



National Milk Producers Federation

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15 July 2005

Antitrust Modernization Commission
Attn: Public Comments
1120 G Street, NW
Suite 810
Washington, DC 20005

To Whom It May Concern:

In reply to the request for comments published in the Federal Register (Vol. 70, No. 96) and dated May 19, 2005, the National Milk Producers Federation (NMPF) submits the enclosed response.

NMPF appreciates the opportunity to comment on these significant issues and urges thoughtful consideration of the views contained in this submission during the review of U.S. antitrust laws.

Questions regarding these comments should be directed to:

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Sincerely yours,

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BEFORE THE
ANTITRUST MODERNIZATION COMMISSION

Comments of the National Milk Producers Federation
In response to Request for Public Comment
Published in *Federal Register*, May 19, 2005

These comments are presented on behalf of the National Milk Producers Federation (NMPF) in response to the request by the Antitrust Modernization Commission for public comment on its proposed program of study. In particular, NMPF opposes any change to the Capper-Volstead Act which provides agricultural producers, including dairy farmers, with limited immunity from liability under the antitrust laws in certain circumstances where those producers associate to take concerted or cooperative action in the marketplace. NMPF also opposes any changes to the provisions of the Agricultural Marketing Agreement Act, 7 U.S.C. § 608, that provide limited immunity from the antitrust laws in respect of milk marketing orders. NMPF supports and associates itself with the comments submitted to the Commission by the National Council of Farmer Cooperatives. However, NMPF wishes to amplify NCFC's comments by emphasizing the particular importance of the Capper-Volstead Act and Federal marketing orders to dairy farmers.

NMPF is a national federation of dairy cooperatives that was first organized in 1916 under the laws of the State of Illinois. Its general objectives are to improve the conditions under which milk and its products are promoted, to improve dairy marketing methods, to standardize and improve the quality of dairy products, and to promote the welfare and protect the interests of dairy farmers and of dairy cooperatives. Currently, NMPF's membership consists of 33 dairy cooperatives from all regions of the country that represent

approximately 70 percent of the milk production of the United States. Those 33 member dairy cooperatives, in turn, represent approximately 50,000 dairy producers across the United States, nearly all of whom are family farmers.

The Capper-Volstead Exemption

NMPF is a cooperative that operates within the strictures of the Capper-Volstead Act. Indeed, NMPF is a Capper-Volstead cooperative whose members are Capper-Volstead cooperatives. No sector in the United States is more affected by, nor reliant upon, the Capper-Volstead Act than the U.S. dairy industry. The existence of this law has influenced the shape and character of the industry and any alteration of the act to lessen the protections that it affords dairy farmers and their cooperative associations would create serious dislocation and uncertainties for most all dairy producers, adversely affect thousands of small business and family owned and operated farms across the United States.

The purpose of the Capper-Volstead Act (and the provisions of section 6 of the Clayton Act which preceded it) was to empower the individual farmer and to attempt to level the economic playing field for farmers who were at a distinct disadvantage *vis-à-vis* middlemen in the agricultural marketplace. As the law's co-sponsor Senator Capper stated during the congressional debates, individuals farmers were dealing largely with corporations when they attempted to sell their product into the consumer markets, and without the ability of farmers to act collectively "farmers must for all time remain at the mercy of the buyers." Although the Capper-Volstead Act is viewed as an "exception" to the antitrust laws, in economic reality it is a leveling tool. It permits farmers to act collectively

in dealing with the other participants in the food processing and distribution chain who are also acting collectively, albeit through corporate structures – a different, but certainly no less effective, economic and legal vehicle.

Although various cooperatives have been formed among farmers growing any one of a number of different agricultural products, the cooperative movement has succeeded most prominently in the dairy sector. This is because the nature of milk production and milk use – the perishability of the product as well as the varied nature and value of the products that can be produced from milk – place the individual dairy farmer at a particular disadvantage in the market place, and those difficulties can only be effectively addressed for most farmers through cooperative action.

The first issue that the individual farmer faces is the perishability of the product. Milk must either be sold into the marketplace in a very short period of time or immediately processed in order to be stored. The average dairy farmer acting individually does not have the means to make capital investment in refrigeration or processing technology that would provide sufficient leverage to bargain effectively with large cooperate buyers in the food-processing or grocery industries. This is particularly true with respect to the dairy product that is most perishable and which has traditionally had the greatest value in the market – fresh milk. The cooperative provides a mechanism by which farmers can take advantage of economies of scale to command a fair price in the market for their fresh products, or to invest in the technologies that would permit them to convert their fresh milk into other dairy products.

Cooperatives allow farmers to organize their assets in order to negotiate on more equal terms with corporate processors. However, the nature of the cooperative – and of the individual farmer’s participation in the cooperative – does not lend itself to anticompetitive behavior. Corporate processors’ capital is organized and bound very tightly to the collective enterprise; stocks may be sold among individuals, but the corporation has no obligation to disgorge assets to the stockholder. By contrast, the cooperative producer is generally able to extract his or her own productive capacity from the cooperative on less than 12 months notice. This produces a much stronger tendency toward dissolution among cooperatives than among corporations, and therefore presents a much smaller threat that the cooperative would use its potential to pursue anti-competitive practices. In this sense, and in the sense that the farmer cooperative organizes the labor of the farmer as much as the capital, the farmer cooperative resembles a labor union more than a corporation.

At the same time, Cooperatives allow the individual farmer to capture a premium available in the market for branded products. Without cooperatives, most individual farmers would have insufficient volume of production to permit them to regularly supply a large number of retail outlets with a variety of dairy products carrying the same brand name. Brand selling, of course, allows producers to capitalize on the quality of the products they produce and the reliability of their supply. Through the cooperative mechanism, individual farmers have been able to maintain their own herds and farms while joining together with other farmers in their region to capture the benefit of high quality products through the promotion of cooperative brand names.

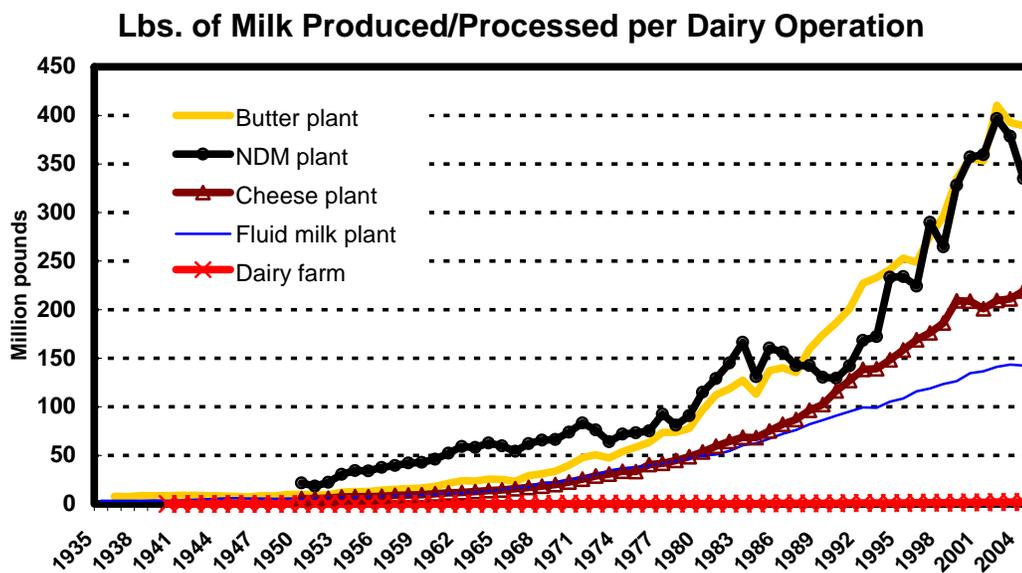
In 1922 when Congress passed the Capper-Volstead Act, it perceived the need to permit farmers in this country to participate in cooperative marketing. At that time, U.S. dairy farmers sold virtually all of their milk in the form of a few simple products – fresh milk, butter and cheese – and marketed much of that milk directly for consumption in nearby localities. Today, milk is used to produce a myriad of products and product components and dairy farmers compete in larger regional and even national markets. Much of the milk produced today is sold to large corporate processors who wield much greater market power than the middlemen with whom the Congress of 1922 was concerned. In today's market, the individual dairy farmer faces far more significant problems than his predecessor in terms of both the complexity and scope of the market. Food processing and food retailing companies in the United States are typically components of huge corporate conglomerates that wield immense market power. For example, in 2004, the largest U.S. dairy processor accounted for nearly \$10 billion in dairy sales (Dairyfield Magazine, June 2005).

Farmers today are also faced with increasing consolidation at the retail sales level. In 2002, just eight supermarket firms controlled 46% of the industry's sales; and this concentration is much higher in the local and regional markets in which many of the more bulky and perishable dairy products trade. Similarly, in 1997 (for which the most recent numbers are available) the eight largest fluid milk processing companies processed 31% of sales; the eight largest cheese makers had 51% of sales; the eight largest ice cream makers had 49% of sales; and the eight largest butter makers had 73% of sales. The independent farmer's terms of trade are further weakened by firm ownership of multiple plants.

Although there has also been some increase in concentration in dairy production, it has not been nearly so dramatic. By contrast, in 2002 the 400 largest dairy farms produced less than 16% of U.S. milk. The dairy production sector still contains many small or average sized producers. In 1946, the average-sized butter plant received the cream from 247 average-sized dairy farms; in 2002, that number was only slightly lower, about 220. In 1940, the average-sized fluid milk plant bottled the milk from 145 average-sized farms; in 2002, that number was still 76. In 1950, the average cheese plant made cheese from the milk of 171 farms; in 2002 from 112.

The justification underlying	Average farms required to supply average:				
	Butter plant	Powder plant	Cheese plant	Bottling plant	
enactment of the Capper-Volstead Act more than 80 years ago—leveling the playing field for the individual farmer in an increasingly corporate world – is even more valid today.	1940	362	n/a	n/a	145
	1945	273	n/a	n/a	203
	1950	309	672	171	176
	1955	283	750	167	165
	1960	243	621	139	132
	1965	224	534	128	131
	1970	221	409	125	138
	1975	225	282	128	146
	1980	252	299	139	130
	1985	258	302	141	127
1990	244	169	152	118	
1995	227	210	143	98	
2000	223	224	131	85	

Source: USDA/NASS; USDA/ERS; NMPF



The Agricultural Marketing Agreements Act

NMPF is also deeply concerned about the Commission's decision to prioritize section 608 of the Agricultural Marketing Agreements Act for study and possible revision. Like the Capper-Volstead Act, the Agricultural Marketing Agreements Act is crucial to the structure and stability of the dairy industry in the United States. Essentially, provisions of section 608 permit the Secretary of Agriculture to establish federal milk marketing orders which ensure the availability of fluid milk to local markets in many parts of the country. Federal milk marketing orders inject stability in the market place by ensuring producers a price adequate to maintain their productive capacity. Consumers benefit because they are guaranteed a regular supply of fluid milk at reasonable and consistent prices.

The Commission should appreciate, first of all, that Congress has historically authorized a price support program for dairy pursuant to which dairy producers are guaranteed a minimum price – currently about \$9.90 per hundredweight -- for the milk they

produce. This minimum price system operates through government management of excess supply – i.e., when prices fall below the threshold set by Congress, the federal government will remove supply from the market through purchases of cheese, butter and nonfat dry milk. The laws establishing this minimum pricing system are entirely separate and apart from the provisions of the Agricultural Marketing Agreements Act.

However, the system of “order pricing” established under the Agricultural Marketing Agreements Act ensures that the benefits of the price support program reaches producers in all parts of the country; and that these benefits reach those for whom they were intended – i.e., dairy producers and consumers. Without the Federal system of milk order pricing, local prices in many markets would bear no consistent relationship to national dairy prices or the government support price. In regional markets where there is a level of demand for fresh milk and where only a small portion of the milk is used for production of cheese, butter, and nonfat dry milk as outlet for milk production, dairy farmers would derive little benefit from the price support program. The prices in these markets would not be stabilized, but would fluctuate unpredictably with local conditions. The Agricultural Marketing Agreements Act, in essence, ensures that the benefits of the Congressionally-mandated minimum price system for dairy products flows equitably to all producers regardless of the region of the country in which they live, or the particular use to which a farmer’s milk is put.

Federal orders are also vital to maintaining the independence of dairy farmers and their cooperatives. One of the principal goals of U.S. farm policy has always been to

maintain a way of life for small farmers in rural communities, a goal that is aside from strict costs and benefits. That goal would not be served by the termination of Federal orders.

Federal marketing orders allow small farmers and cooperatives to compete on equal terms with larger ones. By setting minimum regional prices for various classes of dairy products, based on national prices for butter, cheese, and nonfat dry milk, federal orders allow small producers and small cooperatives to continue to operate their own farms and processing enterprises under varied economic conditions without engaging in crippling short-term local price competition.

This is not a question of laws or government program protecting the inefficient. Indeed, U.S. dairy farmers are highly efficient; dairy producers in the United States consistently, year in and year out, increase the productive capacity of the U.S. dairy herd by approximately two per cent per year. But dairy farmers, however efficient, have to deal with increasing concentration in the dairy processing and food retail sectors of the economy. Every year, there are fewer buyers for dairy products, and those fewer buyers exercise ever more significant market power and economic leverage. The most important function that Federal orders serve is to maintain the independence of dairy farmers and their cooperatives. Because of the existence of the federal order system, dairy farmers have been able to avoid the kind of binding relationships that, for example, broiler growers have with integrators in the chicken industry. Without minimum pricing, large processors would push milk producers into the kind of inflexible piecework that broiler growers do. Instead, Federal orders set market-based minimum prices, allowing the dairy producer to retain independence and to avoid vertical contract integration; all dairy processors pay a minimum

price, and small farmers are able to continue to operate in an ever more economically-concentrated world.

In other words, the Federal milk marketing order system protects and helps maintain a diverse and competitive milk production sector in the U.S. This contrasts sharply with the situation that has occurred in recent decades in the chicken industry where broiler integrators provide or dictate every element of a broiler grower's operation – facility design, formulated feed, animal stock, and production practices – so that the grower loses all independence and becomes an “integrated” part of the larger company in all but name.

Dairy producers, consumers, and (whether they know it or not) processors benefit from the independence and diversity of U.S. dairy production that is fostered by the Federal milk marketing order system and its state-based counterparts. For this reason alone, the operation of the federal marketing orders should not lose their important antitrust immunity.

Response to the Commission's General Questions

With respect to the specific questions the Commission has asked, NMPF does not believe that there is a single methodology or set of methodologies that the Congress could use to assess the costs and benefits of the 31 different general immunities and exemptions listed. Certainly the immunities and exemptions listed vary greatly both in terms of the type and level of economic activity protected, the degree of immunity afforded by the exemption, and whether the exemption reflects an express policy choice made by Congress or a judicial interpretation of more general legislative language.

Moreover, it is not clear why the Commission appears to assume that the methods used by the Congress to assess the costs and benefits of a statute such as the Capper-Volstead Act should be any different from the methods employed by Congress to assess the costs and benefits of any other piece of legislation. Any piece of legislation involves policy and social choices, and congressional decisions to pass or defeat a particular bill do not typically depend upon a formulaic calculation of costs and benefits. The legislative process, and the attendant political process, promote social values but do not necessarily or typically claim to reach decision on the basis of a strict mathematical rigor. NMPF would not make any particular recommendation with respect to a “methodology” for assessing costs and benefits, because it recognizes that the “benefits” that Congress intends to result from legislation are not always capable of precise, or even approximate, mathematical ascertainment. For example, any assessment of the benefits of the Capper-Volstead Act would have to account for those “benefits” that Congress clearly intended: *e.g.*, increased market leverage for farmers vis-à-vis middlemen; encouragement of family farming and small business; greater equity and fairness in the agricultural and agri-food market places. It is not clear how those benefits could be assessed in relations to costs that might result from the legislation.

It is also not clear to NMPF why the Commission appears to feel that statutes passed by Congress that confer immunities or exemptions from the antitrust laws should be subject to “sunset” provisions any more than any other piece of legislation passed by Congress. There are no sunset provisions in the principal antitrust laws; why should there necessarily

be sunset provisions in the exemptions or immunities that Congress has expressly created by statute to those antitrust laws? Congress could, of course, place sunset provisions in a law if it so determined; but there is no reason why Congress must do so for every statute that happens to create an exemption to the antitrust laws anymore than in any other area of law.

Congress has oversight committees that regularly debate the antitrust laws and its various exemptions. Moreover, on a number of occasions, Congress already has authorized special studies to review the currency of existing law. This Commission is, itself, an example of this type of periodic inquiry. There is no justification that NMPF can see to singling out these laws, from the many laws Congress has passed, for “sunsetting.”

The Commission’s final question – whether proponents of an immunity or exemption should bear the burden of proving that the benefits exceed the costs” – strikes NMPF as particularly inapposite. The notion of “burden of proof” is a judicial concept useful primarily in court cases where a jury has to decide a case under circumstances where the competing evidence is more or less equal. In the case of exemptions or immunities to the antitrust laws, the Congress will decide to vote to continue or to repeal existing statutes and the placement of “burdens of proof” on proponents has no apparent relevance to the legislative process whatsoever. If proponents of an exemption bore the burden of proof, so what? Moreover, the question assumes that benefits and costs can be mathematically determined and easily equated so that an objective comparison can be easily made. As NMPF has pointed out above, the question of benefits and costs depend ultimately on the

social values that Congress is attempting to promote in the legislation, and many of these social values – *e.g.*, greater economic equity for individual farmers – simply do not lend themselves to mathematical expression.

CONCLUSION

Dairy farmers depend heavily on both their cooperative associations and the Federal order system, and have for many decades. Both are largely market oriented institutions that achieve fair, but not unduly high, prices for farmers. Without the protections that both provide, the independent family farmer would suffer from the vastly inferior economic position that he or she occupies in the marketplace relative to much larger food processing or food retailing firm.

The original intent of Congress in passing the antitrust laws was not to hamper the organization of farmers into cooperative associations. This intent was reinforced by the Clayton and Capper-Volstead Acts, and was further encouraged by the passage and regular reauthorization of the Agricultural Marketing Agreement Act of 1937. There is a long record on Congressional support for farmers' cooperative associations, and we believe that record should preclude substantial change to these exemptions.

We appreciate the opportunity to comment.

Additional sources:

U.S.D.A., Rural Business-Cooperative Service. Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act. Cooperative Information Report 59. Issued September 2002. (<http://www.rurdev.usda.gov/rbs/pub/cir59.pdf>)

U.S. Census Bureau. Food and Beverage Stores: 2002; 2002 Economic Census, Retail Trade, Industry Series [EC02-441-07]. Issued September 2004.

(<http://www.census.gov/prod/ec02/ec0244i07.pdf>)

U.S. Census Bureau. Concentration Ratios in Manufacturing, 1997 Economic Census, Manufacturing, Subject Series. [EC97M31S-CR] Issued June 2001.
(<http://www.census.gov/prod/ec97/m31s-cr.pdf>)