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**To:** <info@amc.gov>  
**Subject:** Consitutionality of Milk Pooling

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

August 21, 2006

Dear Ms. Garza and Commission,

Today's dairy industry is a classic victim of what economists call the *tragedy of the commons*. A tragedy of the commons is a term used by economists to describe a common resource that is ultimately doomed due to over-exploitation by self-interested individuals.

The term originated from the medieval custom where the landowning nobility granted sections of land for common use. These sections of land became known as *the commons*. Commoners were granted rights to hunt game and pasture animals on these sections of land. Inevitably, the use of this common property started a series of events that resulted in an economic *tragedy*. Commoners, using common pasture for example, would add additional animals whenever possible. Each additional animal had both a positive and negative economic impact. The individual commoner received positive benefit from each additional animal. The rational course of action was to add an extra animal - and another, and another. However, each additional animal negatively taxed the common pasture's ability to sustain the common good of all those sharing the pasture. Since all of the commoners came to the same conclusion, overgrazing and full degradation of the pasture was the ultimate result. Nonetheless, the rational response remained the same at every stage of degradation because the benefits of exploitation accrued to each commoner, while the costs of exploitation were distributed between all the commoners exploiting the resource. The overgrazing of a common pasture is an example of the tragedies that result from making an economic resource common.

During the depression era, chaotic events in milk marketing led to the development of a fluid-milk-value commons. Legislation was enacted which made the higher value of fluid milk *common*. The higher value of fluid milk was to be shared by all

producers supplying the market. Today, the real or perceived higher value of fluid milk has been extremely over-exploited. Few would disagree that a *tragedy of the commons* has caught up with our dairy industry. The fluid-milk-value commons has exhausted its useful application and the pasture has been so severely overgrazed to the detriment of all industry participants. The situation has now evolved into winners and losers who constantly wrangle over their own perceived sections of pasture and an aristocracy that has no choice but to arbitrarily grant benefit to some at the expense of others.

Early in American history, inspired civil servants ventured to overcome economic tragedies of the common by establishing a system of law that protected individual property rights and held all individuals equal under the law. Our legal system came to be known as *common law* or law that applied to all regardless of social status or position. Our Constitution defined a new system that was meant to entice all self-interested individuals in society to negotiate and reach mutually acceptable compromises between each other. Such a system of law would promote equality of opportunity, liberty, and justice for all. Under this system of law most individual disputes over limited economic resources would impartially self-regulate because the law itself would be impartial and all individuals would be held equal under that law.

However, during the depression era, dairy's policymakers deviated from that system of equality and impartiality under the law and set the stage for dairy's ultimate tragedy of the commons. Supreme Court Justices McReynolds, Van Devanter, Sutherland, and Butler, objecting to the new dairy statute, stated that *The adoption of any concept of jurisprudence which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction. Then, all rights will be subject to the caprice of the hour; government by stable laws will pass.* (Nebbia v. People of State of New York, 291 U.S. 502, 1934) Five years later, the Supreme Court Justices, again objecting to the administration of the adopted dairy statute, insightfully stated: *This is not government by law but by caprice. Whimseys may displace deliberate action by chosen representatives and become rules of conduct. To us the outcome seems wholly incompatible with the system under which we are supposed to live.* (United States v. Rock Royal Co-op., 307 U.S. 533, 1939)

Dairy's tragedy of the commons gives our industry the unique opportunity to observe first-hand the wisdom of our foundational economic and legal system. This system was meant to protect individual property rights and motivate individual incentive to serve the common good of all. This system was meant to

allow the invisible hand of the free market to equitably and impartially balance conflicting interests and maximize the allocation of capital resources. This system was meant to provide maximum freedom of opportunity to all producers, processors, and consumers. It is past time for our dairy industry to restore the foundational economic principles that not only assure prosperity but also assure true equality and impartiality under the law.