if AMS fails to make yogurt-containing products Class II, then the only acceptable position for AMS to take is to simply maintain the status quo.

In so doing, AMS should mandate clear and consistent application of existing standards by all market administrators to ensure uniform treatment of products across all market areas. The fluid milk product definition is, after all, contained in the general provisions that are supposed to "be common and apply to" all milk marketing orders.²⁰ Inconsistent interpretation and application of the definition creates an uneven playing field that hurts manufacturers and producers alike.

VII. Conclusion

The record contains substantial evidence that yogurt-containing products are fundamentally different in form and use from fluid milk, and that they compete with and substitute for other food products. The record provides no evidence that would suggest otherwise. Thus, AMS must classify these products as Class II products. If AMS fails to exempt yogurt-containing products from the fluid milk product definition, the status quo must be maintained since there is insufficient evidence and reasoning in the record to proceed with Proposal 7.

²⁰ 7 CFR 1000.1.