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August 16, 1996

Mr. Richard M. McKee
Director, Dairy Division
Agricultural Marketing Service
United States Department of Agriculture
P.O. Box 96458
Washington, D.C. 20090-6456

Re: Reform of Federal Milk Marketing Orders—
Elimination of the Producer-Handler Exemption

Dear Mr. McKee:

The recent Fifth Circuit decision in the Gore case suggests that now may be the time for reform of the federal milk orders to eliminate the discriminatory producer-handler exemption as the Dairy Division has administered it over the years. Associated Milk Producers, Inc. (AMPI) and United Dairymen of Arizona (UDA) submit that it's time to address the sharp criticism of the exemption voiced by the Secretary's Federal Order Study Committee in its 1962 Report (at p. 62):

> Historically, exemption from regulation has been given to certain handlers, particularly public-owned processors and producer distributors. Little justification exists today for exemption from regulation and only under the most unusual circumstances should such exemption be granted.

Clearly, a 6 million pound plus per month producer-handler, such as Gore, or, indeed, any producer-handler who distributes milk on routes to wholesale accounts in competition with fully regulated handlers fails to present the kind of "unusual circumstances" referred to in the Report. As to such producer-handlers, the Report might well have said that there is neither "justification" nor statutory authority for their exemption, as disclosed by the legislative history of the AMAA and judicial decisions authorizing the Secretary to regulate handlers with respect to "own farm production."

The underlying purpose of the AMAA is to raise producer prices by promoting "orderly marketing." 7 U.S.C. § 602; Block v. Community Nutrition Institute, 467 U.S. 340, 342 (1984). The basic mechanism for achieving "orderly marketing" is through the statutory

authority granted by the AMAA to regulate "handlers" by requiring them to pay minimum prices for milk purchased from producers. The term "handler" is defined in 7 U.S.C. § 608c(1) to include "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof...." Milk orders adopted by the Secretary fix "minimum prices ... which all handlers shall pay ... for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to [specified] adjustments...." 7 U.S.C. § 608C(5)(A). (Emphasis supplied).

While the AMAA precludes the Secretary from issuing any milk order "applicable to any producer in his capacity as a producer" (emphasis added), there is nothing in the AMAA that purports to exempt a producer "in his capacity [as a handler]" from full regulatory coverage of a milk order. (7 U.S.C. § 608C(13)(B)). In fact, the AMAA specifically requires complete regulatory coverage of producers in their capacity as handlers by providing, in § 8c(5)(C), that in order to ensure the uniformity of class prices among handlers mandated by §§ 8c(5)(A) and (B) of the AMAA, the Secretary shall provide in each Order:

> a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection. (Emphasis added).

Moreover, the legislative history of the AMAA and its 1933 Agricultural Adjustment Act ("AAA") predecessor legislation clearly demonstrates an intent by Congress that producers acting as "handlers" should be subject to the same rules as other handlers. During hearings on the AAA (H.R. 5585), Chester R. Davis, Administrator of the AAA, testified that the Act specifically precluded the Secretary from "licensing" producers:

> except the licensing of a producer acting in the same capacity as a commercial enterprise; that is, where a producer also is a large distributor or engages in business in such volume that his cooperation is necessary to carry out the marketing plan; in that case he would be licensed, not as a producer but as to his capacity as a handler and producer.

Hearings on H.R. 5585, 74th Cong., 1st Sess. at 14. During questioning of Mr. Davis following his testimony, the following colloquy occurred:

> Mr. Fulmer: What do you propose to do with the farmer who produces and processes [and] sells his own farm products?

> Mr. Davis: If the volume is large enough to be an important factor in the market, then they would be expected to come under the market plan just the same as the man who buys and sells.

Id. at 27.

The provisions of the 1933 AAA relative to the "licensing" of producers in their capacity as "handlers" was carried forward in the 1935 legislation amending the AAA (H.R. 8492) and in the 1937 amendments that eventually became the AMAA of 1937.

The debates on H.R. 8492 on the floor of the Senate demonstrate that the Congress intended full regulation of producer-handlers in their capacity as handlers as indicated by the following exchange between Senators Copeland and Murphy:

> Mr. Copeland: In up-state New York a great many of the milk handlers are producers and distributors. According to the amendments ... everyone of those ... would be subject to all the orders promulgated by the Secretary. These producers ... would be required to make adjustments by being compelled to contribute to maintenance of an adjustment or equalization fund.... Therefore the distributors who [produce] ... their own milk ... would have to share their position in the market with other producers. Is that correct?
>
> Mr. Murphy: Yes; that is correct.

79 Cong. Rec. 11,138 (1935). As explained by Senator Byrd during debates on the 1935 legislation on the floor of the Senate, "if a producer handles his own milk he becomes a handler and therefore is subject to all the rules and regulations affecting handlers." 79 Cong. Rec. 11,140 (1935).

Thus, as is plainly revealed by the foregoing review of the legislative history accompanying Congress's consideration and adoption of the AMAA, there is no express statutory authority for granting to producers-handlers any exemption from the provisions of the AMAA establishing minimum prices which "all handlers" must pay to producers and from the obligations to the pool imposed on handlers by the AMAA. On the contrary, it is clear from the legislative history that the Congress that adopted the AMAA fully intended that producers, in their capacity as handlers, be regulated in the same manner and to the same extent as the AMAA regulates "ordinary" handlers.

Judicial decisions and prior adjudicatory decisions of the Secretary have confirmed that Secretary's authority to fully regulate producers with respect to their own farm production which they market as handlers. Freeman v. Vance, 319 F.2d 841 (5th Cir. 1963), cert. denied, 377 U.S. 930 (1964); Ideal Farms, Inc. v. Benson, 288 F.2d 608 (3rd Cir. 1961), cert. denied, 372 U.S. 965 (1963); Acme Breweries v. Brannan, 109 F. Supp. 116 (N.D. Cal. 1952). In Acme Breweries, the court held that the Secretary was authorized under the AMAA to regulate a brewer who consumed all of the hops which it grew in the brewing of its beer because "[t]he Act authorized the Secretary to apply orders regulating the handling of [agricultural commodities] to 'processors, associations of producers, and others engaged in the handling of' [the commodity]. 7 U.S.C.A. § 608c(1)." (109 F. Supp. at 117). The court noted further that

> The Act exempts two classes of persons from regulation: "any person who sells agricultural commodities ... at retail in his capacity as such retailer," 7 U.S.C.A. § 608c(13)(A); and "any producer in his capacity as a producer." 7 U.S.C.A. § 608c(13(B). The inclusion of these exemptions in the Act indicates that it was intended that the incidence of regulation should fall upon those who do something with ... hops other than to grow them or to sell them at retail. The language "in his capacity as ..." limits the exemption in each instance.

Id. at 18. The court concluded that "[t]he declared policy of Congress can be achieved only if all hops which supply the commercial demand therefor are regulated." Id. at 120.

In Ideal Farms, Inc. v. Benson, supra the Third Circuit upheld the Secretary's authority under the AMAA to compel a handler to account to the federal order pool for milk which the handler produced on his own farm and bottled sold in competition with other regulated handlers. In rejecting the appellants' contention that AMAA did not authorize the Secretary to regulate producers in their capacity as handlers, the Third Circuit said:

> Were we to accept appellants' construction ... they could avoid the intent of the Act to achieve a fair division of the more profitable fluid milk market among all producers and they would avoid the necessity of sharing the burden of surplus milk. See United States Rock Royal Cooperative, Inc. supra....

288 F.2d at 613. Noting that § 8c(5)(C) of the AMAA authorizes the Secretary to regulate "handlers (including producers who are also handler to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed [by the order])" (id. at 614), the court concluded that "[t]he more reasonable construction [of the section] is that

the parenthetical phrase was meant to reach a producer-handler who handles or distributes milk which he himself produces." Id. at 615. Accord, Freeman v. Vance, supra. (The AMAA applies to a producer in his capacity as a handler).

Though the express statutory language of the AMAA, its legislative history and judicial decisions establish that "producers" who are also "handlers" should be regulated to the same extent as other handlers, in the administration of the AMAA, the Dairy Division decided, in the interest of administrative simplicity and to avoid challenges to the Secretary's regulatory authority, to exempt handlers whose own farm production was "not sufficiently significant to constitute a serious competitive factor in the marketing area." In re Jacob Tanis, 17 Ag. Dec. 1091, 1093-1094. According to Herbert L. Forest, the Division's long time Director, the producer-handler exemption had its origin under the licensing program preceding the 1937 AMAA when the Department decided that the de minimus competitive impact of small producer-handlers in the Kansas City market did not warrant their regulation. (Statement of Herbert L. Forest Re: Producer-Handler Regulation, February 1, 1990, Phoenix Arizona)

Except for the de minimus exemption, it was standard practice under the licensing authority of the 1933 AAA to specifically include within the definition of "distributor [handler] all persons engaged in distribution in the marketing area irrespective of whether such person was also a producer, and to subject such persons to complete regulation (License No. 30, Chicago Illinois) or to exemption up to a specified daily minimum quantity. (See, e.g. License No. 63, Alameda County Calif.; License No. 38, Greater Boston area; License No. 60, Louisville, Kentucky; License No. 65 Ann Arbor Mich.; License No. 50 Detroit Mich.; License No. 80 Baltimore Md.).

The authority to regulate producers in their capacity as handlers of their own production was carried forward in the 1935 amendments to the AAA and the AMAA of 1937. Under the 1935 amendments, some orders provided for full regulation of own farm production with no exemption. (Order No. 11, District of Columbia, September 21, 1936), while others provided for partial exemption or various methods of proration when some milk was purchased from other producers.

It is thus crystal clear that throughout the entire history of milk regulation, from the 1933 AAA license program. through the 1935 amendments through the 1937 reenactment of the AMAA, the Secretary has had not only the authority but the statutory duty to regulate "producers who are also handlers to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with" § 8c(5)(A) of the AMAA.

While Congress has provided in a number of AMAA amendments that: "The legal status of producer-handlers under ... the [AMAA] shall be the same after the amendments made by this title take effect as it was before the effective date of such amendments," the amendatory language has not diminished the Secretary's authority and duty to fully regulate Producer-Handlers. Since the language of the AMAA and judicial decisions directed "producers who are also handlers" to be regulated before the amendatory legislation by Congress, nothing has been changed by the legislation that would have the effect of exempting "producers who are also handlers" from full regulation under the AMAA.

AMPI and UDA submit that the basis for exemption of a producer-handler from full regulation stated by Chester R. Davis, the original Administrator of the AAA in 1933 remains the only justifiable basis for the exemption today: "If the volume is large enough to be an important factor in the market, then they would be expected to come under the market plan. ..." Hearings on H.R. 5585, 74th Cong. 1st Sess. at 14. "If ... he became a large enough commercial operator he would have to be subject to the same regulation." Hearings at 44.

Applying that standard for exemption to the existing structure of the market for fluid milk products would require amendment of the producer-handler provisions of all federal milk orders to limit the exemption to producer-handlers who dispose of fluid milk products directly to consumers through home delivery retail routes or through a retail store located on the same property as the milk processing plant. To exempt from pricing and pooling producer-handlers who compete for wholesale accounts directly with handlers subject to full regulation is not only contrary to the AMAA but is so patently discriminatory as to raise a serious "equal protection" question under the U.S. Constitution.

Very truly yours,

Sydney Berde

cc: Robert M. Girard
Jim Box

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