Ms. Deborah A. Garza, Chairman
Antitrust Modernization Commission
1120 G. Street, N.W., Suite 810
Washington, D.C. 20005

July 14, 2006

Dear Ms. Garza,

I have been extremely interested in the activities of the Antitrust Modernization Commission. In particular, I am interested in your activities as they relate to our domestic dairy industry. I am an advocate of a disciplined process toward deregulated milk pricing and competition advocacy. You have received my comments pertaining to a specific statutory immunity contained in the Agricultural Marketing Agreement Act (AMAA). I would like to submit for your information and consideration a few additional points that may influence your conclusions and report content.

As it relates to the dairy industry, it is important that the commission be very clear and specific in order to overcome strong political barriers that exist in all three branches of government. As indicated in my July 14, 2005, submission; “The AMAA’s milk price regulating immunities and exemptions have somehow survived in spite of plain and repeated repugnancy.”

**Legislative:** Appendix A to the Immunities and Exemptions Discussion Memorandum (page 9) made mention of a February 2006 Wall Street Journal article about a “maverick California processor and producer not bound by federal and state milk marketing regulations…” (Text included at endnote\(^\text{A}\) for your convenience) In case the AMC is not aware, this competitor, by an act of Congress, has since become regulated. The controversial Milk Regulatory Equity Act\(^1\) further amended the AMAA and passed through the House on March 28, 2006, on the suspension calendar with no notice or opportunity for prudent debate whatsoever. Using yesterday’s illustration by Commissioner Cannon, the AMAA immunity is not “clear cut but is more like sausage” which continues to be stuffed.

**Executive:** On April 11, 2006, President Bush signed the Milk Regulatory Equity Act into law. In addition, the executive regulatory agency responsible for oversight continues to proffer that adoption of deregulatory reforms are beyond their powers and solely within the jurisdiction of Congress. However, as DOJ stated in 1991: “The Act expressly provides that the [agency] shall terminate or suspend operation of an order or a provision of an order if the [agency] finds that the order or provision “obstructs or does not tend to effectuate the declared policy of [the act].” 7 U.S.C. § 608c16(A).\(^2\)

**Judicial:** The constitutional legality of the statute’s immunity to regulated milk pricing narrowly passed a New Deal Supreme Court in two landmark and precedent setting

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cases.\(^3\) Since then a very broad and expansive set of legal precedent has been laid down based upon this weak judicial foundation. Milk price regulation issues have been so constitutionally controversial that over 30 regulated milk pricing cases have had to deliberated and decided by the Supreme Court since the statute’s enactment. The AMC must be very clear and specific in order to overcome *stare decisis*.

I fully agree with Professor Carstensen that the AMC must clearly and specifically “point out that the present system [as it pertains to the dairy industry] both insulates exclusionary and exploitative conduct from antitrust review and imposes significant costs on consumers that may yield little real gain to the purported beneficiaries–dairy farmers.”\(^4\)

I applaud the transparency and openness of your deliberations. I have tremendous trust in your efforts to restore competition as the fundamental economic policy of the United States. I stand ready to assist you in any way possible.

Sincerely,

Randal K. Stoker  
Former dairyman and public servant

\(^3\) Nebbia v. New York, 291 U.S. 502 (1934)  
and U.S. v. Rock Royal, 307 U.S. 533 (1939)  

\(^4\) Professor Peter C. Carstensen, submitted comment at:  
A Small dairyman shakes up milk industry

Source: Wall Street Journal
By: Ilan Brat, The Wall Street Journal
Date: Thursday, February 02, 2006

A lone milkman is delivering misery to the doorstep of the giant dairy industry. Hein Hettinga was once a simple dairy farmer who sold raw milk from his farm in Chino, Calif. Today the Dutch immigrant has expanded his operation so much, so fast, that some of the biggest dairy companies and cooperatives in the U.S. have banded together against him. They are lobbying for federal laws to close loopholes they claim he exploits. Mr. Hettinga counters that the only purpose of the proposed legislation is to kill competition -- and keep milk prices high. "That's not right," says the 63-year-old farmer.

The milk fight, which is being watched in the industry from coast to coast, started because Mr. Hettinga runs a rare hybrid operation. Most dairy businesses either only produce milk, or only process it. He does both. As a result, he falls into a protected class that isn't bound by an arcane system of Depression-era federal rules. Under it, milk processors selling into specific geographical areas, which cover most of the country, must all pay into that area's pool for subsidizing milk prices. But so-called producer-distributors have always been exempt.

Mr. Hettinga also has avoided pricing rules at the state level. Because he has a bottling plant in Yuma, Ariz., that ships milk into California, he isn't covered by Golden State regulations. That means his costs are lower than those of rival processors; he can sell his milk for less. By some estimates, his entrance into the Southern California market lowered milk prices for retailers by 20 cents a gallon -- though the dairy industry in California says consumers haven't seen the savings at the grocery store.

Feeling Mr. Hettinga's regulatory end run is legal but unfair, dairy-processing giant Dean Foods Co., supermarket chain Kroger Co. and the Dairy Farmers of America, the nation's largest such cooperative, are backing bills introduced in Congress in recent months by California Republican Rep. Devin Nunes, a former dairyman, and Sen. Jon Kyl, a Republican from Arizona. The bills would force the smaller operators doing business in those two states to pay into the pool if they grow to a certain size.

Mr. Hettinga is a standout in U.S. agriculture. He has figured out how to thrive as an independent farmer when the American farm belt is dominated by corporations. Cargill Inc. and Archer-Daniels-Midland Co. have consolidated the business of grinding and milling grain. Tyson Foods Inc. has done the same in meat. Now Dean Foods and the Dairy Farmers of America are working on a similar feat with milk. Dean already controls a third of all milk that is consumed in America annually and DFA represents more than a third of fresh milk produced.

The showdown on the West Coast has national implications. The Virginia State Dairymen's Association says the legislative crackdown would protect the state's dairy industry from similar unregulated incursions such as California is facing. The International Dairy Foods Association, the largest group representing processors in the country, and the National Milk Producers Federation, a collective of cooperatives, call the emergence of large farm operations that could also package their own milk a national issue of "critical concern." The growth of producer-distributors, they argue, would disrupt a system developed in the 1930s to ensure that Americans would have stable access to milk. Because the product is perishable, in the old system, big processors exerted so much market clout over small dairy farmers that they strong-armed pricing, sometimes causing shortages in the milk supply. The current rules give farmers more predictable milk prices.
Under the federal regulation and California's state system, processors now pay a set price into a pool based on how they will use the raw milk, for cheese, yogurt or bottling. The pool is averaged, and that sets a minimum price guaranteed to farmers. Farmers like Mr. Hettinga who also bottle their own milk -- a group whose numbers have actually been shrinking -- were exempted from the pricing provisions partly because they were such small-time operations that they were negligible market forces.

Mr. Hettinga moved as a child from Holland to Southern California in 1949 with his family. After high school, he took a job working with livestock, first milking cows, then later trimming hooves and castrating bulls. By the early 1970s, he was running his first dairy farm, in Chino. He joined local cooperatives and expanded his business, buying up seven dairies in Southern California and Nevada in the next two decades. In 1994, he built a $160,000 bottling plant for his own milk in Yuma. He began shipping to nearby Mexico and elsewhere in Arizona, competing with the farm cooperative United Dairymen of Arizona, which says it controls 80 percent of the state's raw milk supply. He undercut his rivals and soon was selling milk in discount supermarkets across the state. As the stores multiplied, so did his milk sales, more than tripling in less than a decade. He now supplies more than 10 percent of the bottled milk in Arizona, about 25 million gallons annually, he says.

"He went from a curiosity to an irritation to a real problem in the marketplace in a relatively short period of time," says Bill Shiek, an economist with the Dairy Institute of California. His opponents were particularly riled by Mr. Hettinga's building a $12.5-million milk-processing plant in Yuma. The plant supplies about 700,000 gallons of milk a month to more than 20 Costco Wholesale Corp. stores across the border in Southern California. Dairy farmers in California and Arizona say Mr. Hettinga is costing them millions of dollars a month by not having to pay into either of the two states' price pools. "The farmers just want everybody to play by the same set of rules that they have to play by," says Mike Marsh, president of the Western United Dairymen, a large industry group in California. Defiant, Mr. Hettinga has taken his battle to the streets. Last year, he slapped about 50 giant stickers on the backs of all his milk tankers and trucks. They read: "Stop the milk monopolies from raising your milk prices!"