continuously pooled on any Federal Order for the entirety of the most recent three consecutive months.

(3) The market administrator may waive the 125 percent limitation:

(i) For a new handler on the order, subject to the provisions of paragraph (f)(3) of this section, or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(4) A bloc of milk may be considered ineligible for pooling if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph (f).

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 06–1584 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1033

[Docket No. AO–166–A72; DA–05–01–B]

Milk in the Mideast Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; Recommended Decision.

SUMMARY: This decision recommends adoption of a proposal that would amend certain features of the Mideast Federal milk marketing order to deter the de-pooling of milk.

DATES: Comments must be submitted on or before April 24, 2006.

ADDRESSES: Comments (six copies) should be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue, SW., Washington, DC 20250–9200. Comments may also be submitted at the Federal eRulemaking portal: *http://www.regulations.gov* or by e-mail: *amsdairycomments@usda.gov*. Reference should be made to the title of action and docket number.

FOR FURTHER INFORMATION CONTACT: Gino Tosi, Associate Deputy Administrator, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2968, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202)690–1366, e-mail: *gino.tosi@usda.gov*.

SUPPLEMENTARY INFORMATION: This decision recommends adoption of amendments that would: (1) Establish a limit on the volume of milk a handler may pool during the months of April through February to 115 percent of the volume of milk pooled in the prior month; and (2) Establish a limit on the volume of milk a handler may pool during the month of March to 120 percent of the volume of milk pooled in the prior month.

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 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing 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. 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 its principal place of business, has jurisdiction in equity to review the Deparment's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ‘‘small business’’ if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ‘‘small business’’ if it has fewer than 500 employees.

For the purposes of determining which dairy farms are ‘‘small businesses,’’ the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ‘‘small’’ dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During March 2005, the month during which the hearing occurred, there were 9,767 dairy producers pooled on, and 36 handlers regulated by, the Mideast order. Approximately 9,212 producers, or 94.3 percent, were considered small businesses based on the above criteria. Of the 36 handlers regulated by the Mideast during March 2005, 26 handlers, or 72.2 percent, were considered small businesses.

The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with and consistently serve the fluid needs of the Mideast milk marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market and, by doing so, to determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk.

Criteria for pooling are established without regard to the size of any dairy industry organization or entity. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This recommended decision does not require additional information collection that requires clearance by the

Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This rulemaking proceeding does not duplicate, overlap, or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior Documents in This Proceeding

Notice of Hearing: Issued February 14, 2005; published February 17, 2005 (70 FR 8043).

Amended Notice of Hearing: Issued March 1, 2005; published March 3, 2005 (70 FR 10337).

Tentative Partial Decision: Issued July 21, 2005; published July 27, 2005 (70 FR 43335).

Interim Final Rule: Issued September 20, 2005; published September 26, 2005 (70 FR 56111).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Mideast marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act (AMAA) and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue, SW., Washington DC 20250–9200, by the 60th day after publication of this decision in the **Federal Register**. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. Some evidence was received that specifically addressed these issues, and some of the evidence encompassed entities of various sizes.

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Mideast marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The proposed amendments set forth below are based on the record of a public hearing held at Wooster, Ohio, on March 7–10, 2005, pursuant to a notice of hearing issued February 14, 2005, published February 17, 2005, (70 FR 8043) and a amended notice of hearing issued March 1, 2005, and published March 3, 2005 (70 FR 10337).

The material issues on the record of hearing relate to:

1. Pooling standards
A. Establish pooling limits.
B. Producer definition.
2. Transportation Credits.

Findings and Conclusions

This recommended decision specifically addresses proposals published in the hearing notice as Proposals 4, 5, 6, 7, and 8 which seek to establish a limit on the volume of milk that can be pooled on the order; Proposal 9 which seeks to establish transportations credits; and features of Proposal 3 intended to clarify the *Producer* definition by providing a definition of ''temporary loss of Grade A approval.'' Proposals which sought to change the performance standards of the order, Proposals 1 and 2, were addressed in a tentative partial decision published on July 27, 2005 (70 FR 43335). The portion of Proposal 3 that sought to amend the number of days a producer needs to deliver milk to a distributing plant before the milk of the producer is eligible for diversion was abandoned by the proponents at the hearing. No further reference to that portion of Proposal 3 will be made.

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

1. Pooling Standards

A. Establishing Pooling Limits

Preliminary Statement

Federal milk marketing orders rely on the tools of classified pricing and marketwide pooling to assure an adequate supply of milk for fluid (Class I) use and to provide for the equitable sharing of the revenues arising from the classified pricing of milk. Classified pricing assigns a value to milk according to how the milk is used. Regulated handlers who buy milk from dairy farmers are charged class prices according to how they use the farmer's milk. Dairy farmers are then paid a weighted average or ''blend'' price. The blend price that dairy farmers are paid for their milk is derived through the marketwide pooling of all class uses of milk in a marketing area. Thus each producer receives an equal share of each use class of milk and is indifferent as to the actual Class for which the milk was used. The Class I price is usually the highest class price for milk. Historically, the Class I use of milk provides the additional revenue to a marketing area's total classified use value of milk.

The series of Class prices that are applicable for any given month are not announced simultaneously. The Class I price and the Class II skim milk price are announced prior to the beginning of the month for which they will be effective. Class prices for milk in all other uses are not determined until on or before the 5th day of the following month. The Class I price is determined by adding a differential value to the higher of either an advanced Class III or Class IV value. These values are calculated based on formula using the National Agricultural Statistics Service (NASS) survey prices of cheese, butter, and nonfat dried milk powder for the first two weeks of the prior month. For example, the Class I price for August is announced in late July and is based on the higher of the Class III or IV value computed using NASS commodity price surveys for the first two weeks of July.

The Class III and IV prices for the month are determined and announced after the end of the month based on the NASS survey prices for the selected dairy commodities during the month. For example, the Class III and IV prices for August are based on NASS survey commodity prices during August. A large increase in the NASS survey price for the selected dairy commodities from one month to the next can result in the Class III or IV price exceeding the Class I price. This occurrence is commonly

referred to by the dairy industry as a ''Class price inversion.'' A producer price inversion generally refers to when the Class III or IV price exceeds the average classified use value, or blend price, of milk for the month. Price inversions have occurred with increasing frequency in Federal milk orders since the current pricing plan was implemented on January 1, 2000, despite efforts made during Federal Order Reform to reduce such occurrences. Price inversions can create an incentive for dairy farmers and manufacturing handlers who voluntarily participate in the marketwide pooling of milk to elect not to pool their milk on the order. Class I handlers do not have this option; their participation in the marketwide pool is mandatory.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Classes. In essence, the PPD is the dairy farmer's share of the additional/reduced revenues associated with the Class I, II, and IV milk pooled in the market. If the value of Class I, II, and IV milk in the pool is greater than the Class III value, dairy farmers receive a positive PPD. However, a negative PPD can occur if the value of the Class III milk in the pool exceeds the value of the remaining classes of milk in the pool. This can occur as a result of the price inversions discussed above.

The Mideast Federal order operates a marketwide pool. The Order contains pooling provisions which specify criteria that, if met, allow dairy farmers to share in the benefits that arise from classified pricing through pooling. The equalization of all class prices among handlers regulated by an order is accomplished through a mechanism known as the producer settlement fund (PSF). Typically, Class I handlers pay the difference between the blend price and their use-value of milk into the PSF. Manufacturing handlers typically receive a draw from the PSF, usually the difference between the Class II, III or IV price and the blend price. In this way, all handlers pay the Class value for milk and all dairy farmer suppliers receive at least the order's blend price.

When manufacturing class prices of milk are high enough to result in a use-value of milk for a handler that is higher than the blend price, handlers of manufacturing milk may choose to not pool their milk receipts. Opting to not pool their milk receipts allows these handlers to avoid the obligation of paying into the PSF. The choice by a manufacturing handler to not pool their milk receipts is commonly referred to in the dairy industry as ''de-pooling.'' When the blend price rises above the manufacturing class use-values of milk these same handlers again opt to pool their milk receipts. This is often referred to as ''re-pooling.'' The ability of manufacturing handlers to de-pool and re-pool manufacturing milk is viewed by some market participants as being inequitable to both producers and handlers.

The ''De-Pooling'' Proposals

Proponents are in agreement that milk marketing orders should contain provisions that will tend to limit the practice of de-pooling. Five proposals intending to limit the de-pooling of milk were considered in this proceeding. The proposals offered different degrees of deterrence against de-pooling by establishing limits on the amount of milk that can be re-pooled. The proponents of these five proposals are generally of the opinion that de-pooling erodes equity among producers and handlers, undermines the orderly marketing of milk and is detrimental to the Federal order system.

Two different approaches on how to best limit de-pooling are represented by these five proposals. The first approach, published in the hearing notice as Proposals 6 and 7, addresses de-pooling by limiting the volume of milk a handler can pool in a month to a specified percentage of what the handler pooled in the prior month. The second approach, published in the hearing notice as Proposals 4, 5 and 8, addresses de-pooling by establishing what is commonly referred to as a ''dairy farmer for other markets'' provision. These proposals would require milk of a producer that was de-pooled to not be able to be re-pooled by that producer for a defined time period. All proponents agreed that none of the proposals would completely eliminate de-pooling, but would likely deter the practice.

Of the five proposals received that would limit de-pooling, this decision recommends adoption of Proposal 7 as modified in post-hearing briefs, offered by Dairy Farmers of America and Michigan Milk Producers Association (DFA/MMPA). DFA/MMPA are Capper-Volstead cooperatives who pool milk on the Mideast market. Specifically, adoption of Proposal 7 will limit the volume of milk a handler could pool during the months of April through February to no more than 115 percent of the volume of milk pooled in the prior month, and limit the volume of milk a handler could pool in the month of March to 120 percent of the volume of milk pooled in the month prior. Milk diverted to nonpool plants in excess of these limits will not be pooled. Milk shipped to pool distributing plants will not be subject to the 115 or 120 percent limitation. Milk pooled on another Federal Order during the previous three consecutive months would not be subject to the 115 or 120 percent limitation. The 115 or 120 percent limitation may be waived at the discretion of the Market Administrator for a new handler on the order or for an existing handler whose milk supply changes due to unusual circumstances.

As published in the hearing notice, Proposal 6, offered by Ohio Dairy Producers (ODP) and Ohio Farmers Union (OFU), was virtually identical to Proposal 7. ODP is an organization of independent Ohio dairy farmers and agriculture businesses that work to increase the productivity and profitability of dairy farmers. OFU is an organization whose members include dairy farmers pooled on the Mideast order. Proposal 6 would limit the volume of milk a handler could pool in a month to 115 percent of the volume of milk pooled in the prior month. The proposal does not contain a separate pooling standard for the month of March. Milk shipped to pool distributing plants, or milk pooled on another Federal order during the preceding six months, would not be subject to the 115 percent standard. The proposal would grant authority to the Market Administrator to increase or decrease the 115 percent standard.

As published in the hearing notice, Proposals 4, 5 and 8 address de-pooling by establishing defined time periods during which de-pooled milk could not be pooled. Proposal 4, also offered by ODP and OFU, would require an annual pooling commitment by a handler to the market. The proposal specified that if the milk of a producer was not pooled during a month, or any of the preceding eleven months, the equivalent of at least 10 day's milk production of the dairy farmer would need to be delivered to a pool distributing plant during the month in order for all the milk of the dairy farmer for that month to be pooled. Proposal 4 is not recommended for adoption.

Proposal 5, offered by Continental Dairy Products (Continental), would limit the ability to pool the milk of a producer if such milk had not been pooled during the previous 12 months. Continental is a Capper-Volstead cooperative whose member's milk is pooled on the Mideast order. Proposal 5 is not recommended for adoption.

Proposal 8, offered by Dean Foods Company (Dean), would not permit re-pooling for a 2 to 7 month period for milk that had been de-pooled. Dean is a handler that distributes fluid milk products within the Mideast marketing

area. Under Proposal 8, if a producer's milk were de-pooled in any of the months of February through June, or during any of the preceding three months, or during any of the preceding months of July through January, the equivalent of at least 10 day's milk production would need to be physically received at a pool distributing plant in the order to pool all of the dairy farmer's production for the month. Additionally, if the milk of a dairy farmer is de-pooled in any of the months of July through January, or in a preceding month, at least 10 day's milk production of the dairy farmer would need to be delivered to a pool distributing plant to have all the milk of the dairy farmer pooled for the month. Proposal 8 is not recommended for adoption.

While Proposals 4, 5 or 8 are not recommended for adoption, to the extent that these proposals offered alternative methods to deter the practice of de-pooling, adoption of Proposals 6 and 7 essentially accomplishes this objective.

The proponents of Proposals 4, 5, 6, 7 and 8 are all of the opinion that current inadequate pooling standards enable manufacturing handlers to de-pool milk and immediately re-pool milk the following month and are in need of revision. According to the proponents, the Mideast blend price is lowered when large volumes of higher valued milk used for manufacturing is de-pooled as well as when the large volumes of de-pooled milk returns to the pool. Furthermore, the witnesses argued that de-pooling handlers do not have to account to the Mideast pool at classified prices and therefore face different costs than their similarly situated pooling competitors. While all proponents insisted that the pooling standards of the order need to be amended to ensure producer and handler equity, their opinions differed only on how to best meet this end.

The current *Producer milk* provision of the Mideast order considers the milk of a dairy farmer to be producer milk when it has been received at a pool plant of the order. A producer must deliver 2 day's milk production to a pool plant during each of the months of August through November so that all the milk of a producer will be eligible to be pooled throughout the year. Once the standard has been met, the milk of a producer is eligible to be diverted to nonpool plants and continue to be priced under the terms of the order. A pool plant cannot divert more than 50 percent of its total producer milk receipts to nonpool plants during each of the months of August through February and 60 percent during each of the months of March through July. Milk that is subject to inclusion in another marketwide equalization program operated by another government entity is not considered producer milk. The order currently does not limit a handler's ability to de-pool manufacturing uses of milk.

A witness appearing on behalf of Continental testified in support of Proposal 5. The witness was of the opinion that pooling provisions should limit a handler's ability to de-pool their milk receipts at will and with little consequence. The witness testified that Proposal 5 would prohibit a handler from pooling the milk of a producer that had been de-pooled during the previous 11 months. The witness characterized Proposal 5 as an adequate deterrent to handlers de-pooling large volumes of milk for short term financial gain. The witness added that adoption of Proposal 5 would provide adequate safeguards for new producers on the order or producers who may temporarily lose Grade A status to pool their milk without penalty.

A post-hearing brief submitted on behalf of Continental reiterated their support for the adoption of Proposal 5. The brief stressed that de-pooling leads to the inequitable sharing of revenues amongst producers and therefore should be dealt with in the most stringent manner. Continental argued that adoption of any proposal that would allow handlers to continue to de-pool any percentage of their milk receipts supports the concept that de-pooling is an acceptable practice. Continental vigorously opposed any level of de-pooling and insisted that adoption of Proposal 5 was the only appropriate proposal to re-establish equity in the marketplace.

A witness appearing on behalf of ODP testified in support of Proposals 4 and 6. According to the witness, over 1.3 billion pounds of milk was de-pooled during April and May 2004 reducing the value of the marketwide pool by $21.3 million. The ODP witness insisted that pooling standards should ensure that producer milk which regularly supplies the needs of the fluid market does not receive a lower blend price when manufacturing handlers opt to not pool their milk receipts. The witness noted that Federal order hearings have been held in the Central and Upper Midwest markets to address de-pooling. The witness stressed that if the ability of manufacturing handlers to not pool their milk receipts is eliminated in the Central and Upper Midwest markets, it may add to the volume of de-pooled milk in the Mideast market. The witness was of the opinion that adoption of either Proposal 4 or Proposal 6 would best solve the inequities created from de-pooling.

A witness appearing on behalf of Dean testified in support of Proposal 4. The witness asserted that the intent of the Federal order system is to ensure a sufficient supply of milk for fluid use and provide for uniform payments to producers who stand ready, willing, and able to serve the fluid market regardless of how the milk of any individual is utilized. The Dean witness testified that provisions allowing manufacturing handlers the option to participate or not participate in the pool causes inequities between handlers.

The Dean witness was of the opinion that de-pooling causes inequities between handlers and undermines the order's ability to provide for a stable milk supply to meet Class I demand. The inequity, the witness said, is that all handlers do not have the same ability to pool and de-pool; fluid handlers are required to pool their milk receipts while manufacturing handlers have the option of pooling their milk receipts. The witness was of the opinion that this difference in pooling options creates cost inequities between handlers since a fluid handler must always account to the pool at classified use values while manufacturing handlers may not.

The Dean witness also explained how de-pooling leads to inequities between producers. The witness used a hypothetical example of two cooperatives—Cooperative A that delivers 50 percent of its milk receipts to distributing plants and Cooperative B who delivers 30 percent of its milk receipts to distributing plants. Cooperative A, the witness said, is always at a disadvantage when a price inversion occurs because they can only de-pool 50 percent of their milk receipts because the milk delivered to distributing plants must be pooled. However, the witness said, Cooperative B can de-pool 70 percent of their milk receipts because only 30 percent is delivered to distributing plants. Therefore, the witness concluded, Cooperative B is able to pay a higher price to its dairy farmer suppliers since it is able to de-pool an additional 20 percent of its total milk receipts that Cooperative A cannot.

The Dean witness stressed that hearings have been held in other Federal orders to consider proposals seeking to deter de-pooling and urged the Department to adopt provisions to prevent milk from opportunistically pooling on the Mideast order. In the opinion of the Dean witness, Proposal 4 is the most appropriate solution to deter the de-pooling of milk because it creates

large and long-term consequences to handlers who opt to de-pool. The Dean witness believed that should the Department determine that Proposal 4 is not appropriate, Proposal 8 would be the best alternative.

A post-hearing brief submitted on behalf of Dean reiterated support for the adoption of Proposal 4 with a modification. Dean proposed granting the Market Administrator the ability to waive a producer's de-pooled status if the producer was de-pooled after informing its pooling handler that it intended to deliver its milk to another handler. The brief stressed that the intention of Proposal 4 is not to prevent a producer from being pooled because of circumstances out of their control and believed their modification would remedy this potential situation. Dean's brief reiterated that de-pooling results in inequities between both handlers and producers. The brief noted that a provision similar to Proposal 4 is in place in the Northeast order and asserted that it has been very effective in limiting de-pooling.

A witness appearing on behalf of Superior Dairy (Superior) testified in support of Proposal 4. Superior is a pool distributing plant regulated by the Mideast order. The witness said that Proposal 4 should be adopted because the de-pooling actions of some handlers are reducing the blend price paid to producers who regularly and consistently service the needs of the Class I market.

A witness appearing on behalf of OFU testified in support of Proposal 6. The witness said that current regulations allow handlers to take advantage of the Federal order program and not share income generated in the market with pooled producers. The witness supported adoption of Proposal 6 and stressed that adoption of the proposal would discourage manufacturing handlers from not pooling their milk receipts when it is to their financial advantage.

A second witness appearing on behalf of Dean testified in support of Proposals 4, 6, 7, and 8. The witness testified that Proposal 4 would encourage handlers to pool their milk receipts in times of a price inversion since the decision to de-pool would result in a 12-month penalty. The witness said that adoption of Proposal 4 would also ensure that the de-pooled producer provided service to the Class I market by making substantial and consistent service to fluid distributing plants.

The second Dean witness characterized Proposal 8 as a less desirable alternative to Proposal 4. The difference in the two proposals, the witness said, is the number of months a producer must meet the 10-day touch base standard to be re-pooled—it is fewer under Proposal 8 and varies depending on the month in which the milk was de-pooled. In general, emphasized the witness, the effects of both proposals would be the same except that if Proposal 8 were adopted, the cost to a de-pooling handler and the benefit to continuously pooled producers would be less.

The second Dean witness testified that Proposal 7 and Proposal 6 are less desirable options to Proposals 4 and 8. According to the witness, if a 115 percent re-pooling standard were adopted it would take a handler who opted to de-pool 90 percent of its milk 17 months to re-pool all the handler's milk receipts. If a handler opted to de-pool 30 percent of its milk receipts, the witness added, it would only take 3 months to again pool all of its milk receipts. The witness emphasized that the larger the volume of milk a handler opted to de-pool, the longer the length of time a handler would need to requalify all its milk receipts and the more money it would cost the de-pooling handler. The witness concluded that Proposals 6 and 7 offered a different method for limiting de-pooling that would not be as effective as the method contained in Proposals 4 and 8.

A dairy farmer whose milk is pooled on the Mideast order testified in support of Proposals 4, 5, and 6. The witness testified that in April 2004 their farm lost $9,000 because of the reduced PPD that resulted from de-pooling. The witness urged the Department to adopt either Proposal 4, 5, or 6 to remedy de-pooling and to do so on an emergency basis.

A witness appearing on behalf of DFA/MMPA testified in support of Proposal 7. The witness said that Proposal 7 was designed to limit de-pooling by creating financial consequences for manufacturing handlers who de-pool their milk receipts. The witness testified that members of DFA/MMPA currently de-pool milk when it is to their advantage but emphasized that de-pooling causes market disorder and should be prohibited.

The DFA/MMPA witness said that de-pooling is not a new occurrence; however, the volatility of milk prices in recent years has caused more frequent price inversions and subsequent opportunities to de-pool. The witness referenced data presented at a similar proceeding held in the Central order that during the 84 month period from 1993 to 1999, there were 16 months with negative PPD's, 6 of which were in excess of a negative 50 cents per cwt. However, the witness noted that during the 60 month period from January 2000 through December 2004 the opportunity to de-pool had occurred 51 times.

The DFA/MMPA witness contended that de-pooling causes inequities because similarly situated handlers face different costs in procuring a milk supply. Class I milk is required to be pooled, the witness said, and distributing plants always have to share the additional value of their Class I milk sales with all pooled producers. However, the witness said, a manufacturing handler is not required to account to the pool at classified prices and can therefore retain the revenue generated from not pooling milk when price inversions occur. The witness asserted that manufacturing handlers use the additional revenue generated from de-pooling to pay a higher price to their producers while fluid handlers must use money from their profit margins to pay a competitive price. In this regard, the witness said, Class I handlers are at a disadvantage in competing with manufacturing handlers for a producer milk supply.

Relying on Market Administrator statistics, the DFA/MMPA witness illustrated that in April 2004 manufacturing handlers that may have chosen to not pool their milk receipts were able to keep $3.78 more per hundredweight than a fluid handler on all their de-pooled milk and could use the proceeds to pay dairy farmers. The witness showed how a supplying handler that delivered one load of milk a day for a month to a Class I plant, would have received $56,700 less than a manufacturing handler who could opt to de-pool their milk receipts. Relying on Market Administrator statistics, the witness testified that 649.3 million pounds of milk was de-pooled in April 2004. According to the witness, if that milk had been pooled the PPD paid to all producers would have been $1.66 per cwt higher.

The DFA/MMPA witness testified that Proposal 7 would limit the amount of milk a handler could pool to 115 percent of the handlers prior month pooled milk volume. The witness insisted that the 115 percent standard would create the economic incentive necessary to keep an adequate reserve supply of milk pooled on the order while accommodating reasonable levels of growth in a handler's month-to-month production and other seasonal production fluctuations. The witness noted that the Market Administrator should be given the discretion to disqualify de-pooled milk from pooling if the Market Administrator believes

that the handler was trying to circumvent the pooling standards.

The DFA/MMPA witness testified that emergency marketing conditions exist without a deterrent to de-pooling that warrant the omission of a recommended decision. The witness was of the opinion that the volatile dairy product markets that gave rise to rapid price increases and price inversions will continue and therefore, should be addressed in an expedited manner.

A post-hearing brief submitted on behalf of DFA/MMPA reiterated their support of Proposal 7. The brief stressed that adoption of Proposal 7, while not completely eliminating a handler's ability to de-pool, would reduce the total volume of de-pooled milk. DFA/MMPA suggested a modification to Proposal 7 in their post-hearing brief to establish a limit on the volume of milk a handler could pool in March to 120 percent of the their total volume of milk pooled during the prior month. DFA/MMPA believed that this modification would better accommodate and account for the fewer number of days in the month of February.

The DFA/MMPA brief argued that Proposals 4 and 5 are not appropriate for the Mideast order because they call for stringent and unnecessary changes in the order's pooling provisions. The brief stressed that the intention of Proposal 7 was to improve the pooling standards of the order but not in a manner that would necessitate a change to a handler's business operations.

A witness appearing on behalf of Ohio Farm Bureau Federation testified in support of Proposal 7. The witness was of the opinion that if the current pooling provisions are not amended to deter the practice of de-pooling, prices received by farmers who reliably service the Class I market would decrease. The witness claimed that handlers who de-pool milk do not share the revenues generated from de-pooling with all pooled producers which lowers returns to producers who are consistently serving the Class I market. The witness added that Federal order hearings concerning de-pooling have been held in other Federal orders. The witness claimed that if de-pooling is not addressed in the Mideast order, milk from other Federal orders may seek to be pooled on the Mideast order. In this regard, the witness said that adoption of Proposal 7 is necessary to ensure that blend prices received by producers who are consistently pooled are not further eroded.

A witness appearing on behalf Prairie Farms Dairy (Prairie Farms) testified in support of Proposal 7. Prairie Farms is a member owned Capper-Volstead cooperative that pools milk on the Mideast order. The witness testified that since Prairie Farms is required to pool all milk utilized at their distributing plants, all revenues generated from their Class I sales are shared with all pooled producers. The witness noted that Prairie Farms does de-pool its manufacturing milk when it is advantageous but emphasized that this practice is detrimental to producers who are consistently serving the Class I market. The witness urged adoption of Proposal 7 but also offered support for Proposal 6.

Seven dairy farmers whose milk is pooled on the Mideast order testified in support of Proposal 7. The dairy farmers testified that the purpose of the Federal order system is to ensure that pooled producers receive an equitable share of the revenue generated from all classes of milk. The witnesses were of the opinion that the practice of de-pooling caused them to lose a substantial amount of potential income. These witnesses stressed that if a manufacturing handler chooses to pool their milk receipts in months when the PPD is positive, it is only equitable for them to pool their milk receipts when the PPD is negative. The witnesses believed that de-pooling results in producers who consistently service the Class I needs of the market receiving a lower blend price than they otherwise would have if all milk had been pooled. The witnesses maintained that because de-pooling erodes revenues received by pooled producers, the Department should addressed de-pooling on an emergency basis.

Another dairy farmer witness whose milk is pooled on the Mideast order testified in support of limiting de-pooling but did not offer support for any specific proposal. The witness said that as a result of de-pooling in the months of April and May 2004, their farm lost over $6,000. The witness was of the opinion that the Department should act on an emergency basis since the ability for manufacturing handlers to de-pool milk will continue to lower the proceeds received by producers that service the needs of the Class I market.

A witness appearing on behalf of Smith Dairy Products Company testified in support of proposals limiting de-pooling. Smith operates two distributing plants located in the Mideast marketing area. The witness said that the practice of de-pooling manipulates the intent of the Federal milk order system and results in the lowering of the blend prices paid to producers that service the needs of the Class I market. The witness did not offer support for a specific proposal but urged the Department to eliminate the ability to de-pool milk on the Mideast order on an emergency basis.

A witness appearing on behalf of Continental testified in opposition to Proposals 4, 6, 7, and 8. The witness opposed adoption of these proposals because they would allow milk delivered to a distributing plant to be immediately re-pooled and maintained that Proposal 5 would be a better option for the marketing area.

A witness appearing on behalf of White Eagle Cooperative Federation (White Eagle) testified neither in support of or opposition to Proposal 7. White Eagle is a federation of cooperatives and independent producers that markets approximately 150 million pounds of milk per month on the Mideast order. The witness asserted that adoption of the 115 percent pooling standard could limit smaller cooperatives from increasing their dairy farmer membership. The witness testified that adoption of Proposal 7 would allow for an increase in the volume of milk pooled above 115 percent if a producer who was pooled on another Federal order sought to become pooled on the Mideast order but would not make the same exception for a producer continually pooled on the Mideast order who increases production. The witness said that if de-pooling were limited on the Mideast order, de-pooled milk would seek to be pooled on other Federal orders where there are no de-pooling restrictions. The witness was of the opinion that the de-pooling issue should be handled on a national basis and with a recommended decision where the public could submit comments. These positions were reiterated in their post-hearing brief filed on behalf of White Eagle, Superior Dairy, United Dairy, Guggisberg Cheese, Brewster Dairy, and Dairy Support, Inc.

A post-hearing reply brief submitted on behalf of Dean expressed opposition to Proposal 5. Dean argued that Proposal 5 was too restrictive because it contained no provision to enable de-pooled milk to become immediately re-pooled if it was truly needed to service the fluid market later in the month.

All Federal milk marketing orders require the pooling of milk received at pooled distributing plants—which is predominately Class I milk—and all pooled producers and handlers on an order share in the additional revenue arising from higher valued Class I sales. Manufacturing handlers and cooperatives of Class II, III and IV uses of milk who meet the pooling and performance standards make all of their milk receipts eligible to be pooled and usually find it advantageous. Manufacturing handlers and

cooperatives who supply a portion of their total milk receipts to Class I distributing plants receive the difference between their use-value of milk and the order's blend price. Federal milk orders, including the Mideast order, establish limits on the volume of milk eligible to be pooled that is not used for fluid uses primarily through diversion limit standards. However, manufacturing handlers and cooperatives are not required, as are Class I handlers, to pool all their eligible milk receipts.

According to the record, manufacturing handlers and cooperatives have opted to not pool their milk receipts when the manufacturing class prices of milk are higher than the order's blend price—commonly referred to as being ''inverted.'' During such months, manufacturing handlers and cooperatives have elected to not pool all of their eligible milk receipts because doing so would require them to pay into the PSF of the order, the mechanism through which handler and producer prices are equalized. When prices are not inverted, these handlers would pool all of their eligible receipts and receive a payment or draw from the PSF. In receiving a draw from the PSF, such handlers have sufficient money to pay at least the order's blend price to their supplying dairy farmers.

When manufacturing handlers and cooperatives opt to not pool all of their eligible milk receipts in a month, they are essentially avoiding a payment to the PSF. This, in turn, enables them to avoid the marketwide sharing of the additional value of milk that accrues in the higher-valued uses of milk other than Class I. When the Class I price again becomes the highest valued use of milk, or when other class-price relationships become favorable, the record reveals that these same handlers opt to again pool their eligible milk receipts and draw money from the PSF. It is the ability of manufacturing handlers and cooperatives opting to not pool milk and thereby avoid the marketwide sharing of the revenue accruing from non-Class I milk sales that is viewed by proponents as giving rise to disorderly marketing conditions. According to proponents, producers and handlers who cannot escape being pooled and priced under the order are not assured of equitable prices.

The record reveals that since the implementation of Federal milk marketing order reform in January 2000, and especially in more recent years, large and rapid increases in manufactured product prices during certain months have provided the economic incentives for manufacturing handlers to opt not to pool eligible milk on the Mideast order. For example, during the 3-month period of February to April 2004, the Class III price increased over 65 percent from $11.89 cwt to $19.66 cwt. During the same time period, total producer milk pooled on the Mideast order decreased by nearly 40 percent from 1.4 billion pounds to 873 million pounds. When milk volumes of this magnitude are not pooled the impacts on producer blend prices are significant. Producers who incur the additional costs of consistently servicing the Class I needs of the market receive a lower return than would otherwise have been received if they did not continue to service the Class I market. Prices received by dairy farmers who supplied the other milk needs of the market are not known. However, it is reasonable to conclude that prices received by dairy farmers were not equitable or uniform.

The record reveals that ''inverted'' prices of milk are generally the result of the timing of Class price announcements. Despite changes made as part of Federal milk order reform to shorten the time period of setting and announcing Class I milk prices and basing the Class I price on the higher of the Class III or Class IV price to avoid price inversions, large month-to-month price increases in Class III and Class IV product prices sometimes trumped the intent of better assuring that the Class I price for the month would be the highest-valued use of milk. In all orders, the Class I price (and the Class II skim price) is announced prior to or in advance of the month for which it will apply. The Class I price is calculated by using the National Agricultural Statistics Service (NASS) surveyed cheese, butter, nonfat dry milk and dry whey prices for the two most current weeks prior to the 24th day of the preceding month and then adding a differential value to the higher of either the advanced Class III or Class IV price.

Historically, the advance pricing of Class I milk has been used in all Federal orders because Class I handlers cannot avoid regulation and are required to pool all of their Class I milk receipts they should know their product costs in advance of notifying their customers of price changes. However, milk receipts for Class III and IV uses are not required to be pooled; thus, Class III and IV product prices (and the Class II butterfat value) are not announced in advance. These prices are announced on or before the 5th of the following month. Of importance here is that manufacturing plant operators and cooperatives have the benefit of knowing all the classified prices of milk before making a decision to pool or not pool eligible receipts.

The record reveals that the decision of manufacturing handlers or cooperatives to pool or not pool milk is made on a month-to-month basis and is generally independent of past pooling decisions. Manufacturing handlers and cooperatives that elected to not pool their milk receipts did so to avoid making payments to the PSF and they anticipated that all other manufacturing handlers and cooperatives would do the same. However, the record indicates that normally pooled manufacturing handlers and cooperatives met the pooling standards of the order to ensure that the Class I market was adequately supplied and that they established eligibility to pool their physical receipts including diversions to nonpool plants. Opponents to proposals to deter de-pooling are of the view that meeting the pooling standards of the order and deciding how much milk to pool are unrelated events. Proponents took the view that participation in the marketwide pool should be based on a long-term commitment to supply the market because in the long-term it is the sales of higher priced Class I milk that adds additional revenue to the pool.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Class I, II and IV milk pooled. In essence, the PPD is the residual revenue remaining after all butterfat, protein and other solids values are paid to producers. If the pooled value of Class I, II and IV milk is greater than the Class III value, dairy farmers receive a positive PPD. While the PPD is usually positive, a negative PPD can occur when class prices rise rapidly during the six-week period between the time the Class I price is announced and the time the Class II butterfat and III and IV milk prices are announced. When manufacturing prices fall, this same lag in the announcement of class prices yields a positive PPD.

As revealed by the record, when manufacturing plants and cooperatives opted to not pool milk because of inverted price relationships, PPD's were much more negative. When this milk is not pooled, a larger percentage of the milk remaining pooled will be the ''lower'' priced Class I milk. When manufacturing milk is not pooled the weighted average value of milk decreases relative to the Class II, III or IV value making the PPD more negative. For example, record evidence demonstrated that in April 2004, a month when a sizeable volume of milk was not pooled, the PPD was a negative $3.78 per cwt. If all eligible milk had

been, the PPD would have been $1.66 per cwt higher or a negative $2.12 per cwt.

The record reveals that when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers. For example, Dean noted that when a cooperative delivers a high percentage of their milk receipts to a distributing plant, it lessens their ability to not pool milk and makes them less competitive in the marketplace relative to other producers and handlers. Other evidence in the record supports conclusions identical to Dean that when a dairy farmer or cooperative is able to receive increased returns from shipping milk to a manufacturing handler during times of price inversions, other dairy farmers or cooperatives who may have shipped more milk to a pool distributing plant are competitively disadvantaged.

The record of this proceeding reveals that the ability of manufacturing handlers and cooperatives to not pool all of their eligible milk receipts gives rise to disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling. Current pooling provisions do not require or prohibit handlers and cooperatives from pooling all eligible milk receipts. However, the record reveals that when handlers and cooperatives opt to not pool milk, inequities arise among producers and handlers that are contrary to the intent of the Federal milk marketing order program—maintaining orderly marketing conditions.

The record contains extensive testimony regarding the effects on the milk order program resulting from advance pricing and the priority the milk order program has placed on the Class I price being the highest valued use of milk. It remains true that the Class I use of milk is still the highest valued use of milk notwithstanding those occasional months when milk used in usually lower-valued classes may be higher. This has been demonstrated by an analysis of the effective Class I differential values—the difference in the Class I price at the base zone of Cuyahoga County, Ohio, and the higher of the Class III or Class IV price—for the 65-month period of January 2000 through May 2005 performed by USDA.[1] These computations reveal that the effective monthly Class I differential averaged $1.97 per cwt. Accordingly, it can only be concluded that in the longer-term Class I sales continue to be the source of additional revenue accruing to the pool even when, in some months, the effective differential is negative.

Price inversions occur when the wholesale price for manufactured products rises rapidly indicating a tightening of milk supplies to produce those products. It is for this reason that the Department chose the higher of the Class III or Class IV prices as the mover of the Class I price. Distributing plants must have a price high enough to attract milk away from manufacturing uses to meet Class I demands. As revealed by the record, this method has not been sufficient to provide the appropriate price signals to assure an adequate supply of milk for the Class I market. Accordingly, additional measures are needed as a means of assuring that milk remains pooled and thus available to the Class I market. Adoption of Proposal 7 is a reasonable measure to meet the objectives of orderly marketing.

This decision does find that disorderly marketing conditions are present when producers do not receive uniform prices. Handlers and cooperatives opting to not pool milk do not account to the pool at the classified use value of those milk receipts. They do not share the higher classified use—value of their milk receipts with all other producers who are pooled on the order are incurring the additional costs of servicing the Class I needs of the market. This is not a desired or reasonable outcome especially when the same handlers and cooperatives will again pool all of their eligible receipts when class-price relationships change in a subsequent month. These inequities borne by the market's producers are contrary to the intent of the Federal order program's reliance on marketwide pooling—ensuring that all producers supplying the market are paid uniform prices for their milk regardless of how the milk of any single producer is used.

It is reasonable that the order contain pooling provisions intended to deter the disorderly conditions that arise when de-pooling occurs. Such provisions maintain and enhance orderly marketing. Accordingly, this decision finds it reasonable to recommend adoption of provisions that would limit the volume of milk a handler or cooperative may pool during the months of April through February to 115 percent of the total volume pooled by the handler or cooperative in the prior month and to 120 percent of the prior month's pooled volume during March. Adoption of this standard will not prevent manufacturing handlers or cooperatives from electing to not pool milk. However, it should serve to maintain and enhance orderly marketing by encouraging participation in the marketwide pooling of all classified uses of milk.

Consideration was given on whether de-pooling should be considered at a national hearing with other, broader national issued of milk marketing. However, each marketing area has unique marketing conditions and characteristics which have area-specific pooling provisions to address those specific conditions. Because of this, pooling issues are considered unique to each order. This decision finds that it would be unreasonable to address pooling issues, including de-pooling, on a national basis.

Some manufacturing handlers and cooperatives argue that their milk did perform in meeting the Class I needs during the month and this occurred before making their pooling decisions. They argue that the Class I market is therefore not harmed and that the intents and goals of the order program are satisfied. In response to these arguments, this decision finds that the practice of de-pooling undermines the intent of the Federal order program to assure producers uniform prices across all uses of milk normally associated with the market as a critical indicator of orderly marketing conditions. Similarly, handlers and cooperatives who de-pool purposefully do so to gain a momentary financial benefit (by avoiding making payments to the PSF) which would otherwise be equitably shared among all market participants. While the order's performance standards tend to assure that distributing plants are adequately supplied with fresh, fluid milk, the goals of marketwide pooling are undermined by the practice of de-pooling. Producers and handlers who regularly and consistently serve the Class I needs of the market will not equitably share in the additional value arising momentarily from non-fluid uses of milk. These same producers and handlers will, in turn, be required to share the additional revenue arising from higher-valued Class I sales in a subsequent month when class-price relationships change.

The five proposals considered in this proceeding to deter the practice of de-pooling in the Mideast order have differences. They all seek to address market disorder arising from the practice of de-pooling. However, this decision does not find adoption of the three "dairy farmer for other market" proposals—Proposals 4, 5 and 8—reasonable because they would make it

[1] Official notice is taken of data and information published in Market Administrator Bulletins as posted on individual Market Administrator Web sites.

needlessly difficult for milk to be re-pooled and because their adoption may disrupt prevailing marketing channels or cause the inefficient movement of milk. Likewise, Proposal 6, which suggests restricting pooling in a month to 115 percent of the prior month's volume pooled by the handler, is not recommended for adoption. Adoption of this proposal would disrupt current marketing conditions beyond what the record justifies. Therefore, this decision recommends adoption of Proposal 7 to limit the pooling of milk by a handler during the months of April through February to 115 percent of the total milk receipts the handler pooled in the prior month and to 120 percent of the prior month's pooled volume during March because it provides the most reasonable measure to deter the practice of de-pooling.

Consideration was given to omitting a recommended decision on the issue of de-pooling. The record does not support a conclusion that adoption of measures to deter de-pooling warrant emergency action. The recommended adoption of provisions to limit the volume of milk that can be pooled during the month on the basis of what was pooled in the preceding month warrants public comments before a final decision is issued.

B. Producer Definition

A proposal published in the hearing notice as Proposal 3, seeking to specify the length of time a dairy farmer may lose Grade A status before losing producer status on the order, is not recommended for adoption. Proposal 3, offered by Dean, seeks to amend the *Producer milk* definition by explicitly stating that a dairy farmer may lose Grade A status for up to 21 calendar days per year before needing to requalify as a producer on the order. The Mideast order does not specify the length of time a dairy farmer may lose Grade A status before needing to requalify as a producer on the order.

Two witnesses appearing on behalf of Dean testified in support of Proposal 3. The Dean witnesses supported adoption of Proposal 3 to provide for 21 days in a year that a producer could lose Grade A approval before needing to reassociate with the Mideast order by making a delivering to a Mideast pool plant. By providing for an exact number of days, the witnesses emphasized, a loss of Grade A status could not be used as a method to de-pool or to circumvent the pooling standards. The witnesses believed that the Market Administrator should be granted the authority to extend the length of time a producer could lose Grade A status before they would have to requalify if the loss of status was due to circumstances beyond the producers control. A post-hearing brief submitted on behalf of Dean reiterated their belief that this change was necessary to ensure that the re-pooling standards would not be circumvented.

The *Producer* definition of the Mideast order currently does not define the length of time a producer may lose Grade A status before needing to requalify for producer status on the order. The issue of qualifying for producer status is important since it determines which producers and which producer milk is entitled to share in the revenues arising from the marketwide pooling of milk on the Mideast order.

The definition of "temporary" used by the Market Administrator has accommodated the Mideast market by giving producers a reasonable amount of time to regain Grade A status without burdening the market with excessive touch-base shipments or recordkeeping requirements. Limiting the time period a producer can lose Grade A status would require handlers and the Market Administrator to track the producer's loss of Grade A status throughout the year to determine when the 21 day limit is reached.

This decision finds that the additional touch-base shipments that would be required for a dairy farmer to requalify for producer status on the order would cause uneconomic shipments of milk. Additionally, the increased recordkeeping requirements would burden not only the handlers but also the Market Administrator's office without contributing to the goals and application of the proposed amendments to the pooling standards contained in this decision. Accordingly, Proposal 3 is not recommended for adoption.

2. Transportation Credits

A proposal offered by DFA and published in the hearing notice as Proposal 9 and as modified at the hearing, seeking to establish a transportation credit provision is not recommended for adoption. Proposal 9 seeks to establish a year-round transportation credit on shipments of milk from farms to distributing plants at a rate of $0.0031 per cwt per mile. A separate rate of $0.0024 per cwt per mile for eligible milk movements in the State of Michigan was offered as a modification by MMPA. The credit would not be applicable on the first 75 miles of movement and would be limited to 350 miles. The Mideast order does not currently provide for transportation credits.

A witness appearing on behalf of DFA/MMPA testified that the establishment of a transportation credit in the Mideast order is warranted because the cost of supplying the Class I market is not being equitably borne by all pooled producers. The witness testified that all producers benefit from Class I sales because the revenue generated is distributed through the marketwide pool. In particular, the witness said that all pooled producers were not equitably sharing in the costs of transporting supplemental supplies to meet Class I demand. The witness was of the opinion that Federal order prices should reimburse producers for the cost of transporting milk supplies to Class I plants when needed. The witness emphasized that Proposal 9 is designed to equitably distribute some the cost of transporting those Class I milk supplies with all pooled producers.

The DFA/MMPA witness explained that the proposed exemption of the first 75 miles of eligible milk movement recognizes the producer's responsibility to deliver their milk to the market. The 75 mile exclusion was appropriate, the witness contended, because in the two northern reserve supply regions of Michigan and northern Ohio, the average distance milk travels to a distributing plant is 71 and 74 miles, respectively. The witness also said that a maximum applicable milk movement of 350 miles is a reasonable safeguard to prevent milk from traveling from great distances solely to receive the transportation credit. The DFA/MMPA witness also noted that the Market Administrator should be given the discretion to adjust the transportation credit rate if market conditions warrant. The witness asserted that the market's blend price would be reduced by approximately $0.0297 per cwt per month if Proposal 9 was adopted. The witness maintained that a small reduction in the blend price received by farmers to cover a transportation credit was justified because of the benefit they would receive from having Class I plants fully supplied.

The DFA/MMPA witness contended that the northern region of the Mideast marketing area is a milk surplus region while the southern portion of the marketing area is usually a milk deficit region. The witness said that often surplus milk from the northern region of the marketing area must be transported long distances to supply the southern region for Class I use. Before Federal order reform, the witness asserted, the pricing structure of the Federal order program provided location adjustments that encouraged milk to move to Class I plants because the difference in the

Class I differentials between the surplus and deficit areas provided producers sufficient reimbursement for the transportation costs incurred. However, the witness stressed, the Mideast order's current Class I differential values between surplus and deficit areas do not provide sufficient incentive to encourage this north to south movement of milk.

According to the DFA/MMPA witness, the cost to move a load of milk within the Mideast marketing area from a $1.80 Class I differential zone to a $2.20 Class I differential zone is $0.66 per cwt. However, the order's Class I differential's only provided a $0.40 per cwt incentive to transport that milk. The result, said the witness, is that Class I handlers have to pay additional money to fulfill their Class I needs although all pooled producers benefit from the higher returns generated from those Class I sales. The witness maintained that Federal order prices should cover all transportation costs for supplemental milk supplies and stressed that the proposed transportation credit only seeks to recoup 66 percent of that cost.

The DFA/MMPA witness provided over-order premium and cost information experienced by DFA when delivering supplemental milk supplies. The witness said that the average over-order premium charged for supplemental milk in 2004 was $1.72 per cwt. The witness explained that after subtracting out various customer credits, transportation costs, zone adjustments and give up charges, the net return, on average, was $0.71 per cwt to pay producers and cover the operating costs of the cooperative. The witness discussed the marketing decisions of DFA for October 2004, a month when supplemental supplies are historically needed. The witness said that in October 2004 DFA purchased over 21 million pounds of supplemental milk for delivery to distributing plants in the Mideast marketing area. After subtracting costs from the over-order premium, there was an average of $0.45 per cwt to pay producers and cover operating costs. The witness estimated that if Proposal 9 had been in place during October 2004, DFA would have received an $0.08 per cwt transportation credit on its supplemental supplies of Class I milk.

A post-hearing brief submitted on behalf of DFA/MMPA reiterated their position that transportation credits for the Mideast order are appropriate to ensure that all pooled producers will more equitably bear some costs in servicing the Class I market. The brief also argued that Proposal 9, as modified at the hearing, contained appropriate mileage limits to safeguard against handlers seeking to pool milk on the order solely for the purpose of receiving the credit.

The DFA/MMPA brief contended that the Mideast marketing area lacks sufficient supplemental supplies within the marketing area to service the Class I needs of the market. The brief reiterated that DFA/MMPA members are currently bearing a disproportionate share of the cost of supplying the Class I market because they have to transport milk long distances but are not reimbursed for the additional transportation costs incurred. The brief reiterated that while there are reserve supplies of milk in northern regions of the marketing area that could be delivered to the deficit southern regions, the Class I differential does not sufficiently reimburse the additional transportation cost.

A witness appearing on behalf of Foremost Farms USA Cooperative (Foremost) and Alto Dairy Cooperative (Alto) testified in support of establishing a transportation credit provision. Hereinafter, this decision will refer to these entities as ''Foremost, *et al.*'' Foremost, *et al.*, are dairy farmer owned cooperatives that market milk and supply distributing plants in the Mideast marketing area. The witness was of the opinion that a transportation credit on producer milk delivered to distributing plants was warranted because of the high cost of servicing Class I plants in the Mideast marketing area. The witness explained that on average, the distance from farms to distributing plants in the Mideast marketing area is longer than the distance between farms and manufacturing plants. Therefore, the witness was of the opinion that since producers pay the transportation cost for their milk, a producer delivering to a distributing plant will always receive a lower price for their milk because their transportation costs will be greater.

The Foremost, *et al.*, witness also offered a modification to Proposal 9 that the proposed transportation credit should apply to milk transfers from pool supply plants to pool distributing plants. The witness testified that from 2002 through 2004, Foremost delivered approximately 20 million pounds of milk from their pool supply plants to pool distributing plants during the months of August through November. However, the witness said, under the provision as proposed by DFA/MMPA, these milk transfers would not have received the transportation credit. The witness noted that the Upper Midwest order provides for transportation and assembly credits for milk transferred from supply plants to distributing plants and that a transportation credit provision for the Mideast order should also be applicable for plant-to-plant milk movements.

The Foremost, *et al.*, witness explained that the Mideast Milk Marketing Agency (MEMMA), of which Foremost is a member, markets the milk of is members and charges Class I handlers an over-order premium for milk delivered to their plants. The premium charges are negotiated between MEMMA and the individual distributing plants, the witness explained. The witness was of the opinion that to remain competitive with other suppliers and for their customers to remain competitive in the market, MEMMA cannot increase their over-order premiums to a rate that would compensate the costs of moving milk as would a transportation credit.

A post-hearing brief submitted on behalf of Foremost, *et al.,* maintained their support of Proposal 9 with their modification to include plant-to-plant milk movements as eligible for a transportation credit. The brief contended including credits for plant-to-plant transfers is appropriate because, in their opinion, all Class I milk shipments to distributing plants should be eligible for a transportation credit.

A witness appearing on behalf of Michigan Milk Producers Association (MMPA) testified in support of establishing a transportation credit for Class I milk with a modification. The witness proposed that a lower rate be applicable for milk movements within the State of Michigan.

According to the MMPA witness, trucks used to haul milk within the State of Michigan are often larger because of higher gross weight limits allowed by the State. Typically, a trailer that can hold up to 90,000 pounds of milk, results in transportation costs of approximately $0.0036 per loaded mile, the witness noted. However, in keeping with testimony offered by DFA/MMPA for partial reimbursement of transportation cost, the witness said, Michigan distributing plants receiving milk from Michigan farms should receive a lower credit rate of $0.0024 per loaded mile. Otherwise, the witness said, Michigan handlers would recoup more than 67 percent of their actual transportation cost. The witness was of the opinion that the gain to producers from having all Class I needs satisfied outweighed the small reduction that a transportation credit would have on the blend price.

The MMPA witness testified that the Producer Equalization Committee (PEC), which was identified as the over-order

pricing agency in Michigan, charges an over-order premium for Class I and II milk. According to the witness, these premiums over the previous 2 years have ranged from $1.40 to $1.65 per cwt. The witness explained that PEC pools its over-order revenue and equitably distributes it among participating producers. According to the witness, individual producers who incurred higher transportation costs for shipping milk a long distance will sometimes receive a larger share of the over-order revenue.

The MMPA witness testified in opposition to the Foremost, *et al.,* modification to provide transportation credits on plant-to-plant milk movements. The witness argued that transportation credits should be used to promote efficient movements of milk and that shipping milk directly from farms to distributing plants in the Mideast marketing area is the most efficient movement. The witness was of the opinion that data provided by the Market Administrator demonstrated that there are adequate reserve supplies located within reasonable distances for farm-to-distributing plant deliveries. The witness asserted that providing a transportation credit on milk transfers between plants would encourage milk to be pooled from plant locations far from the marketing area and would inappropriately qualify producers—who would not be reliable suppliers of milk for the Class I needs of the Mideast market—to be pooled on the order. A post-hearing brief submitted on behalf of MMPA reiterated their support for establishing a transportation credit for Class I milk as they modified it during the hearing and opposition to including milk delivered from pool supply plants to pool distributing plants.

A brief submitted on behalf of Dean expressed support for adopting a transportation credit provision with a modification. The brief said that providing a transportation credit to reimburse the cost of supplying the Class I market is appropriate, but expressed concern with exempting the proposed first 75 miles of milk movement from receiving the credit. Dean believed that such an exemption discriminates against local farmers that supply Class I plants.

The Dean brief also asserted that if producer milk receives a transportation credit for supplying the Class I market, milk from that same farm should not be permitted to divert to a plant that is located outside the Mideast marketing area. The brief explained that milk diverted to plants outside the marketing area should be viewed as ‘‘dairy farmer for other markets’’ milk. While Dean acknowledged that such treatment of out-of-area diverted milk is a major change to Proposal 9, their brief nevertheless proposed that for milk diverted to out-of-area plants from the same farm that milk receives a transportation credit, such milk should not count as shipments for the purpose of meeting the order's touch-base standard.

Seven dairy farmers whose milk is pooled on the Mideast order testified in support of establishing a transportation credit for Class I milk. Five of the dairy farmers were members of cooperatives and two were independent dairy farmers. The dairy farmers were of the opinion that the entire market should bear the costs associated with serving the Mideast Class I market, not solely the cooperatives that provide supplemental supplies to the order's distributing plants.

A witness appearing on behalf of OFU testified in opposition to adopting transportation credits. The witness said that a transportation credit would discourage the use of local milk to supply Mideast order pool plants.

A witness appearing on behalf of Prairie Farms testified in opposition to adopting transportation credits for Class I milk. The witness said that the modified transportation credit proposals would provide no benefit to Prairie Farms members who supply distributing plants because most of their producers are located less than 75 miles from the plant. The witness contended that transportation credits in the Mideast order would lead to inefficient milk movements for the sole purpose of receiving a credit.

A witness appearing on behalf of Smith Dairies testified in opposition to adopting transportation credits for Class I milk. The witness was of the opinion that providing a transportation credit would reduce the blend price paid to pooled producers who consistently supply distributing plants. The witness stressed that handlers who have supply agreements with distributing plants should account for their transportation costs of supplemental supplies and not ask the government for regulatory relief. The witness also asserted that the handler's business model should account for all transportation costs of milk from the farm to the retail customer. The witness was of the opinion that transportation credits could give a competitive advantage to those handlers that receive the credit. The witness said that when Smith Dairies purchases supplemental supplies, the price negotiated for the supplemental supplies does cover transportation costs and a transportation credit would be additional reimbursement.

A brief submitted on behalf of Continental expressed opposition to the transportation credit provision. Continental believed that adopting Proposal 9 would only benefit the proponents of the proposal and would reduce the blend price paid to close-in producers who supply a distributing plant. The brief stated that Continental's major concern was that the credit would be paid by the handlers with no guarantee that the credit would be transferred to a non-cooperative producer who incurred hauling costs. Continental was of the opinion that adoption of the proposal could pressure non-members into joining a cooperative and thereby limit producer choices as to where they can market their milk.

The Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders to contain provisions for making payments to handlers for performing services that are of marketwide benefit. In this context, a marketwide service payment is a charge to all producers whose milk is pooled on the order, regardless of the use classification of such milk. The payment, in the form of a credit, is deducted from the total value of all milk pooled before computing the order's blend price. The AMAA identifies services that may be of marketwide benefit to include, but are not limited to: (1) Providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers; (2) handling on specific days quantities of milk that exceed quantities needed by handlers; and (3) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

Proposal 9, as proposed and modified by DFA/MMPA seeks to establish a transportation credit as a marketwide service payment for milk shipped directly from dairy farms to distributing plants. The credit would only be applicable to milk classified as Class I and would be paid at a rate of $0.0031 per cwt per mile. The credit would not apply to the first 75 miles of applicable milk movements because this is the typical distance milk moves from farm to distributing plants in the marketing area. Receipt of the credit would be limited to not more than 350 miles because the Class I needs of the marketing area are satisfied without the need to reach further for a supply. In

light of testimony that higher gross vehicle weight limits are provided in the State of Michigan, MMPA proposed a modification to establish a separate and lower transportation credit rate of $0.0024 per cwt per mile for intra-state milk movements from farms to distributing plants in the State of Michigan. Foremost, *et al.,* sought to expand the adoption of transportation credits for milk transfers between supply plants and distributing plants because milk transferred from supply plants, like direct-shipped milk, also serves the Class I market and should therefore be eligible for a transportation credit. This modification was not supported by DFA or MMPA, the proponents of Proposal 9.

An example of a Federal milk marketing order that currently provides for a marketwide service payment is the transportation and assembly credits employed in the Upper Midwest milk marketing order. The transportation and assembly credit provisions of the Chicago Regional order were carried into the provisions of the current Upper Midwest order as part of Federal order reform. The transportation credit feature of the provision provides transporting handlers with a credit of $0.028 per cwt per mile for milk transfers from pool supply plants to pool distributing plants. The credit is deducted from the total value of all milk pooled on the order. Because the transportation credit reduces the total dollar value of the milk pooled, it results in a lower blend price paid to all producers.

These provisions were first implemented in 1987 to ensure that the costs of serving the Class I market of the Chicago Regional marketing area were more equitably shared among all market participants that benefited from the additional revenue generated from Class I sales. Because of the very liberal pooling standards of the Upper Midwest order, much of the milk is pooled through the diversion process by having delivered one day's production to a pool plant. Since such milk is then pooled on a continuing basis, it is considered equitable that such milk bears some of the cost of supplying the Class I market on a continual basis. The credit was maintained in the larger consolidated Upper Midwest order for the same reasons. The transportation credit, as proposed and modified by proponents in this proceeding, differs from the transportation credit provision of the Upper Midwest order. The principal difference is that as proposed, the credit would be paid to the receiving handler for milk delivered direct from farms to distributing plants.

The dairy-farmer cooperative proponents argue that in their capacity as producers they are bearing an inequitable share of the cost of supplying the supplemental needs of the marketing area's Class I market. In this regard, they assert that while all pooled producers are benefiting from Class I sales in the market, cooperative member producers supply a greater percentage of supplemental milk to Class I plants, and thus conclude that they are inequitably bearing the cost of providing supplemental supplies during certain times of the year.

The cooperative witnesses contend that when independently supplied distributing plants need supplemental supplies, such supplemental supplies are acquired from cooperatives. However, the cooperatives over-order premiums have been determined well before the start of the months when supplemental milk supplies are needed without adjusting for the generally farther distance any given particular load of milk must be transported. Even though proponents seek transportation credits year-round, the evidence reveals that it is the additional cost burden they bear providing supplemental milk supplies in the fall months, using October 2004 as a representative month, which Proposal 9 seeks to address. The basis of the argument advanced by the proponents was that without a transportation credit, meaningful cost recovery is not otherwise obtainable from receiving handlers. The record evidence does not support concluding that this burden is experienced in every month of the year.

The proponent cooperatives also asserted that the Class I differentials of the Mideast marketing area do not offer sufficient incentive to attract Class I milk to distributing plants in certain portions of the Mideast area. This failure, the proponent cooperatives say, places them as Class I suppliers at a competitive disadvantage relative to other Class I suppliers who are not supplying supplemental needs. The cooperatives proposed the establishment of a transportation credit provision as a means of offsetting a portion of the total additional cost of supplying Class I plants that the Class I differentials do not adequately compensate.

The proponents noted that the structure of the Mideast market, namely plant consolidation, diminished milk supplies in certain areas and transportation costs have increased since the Class I differentials were implemented in 2000. Amending the Class I differentials to more equitably reimburse Class I suppliers for transportation costs was another option considered but rejected by the proponents. They were of the opinion that changing the Class I price surface would have been very difficult and concluded that providing for transportation credits would be a satisfactory alternative to pricing problems. Proponents estimated that the impact of the proposed transportation credit on the Mideast order blend price per month, if adopted, would be a reduction of approximately $0.0297 per cwt.

This decision finds that the record of this proceeding does not support the adoption of a transportation credit provision in the Mideast marketing area. The proponents requested a year-round transportation credit for Class I milk deliveries but did not offer sufficient evidence to justify establishment of the credit. Evidence presented at the hearing for the volume and cost of milk deliveries was limited to the fall month of October 2004. Testimony offered in support of the establishment of a transportation credit spoke primarily of the need for partial cost recovery for the transportation of supplemental supplies in the fall months. Because the record contains no data for other months it is difficult to determine to what extent distant milk is moving to the Mideast market as supplemental supplies. Additionally, it is not possible to determine what portion of the distant supplies revealed in the October data are displacing local milk at distributing plants for producer qualification purposes only.

The proponents did provide average cost and revenue data regarding supplemental milk supplies for 2004. The DFA witness testimony compared average milk procurement costs for October 2004 with average annual procurement costs. The two largest changes in procurement costs during the month of October, when compared to the annual average, were for ''give-up charges'' and for ''supplemental hauling costs.'' If the annual average procurement costs are adjusted to remove the impact of supplemental procurement costs calculated for August through November, it is estimated that supplemental hauling costs increased $0.27 and give-up charges increased $0.22 on average in the fall when compared to the average cost as extrapolated for the remainder of the year. This analysis concludes that the give-up charges are a major portion of the costs associated with the supplemental supply. This may indicate that the performance standards for the order are too low. It should be noted that the diversion limits were reduced

and the supply plant shipping standards were increased on an interim emergency basis as a result of this proceeding.

Due to the lack of data detailing the total cost of procuring supplemental supplies of milk and an estimate of the annual revenue generated by the transportation credit, no finding can be made that Proposal 9 should be adopted. Of particular concern is the possibility that the credit could be applicable to current and customary supply arrangements. This would result in a producer financed hauling subsidy on a year-round basis that is not related to any supplemental supplies or marketwide services.

Additionally, it is unclear why government intervention is needed to essentially require producers to supplement the milk procurement costs of handlers located in milk deficit sections of the marketing area. Such a transportation credit would disadvantage handlers located in non-deficit regions of the marketing area that wish to distribute packaged milk products in the deficit regions. The full cost of transporting packaged Class I milk into the deficit regions would be borne by the distributing handler but the cost of transporting bulk milk into the deficit region for subsequent processing would be partially funded by all producers through the transportation credit. The proponent's testimony throughout the proceeding stressed that they are unable to recoup their transportation costs from the marketplace. However, the evidence does not support these assertions. Both DFA and MMPA witnesses revealed that they are able to charge Class I handlers adequate over-order premiums to cover their transportation costs. The proponents asserted that these transportation costs should instead be recouped through marketwide pooling so that they can return a greater portion of the over-order premium to their members. The additional transportation cost of supplemental milk supplies is recovered from handlers who benefit by having such milk made available to satisfy demands.

Cooperatives who deliver supplemental supplies to distributing plants are providing those handlers with the benefit of a supply to meet their demands. However, in return the cooperative receives the benefit of an over-order premium to cover any additional costs it may incur and, if possible, return a higher price to its members. The cooperative also benefits in that these supplemental deliveries are used to satisfy the cooperative's long-term performance standards. It is not reasonable to lower the blend prices received by all dairy farmers when transportation costs are adequately recovered from the Class I handler who needs the milk to meet demands.

This recommended decision finds that government intervention through the adoption of the proposed year-round transportation credit provision is not warranted. The record of this proceeding does not reveal that there are additional costs that cannot be recouped in the marketplace without such intervention.

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 Mideast order was first issued and when it was 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 agreement and the order, 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 marketing area, and the minimum prices specified in the tentative marketing agreement and the order, 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 agreement and the order, 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, the marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Mideast marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1033

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR part 1033, is proposed to be amended as follows:

PART 1033—MILK IN THE MIDEAST MARKETING AREA

1. The authority citation for 7 CFR part 1033 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 1033.13 is amended by revising paragraph (e), to read as follows:

§ 1033.13 Producer milk.

* * * * *

(e) Producer milk of a handler shall not exceed the limits as established in § 1033.13(e)(1) through § 1033.13(e)(3).

(1) Producer milk for the months of April through February may not exceed 115 percent of the producer milk receipts of the prior month. Producer milk for March may not exceed 120 percent of producer receipts of the prior month; plus

(2) Milk shipped to and physically received at pool distributing plants and allocated to Class I use in excess of the volume allocated to Class I in the prior month; plus

(3) If a producer did not have any milk delivered to any plant as other than producer milk as defined under the order in this part or any other Federal milk order for the preceding three months; and the producer had milk qualified as producer milk on any other Federal order in the previous month, add the lesser of the following:

(i) Any positive difference of the volume of milk qualified as producer milk on any other Federal order in the previous month, less the volume of milk qualified as producer milk on any other Federal order in the current month, or

(ii) Any positive difference of the volume of milk qualified as producer milk under the order in this part in the current month less the volume of milk qualified as producer milk under the order in this part in the previous month.

(4) Milk received at pool plants in excess of these limits shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b). Milk diverted to nonpool plants reported in excess of this limit shall not be producer milk. The handler must designate, by producer pick-up, which milk shall not be producer milk. If the handler fails to provide this information the provisions of § 1033.13(d)(6) shall apply.

(5) The market administrator may waive these limitations:

(i) For a new handler on the order, subject to the provisions of § 1033.13(e)(6), or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(6) Milk may not be considered producer milk if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph.

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 06–1586 Filed 2–21–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23948; Directorate Identifier 2005–NM–246–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319–100 and A320–200 Series Airplanes; and A320–111 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Model A319–100 and A320–200 series airplanes; and A320–111 airplanes. This proposed AD would require modifying the wiring to the fuel pump control of the center fuel tank. This proposed AD results from reports that the low-pressure warning for the fuel pumps of the center fuel tank has come on in flight. We are proposing this AD to ensure that the fuel pumps do not run while dry, which could result in a potential ignition source inside the center fuel tank which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by March 24, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''FAA–2006–23948; Directorate Identifier 2005–NM–246–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (67 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (*i.e.,* type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The