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**By E-mail and Regular Mail**

July 17, 2006

Hearing Clerk
Stop 92---1031
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250-9200

**Re: Docket No. AO-14-A73,et al; DA-03-10**
**USDA Federal Milk Marketing Order Hearing**
**Held June 20 through June 23, 2005**

To Whom It May Concern:

HP Hood LLC hereby provides comments on the U.S. Department of Agriculture's Recommended Decision on Proposed Amendments to Marketing Agreements and Orders concerning the definition of Class I fluid milk products as published in the May 17, 2006 issue of the Federal Register at page 28590. As discussed below, we firmly believe that (a) the hearing record does not support the recommended decision and (b) the Department's proposal to make individualized determinations based on a product's "form and use" for products that contain less than 2.25 percent true milk protein and less than 6.5 percent nonfat milk solids is misguided. HP Hood urges the Department to take no action on this proposal unless and until empirical evidence demonstrates that disorderly marketing conditions actually exist.

## I. Absence of Evidence of Disorderly Marketing

The Administrative Procedure Act and the Agricultural Marketing Agreement Act impose on the Department the requirement that proponents of a change to an existing milk marketing order must bring forward adequate and supportable proof that disorderly marketing will occur unless a change in the order is made.

At this hearing the proponents of adding a true protein standard to the definition of fluid milk products made no attempt to present evidence that producers were being disadvantaged by the current order or that processors were gaining any advantage over one another. There was testimony regarding HP Hood's Carb Countdown dairy beverage and other, similar products, but no empirical data presented to confirm that such products had created disorderly marketing conditions or were significantly harming producer revenues. In fact, a representative of Cornell University presented a study that suggested only a marginal impact on producer revenues from new products being reclassified from Class II to Class I, a study that USDA chose to ignore.

The Department has a long history of requiring factual empirical evidence detailing the cause of disorderly marketing and the resultant impact to the dairy industry; specifically

the farmer suppliers of raw milk. In fact, the Department has used almost these exact words as valid reasons for;

1) not holding a hearing
2) not making a suggested change due to the lack of evidence

This decision, if it stands, is a monumental departure from the requirement of the Act and past procedural practice of the Department.

It seems inconceivable that the Department is now, and will presumably in coming years, render decisions and alter the milk marketing orders based on market conditions that "may someday exist" or on the "potential" for disorderly marketing conditions in the future. The Department declares that it can anticipate change due to technological advances and that in and of itself is grounds for making a change to the Class I definition at this time.

We don't dispute that technological change is occurring and advances continue to be made in the production, packaging, marketing and sale of dairy products. However, the dairy industry has been constantly changing long before and long after the Act was put in place, and the Department has always required proof of disorder rather than conjecture before adjustments in regulatory rules and definitions were made. It is easy to speculate on the possible future impact of technological advances on marketing conditions, but such speculation is inherently uncertain and subject to varying interpretations and considerations. For example, proponents of the Recommended Decision argued at the hearing that our Carb Countdown product was being purchased by consumers as a substitute for conventional fluid milk. Contrary to this assertion, HP Hood designed the product specifically for consumers whose diets did not allow them to consume conventional fluid milk products, and we have anecdotal evidence from consumers which suggests that the product has allowed many of them to return to the dairy category for their beverage needs. In essence, HP Hood believes that this product actually expands the number of consumers in the dairy category and does not, as suggested by the proponents of change, result in significant market disruption by drawing traditional fluid milk consumers away from higher valued dairy products.

We make the above point about Carb Countdown not for the purpose of reengaging in the specific debate about our product but to note the uncertainties inherent in speculation about market impacts of technological advances. Two interested parties have diametrically opposed views of the impact of a technological advance on marketing conditions. Without significantly more data than is available to either side at the present time, we have no way of confirming which party is correct in its view of this issue. Unless and until hard evidence of market disruption has been obtained, the Department should be cautious about making broad and far reaching amendments to its marketing regulations. Neither the proponents of change nor the Department in the Recommended Decision have provided any valid justification or basis for deviating from this longstanding practice.

The Department just recently announced that it was reopening the Manufacturing Allowance Proceedings and justified it in part by noting that "new facts were available from a study conducted by Cornell University". When this hearing reconvenes, will the Department agree to alter the make allowances because of evidence which might be presented that describes "technological advances" in the extraction of additional crude oil from Saudi Arabia, thus reducing oil prices in the future, or that new ethanol plants scheduled to go online in the US over the next 24 months may curb rising energy costs? This is yet another example of how engaging in unsubstantiated speculation about the possible impact of technological advances on future marketing conditions is inherently risky and unfair.

**II. Absence of Guidance on How USDA will Make Individual "Form and Use" Determinations**

The Recommended Decision also states that future determinations of Class I products will be made based on empirical test data of MSNF and True Protein along with "form and use" of the product. The Department notes in the Recommended Decision that such an approach is consistent with the statutory requirement in the Act.

We have a clear understanding of how the empirical test data will be evaluated but we have many unanswered questions concerning the determination of form and use. If this provision is carried forward in the final decision, it will be very important for the Department to elaborate on how this procedure will be managed. A detailed description of the procedure that will be used by the Department along with a chronology for making these determinations should be outlined and defined.

Among the many questions the proposal raises are the following:

How will the industry know when and how "form and use" will be employed in classifying a new product that does not meet the empirical thresholds for MSNF and True Protein?

Should we expect to submit every product that is being developed to the Department for a "form and use" determination? If so, when should we submit the product? While it is still in development? Prior to commercialization? After it has been marketed and sold?

Who will be allowed to request such determinations and what sort of process will be followed in dealing with such requests?

What information will need to be submitted in order to obtain a determination?

Will the Department need to know what type of package might be used?

Will proofs of the primary label display panels need to be submitted?

Will recommended placement on the retail shelf be required?

What happens if a product is a food service product packed in a bag-in-box with a list of ingredients listed on the exterior of the corrugated box?

How long will the "form and use" evaluation take before a determination is rendered?

Can the Department change the classification of a product if the actual consumer use of the product is not what was anticipated when the product was launched?

What happens as producers modify product formulations and marketing techniques over time, as often occurs? Will each modification require a further review by the Department for a "form and use" determination?

What rights will processors have to participate in the process and challenge decisions by the Department?

The Department has often explained that certain changes to the order could not be made because the process or procedure suggested was unmanageable and would require an inappropriate level of Department resources. "Form and use" determination seems to epitomize an unmanageable and time consuming addition to the Department's daily regimen. The Department rejected HP Hood's proposal to determine that a product competes directly with fluid milk products before it reclassifies it as a Class I product arguing that such a determination would be "unduly burdensome" to the Department and the dairy industry. We believe that the proposed "form and use" determinations suffer from the same defect.

The questions posed above also illustrate the many difficulties inherent in development of such a process. Among other concerns is the absence of clarity for processors considering new products, particularly the time frame for when the product's classification status will ultimately be determined. If the status can not be timely confirmed, it will be more difficult for processors to bring new products to market.

Another concern we have with this standard is the potential it creates for political considerations to drive decisions regarding product classification. The standard proposed is broad and vague and thus inherently susceptible to varying interpretations. Rather than clarity and certainty, it will cause ambiguity and uncertainty among producers and processors thereby inducing them to lobby the Department for adoption of their view of the proper interpretation in individual cases. Ultimately, classification decisions will be less transparent and harder to justify and explain than the clear standards that exist under the current rules.

For all of the above reasons, we think this is a bad idea which should be rejected.

**Conclusion**

In summary:

1) HP Hood does not feel there was any evidence presented at the hearing that justifies a change to the order;
2) The Department should not use unspecified and uncertain "anticipated changes" in the industry resulting from technological advances as the rationale for modifications to the orders. Modifications should only be made when empirical evidence demonstrates that disorderly marketing conditions are actually occurring; and
3) "Form and use" in addition to empirical test data adds a burden to the Department that will over extend its limited resources, inhibit new product development in the dairy industry and create the potential for political considerations to drive classification decisions.

For all of the above reasons, HP Hood urges the Department to withdraw the Recommended Decision and take no action on that proposal.

Sincerely,

Michael J. Suever
Senior Vice President, R&D, Engineering and
Procurement