



United States Department of Agriculture

Office of the Chief Economist  
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JUL 15 2005

Ms. Deborah A. Garza  
Antitrust Modernization Commission  
1120 G. St. NW, Suite 810  
Washington, DC 20005

Dear Ms. Garza,

This is the comment of the United States Department of Agriculture (USDA) to the Antitrust Modernization Commission's Request for Public Comment, 70 Fed. Reg. 28902, 28905 (May 19, 2005).<sup>1</sup> The comment is specifically directed to Topic V.A.1.b, c, and d, and to the first three exemptions listed in Topic V.A.2: (1) the Capper-Volstead Act at 7 U.S.C. 291-92; (2) the nonprofit agricultural cooperative exemption of the Clayton Act Section 6 at 15 U.S.C. 17; and (3) the Agricultural Marketing Agreement Act at 7 U.S.C. 608b and 608c (collectively "agriculture exemptions"). These three areas are of special interest to the Secretary of Agriculture because USDA is entrusted with oversight over the programs to which these three antitrust immunities and exemptions apply.

USDA requests that the Commission allow it to comment on the findings of the Commission before the submission of the Commission's report to the President because of the importance of these issues to USDA's administration of the statutes identified above.

USDA will not address every question presented by the panel in Topic V, but will instead focus on those areas in which USDA has oversight. These comments are submitted by me on behalf of USDA's Capper-Volstead Committee, which is delegated by the Secretary of Agriculture to carry out USDA's responsibilities under the Capper-Volstead Act. The contact person for this comment is Mary Hobbie, Assistant General Counsel, Trade Practices Division, Office of the General Counsel United States Department of Agriculture, 14<sup>th</sup> and Independence Ave S.W., Washington, DC 20250-1400, Phone: (202)720-5293, Fax: (202)690-1593, Email: [Mary.Hobbie@usda.gov](mailto:Mary.Hobbie@usda.gov).

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<sup>1</sup>USDA Under Secretary for Farm and Foreign Agriculture Services, J.B. Penn, has submitted separately to the Antitrust Modernization Commission a comment concerning the Export Trading Act of 1982 and the Webb Pomerene Act of 1918. Letter from J.B. Penn, Under Secretary for Farm and Foreign Agriculture Services, to Deborah A. Garza, Antitrust Modernization Commission (May 19, 2005), [http://www.amc.gov/comments/USDA\\_Public\\_Comment1.pdf](http://www.amc.gov/comments/USDA_Public_Comment1.pdf).

## Summary of Comment

Section I will address whether Congress should analyze agriculture exemptions in a unique way. The factors which make agricultural production different from other industries include: the variety and number of producers, the unpredictability of agricultural conditions, and the lack of production flexibility. USDA supports an analysis of agriculture exemptions that reflects Congress' public policy goals and the unique characteristics of the agricultural industry.

Section II will address whether agriculture exemptions should be subject to a "sunset" provision. Congress has emphasized the public policies of independence and economic stability for farmers and producers. The establishment of "sunset" provisions for agriculture exemptions would harm this policy goal by creating economic uncertainties.

Section III will address whether the proponents of agriculture exemptions should bear a burden to show that benefits exceed costs. This burden is unnecessary.

Section IV will address the exemptions of the Capper-Volstead Act and Section 6 of the Clayton Act. USDA supports continuation of the exemptions for cooperatives. The benefit cooperative members receive is little more than that of corporate stockholders.

Section V will address the Agricultural Marketing Agreement Act (AMAA) exemption. USDA supports the continuation of the exemption for marketing agreements and orders. The AMAA accomplishes its policy goals of stabilizing prices and supply, providing for uniform quality, and supporting research and product promotion.

### Section I. "Cost/Benefit" and the Analysis of Agriculture Exemptions

The costs and benefits of agriculture exemptions are unlikely to be capable of proof by "generally applicable methodologies" because the public policy goal for which the exemptions exist is not primarily that of perfect competition. USDA believes that an economic "cost/benefit" analysis will not provide insight into the usefulness or benefit of the antitrust exemptions that are in place in agriculture. Production and marketing of agricultural products are recognized as unique, in law, in economics, in public policy, and in the national economy. As this Commission evaluates agriculture exemptions, it needs to consider these characteristics that make agriculture a unique industry:

1. No manufacturing plant would run its assembly line without firm demand information, yet agricultural producers must make major production decisions, such as planting and fertilizer application, long before they can obtain accurate demand information.
2. What a farmer plans or desires to produce may vary widely from actual production because of weather, disease, insect, and biological uncertainties.
3. Farm production units are dispersed and independent.
4. The farming process is not a flexible one. Long biological lags mean that once farmers have committed themselves to a crop or herd, they cannot simply change that commitment to meet a varying demand.

5. At the end of the production process, each producer has a fixed amount of product on hand that must be sold regardless of market response to the total product available from all producers. Many agricultural products are perishable, and producers have little opportunity to delay sales, regardless of the price offered.

6. Capital invested in agricultural production cannot be transferred easily to alternative production processes. Further, capital invested to produce one commodity cannot readily be transferred to another.

7. Market power in purchase price and retail price is concentrated in the limited number of intermediaries between the ultimate consumers and the farmer.

All of these characteristics combine in a complex manner that makes it difficult for producers to consistently market their production on a profitable basis. Agriculture exemptions deal specifically with these problems inherent in agricultural production.

The benefits of agriculture exemptions are discussed with reference to each specific exemption in Sections IV.-V. of this comment.

## **Section II. Whether Agriculture Exemptions Should Be Subject to “Sunset” Provisions**

### **a. Inappropriate to “Sunset” Exemptions in the Capper-Volstead Act and Section 6 of the Clayton Act**

The Capper-Volstead Act and Section 6 of the Clayton Act ensure that agricultural marketing cooperatives are able to exist without fear of prosecution due to the cooperative form.<sup>2</sup> As the Supreme Court said in *Maryland and Virginia Milk Producers Association v. United States*,<sup>3</sup> “We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage -- and responsibility -- available to businessmen acting through corporations as entities.”<sup>4</sup>

By comparison, policy makers would not consider subjecting corporations to “sunset.” To subject corporations to the possibility of dissolution after a number of years, merely because they are corporations, would greatly impair public investment in corporations. Likewise, to submit cooperatives to the constant threat of “sunset” through elimination of their limited antitrust immunity would result in the de-stabilization of cooperatives. Subjecting cooperative antitrust exemptions to regular “sunset” review would eliminate the stability that the Capper-Volstead Act and Section 6 of the Clayton Act provide to the cooperative form.

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<sup>2</sup>See *infra* Section IV.

<sup>3</sup>362 U.S. 458 (1960).

<sup>4</sup>*Id.* at 466.

## **b. Inappropriate to “Sunset” the Exemption in the Agricultural Marketing Agreement Act**

Similarly, the Congressional goal in creating the AMAA was to stabilize market conditions.<sup>5</sup> A “sunset” provision that limited the exemption to a certain period of years would have a detrimental effect on the economic viability of agricultural producers. A “sunset” would defeat the stabilizing effect of marketing agreements and orders, and discourage producers from negotiating marketing agreements.

Further, any “sunset” of the marketing agreement and order exemptions provided by the AMAA is unnecessary because the AMAA requires USDA to terminate programs that no longer comply with statutory objectives. USDA has terminated a number of marketing orders on this basis. Further, pursuant to section 610 of the Regulatory Flexibility Act, USDA reviews selected marketing orders on a periodic basis.<sup>6</sup>

### **Section III. Whether Congress Should Require Proponents of an Exemption to Carry a Burden of Proof Regarding Benefits**

Requiring farmers to carry a burden of proof regarding the cost efficiencies of their antitrust exemption would not aid in determining the effectiveness of agriculture exemptions. These statutes promote the Congressional policy goals of group action by farmers, improvement of product quality and uniformity, protection of farmers against abuses of market power, and provision of stable prices. Congress has consistently reviewed and verified these policy goals.

In the decision-making process, burdens of proof establish policy preferences for achieving specific results. The burden suggested in the Commission's question implies a policy preference toward eliminating these valuable exemptions regardless of their actual effectiveness in reaching Congressional public policy goals. The policies embodied in agriculture exemptions are intended to benefit farmers. The purpose of these policies is to prevent agricultural production from concentrating under corporate ownership and encourage broadly dispersed and independently owned farms. Congress has singled out farmers to receive the economic benefits of collective action which would otherwise be a violation of antitrust laws. Congress is quite capable of determining whether this public policy benefit is worth the cost without the imposition of an artificial burden of proof on those whom Congress intends to benefit.

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<sup>5</sup>See *infra* Section V.

<sup>6</sup>See *id.*

## **Section IV: The Capper-Volstead Act and the Nonprofit Exemption Provided by Section 6 of the Clayton Act**

### **a. Support for Cooperative Exemptions**

The Capper-Volstead Act, enacted in 1922 and unchanged since enactment, permits agricultural producers to join together to process, prepare for market, handle, and market their farm products on a cooperative basis. The use of marketing agencies in common is also permitted as a means to carry out these legitimate functions.

Section 6 of the Clayton Act protects agricultural producers who join together on a “nonprofit” basis. As the Capper-Volstead Act is broader than the Clayton Act, most of this comment will be directed at the Capper-Volstead Act.

USDA supports the Capper-Volstead Act and the nonprofit agricultural cooperative exemption provided by 15 U.S.C. 17 as vital to the development of cooperatives and farmer oriented policy. The cooperative is a key ingredient in American farm policy that strengthens market access for farmers. Further, cooperatives help improve rural life through a democratization of production, and they provide leadership development and education to their members.<sup>7</sup>

### **b. The Cooperative Exemption is Carefully Drawn, and Strictly Limited**

Cooperatives are voluntary organizations. To qualify for the limited protection accorded associations of producers, they must be owned and operated by farmers who sell through them.<sup>8</sup> They must be operated for the mutual benefit of the members as producers. They must either vote on a purely democratic basis (one vote per member) or limit returns on stock and membership capital to 8 percent per year. They are limited in the amount of product they can market for nonmembers.

In addition to these restrictions, once a cooperative is formed, it is limited in its business activities in much the same way as noncooperative businesses:

1. The Capper-Volstead exemption is lost if the cooperative's membership includes persons who are not producers engaged in agricultural production.
2. Where cooperatives combine or conspire with noncooperatives or persons other than producers to monopolize or restrain trade, these anticompetitive activities are subject to the

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<sup>7</sup>RURAL BUS. COOPERATIVE SERV., UNITED STATES DEPT. OF AGRIC., AGRICULTURAL COOPERATIVES IN THE 21<sup>ST</sup> CENTURY v (2002).

<sup>8</sup>Federated cooperatives (cooperatives that have cooperatives as members) receive Capper-Volstead protection from antitrust law if the cooperative members of the federated cooperative would also receive Capper-Volstead protection. In other words, no non-producer may be a member of a Capper-Volstead cooperative, even when the non-producer is organized as a cooperative.

antitrust laws.

3. Cooperatives which engage in predatory, unfair or coercive conduct in order to restrain trade and commerce are subject to action under the Sherman Act.

4. Cooperatives are prohibited from conduct that monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced.

The rules of our national antitrust policy apply to cooperatives just as they do to any other business. The exemptions, such as purely inter-cooperative mergers and coordination through marketing agencies in common, do not come from arbitrary treatment of cooperatives. Instead, they are logical results of the basic idea of a farmer's cooperative: that farmers themselves must be able to coordinate their efforts without giving up their individuality as producers.

### **c. The Benefits of the Cooperative Exemptions**

Among the benefits mentioned in the legislative history of the Capper-Volstead Act are: giving farmers equal right to bargain on price as corporations,<sup>9</sup> creating a civic force that protects farming communities,<sup>10</sup> creating effective farmer-oriented production management,<sup>11</sup> and providing a higher percentage of the profit directly to the producer rather than an intermediary.<sup>12</sup>

Congress provided a limited antitrust exemption to agricultural producers because of the unique nature of agricultural production and the individual producer's lack of market power in negotiation with substantially larger processors and distributors. In the globalizing economy, farmers compete with producers from increasingly more distant countries. And, as ever growing processors and retailers increase their food marketing power, the market strength of even the largest farmers continues to pale in comparison to that of the firms buying agricultural products.

Note that one purported "cost" of the Capper-Volstead Act, that it encourages large cooperatives, should not determine the Act's value. At the time of the enactment of the Capper-Volstead Act, there were at least three large agricultural cooperatives that remain vital today: the California Fruit Growers Exchange (Sunkist) which marketed 72.5 percent of California's citrus in 1922, the California Associated Raisin Company (Sun-Maid) which marketed approximately 86 percent of the national share of raisins in 1922, and the Minnesota Cooperative Creamery Association (Land O' Lakes) which had half of Minnesota's cooperative creameries as members

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<sup>9</sup>H.R. REP. 66-939 (1920) *reprinted at* 59 Cong. Rec. 8033; 61 CONG. REC. 1033 (1921) (statements of Rep. Volstead).

<sup>10</sup>61 CONG. REC. 1043 (1921) (statement of Rep. Hersey)

<sup>11</sup>*Id.*

<sup>12</sup>*See* 62 CONG. REC. 2048-49 (1922) (statement of Sen. Kellog.)

in 1921.<sup>13</sup> Other large cooperatives that were present in 1920 included the Wisconsin Cheese Producer's Federation, the Dairyman's League, and the American Cranberry Exchange.<sup>14</sup> The legislators were well aware of the potential size that cooperatives could develop,<sup>15</sup> but determined that the Capper-Volstead Act was both sufficiently narrow and had sufficient administrative safeguards to counteract any potential damage to competition.

USDA only receives voluntarily submitted information from agricultural cooperatives. Our information suggests that roughly 1,500 of the 3,000 agricultural cooperatives in the United States, with 1,000,000 producer members, derive a majority, if not all, of their income from marketing farm products. Another 900 associations, with 1,300,000 members (many farmers belong to more than one cooperative) market some agricultural production while deriving a majority of their income from sales of farm supplies and services. These associations have combined annual gross sales of \$100 billion. Any legislation that weakens the protection for cooperative marketing provided under the Capper-Volstead Act and Section 6 of the Clayton Act could jeopardize the economic opportunity and quality of life for these producers, their families, and the communities where they live and do business.

## **Section V. The Antitrust Exemptions in the Agricultural Marketing Agreement Act of 1937**

### **a. Support for the Agricultural Marketing Agreement Act**

The Agricultural Marketing Agreement Act of 1937, as amended (AMAA), authorizes marketing agreements and orders that allow agricultural industries to work together to create better markets and better products and to improve the livelihood of producers. For more than 60 years, industries have voluntarily requested marketing agreements or orders because they believe that the programs improve industry competitiveness and viability, and increase sales. These programs regulate the handling (i.e., marketing) of eligible agricultural commodities, such as fruits, vegetables, specialty crops, and milk in interstate or foreign commerce. They allow agricultural industries to collectively address marketing problems that the industries could not otherwise overcome in the absence of an exemption from antitrust laws.

In addition, the AMAA provides a number of special provisions applicable to cooperative marketing associations (e.g., block voting for members and blending the proceeds of all milk

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<sup>13</sup>DONALD A. FREDERICK, UNITED STATES DEPARTMENT OF AGRICULTURE, ANTI-TRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT 59-60 (2002).

<sup>14</sup>*Id.* at 60-63 (2002).

<sup>15</sup>*Compare* 60 CONG. REC. 313 (1920) (statement of Sen. King) (complaining about the California Associated Raisin Company's control over raisin prices) *with* 60 CONG. REC. 361 (1920) (statement of Sen. Kellogg) (lauding the improved situation of California's farmers and the consuming public because of the "scientific, businesslike organizations" of the large California fruit cooperatives). *See also* Frederick, *supra* note 13, at 67.

sales and distributing those proceeds to producer members as provided under the applicable contract) that operate under the antitrust exemption provisions of the Capper-Volstead Act. All AMAA orders are authorized and administered with the full involvement of USDA.

### **b. Marketing Agreements and Orders Narrowly Designed to Benefit Consumers and Producers**

Congress enacted the AMAA in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. Congress accomplished its goal through a carefully planned regulatory process.

First, producers and others requesting new marketing orders or the amendment of existing marketing orders have the burden of proving that the regulatory benefits exceed the costs. Second, the AMAA requires that a public hearing be held to obtain evidence for any new order or revised (amended) order. Third, the Department then evaluates the information, and if appropriate, issues a recommended decision with an opportunity for public comment, and finally a Secretary's decision. If at least two thirds of the producers voting, by number or by volume, approve the proposal, USDA issues the new or amended marketing order. Moreover, as a condition for the issuance of every rule-making action to establish or amend AMAA programs, or to issue regulations to implement them, the Department conducts impact analyses to determine whether regulatory benefits outweigh the costs of the regulatory actions.

Several independent economic studies validate the benefits of AMAA programs, and the Federal Agricultural Improvement and Reform Act of 1996 requires independent evaluation of the marketing orders with promotion and advertising programs every five years. In 1999, the Department consolidated the existing 31 milk orders into a smaller number of regional marketing orders to improve the marketing efficiency of milk in the domestic market. The consolidation simplified administrative orders and made them more uniform.

The consolidated milk marketing orders are one example of the success of the marketing order system. The orders ensure an adequate supply of fluid milk to consumers and provide more consistent and stable prices for handlers and producers. The price stability for handlers and producers permits capital improvements for safety and production efficiency, ultimately providing a safer and more abundant product to consumers.

### **c. Fruit and Vegetable Marketing Orders**

There are 34 active marketing orders for fruits, vegetables and specialty crops benefitting about 70,000 producers. Their annual crop value exceeds five billion dollars.

Marketing orders enable fruit and vegetable producers to work together to solve marketing problems that they could not solve individually. For example, low quality fruit in the marketplace reduces the demand for all fruit, because consumers cannot be assured of a consistent supply of high quality product. Twenty-five of the current fruit and vegetable orders establish minimum grade, quality, size and maturity requirements to improve long term sales by

providing a consistently high-quality product that will promote repeat purchases by consumers.

Marketing orders can also stabilize marketing conditions and increase the demand for fruits, vegetables and specialty crops by establishing reserve pools for storable commodities, and by authorizing research and promotion projects. In fact, marketing agreements and orders provide exactly the benefit that Congress intended, that is, to provide agricultural producers a stable environment in which to engage in production of the national food supply.

#### **d. Milk Marketing Orders**

The marketing of highly perishable fluid milk presents a special problem for agricultural producers. Its inherent price variability undermines the ability of dairy farmers to continue in business. The value of milk varies, depending on season and end-product retail use (i.e., perishable raw milk sold as fluid packaged milk realizes a higher market price than as storable cheese or nonfat dry milk powder) which puts the much larger number of dairy farmers at a competitive disadvantage with the many fewer processors that purchase farmers' milk. Milk marketing orders provide that handlers accurately report the end-product use, and pay farmers accordingly. The milk marketing orders provide a more stable price to the independent dairy farmer that would be otherwise unachievable, while ensuring a stable and safe supply of milk to consumers.

#### **Conclusion**

Before any statutory change is suggested to limit or "sunset" these agricultural exemptions to the antitrust laws, it is essential to understand the potential consequences of change. Actions to modify agriculture exemptions may intend an increase in competition, but may result in a reduction in the viability of the business of many individual agricultural producers. The buyers' side of the agricultural product markets has tremendous strength because of buyers' market power. But the producers' side is made up of millions of individual farmers who have no market power in their product's market.

Agriculture exemptions provide some balance to buyers' market power by giving farmers some tools of collective action. Agriculture exemptions are narrowly tailored to prevent monopoly power, provide equity to the farmer, and provide a consistent food supply to the consumer. History, experience and research all support the view that drastic modification to agriculture exemptions is unnecessary. USDA remains committed to agriculture exemptions. The exemptions provide the benefits that Congress intended, and ensure the protection of the unique nature of American farm business and rural life.

Sincerely,



Keith Collins  
Chair, USDA Capper-Volstead Committee  
Chief Economist, USDA