



NATIONAL COUNCIL OF FARMER COOPERATIVES

**Hand Delivered**

July 15, 2005

Ms. Deborah A. Garza, Chair  
Mr. Jonathan R. Yarowsky, Vice Chair  
Antitrust Modernization Commission  
1120 G Street, N.W., Suite 810  
Washington, DC 20005

Re: Response to the Commission's Request for Public Comment on antitrust immunities and exemptions, 70 Fed. Reg. 28902 (May 19, 2005).

Dear Ms. Garza and Mr. Yarowsky:

In response to the Antitrust Modernization Commission's request, we are pleased to submit the attached comments on behalf of the National Council of Farmer Cooperatives (NCFC) and the organizations listed at the conclusion of our submission.

NCFC is the national trade association representing America's farmer cooperatives. There are over three thousand farmer cooperatives across the United States, whose members include a majority of our nation's two million farmers.

We appreciate the opportunity to comment on this important topic and would be happy to answer any questions you may have. Please direct your questions to Marlis Carson, Vice President, Legal, Tax and Accounting, at 202-879-0825 or [REDACTED].

Yours very truly,

A handwritten signature in black ink that reads "Jean-Mari Peltier". The signature is written in a cursive, flowing style.

Jean-Mari Peltier  
President and CEO  
National Council of Farmer Cooperatives

Response to the Commission's Request for Public Comment on antitrust immunities and exemptions, 70 Fed. Reg. 28902 (May 19, 2005).

### **Executive Summary**

- The limited antitrust immunity provided by the Capper-Volstead Act enables farmers to join together to collectively process and market their products and strengthens their bargaining power in an economy increasingly dominated by relatively few, large buyers.
- Joint action through cooperatives enables farmers to combat potential exploitation and abuse from buyers and promotes entry into agricultural processing, thereby increasing competition.
- Congress has recognized the need for farmers to join together and has expressed its intent to promote associations of producers through the Clayton Act, the Capper-Volstead Act, the Agricultural Marketing Act, and the Agricultural Marketing Agreement Act of 1937.
- There is no need to repeal or sunset the limited immunity provided in the Capper-Volstead Act because effective limits on its application already exist. The Act gives the Secretary of Agriculture authority to prevent cooperatives from using their market power to unduly enhance the price of the products they market; the framework and operation of the Act places limits on cooperatives' growth; and cooperatives are subject to inherent practical limitations relating to obtaining capital.
- Accordingly, we urge the Commission to recommend that the Capper-Volstead Act limited antitrust immunity and historical protections for farmers be maintained.

## **Introduction**

Farmer cooperatives provide over 220,000 jobs in the United States, with a total payroll in excess of \$8 billion, and contribute significantly to the economic well-being of rural America. Farmer cooperatives handle, process and market almost every type of agricultural commodity, furnish farm supplies, and provide credit and related financial services, including export financing, to their farmer members. Earnings from these activities are returned to their farmer members on a patronage basis, helping improve their income from the marketplace.

These comments first provide an overview of Capper-Volstead and Congressional policy relating to associations of agricultural producers. The comments next address the questions listed in the Commission's Request for Public Comment, labeled as "General Immunities and Exemptions." The comments then explore the role of farmer cooperatives in today's economy, including numbers of cooperatives and their business volume. The comments also address the reasons why cooperatives are essential to agricultural production and distribution and how they help remedy farmers' relative lack of bargaining power in the marketplace. Finally, the comments explain the nature of the Capper-Volstead limited immunity; the safeguards against price fixing between cooperatives and non-cooperatives; and the handicaps inherent to farmer cooperatives that ensure monopolization will not occur.

The Commission also has asked for comments on Section 6 of the Clayton Act (referred to as "the non-profit agricultural cooperatives exemption" in the Commission's Request for Public Comment). These comments focus on the Capper-Volstead Act, which has a broader scope than Section 6 of the Clayton Act. Any comments concerning Capper-Volstead also apply to Section 6 of the Clayton Act.

## **Capper-Volstead and Congressional Policy**

Acting independently, individual farmers are too small and too numerous to deal effectively with larger agribusinesses in the supply, processing, and marketing sectors of agriculture. Consequently, in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, farmers joined forces to form cooperative associations to market their products and purchase farm-related supplies and services. Contrary to the likely intentions of Congress, early court decisions held that these associations fell within the broad reach of the Sherman Act of 1890, which made "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . illegal."<sup>1</sup> Along with labor unions, cooperatives were challenged under the Sherman Act. Consequently, Congress later enacted Section 6 of the Clayton Act, which exempted agricultural organizations from antitrust laws if they were established for mutual help, did not have capital stock, and were not operated on a for-profit basis.<sup>2</sup>

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<sup>1</sup> 15 U.S.C. § 1.

<sup>2</sup> 15 U.S.C. § 17.

The language of Section 6 of the Clayton Act made it clear that forming a cooperative was not a violation of the Sherman Act, but Section 6 did not clearly specify the types of activities in which a cooperative could engage, nor did it apply to cooperatives organized on a stock basis. The shortcomings of the Clayton Act led to the passage of the Capper-Volstead Act in 1922.<sup>3</sup> The Supreme Court has noted: “From the standpoint of agricultural cooperatives, the principal defect in that exemption [Clayton Act Section 6] was that it applied only to non-stock organizations. The Capper-Volstead Act was intended to clarify the immunity for agricultural organizations and to extend it to cooperatives having capital stock.”<sup>4</sup>

The Capper-Volstead Act gives agricultural producer organizations limited antitrust immunity “in collectively processing, preparing for market, handling, and marketing” their products and permits such organizations to have “marketing agencies in common.”<sup>5</sup> The Act also gives the Secretary of Agriculture authority to prevent cooperatives from using their market power to unduly enhance the price of the products they market.<sup>6</sup> Subsequent decisions have made clear that agreements between cooperatives and non-cooperatives are subject to the antitrust laws, that Section 2 of the Sherman Act applies to cooperatives but that voluntary affiliation of members is not monopolizing activity, and that only producers may be members of cooperatives.

The protections provided by the Capper-Volstead Act are essential to the economic well-being of farmers in today’s economy. Indeed, the Capper-Volstead Act is frequently referred to as the Magna Carta of farmer cooperatives.<sup>7</sup> Without limited antitrust immunity for cooperatives, family farmers would find it more difficult to compete in a business economy in which farmers lack bargaining power in dealing with relatively few, large buyers, and would lack the ability to integrate into agricultural processing to compete with those entities. In addition, limited antitrust immunity promotes efficient integration in farming production and allows farming operations to survive in the market. As the Supreme Court has stated: “By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.”<sup>8</sup>

Congress also has declared its support for agricultural production and cooperatives through the Agricultural Marketing Act of 1939. In that Act, Congress declared the policy of Congress to be:

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<sup>3</sup> 7 U.S.C. §§ 291-292.

<sup>4</sup> *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391 (1967).

<sup>5</sup> 7 U.S.C. § 291. In 1926, following *American Column & Lumber Co. v. U. S.*, 257 U.S. 377 (1921), Congress enacted the Cooperative Marketing Act of 1926, 7 U.S.C. §§ 451-457, which further clarified that cooperatives may exchange marketing and other economic information as part of their immunity.

<sup>6</sup> 7 U.S.C. § 292.

<sup>7</sup> *Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act*, U.S. Department of Agriculture, Cooperative Information Report 59 (2002), p.1; citing Ewell P. Roy, “Cooperatives: Today and Tomorrow,” pp. 215-216, (Interstate Printers & Publishers, 1964).

<sup>8</sup> *National Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 826 (1978).

[T]o promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products . . . by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.<sup>9</sup>

Congress further supports associations of agricultural producers through the Agricultural Marketing Agreement Act of 1937,<sup>10</sup> which grants the Secretary of Agriculture authority to enter into marketing agreements with associations of producers and to thereby help stabilize market conditions and assure consumers of adequate supplies of commodities. Marketing orders for dairy, poultry, fruits, vegetables, and livestock are currently in place. The terms of orders are developed through public hearings held by the Department of Agriculture, providing an opportunity for the public and other government agencies to comment prior to issuance. A recent study determined that orders do not prevent entry into the industry and “do not allow producers to set prices directly or even to set limits on pricing such as price floors.”<sup>11</sup> While these comments focus on the Capper-Volstead Act, we wish to stress our strong support for federal marketing orders and urge the Commission to recommend that sections 608b and 608c of the Agricultural Marketing Agreement Act of 1937 remain in place.

### **General Immunities and Exemptions Analysis**

The Capper-Volstead Act’s limited antitrust immunity for agricultural cooperatives is essential to the economic well-being of American farmers because it enables farmers to more efficiently market their agricultural products and integrate into agricultural processing. This limited immunity introduces more competitors into agricultural processing than would exist absent the immunity. It also permits local cooperatives to obtain the benefits of specialization by permitting them to join together in a federated cooperative that may carry out specialized functions not performed by the local cooperative. Activities such as manufacturing production supplies, exporting, and marketing may be too complex and expensive to perform individually.

In circumstances where farmers do not integrate into processing to capture more product value, but use a cooperative as a bargaining agent in dealing with processors, the cooperative performs a valuable transaction function that might otherwise have to be performed by a processor’s field force, taking over what might otherwise be a disparate relationship between buyer and seller. Cooperatives also perform a valuable function of providing market intelligence to their members. In other cases, the bargaining

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<sup>9</sup> 12 U.S.C. § 1141(a).

<sup>10</sup> 7 U.S.C. § 608b-c.

<sup>11</sup> Sexton, Richards, and Patterson, *Retail Consolidation and Produce Buying Practices*, Giannini Foundation Monograph Number 45, p. 32 (December 2002).

association may promote sales of the finished product, such as the work of the California Canning Peach Association supporting the United States Department of Agriculture school lunch purchases of canned fruits.

The benefits of agricultural cooperatives are so self-evident that each of the fifty states has enacted legislation authorizing the cooperative form of organization and providing limited immunity from the state's antitrust laws. This is not a case of a narrow interest group obtaining some immunity at the federal level -- it is well-established and longstanding federal and state policy in recognition of the unique characteristics of agriculture.

Moreover, agricultural cooperatives, like corporations themselves, are a standard form of business organization in agriculture. This form of business organization is not unique to the United States, but exists in virtually all parts of the developed world and the developing world.<sup>12</sup> In order to compete in global markets, U.S. farmers need to be able to legally organize cooperatives and to function within cooperatives as do farmers in the rest of the world.

In fact, the United States' development policy is to teach farmers how to form their own cooperatives so that they may increase their standard of living and provide more goods and services to their own citizens. The United States Agency for International Development (USAID) supports the formation of cooperatives around the globe through its Cooperative Development Organization (CDO) Program funded by a competitive grants program. The purpose of the CDO Program is to "strengthen the development of cooperative systems overseas" by: promoting the growth of cooperative systems in developing countries and emerging democracies; providing training and advisory services; encouraging the establishment of long-term partnerships between U.S. CDOs and host country cooperatives; and expanding support for international cooperative development activities from U.S. cooperatives and their members.<sup>13</sup>

As more fully discussed in **Scope and Limited Nature of Immunity** below, unlike corporations, cooperatives have legal and practical limits on their growth. Such limits include legal restrictions on membership, payment of dividends, and non-member business, in addition to one-member one-vote governance. They also operate under practical restrictions resulting from inherent difficulties in obtaining capital, difficulties related to cooperative tax law and the independence of farmers. Thus, there are natural limits to cooperative growth due to the framework and operation of the immunity, limits that may actually hamper efficient growth.

From an antitrust economics perspective, agricultural cooperatives also differ from corporations in another very important respect: cooperatives distribute their earnings to their producer members, who may take those earnings as a signal to produce more product. The cooperative then has to expand output, thereby reducing prices. Corporations, on the other hand, simply distribute dividends to shareholders, who are not input suppliers to the enterprise; thus, there is no encouragement of additional production

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<sup>12</sup> Egerstrom, "Make No Small Plans: A Cooperative Revival for Rural America," (Lone Oak Press, 1995).

<sup>13</sup> *Cooperative Development Program Overview*, U.S. Agency for International Development, available at: [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/private\\_voluntary\\_cooperation/coop.html](http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/coop.html).

through such distributions. As numerous industrial organization economists have pointed out, because of this feedback mechanism, cooperatives have a self-correcting supply enhancement in profitable times, which makes it unlikely for cooperatives to achieve market power.<sup>14</sup> Cooperatives also are unlikely to achieve market power because members can leave to compete against the cooperative, to form another competing cooperative, or to become a supplier to a proprietary firm – and, of course, farmers who were never members of the cooperative can do all of this, too.

In addition to the losses of benefits to farmers from eliminating the Capper-Volstead limited immunity, there would also be substantial costs from such elimination. Eliminating the Capper-Volstead limited antitrust immunity would result in purchases of the processing assets of cooperatives by proprietary firms or the introduction of non-farmer stockholders into restructured agricultural enterprises. If a cooperative could not freely federate with another cooperative to perform a processing or marketing function for it, it would be left with the stark choice of dealing only with proprietary firms.

Further, while other of the activities engaged in by agricultural cooperatives may be allowable under antitrust laws, the Capper-Volstead limited immunity provides a significant benefit to farmers. Without Capper-Volstead, cooperatives would have to incur the substantial costs of proving that their activities do not violate antitrust laws in "rule of reason" proceedings which often are extremely expensive. The threat and actuality of such additional costs could be used by larger competitors to harass cooperatives who already have limited resources. Removal of the limited immunity would result in a reduction in the number of competitors in the agricultural marketplace and reduced investment in agriculture.

Subjecting the Capper-Volstead limited immunity to a sunset provision also would be damaging to the agricultural economy because it would disrupt the agricultural lending market. The primary lender to farmer cooperatives, the Farm Credit System, is a cooperative nationwide system comprised of 109 banks, associations, and service corporations that make loans to agricultural producers and their cooperatives nationwide. The System originally was capitalized by the federal government, but is now owned by its members and borrowers. As of December 31, 2004, Farm Credit System Banks had \$84 billion in gross loan volume.<sup>15</sup> Imposing a sunset provision on the Capper-Volstead limited antitrust immunity provision would cause uncertainty as to the viability of many cooperatives, particularly marketing cooperatives, and would be damaging to the Farm Credit System.

### **Role of Farmer Cooperatives in Today's Economy**

Farmer cooperatives fall into three major categories, all of which play a vital role in the United States agricultural economy. Marketing cooperatives sell their members'

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<sup>14</sup> Y. J. Youde and P.G. Helberger, *Marketing Cooperatives in the U.S.: Membership Policies, Market Power, and Antitrust Policy*, Journal of Farm Economics 48 (1966) and P. Helmberger and S. Hoos, *Economic Theory of Bargaining in Agriculture*, Journal of Farm Economics 45 (December 1963). See also, Mueller, Helmberger and Paterson, "The Sunkist Case: A Study in Legal-Economic Analysis" (Lexington Books, 1987).

<sup>15</sup> Farm Credit System Major Financial Indicators (December 31, 2004).

products, including milk, fruits, vegetables, nuts, grains, oilseeds, and cotton, among other commodities. Farm supply cooperatives provide farm production supplies, farm machinery and equipment, and building materials. And service cooperatives provide specialized services such as cotton ginning, trucking, storing, and drying of products. In 2002, there were 3,140 agricultural cooperatives operating in the United States. Marketing cooperatives accounted for approximately 50 percent of those cooperatives, while farm supply cooperatives made up 38 percent of the total and service cooperatives comprised approximately 12 percent.<sup>16</sup> In 2002, agricultural cooperatives had 2.8 million members and 166,000 full-time employees; they recorded net income of \$1.2 billion on net business volume of \$96.8 billion.<sup>17</sup> Of the 3,140 farmer cooperatives operating in 2002, 3,060 were local cooperatives with individual farmer members,<sup>18</sup> illustrating the importance of farmer cooperatives in the continued viability of rural communities.

While farmer cooperatives play an important role, their numbers are in decline. During the decade from 1993 to 2002, memberships in farmer cooperatives dropped from 4 million to 2.8 million. Memberships in marketing cooperatives dropped 42.7 percent; service cooperative memberships dropped 50 percent; and farm supply cooperative memberships decreased 17 percent.<sup>19</sup> These declining numbers reflect the decreasing numbers of farms, farmers, and ranchers in the past decade. The number of farmer cooperatives dropped from 4,244 to 3,140, a decline of 26 percent in a decade.

Despite declining numbers, farmer cooperatives are still an important part of the agricultural economy. In 1978, the Secretary of Agriculture testified before the National Commission for the Review of Antitrust Laws and Procedures. He noted that farmer cooperatives are needed because “production and distribution of agricultural products are recognized as special problems, in law, in economics, in public policy, and in the national economy.”<sup>20</sup> Those “special problems” exist today, as the Department of Agriculture has recently observed:

Producers and their cooperatives are selling into markets increasingly dominated by fewer, larger buyers. A variety of ownership and contractual arrangements intensifies concentration and creates a dramatic disparity in market power. Even the largest farmer cooperatives have much smaller sales and asset bases than many of their competitors and customers.<sup>21</sup>

Because they always have operated as smaller, less concentrated economic units than the buyers to which they sell, farmers have long received an unfair and unreasonably small

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<sup>16</sup> United States Dep’t of Agriculture, *Farmer Cooperative Statistics*, Service Report 62 (2002), p. 2.

<sup>17</sup> *Id.*, pp. 2-8.

<sup>18</sup> *Id.*, p. 2.

<sup>19</sup> *Id.*, p. 3.

<sup>20</sup> Secretary of Agriculture Bob Bergland, *Written Testimony Submitted to the National Commission for the Review of Antitrust Laws and Procedures* (July 27, 1978).

<sup>21</sup> Dunn *et al.*, *Agricultural Cooperatives in the 21st Century*, USDA Rural Business Cooperative Service, *Cooperative Information Report 60* (2002), p. 6.

share of the dollar paid by ultimate consumers for food and fiber. A recent and comprehensive economic study of the U.S. food marketing system, performed by USDA economists, shows that the farmers' share of the food dollar has declined from above 30 percent to below 20 percent, and it is still shrinking.<sup>22</sup> In 2003, revenues for the top ten grocery retailers totaled \$36.1 billion<sup>23</sup> and revenues for the top ten food processors totaled \$23 billion.<sup>24</sup> In contrast, revenues for the top ten farmer cooperatives during the same time period averaged \$3.4 billion.<sup>25</sup>

### **Necessity of Farmer Cooperatives**

Farmer cooperatives provide farmers an alternative for marketing products and procuring goods and services. They also offer a method for farmers to store raw and finished products in order to increase market favorability, bargain collectively over prices, and share in profits from the processing and marketing of products. Farmer cooperatives are necessary if family farmers are to survive in today's rapidly changing agricultural economy.

Farmer cooperatives by their very nature promote competition in farm products and farm supply markets. They are neither formed nor operated to provide a return on investor capital. Instead, their purpose is to provide products or services to their patrons at the lowest possible cost. Joint action among farmers originated as a defensive mechanism to combat exploitation and abuse from buyers and has expanded to include entry into agricultural processing, thereby increasing competition. Trends in farming – increased farm size, mechanization, and improved managerial and operational skills of farmers – have not changed the basic market structure of farmers.

The difficulty of farmers in markets that determine prices of farm products and prices of farm production supplies results from a number of conditions unique to farming:

- 1) Farmers must make production decisions long before demand for the product is known;
- 2) Once production decisions are made, they cannot be easily or quickly changed;
- 3) Weather, disease, insects, and other conditions may impact farming plans;
- 4) Due to the perishable nature of most farming products, farmers have few opportunities to delay selling;
- 5) Capital investments cannot be easily transferred to alternative production choices; and
- 6) Thousands of small-scale farm firms sell to and buy from only a few large-scale non-farm firms, resulting in inequality in bargaining power.

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<sup>22</sup> Harris *et al.*, *The U.S. Food Marketing System, 2002*, USDA Economic Research Service, Agricultural Economic Report No. 811 (2002), at p. 1.

<sup>23</sup> *SN's Top 75*, Supermarket News, at <http://www.supermarketnews.com/sntop752003.htm>.

<sup>24</sup> *Food Processing's Top 100*, Food Processing, August 2004, at p. 28.

<sup>25</sup> *America's Top Co-Op Companies*, National Cooperative Bank, at <http://ncbweb2.ncb.com/2004coop100.nsf/2004agriculture>.

The Supreme Court has recognized the inherent and unique difficulties faced by farmers. In a 1929 opinion, Justice Sutherland, acknowledging the special treatment of cooperatives, wrote: “It is settled that to provide specifically for peculiar needs of farmers or producers is a reasonable basis of classification.”<sup>26</sup> And in a case reviewing the constitutionality of a Texas antitrust law, Justice Frankfurter acknowledged that:

[f]armers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen.<sup>27</sup>

In finding that Kentucky cooperative marketing statutes promoted the common interest, Justice McReynolds cited the lower court’s finding that the statutes were enacted because producers were “at the mercy of speculators and others who fixed the price of the selling producer and ... the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the [producer] obtained a grossly inadequate price for his products.”<sup>28</sup>

The processors, distributors, manufacturers, and other buyers to whom farmers sell their products have grown increasingly concentrated and integrated. The USDA has described the squeeze this concentration has put on farmers and their cooperatives:

Consolidation of firms at the processing, wholesale, and retail levels of the U.S. food marketing system continues unabated. Market influence and bargaining strength of even the largest cooperatives are limited as a consequence. Food retailers flex their market muscle by imposing coordination mechanisms that demand strict discipline and conformity from suppliers. Food processors exert greater control over distribution channels by integrating back into the production of raw materials through a variety of ownership and contractual arrangements. Such arrangements rob producers of decision-making authority and market choices.<sup>29</sup>

Indeed, one major, concentrated segment of farmers' buyer base has developed since 1922 -- the national or regional grocery store chain. When Capper-Volstead was enacted, the paradigm for retail grocery sales was the neighborhood store. To a large and increasing extent, however, the grocery industry is concentrated into large chains that

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<sup>26</sup> *Frost v. Corporation Com’n of State of Okla.*, 278 U.S. 515, 535 (1929).

<sup>27</sup> *Tigner v. State of Texas*, 310 U.S. 141, 145 (1940).

<sup>28</sup> *Liberty Warehouse Co. v. Burley Tobacco Growers’ Co-Op. Marketing Ass’n*, 276 U.S. 71, 93 (1928).

<sup>29</sup> *Agricultural Cooperatives in the 21st Century* (fn. 21, *supra*), p. 4; and see, e.g., *The U.S. Food Marketing System*, 2002 (fn. 19, *supra*), at pp. 2, 6, 15, 17-19, 26-28, 32-33.

exert enormous buying power. Industry estimates by Supermarket News indicate that Wal-Mart, Costco and Sam's Club account for nearly one-fourth of U.S. grocery sales. The top eight retailers in the sales rankings account for nearly 50 percent of total sales. The USDA has taken note of this trend:

Consolidation among U.S. retail food marketers is continuous. It is augmented by the entry of foreign firms into the U.S. market through aggressive acquisition strategies . . . Retailers are positioned to dictate product requirements, prices, and other terms of trade to suppliers. Purchasing is centralized for logistical and pecuniary advantage as retailers seek to purchase as many products as possible from the fewest number of suppliers. Moreover, suppliers must be substantial enough to carry not only a nationwide presence, but also global networks of stores. As traditional supermarkets expand in size and scope, volume discounters and warehouse clubs are entering food retailing and becoming dominant market participants.<sup>30</sup>

Accordingly, a recent USDA-published economic study of several produce products concludes: "[T]he evidence supports a conclusion that [retail grocery chains] are often able to exercise oligopsony power in procuring fresh produce commodities." For example, for iceberg lettuce, "retailers were able to capture the lion's share (about 80 percent) of the market surplus, whereas under competitive procurement, the entire surplus would go to producers."<sup>31</sup> Interestingly, producers of Florida mature-green tomatoes were able to retain more of the market surplus through collective action. This "demonstrates the potential benefits to producers through the coordinated behavior allowed them under the law."<sup>32</sup> This in a nutshell is what the Capper-Volstead limited antitrust immunity is about.

Moreover, cooperatives face large-scale concentration and integration not only in the part of the businesses that buy farmers' products, but even among their direct competition at the producer level. Investor-owned firms are increasingly integrating vertically, operating at the levels of initial production (what farmers do), processing and marketing (what many farmer cooperatives do), and distribution and retailing (what much of farmers' usual customer base does). The USDA study concludes:

As part of their response to the growth of consumer power, food processors and retailers are extending their influence over associated market channel activities. Firms that control key elements of the distribution and marketing system are attempting to control each level of the process, up to and including delivery to the consumer . . . Competition gives way to coordination, as large

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<sup>30</sup> Agricultural Cooperatives in the 21st Century (fn. 21, *supra*), p. 6.

<sup>31</sup> Sexton, Zhang, and Chalfant, *Grocery Retailer Behavior in the Procurement and Sale of Perishable Fresh Produce Commodities*, USDA Economic Research Service, Contractors and Cooperators Report No. 2 (2003), at p. 45.

<sup>32</sup> *Id.*

consolidated firms internalize transactions through ownership or other coordination mechanisms that give them greater control of variables affecting profitability. It also results in thinner markets where the disparity in bargaining power among the parties becomes even more pronounced.<sup>33</sup>

Farmers in the United States also face impediments when exporting their products. While U.S. agricultural tariffs on imports average 12 percent, the global average is 62 percent.<sup>34</sup> For example, duties imposed by the United States on fresh citrus imports into the U.S. market average not more than 2.5 percent ad valorem duty, and most citrus enters the U.S. duty free. In contrast, the average duty imposed on United States citrus is over 40 percent.

Farmer cooperatives are the primary instrument to raise farm income and to improve farmers' well-being by correcting or alleviating such market or competitive weaknesses. It is the structural imbalance referred to above that originally impelled and currently justifies the Capper-Volstead Act. Without the freedom to act in association with other producers, the farmer has almost no bargaining power and is at a competitive disadvantage.

### **Scope and Limited Nature of Immunity**

The Capper-Volstead antitrust immunity is statutorily limited in two important ways. First, the immunity is available only to qualified associations. In order to qualify, the association must choose to either operate under one member/one vote, or must limit distributions on dividends to eight percent. In addition, the association must conduct more than half of its business with members, and its voting members must all be producers.<sup>35</sup>

A second important limitation is that this limited antitrust protection does not apply if cooperatives combine or conspire with non-producers to monopolize or restrain trade.<sup>36</sup> And monopolistic practices, engaged in outside the legitimate purposes of a cooperative, are not within the scope of the immunity.<sup>37</sup>

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<sup>33</sup> Agricultural Cooperatives in the 21st Century (fn. 21 *supra*), p. 5.

<sup>34</sup> United States Dep't of Agriculture, Foreign Agricultural Service GAIN Report #US2001 (4/17/2002), p. 3.

<sup>35</sup> 7 U.S.C. § 291.

<sup>36</sup> *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *U.S. v. Borden Co.*, 308 U.S. 188, 204-205 (1939); *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 210 (9<sup>th</sup> Cir. 1974), *cert denied*, 419 U.S. 999 (1974); *U.S. v. Maryland Cooperative Milk Producers*, 145 F. Supp. 151, 153 (D.D.C. 1956).

<sup>37</sup> *Maryland and Virginia Milk Producers Ass'n., Inc. v. United States*, 362 U.S. 458, 467-468 (1960); *North Texas Producers Ass'n. v. Metzger Dairies, Inc.*, 348 F.2d 189, 193-194 (5<sup>th</sup> Cir. 1965), *cert denied*, 382 U.S. 977 (1966); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 483-484 (E.D. Mo. 1965), *aff'd*, 368 F. 2d 679 (8<sup>th</sup> Cir. 1966).

In addition to these limitations based in statutory law and case law, farmer cooperatives are subject to other inherent practical constraints because they are user-owned and consist of a limited number of owner-investors. Cooperatives typically do not seek capital from outside investors and their ability to raise additional capital from their producer members is limited, due to what one cooperative expert has identified as the “portfolio and horizon problems”:

The portfolio problem arises because producer-members are required to invest capital in an industry in which they already have significant investment in production capacity. The horizon problem occurs because, traditionally, cooperatives’ residual earnings are contractually tied to their producer-members’ current transactions, rather than to their investment. Since members are unable to recognize appreciation in their equity investment, they exert pressure on their cooperative to maximize current returns rather than investing for higher future returns.<sup>38</sup>

Such practical limitations on access to capital are a major limitation on the activities of most cooperatives and make it difficult for such cooperatives to expand and approach significant market power, especially when operating and expansion expenses are increasing for such things as environmental compliance, expanding globalization, and corporate governance and accountability.

Further, the requirements for the favorable tax treatment of distributions of earnings by agricultural cooperatives to their members under Subchapter T of the Internal Revenue Code<sup>39</sup> impose significant practical limitations on the activities of cooperatives. In order to distribute earnings as patronage distributions under the provisions of Subchapter T, such earnings must be from activities with or on behalf of the members and must be related to the agricultural activities of the members. These restrictions mean that agricultural cooperatives cannot expand or move away from a close connection with such agricultural activities without losing the benefits of Subchapter T.

Finally, being farmer owned and controlled, farmer cooperatives have a unique accountability. Thus, relationships among directors and between the cooperative and its members are often more sensitive than in an investor-owned corporation, in that members are not only investors, but also the major suppliers or customers of the cooperative. Expansion of activities or diversification into non-core matters by the cooperative often takes significantly more time and effort on the part of management than would be required in an investor-owned corporation. Further, the consequences of an unwise expansion or diversification can be more immediate and extensive to the cooperative as farmers exercise their independence by reducing their patronage with the cooperative, squeezing it at both the investor and supplier/customer positions.

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<sup>38</sup>S. Hardesty, *Positioning California’s Agricultural Cooperatives for the Future*, Agricultural and Resource Economics Update, Vol. 8, No. 3 (Jan./Feb. 2004).

<sup>39</sup> 26 U.S.C. §§ 1381, *et seq.*

## Conclusion

The limited antitrust immunity provided by the Capper-Volstead Act enables farmers to join together to collectively process and market their products and gives family farmers bargaining power in an economy increasingly dominated by relatively few, large buyers. Congress has recognized the need for farmers to join together and has expressed its intent to promote associations of producers through the Clayton Act, the Capper-Volstead Act, the Agricultural Marketing Act, and the Agricultural Marketing Agreement Act of 1937.

There is no need to repeal or sunset the limited immunity provided in the Capper-Volstead Act because effective limits on its application already exist. Namely, the Act gives the Secretary of Agriculture authority to prevent cooperatives from using their market power to unduly enhance the price of the products they market; the framework and operation of the Act places limits on cooperatives' growth; and cooperatives are subject to inherent practical limitations relating to obtaining capital.

Repealing or sunsetting the Capper-Volstead Act limited antitrust immunity would eliminate the sole means by which farmers are able to negotiate effectively with the large corporate entities that purchase farmers' products. The Supreme Court has recognized the importance of placing farmers in the same position as the purchasers of their products:

We believe it reasonably clear from the very language of the Capper-Volstead Act, as it was in Section 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>40</sup>

Accordingly, this Magna Carta of farmer cooperatives should not be repealed or time-limited. We urge the Commission to recommend that the Capper-Volstead limited antitrust immunity be maintained.

We would be happy to answer any questions you may have; please direct your questions to Marlis Carson, Vice President, Legal, Tax and Accounting, National Council of Farmer Cooperatives, at 202-879-0825 or [REDACTED].

Respectfully submitted,

National Council of Farmer Cooperatives  
American Farm Bureau Federation  
Farm Credit Council  
National Farmers Union  
The National Grange  
Agricultural Council of California

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<sup>40</sup> *Maryland and Virginia Milk Producers*, 362 U.S. at 466.

Colorado Cooperative Council  
Iowa Institute for Cooperatives  
The Kansas Cooperative Council  
Mid America Cooperative Council  
Missouri Institute of Cooperatives  
Montana Council of Cooperatives  
The Cooperative Marketing Association of New Jersey, Inc.  
Cooperative Council of North Carolina  
Northeast Cooperative Council  
Oklahoma Agricultural Cooperative Council  
Agricultural Cooperative Council of Oregon  
South Dakota Association of Cooperatives  
Texas Agricultural Cooperative Council  
Utah Council of Farmer Cooperatives  
Washington State Council of Farmer Cooperatives