



National Milk Producers Federation

National Milk Producers Federation • 2101 Wilson Blvd., Arlington, VA 22201 • 703-243-6111; FAX 703-841-9328

January 30, 2009

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Southeast Milk, Inc.
Swiss Valley Farms, Co.
Tillamook County Creamery Assn.
United Dairymen of Arizona
Upstate Niagara Cooperative, Inc.
Zia Milk Producers

Dana Coale, Deputy Administrator for Dairy Programs
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Re: Petition to amend all Federal milk marketing orders

Dear Ms. Coale:

Please find attached NMPF's petition requesting that all Federal milk marketing orders be amended to:

- end special treatment of so-called "producer-handlers", and
- expand and clarify the regulatory exemption of small distributing plants

We believe that the producer handler provisions have outlived their usefulness, given changes in technology and markets.

We also believe that the exemption for small distributing plants can be expanded modestly. This will reduce the regulatory burden – for small handlers and for USDA – without having a significant impact on orderly marketing and Federal order pool values.

Thank you for your consideration on this important issue, and please feel free to call me or Roger Cryan if you have any questions about this.

Sincerely,

Jerry Kozak

CC:

Cindy Smith, Acting Deputy Under Secretary for Marketing and Regulatory Programs
Kevin Shea, Acting Deputy Under Secretary for Marketing and Regulatory Programs
David Shipman, Acting Administrator, Agricultural Marketing Service

Jerry Kozak, President/Chief Executive Officer

Randy Mooney, Chairman

**Proposal by the National Milk Producers Federation
To Amend Federal Milk Marketing Orders to Expand the Size Limit
For Exempt Handlers and Delete the Producer-Handler Provision**

The National Milk Producers Federation (NMPF) is the voice of American dairy farmers and their cooperative associations. NMPF's 31 member cooperatives represent three-fifths of the nation's 60,000 commercial dairy farmers and a similar share of their production.

NMPF has long supported the full and fair regulation of fluid milk handlers who are also producers under Federal milk marketing orders. The special status of producer-handlers was instituted in the early years of the Federal orders for administrative reasons, at a time when the size of today's large producer-handlers were not even imagined.

After 70 years, conditions demand the elimination of special status for producer-handlers. Changes in technology and the growth of the largest dairy farms offer a new model of producer-handler. Large producer-handlers can now capture sufficient economies of scale in processing their own-farm milk to unfairly exploit their artificial raw milk price advantage – an advantage of as much as 15¢ per gallon or 8% of the raw milk cost. Such a producer-handler can, by itself, disrupt the orderly marketing of milk in a market. More importantly, such large producer-handlers could proliferate across a market, causing even greater disruption in aggregate. Moreover, the potential exists under current regulation for such producer-handlers to be recruited and organized for the purposes of capturing additional scale economies. This could thoroughly undermine the pooling of market values.

Numerous producer-handlers have achieved sizes at which their special status is disruptive to marketing under Federal orders; the producer-handler provision has become an unjustified loophole in Federal order regulation. The law under which Federal orders operate specifically authorizes the regulation of producers in their capacity as handlers. The current producer-handlers provisions pose a potential threat to each and every Federal milk marketing order, and to the producers and processors participating in the orders.

There is also good reason to expand the current exemption for small plants. The scale of milk production and milk processing has grown, and the regulatory burden on very small plants and USDA can be reduced through a reform of the exemption for small independent distributing plants.

NMPF, representing U.S. dairy farmers and their cooperative enterprises, believes that it is time to eliminate the producer-handler provision, and to expand and qualify the exempt plant provision in every Federal milk marketing order. These two proposals will more fairly exempt small businesses, and end an unjustified loophole.

* * *

Specifically, NMPF proposes to delete Section 10 in Parts 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131, and all references to those sections and to "producer-handlers".

NMPF further proposes to amend Section 8 in Part 1000, as follows:

§ 1000.8 Nonpool plant.

Nonpool plant means any milk receiving, manufacturing, or processing plant other than a pool plant. The following categories of nonpool plants are further defined as follows:

(a) A plant fully regulated under another Federal order means a plant that is fully subject to the pricing and pooling provisions of another Federal order.

(b) ~~Producer handler plant means a plant operated by a producer handler as defined under any Federal order.~~

(e) Partially regulated distributing plant means a nonpool plant that is not a plant fully regulated under another Federal order, ~~a producer-handler plant~~, or an exempt plant, from which there is route disposition in the marketing area during the month.

(d) Unregulated supply plant means a supply plant that does not qualify as a pool supply plant and is not a plant fully regulated under another Federal order, ~~a producer-handler plant~~, or an exempt plant.

(e) An exempt plant means a plant described in this paragraph that is exempt from the pricing and pooling provisions of any order provided that the operator of the plant files reports as prescribed by the market administrator of any marketing area in which the plant distributes packaged fluid milk products to enable determination of the handler's exempt status:

(1) A plant that is operated by a governmental agency that has no route disposition in commercial channels;

(2) A plant that is operated by a duly accredited college or university disposing of fluid milk products only through the operation of its own facilities with no route disposition in commercial channels;

(3) A plant from which the total route disposition is for individuals or institutions for charitable purposes without remuneration; or

(4) A plant that in all markets has route disposition and packaged sales of fluid milk products to other plants of ~~450,000~~ 450,000 pounds or less during the month, all of which are uniquely branded.

* * *

Eliminate special status for producer-handlers.

The producer-handler provisions were created 70 years ago to address the administrative difficulty of regulating many small farms that bottled, and often delivered, their own milk. It has evolved into a loophole for a handful of relatively large plants. We propose that USDA eliminate the producer-handler provision from all Federal orders, and concurrently adopt an expansion of the current size exemption.

NMPF requests that any special status under Federal milk marketing orders for “producer-handlers” be eliminated, in recognition of the increasing potential of such handlers to disrupt orderly marketing.

The Agricultural Marketing Agreement Act of 1937 specifically authorizes the regulation of “producers who are also handlers.” It is clear from the 1935 hearing record of the legislation reauthorized by Agricultural Marketing Agreement Act of 1937 that Congress intended for marketing agreement and marketing order programs to include producer-handlers whose volume “is large enough to be an important factor in the market,” since their “cooperation is necessary to carrying out the marketing plan.” (Amendments to Agricultural Marketing Agreement Act: Hearing before the Committee on Agriculture, House of Representative, 74th Congress, First Session on HR 5585-Serial E; cited in mimeographed brief on authority to regulate producer-handlers.)

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 608c(5)(C) authorizes:

“In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing 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 purchases by him at the prices fixed in accordance with paragraph (A) hereof.” [Emphasis added.]

Treating producer-handlers like other handlers is equitable and consistent with the both the letter and the intent of the law.

Producer-handlers were originally given special status for administrative reasons, not on legal principles. The Kansas City Market Administrator was unable or unwilling to fully regulate a large

number of small producer-handlers in the 1930's. The producer-handler definition was created to establish an alternative form of regulation for such operators. This form of regulation requires regular reporting to the Market Administrator and requires producer-handlers to substantially balance their own supplies and defines the Federal order value of milk delivered from a producer-handler to another regulated plant. It was originally assumed that these operators, subject to these restrictions on their supply and marketing, would each be so small as to not have a significant effect on the market. However, this special status can provide substantial advantages, if the assumptions about small size fail to hold true.

Origin of Producer-Handler Regulation

The Federal milk marketing order program itself has its origins in the Agricultural Adjustment Act of 1933, which generally authorized the Secretary of Agriculture to enter into agreements with producers and to license handlers, in order to “restore normal economic conditions in the marketing of” milk and milk products. The Department combined these powers to implement marketing agreements enforced by licensing in numerous markets. These licenses are the direct antecedents of today’s milk marketing orders.

Although many markets were supplied primarily by handlers who procured milk from producers and cooperative associations, in the Kansas City market producer-handlers sold 50% of the milk and cream consumed when the market’s license was instituted in 1935. This license was intended to regulate them along with other fluid milk handlers. However, the market administrator encountered considerable resistance from a substantial number of these producer-handlers, who generally failed to submit reports and who refused to make payments to the equalization fund when they did submit reports. Most of the rest followed suit when the market administrator failed to enforce these requirements on the original non-compliers. Successive amendments to the marketing agreement were made to lessen the burden on producer-handlers, but since no effective enforcement accompanied even these, non-compliance among producer-handlers continued to grow. In July 1935, unable or unwilling to surmount the practical difficulties of enforcement, the department abandoned its attempts to regulate producer-handlers beyond reporting requirements. *That is, producer-handlers were given special regulatory status as a matter of administrative expediency.* This is the status that producer-handlers of all sizes enjoy today in all Federal order markets. (See *Early Developments of Milk Marketing Plans in the Kansas City, Missouri, Area*. 1952; USDA.)

In May 1935 the Supreme Court invalidated the National Industrial Recovery Act for its overly broad delegation of Congressional authority to the executive branch (*A.L.A. Schechter Poultry Corp. v. United States*). The marketing agreement and licensing provisions of the Agricultural Adjustment Act of 1933 (PL 73-10) gave the President and Secretary of Agriculture similarly broad and ambiguous powers over agriculture. In August of 1935, for this reason, Congress amended this Act to codify the previous practices of the USDA, re-establishing the licensing of handlers as Federal milk marketing orders. (PL 74-320) Significantly, these 1935 amendments included language “providing 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 prices fixed” by USDA. In other words, the regulation of producer-handlers was specifically authorized. After the Agricultural Adjustment Act of 1933 was invalidated in *United States v. Butler* (1936), this language was reenacted in the Agricultural Marketing Agreement Act of 1937 (PL 75-137), and has been retained to the present day (7 USC 608c(5)(c)), as part of a continuous system of milk marketing regulation; for example, the Central Federal Milk Marketing Order (7 CFR 1032) incorporated the Greater Kansas City Order, which had been continuously in force since its December 1936 establishment as the successor to the license discussed above. (See *Federal Milk Market Order Statistics Annual Summaries* for 1999 & 2002. USDA/AMS.)

Over the years, a variety of orders had a variety of producer-handler provisions whose basic thrust was to require producer-handlers to nominally balance most of their own supply. In 2003, a petition to limit the potential size of producer-handlers in the Arizona and Pacific Northwest markets was heard, and in 2005 was acted upon favorably, by USDA. A final rule issued in 2006 limited producer-handlers in those markets to 3 million pounds of fluid milk sales per month. (71 FR 9430)

A Changing Industry

Changes in the industry have drastically reduced the number of producer-handlers and as drastically increased their potential size. Some of those have become much larger than could have been imagined 70 years ago.¹ The regulation of large producer-handlers would now be no more difficult than that of other handlers.

The early difficulties in regulating producer-handlers gave way over the years to indifference about their regulation, due to their shrinking numbers and small size. Even today, in many markets, most (82 out of 111) potential producer-handlers fall under the 150,000 pound size exemption. (See table entitled *Federal Milk Order Small Plant Structure Information for May 2008*, attached.) Until recently, the substantial growth in the scale and efficiency of large fluid milk processors meant that even the largest farms were unable to take advantage of the scale economies; with relatively high unit costs, producer-handlers did not proliferate, and in fact, they declined in number and volume processed.

In 2007, however, there were 595 dairy farms with over 2000 cows, compared to only 235 in 1998, when they were first counted. A 2000-cow dairy produces nearly 4 million pounds per month. The average farm in this category produced 6.6 million pounds per month in 2007 (compared to 4.7 million in 1998). These 595 farms now produce over one-quarter of the U.S. milk supply. They are large enough to exploit both the producer-handler raw milk price advantage and economies of scale in fluid milk processing. Their share of production means they could capture a large share of the Class I sales in an individual market or nationally, if many of them adopted this model: milk production on those 595 largest farms is equal to 80% of all sales of fluid milk products in the U.S. (*Milk Production*. USDA/NASS, February 2000, February 2008; *Farms and Land in Farms*. USDA/NASS, February 2008; *Federal Milk Marketing Order Statistics 2007*, USDA/AMS.)

Today there are 17 producer-handlers with route sales in excess of 300,000 pounds, including 5 with route sales above 2,000,000 pounds. (*Federal Milk Order Small Plant Structure Information for May 2008*. USDA/AMS.) The hearing on producer handlers in the Arizona and Pacific Northwest markets demonstrated the potential disruption that large producer-handlers can inflict, individually and collectively, on orderly marketing, finding specifically that large producer-handlers in those markets were “the primary source of disruption to orderly marketing of milk.” (70 FR 74186) Producer-handlers also have a significant and growing share of Class I sales in the Northeast market; this was 114 million pounds in 2007, up from 69 million pounds in 2002. (*Market Administrator’s Bulletin*, April 2008. p. 2) This is the only market for which such a breakout is readily available; it is believed that the market share of producer-handlers is much greater in several other markets for which we await data from U.S.D.A.

The Cost Advantage of Producer-Handlers and Uneconomic Re-organization.

A producer-handler, by avoiding full Federal order regulation as a distributing plant, can pay, effectively, the uniform price for milk at the plant. (As the market price for producer milk on the market, this is the appropriate transfer price for analysis of the regulatory impact on the producer handler plant.) Its regulated competitors pay the Class I price for the same milk. Table 1 shows selected statistics for all

¹ In 1947, for example, four different Federal milk orders each pooled less than 3,000,000 pounds of producer milk per month. (*Federal Milk Order Market Statistics, 1947-56*. Agricultural Marketing Service, USDA. 1959.)

Federal order markets, including a calculation of the price advantage that a producer-handler has in each market, equal to the Class I price minus the uniform price. This advantage ranges from 6¢ to 15¢ per gallon, or 72¢ to \$1.74 per hundredweight. (The difference between the Class I price and the uniform price at the base point will be the same across the market, since both are adjusted by the same location differential.)

As producer-handlers become large enough, their price advantage can become the primary basis for their existence. A large producer-handler can now enter the bottling business, even with uneconomic processing costs, purely to exploit this regulatory loophole.

The producer-handler provisions violate the principles of producer equity upon which the Federal orders rest. In the best case (vertical integration of efficient milk production with efficient milk processing) the producer pool is robbed to pay producer-handlers.

In the worst case (uneconomic reorganization of farms into producer-handlers) the status also creates deadweight losses in the market whose whole cost is borne by pooled producers. For example, a producer-handler could be up to 15¢ per gallon less efficient than the competition would otherwise require, and still be viable.

Orderly Marketing.

Producer-handlers' special treatment threatens orderly marketing. As stated above, less than 600 farms with over 4 million pounds of monthly production now produce about 25% of the U.S. milk supply, equal to about 87% of U.S. fluid milk sales. And the 1500 farms with over 2 million pounds control 42% of milk production, equal to more than 140% of fluid sales. These numbers are steadily increasing. The ability of such farms to exploit such a provision threatens both the producers and the handlers currently supplying U.S. markets.

Further, such producer-handlers, even if they bottle all of their milk and buy or sell no more, can now sell to wholesalers or retailers at an advantageous price. Such wholesalers or retailers can either balance their own supplies of milk, at the expense of pooled market participants; or they can raise and lower their prices seasonally, so that consumers will balance their supply at other stores, also at the expense of pooled market participants.

The upper limit of the loss to the pool is the loss of all Class I value. This would reduce the average pooled price by over a dollar per hundredweight. (Table 1)

Regular home delivery once provided an argument that a producer-handler could balance its own supply; it is the only marketing channel that is consistent enough to make this claim. However, home delivery has declined from 30% of fluid milk sales in 1963 to less than one half of one percent in 1997. (*Federal Milk Order Market Statistics for January and February 1999*. USDA/AMS.) And even home delivery sellers can find ways – seasonal pricing and seasonal sales efforts, for example – to shift their balancing burden onto the rest of the market. For example, one large producer handler in the Pacific Northwest market testified that its large grocery customers can balance their supplies with pool sources when the producer-handler plant cannot. (Docket No. AO-368-832; AO-271-837; DA-03-404. Transcript, p. 2374)

The conclusion must be that no producer-handler plant can truly be made to balance its own supply, if only because its customers have a choice of alternative sources for fluid milk.

The Need to Eliminate the Producer-Handler Provisions

There is no proper justification for the producer-handler provisions; and the Federal order objective of orderly marketing demands their elimination.

A producer who manufactures cheese, for example, is allowed to draw from the Federal order pool; but if the same producer bottles milk, he may avoid paying into the pool. As a matter of equity, it is time to bring the regulation of larger “producer-handlers” into line with that of other distributing plants.

In its December 14, 2005, recommended decision for the Arizona and Pacific Northwest Markets, USDA stated that, “Review of the intent of the producer-handler provision and the marketing conditions arising from this provision in these orders could warrant finding that the original producer-handler exemption is no longer valid or should be limited to 150,000 pounds per month Class I route disposition limit. However, the hearing notice for this proceeding constrains such a finding to a level of not less than 3 million pounds per month of Class I route dispositions.” (70 FR 74186)

We agree with USDA that producer-handler status is an anachronism, and propose to act on the Department’s conclusion through a new hearing whose scope is clearly defined to include the entire elimination of producer-handler regulation.

The principle of limiting producer-handlers to the same size exemption as other processors is a matter both of equity and of orderly marketing. In some Federal order markets, large producer-handlers already capture a significant share of Class I sales, undermining the pool value at the expense of producers and pool handlers.

We also propose to raise the size limit for exempt plants from 150,000 pounds of monthly Class I sales in an individual market to 450,000 pounds of monthly Class I sales in all markets. This is a distinct proposal, but effecting it concurrently with the elimination of the producer handler provisions can avoid unduly affecting small producer-handlers who have a very limited impact on the market. This would exempt all but the 10 to 15 largest current producer-handlers, as well as 30 to 35 plants that are now regulated or partially regulated.

Although several Federal order markets are not now substantially disrupted by the operations of large producer-handlers, it is good policy to establish uniform provisions which address this issue proactively, before such a foreseeable problem develops. This proactive approach minimizes the burden of regulation by laying out the rules in advance. The proposed changes would simplify and clarify the responsibilities of current producer-handlers, relaxing the regulatory constraints on their operations, and directing the largest of them to participate in the Federal order pool.

Expanding and Reforming the Exemption for Small Distributing Plants

Today, any plant with less than 150,000 pounds in monthly Class I sales is exempt from Federal order regulation. Given the growth in average farm size, and the growing economies of size in milk processing, it is reasonable to increase the size exemption to 450,000 pounds per month, and we propose to do so. For perspective, this is equal to the production of about 260 cows, or twice the size of the average dairy herd in the U.S. This would exempt 30 to 35 plants that are now regulated or partially regulated, as well as all but the 10 to 15 largest current producer-handlers. Plants this small cannot and do not compete with large modern plants on cost alone, with or without the pricing advantage offered by producer-handler status; some 100 such plants already do compete in Federal order markets primarily on the basis of additional value added.

We urge USDA to consider this increase in the limit concurrently with the proposal to eliminate the producer-handler provisions. The principle of raising the limit is sound, but the coincidence of the two should mitigate the regulatory impact of removing special regulatory status from small producer-handlers.

Origin of the Current Exempt Plant Size Limit

Today, any plant with under 150,000 pounds in monthly Class I sales is exempt from Federal order regulation. This limit was made uniform for all orders under Federal order reform. The proposed rule, published in 1998, stated:

“Options 2 and 3 both recognize the Identical Provisions Committee determination that [s/c] a handler distributing less than 150,000 pounds per month of fluid milk products does not have a significant competitive effect on the market, and that handlers of such size should, therefore, be exempt from the pricing and pooling provisions of the orders. The level of route disposition required before an exempt plant becomes regulated varies in the current orders. As recommended, any plant with route disposition during the month of 150,000 pounds or less would be exempt in the consolidated orders. This limit reflects the maximum amount of fluid milk products allowed by an exempt plant in any current Federal milk order and ensures plants that are currently exempt from regulation would remain so. (63 FR 4818)”

This decision confirmed the existing 150,000 pound size-based exemption in the West Texas-New Mexico order (7 CFR 1138.8(e)). This limit was set in 1991, based on proponent testimony. (56 FR 42246) That decision concluded that 150,000 pounds, which was smaller than the size of the average producer in the market, was small enough not to disrupt marketing.

“It is noted that the 150,000-pound monthly size limitation for an exempt plant is substantially less than the average size of producers that are currently associated with these markets. Consequently, it would appear that a plant of such size would not be a disruptive factor in the market either in terms of sales of fluid milk products or in the procurement of raw milk supplies. Thus, the proposal, which was not opposed by any party, is adopted in the merged order. (56 FR 42246)”

Based on changed conditions, we propose to raise this limit to 450,000 pounds, consistent with the principles upon which the 1991 decision was made.

Fluid milk bottling plants have increasing economies of scale. That is, the bigger they are, the lower their costs per gallon. This has been consistently demonstrated in industry and academic studies. These economies of scale flatten out, so that the advantages of increasing plant size are greater near the bottom of the range than near the top. Several published studies, including two studies at the University of Maine and a nationwide study conducted by Cornell University, all clearly demonstrate this principle.

Although exempt plants enjoy the same price advantage that producer-handlers now do, this advantage is greatly outweighed by the high processing costs of very small plants; so it is neither the primary basis for a small handler’s business nor a disruptive force on the market. Given this cost structure, such a plant should have little impact on the market, and so its regulation does not contribute to orderly marketing. That is, such plants will not proliferate on the basis of their regulatory cost advantage and are not anticipated to cause disorderly marketing.

In addition, some plants are so small that their contribution to the pool can be less than they cost to regulate, including the reporting burden on the plant and the burden on USDA. In a market with a 5¢ per hundredweight administrative assessment, a plant with 500,000 pounds of pooled receipts only contributes about \$250 per month toward the Market Administrator’s operating budget. If there is no meaningful contribution to orderly marketing from their regulation, they may reasonably be exempted.

Setting the Size Limit

We recognize the difficulty of setting any “bright line” size limit. In a dynamic dairy market, any attempt to fix a limit too finely may be self-defeating. Technologies change, market prices and rates of

Class I utilization change, and there is a risk of setting a limit that is too high, leading to uneconomic investment and disorderly market conditions, then causing further loss of investment if and when the limit is re-adjusted.

Nevertheless, we offer several bases for setting the limit at 450,000 pounds.

It is clear that the current limit is too low. A plant processing the output of a 90-cow dairy cannot compete in the milk commodity market. If the current limit is too low, then raising it incrementally is a positive improvement in the regulation. As a matter of principle, the change should be cautious, increasing to a level that is clearly not too high.

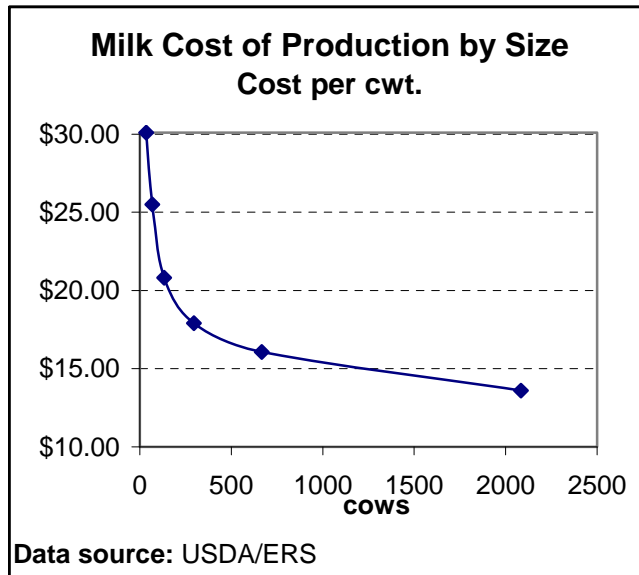
This proposal addresses the regulatory status of milk plants with respect to size, and does not attempt to effect any regulation of dairy farms. However, milk plants obtain their milk from dairy farms, whether they are under the same ownership or not. Moreover, precedent shows a reliance on farm size as a basis for establishing a size limit on exempt plants. For this reason, we extend our analysis to include a consideration of farm size.

Between 1991, the year of the West Texas-New Mexico hearing and decision, and 2007, the last year for which data is available, average milk production per U.S. dairy farm tripled from 68,000 pounds to 214,814 pounds. Since the original 150,000 pound limit was based in part on a consideration of farm sizes at that time, this tripling of average per-farm production supports a tripling of the exemption limit to 450,000.

Dairy farms have economies of scale such that there are cost disadvantages to a producer-handler with less than 500,000 pounds of monthly production. This is the conclusion of a USDA study of farm size. In 2005, it was estimated, farms with 500 to 999 cows had a \$4.75 per hundredweight cost advantage over farms with 100 to 199. This is a difference of 41¢ per gallon, and represents a substantial scale economy that could be considered in setting the size limit. More generally, based on this study, 500,000 pounds per month of production (about 300 cows) is near the point where the cost curve begins to get quite steep. That is, below that size, farm cost of production is clearly high enough that the value of the regulatory exemption will not encourage uneconomic processing paired with production. As such, it represents a reasonable bright line limit on regulation of an integrated farm and plant, which is one common business model for small exempt plants. (McDonald, James, et al., *Profits, costs, and the changing structure of dairy farming*. Economic Research Report No. 47; USDA/ERS; Sept. 2007. p. 9)

Under the mandates of the Regulatory Flexibility Act of 1980 and the Small Business Regulatory Enforcement Fairness Act of 1996, Federal agencies must consider impacts of regulation on small business. The formal small business definition for dairy farms is \$750,000 in sales or less. (13 CFR 121.201) As a practical matter, and because value fluctuates with milk prices, USDA, the Small Business Administration, and the Office of Management and Budget have determined that regulatory flexibility analysis should be based on a small business definition of 500,000 pounds of monthly milk production. (70 FR 74185) Given that a fluid milk handler can be hard pressed to achieve a Class I use rate of more than 90% of receipts, 450,000 pounds represents an approximate upper limit of the Class I use for a handler within this small business definition.

The small business definition was originally intended to provide a context for consideration of



alternative regulatory approaches for smaller businesses, rather than serving as the basis for exemption from meaningful or necessary regulation. Nevertheless, Federal small business definitions are used in a number of programs, such as Federal procurement programs, where a bright line is necessary and where the limit provides one reasonable choice, even if it is one among many. (Examples may be found at 7 CFR 4280.103, 7 CFR 4290.50, 12 CFR 24.2, and 13 CFR 127.) The small plant exemption in Federal orders was originally intended to alleviate the administrative and regulatory burden of regulating small entities. This intention was consistent with the objectives of the Regulatory Flexibility Act of 1980 and Small Business Regulatory Enforcement Fairness Act of 1996. Those acts recognize that regulation designed with large enterprises in mind can be unfairly burdensome when applied to small businesses, and require consideration of the impacts. Combined with consideration of economies of scale, above, the small business definition for a dairy farm can provide one reasonable bright line for the exempt plant definition. The small business definition for dairy plants, by contrast, is 500 employees; such a plant would be very large, and well beyond any reasonable limit for the regulatory exemption under discussion.

Finally, the limit should be set at the same level in all markets, consistent with the decision made at order reform. This should preclude setting the limit in each market according to a proportional impact on the individual market. The market-by-market approach should also be avoided because the larger consideration is whether a proliferation of exempt plants is probable and whether that proliferation could cause disorderly marketing, rather than what the impact of an individual handler may be.

Unique labelling

We further propose that USDA allows only uniquely labelled products under the size exemption. That is, an exempt plant should not produce any products under brands that are also produced by other plants. Clearly associating an exempt plant's products with a plant-specific brand will enforce the plant's independent nature. This is intended to reduce the potential for the assembly of a supply of packaged milk by a cost-oriented milk "integrator" with substantial control of the exempt plant's product. Such an "integrator" arrangement would violate what we consider to be the spirit of the size-based exemption, as an allowance for small businesses that are unlikely to affect their market, either individually or collectively.

Clarifying the exempt definition as based on total plant sales

Finally, we propose a clarification in the wording of the size-based exemption, to make clear that the expanded 450,000-pound monthly allowance applies to a plant's total sales, not only to sales in an individual market. This would avoid confusion by confirming the current interpretation by the Market Administrators.

Conclusion

NMPF agrees with USDA's conclusion in the December 14, 2005, recommended decision: "Review of the intent of the producer-handler provision and the marketing conditions arising from this provision in these orders could warrant finding that the original producer-handler exemption is no longer valid or should be limited to 150,000 pounds per month Class I route disposition limit." (70 FR 74186)

The current producer-handler provisions have become outmoded by a changing industry, and we believe that their underlying intent of limiting the regulatory burden of small handlers who do not substantially impact the market is better served through an expansion of the exempt handler provision.

- **January 29, 2009**

NMPF: Table 1
Selected Annual Price and Pool Statistics for Federal Milk Order Marketing Areas, 2007

FMMA	Base point	FO	Prod Milk (mil. lbs.)	CI I PM (mil. lbs.)	CI I %	CI II %	CI III %	CI IV %	Uniform price	Class I price	Diff. \$/cwt.	Diff. \$/gal.	Pool Loss of All Cl. I	Pkg'd disp., pool plants		
														Dist. plants	Million lbs. per year, all plants	Million lbs. per mo. per plant
Northeast	(Boston)	1	23,040	10,496	46	21	24	9	19.92	21.39	1.47	0.127	-1.23	59	10,521.2	14.9
Appalachian	(Charlotte)	5	5,865	4,120	70	17	5	8	20.36	21.19	0.83	0.072	-1.96	21	4,123.0	16.4
Southeast	(Atlanta)	7	7,521	4,772	63	12	20	5	20.09	21.20	1.11	0.096	-1.93	28	4,799.3	14.3
Florida	(Tampa)	6	3,207	2,604	81	9	5	5	21.29	22.01	0.72	0.062	-3.11	12	2,667.0	18.5
Mideast	(Cleveland)	33	16,268	6,571	40	18	35	7	18.75	20.12	1.37	0.118	-0.93	39	6,451.4	13.8
Upper Midwest	(Chicago)	30	26,490	4,508	17	5	76	2	18.41	19.94	1.53	0.132	-0.31	22	4,412.8	16.7
Central	(Kansas City)	32	11,193	4,345	39	17	32	12	18.67	20.12	1.45	0.125	-0.92	31	4,335.3	11.7
Southwest	(Dallas)	126	9,990	4,161	41	12	35	12	19.35	21.09	1.74	0.150	-1.24	20	4,178.5	17.4
Arizona-Las Vegas	(Phoenix)	131	3,799	1392.5	37	9	28	26	18.95	20.47	1.52	0.131	-0.88	5	1,393.9	23.2
Pacific Northwest	(Seattle)	124	7,036	2,256	32	7	30	31	18.62	20.04	1.42	0.122	-0.67	17	2,219.9	10.9
All Market Average or Total			114,408	45,226	40	13	38	9	19.19	20.81	1.32	0.113	-1.06	254	45,102.3	14.8

Source: Dairy Market Statistics, Annual Summary, 2007

Source: FMMOS, Ann'l Summ.,
2007

Federal Milk Order Small Plant Structure Information for May 2008

Plants Sizes Based Upon Total Route Sales

Data compiled on October 10, 2008, by Clifford Carman from information supplied by the Federal milk marketing order Market Administrator offices.

	Total Number	less than 150,000	150,000 to less than 300,000	300,000 to less than 1,000,000	1,000,000 to less than 2,000,000	More than 2,000,000
Total of producer-handlers qualified by an order	45	16	12	8	4	5
Total for Eastern orders (FO #'s 1, 5, 6, 7, 33)	16	na	9	4	na	na
Total for Western orders (FO #'s 30, 32, 124, 126, 131)	29	na	3	4	na	na

Note that some producer-handlers have sales in more than one marketing area and in unregulated marketing areas but they are counted only once based upon their total route sales in all areas.

	Total Number	less than 150,000	150,000 to less than 2,000,000
Total of exempt plants (additional break out provided below)	96	92	4
Total for Eastern orders (FO #'s 1, 5, 6, 7, 33)	73	>68	na
Total for Western orders (FO #'s 30, 32, 124, 126, 131)	23	>18	na
Additional break out information for exempt plants			
Governmental agency 1000.8(e)(1) or College or University 1000.8(e)(2)	11	7	4
Limited size (less than 150,000 of sales) 1000.8(e)(4) with own farm milk			
Total for Eastern orders (FO #'s 1, 5, 6, 7, 33)	58	58	
Total for Western orders (FO #'s 30, 32, 124, 126, 131)	8	8	
Limited size (less than 150,000 of sales) 1000.8(e)(4) with no own farm milk			
Total for Eastern orders (FO #'s 1, 5, 6, 7, 33)	8	8	
Total for Western orders (FO #'s 30, 32, 124, 126, 131)	11	11	

	Total Number	(1) less than 150,000	(2) 150,000 to less than 450,000	(3) 450,000 to less than 600,000	(4) 600,000 to less than 1,000,000	(5) 1,000,000 to less than 2,000,000	(6) 2,000,000 to less than 3,000,000	(7) 3,000,000 to less than 5,000,000	(8) 5,000,000 to less than 10,000,000	(9) 10,000,000 to less than 20,000,000	(10) 20,000,000 to less than 20,000,000	(11) More than 20,000,000
Total of regulated pool distributing plants (includes unit pooling plants)	256	7	11	4	14	10	3	19	37	78	73	
Total for Eastern orders (FO #'s 1, 5, 6, 7, 33)	160	4	8	na	na	6	na	14	22	43	47	
Total for Western orders (FO #'s 30, 32, 124, 126, 131)	96	3	3	na	na	4	na	5	15	35	26	

Note that 9 of the plants have some own farm milk -- 5 are in the Eastern markets and 4 are in the Western markets -- 3 have between 150,000 to less than 600,000 of sales and 6 have sales between 3,000,000 and 20,000,000

	Total Number	less than 150,000	150,000 to less than 300,000	300,000 to less than 600,000	600,000 to less than 1,000,000	1,000,000 to less than 3,000,000	3,000,000 to less than 10,000,000	10,000,000 to less than 20,000,000	More than 20,000,000
Partially regulated distributing plants -- none have own farm milk	39	8	4	5	5	4	3	7	3
Total for Eastern orders (FO #'s 1, 5, 6, 7, 33)	17	na	na	na	na	na	na	3	na
Total for Western orders (FO #'s 30, 32, 124, 126, 131)	22	na	na	na	na	na	na	4	na

Footnotes: 'na' means administrative confidential; therefore not available. The symbol '>' means greater than

Summary of data collection. The MA office's were asked to provide the total number of plants for four types; producer-handlers, exempt, regulated pool distributing, and partially regulated distributing in nine size ranges of total sales for each order as shown above for the type regulated distributing plants. The MA offices were also asked to indicate the plants with own farm milk. The numbers were added across all orders and then in order to not disclose any one plants' operation in each type (the regulated pool distributing type being the exception) the sizes were combined as shown above.