



Benjamin F. Yale - OH, TX, NM
ben@yalelawoffice.com

March 16, 2009

Ms. Dana Coale
Deputy Administrator USDA/AMS/Dairy Programs
Stop 0225-Room 2971
1400 Independence Ave., SW
Washington, DC 20250-0225
amsdairycomments@usda.gov

Re: Proposal for changes to Producer Handler Definition

Dear Ms. Coale

Select Milk Producers, Inc. and Continental Dairy Products, Inc. (“Select/Continental”) respond to the Department’s invitation for proposals regarding producer handler provisions in the milk marketing orders. In conjunction with and as an alternative to the NMPF proposal, Select/Continental propose two alternatives to be considered as amendments to 7 C.F.R. §1000.11 and adoption by all milk marketing orders. The alternatives are in response to industry requests to remove producer handler exemption altogether and establish a 450,000 pound cap for exempt plants. While Select/Continental support this generally, they oppose denying existing producer handlers the ability to continue their operations under the business model under which they now operate. Alternative I (proposals 1-3 combined) provides for a “grandfather clause” for existing smaller producer handlers at the lower of their 2007-2008 milk production or 3 million pounds. Alternative II (proposals 4-5) limits such exemption to plants with 3 million pounds per month of class I distribution or less.

It is our understanding that NMPF will support Alternative I in conjunction with its proposal to eliminate producer handler exemption altogether and have, in its place, an exempt plant limited at 450,000. Select/Continental support the combination of the NMPF proposal on a 450,000 cap with the grandfathering under Alternative I. In the event that the combination is not approved together, Select/Continental support Alternative II.

1. Explanation of the Proposal. Select/Continental alternatives provide in two different ways, that those producers who operate distributing plants prior to December 31, 2008, can avail themselves of the producer handler exemption for the lesser of the dairy farms total production for 2007-2008 base or 3 million pounds per month. In the event, the Department believes it has no authority for this provision or otherwise chooses not to adopt it, then Select/Continental proposes all marketing orders



March 16, 2009

Ms. Dana Coale

Re: Proposal for changes to Producer Handler Definition

Page 2 of 14

have the same language now used in the Pacific Northwest which is a uniform standard of 3 million pounds of Class I sales per month.

Both have the effect of “grandfathering” existing PDs. Alternative I is targeted to existing smaller PDs and protects their status quo. Only existing producers who process would be eligible for this proposal. Alternative II provides a universal cap available to anyone, even prospectively, that would, as a matter of course, allow smaller PDs to continue to operate.

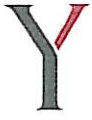
2. Purpose of the Proposal. USDA announced that it is considering holding a hearing to set the cap at 450,000 pounds and sought other proposals. These alternatives are in response to the one being promoted by NMPF and IDFA. The Select alternative proposals would protect existing, family owned and operated, producer handlers under 3 million pounds from regulation.

3. Describe the current Federal order requirements or industry practices relative to the proposal. The need for the lower of producer handler limits is detailed by NMPF. Select/Continental’ proposals 4-5 contained herein are now in place in Arizona and Pacific Northwest Marketing Areas. There are no caps in the remaining eight orders. Each of those orders has unique language, but fundamentally a producer handler is exempt if the producer has the full risk of the distributing plant and the distributing plant has the full risk of the dairy farm. With the exception of three larger producer handlers in the Southwest and Central Orders, the size of producer handlers are relatively small. This is due to the fact that current federal order minimum pricing and market wide pooling provide benefits to processors which are denied producer handlers. Growing and maintaining a larger producer handler as an exempt plant comes with great risk.

Larger producer handlers are not only not subject to minimum pricing under the orders, they undermine the ability of cooperatives to maintain over order premiums necessary to cover the costs of balancing the market.

At the same time, the smaller producer handlers now in the marketing areas have been there a long time, are part of the marketing conditions, and are not destabilizing. These operations exist today because they were begun years ago. With older, depreciated assets, established customer basis and no expressed intent for major expansion, they provide no threat to the marketing orders. At the same time, the economies of scale are prohibitive to the creation of such an operation today.

4. Describe the expected impact on the industry, including on producers and handlers, and on consumers. Prospective removal of the producer handler exemption will have no impact on existing



March 16, 2009

Ms. Dana Coale

Re: Proposal for changes to Producer Handler Definition

Page 3 of 14

producers, processors or consumers. Further, adoption of either of Select/Continental alternative proposals which either keep producer handlers where they are now or limit them to 3 million pounds of distribution per month will not have any impact on their consumers. Maintaining producer handler exemption for plants 3 million pounds and less will maintain a status quo amongst handlers who now compete against those in that size range and will have no impact on producers. Regulating producer handlers above 3 million pounds will have negligible if no impact on blend prices under the FMMO due to the relative size of the remaining order pools. Its benefit will be to provide stability in the market place. Removing the exemption for larger producer handlers will change the competitive relationship between them and their fully regulated handlers. It might also have an impact on consumer prices.

5. What are the expected effects on small businesses as defined by the Regulatory Flexibility Act (5. U.S.C. §601-612)? First, it is important to define “Small business”. Producer handlers are an issue not because they are large producers but because they are exempt handlers. The direct beneficiaries of regulating producer handlers goes to other handlers in the market. By bringing greater transparency to the market, producers benefit from the stability. The impact of removal of the exemption on producer handlers is on the handler side of those operations.

Having thus defined what is the “business” to be determined small, the impact of our proposal would have zero impact on producer handlers smaller than 3 million pounds and impact those small businesses who operate as producer handlers with greater than 3 million pounds per month.

As the industry enters into this highly contentious rulemaking, we must recognize that there are two views on why producer handlers should be subject to regulation. The view of the industry is that the existence of producer handlers is harmful to the purpose of the AMAA and to the industry. Regulation is therefore necessary to promote uniformity and equity among handlers and producers and to maintain stability within the marketing areas. For producers, the contribution to the pool of Class I proceeds is critical and allowing some producers to not have to share those proceeds is harmful to the pool. Another view, one held by producer handlers and their sympathizers, is that the current effort to remove the producer handler exemption is one of meanness coming from politically and economically powerful plant interests who see producer handlers as competitive threats.

Those outside the dairy industry (consumers, legislators, the press) find it hard to understand why elimination of family owned integrated businesses is beneficial or even necessary. The integration from farm to retail is being encouraged for other agricultural products through farmers markets, “buy local”, and other programs. Why not milk? That the arguments of why rest almost entirely on the



March 16, 2009
Ms. Dana Coale
Re: Proposal for changes to Producer Handler Definition
Page 4 of 14

complexities of milk marketing orders and milk marketing in general only compounds this lack of understanding. But ordinary people can easily recognize abuse of power. They can see the Goliath versus David fights and will side with the Davids of the world every time.

The existing producer handlers, whether they are small or large, see this proposed rule as a declaration of war against them. They will fight back, and hard. Recognizing that they are a small minority within the industry they we will seek to widen the arena in which this is fought. This larger arena will include their customers, consumers rights groups, and free market advocates, all seeking to obtain coverage in the press and certainly using the internet. The greatest weapon these opponents hold is that the real purpose of the regulation is meant to do harm to someone who does things different from the majority. That coupled with the loss of jobs coming from changes in the regulation, loss of local, hometown, supply of milk, and other similar complaints, changing the rules for producer handlers can become a public relations nightmare. Finally, to add to the fuel there are those producers who were forced into an expensive, if not ruinous, adjustment to their business practices to get to the three million pounds after the last round of regulations. To now force them, after that, to make further adjustments is not even close to being right or fair and this will be used as the biggest weapon against any change in the regulations. The industry cannot win this fight. Pursuing regulation of the smaller producer handlers will seriously damage the reputation or the order system.

There is no justification for imposing additional regulations on existing, smaller, producer handlers. While we certainly can argue with facts and law the necessity of limitations on larger producer handlers to maintain orderly markets and the consistent and efficient delivery of a wholesome food to a consuming public, proponents of regulation and USDA has already conceded publicly that the smaller producer handlers, those less than 3 million pounds, do not constitute a threat to orderly marketing. Facts and arguments to that point were provided by witnesses and exhibits of those who today propose a total ban on producer handlers. These facts and arguments, made just a few years ago, are in the public record and can be found on USDA's website in the hearings and summarized by USDA in its decisions.

The three million pound limit of both alternatives comes from legislation. When Congress passed legislation authorizing the Fluid Milk Promotion Program, it specified that bottlers with less than 3 million pounds of milk per month were exempt. In 2006 when Congress addressed issues in the Southwest and California it established a cap of 3 million pounds for handlers supplying California from out of state and the same cap for producer handlers within the Arizona Marketing Area. This hearing on producer handlers cannot change those laws. USDA issued regulations at the same time



March 16, 2009
Ms. Dana Coale
Re: Proposal for changes to Producer Handler Definition
Page 5 of 14

which provided caps at 3 million pounds for producer handlers in Arizona and the Pacific Northwest.

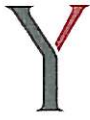
By not regulating existing producer handlers, it avoids the whole issue of big versus little. It simply brings consistency to a national program using standards that have been set by Congress in three instances and accepted by USDA after a lengthy hearing for two of the ten orders. It accomplishes what is needed –elimination of disorderly marketing by larger producer handlers– while avoiding an unnecessary defense of the motives.

The three million pound cap is reasonable. It is only two loads of milk a day and would not impose any kind of disruption in the marketing areas. It only applies to some of the existing producer handlers depending on the size of the smaller producers. Not all are as big as that. As testified at prior hearings, the inefficiencies of the smaller plant size outweigh any milk cost advantage and thus would not create unfair competition. Further, for those plants who adjusted their operations to be under the three million cap after the last round, they would not be forced to go out of business or take other actions. It is an issue of fairness. Finally, the fight will be between proponents and the several large units who have resources to defend their claims and cannot be viewed as “Davids”. It will be an argument on facts and policies, not questions of motive.

6. How would the proposal increase or decrease costs to producers, handlers, others in the marketing chain, consumers, the Market Administrator offices and/or the Secretary? By grandfathering existing operations, there will be no loss to them. The proposal should, longer term, provide increased income to producers by providing market transparency and stability. For producer handlers it will result in significant additional costs. Depending on the order, it could be as much as \$2 per hundred weight or 20 cents per gallon on newly regulated milk. It will result in higher consumer costs, at least for the customers being supplied by regulated producer handlers and their competitors. We do not expect any additional administrative costs.

7. Would a pre-hearing information session be helpful to explain the proposal? Yes. It will help everyone, proponents, opponents, and agency employees get a better feel of the proposals without getting bogged down in the hearing itself. It would also be an excellent time to plan the two or three weeks of hearings. Pre setting days on which certain parties would be heard would help bring some predictability to the process and reduce significantly the costs associated with some parties and witnesses attending.

We understand that two weeks have been set aside for the hearing. We believe that a third week should be tentatively scheduled as well.



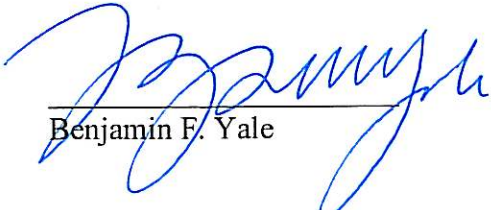
| www.yalelawoffice.com

March 16, 2009
Ms. Dana Coale
Re: Proposal for changes to Producer Handler Definition
Page 6 of 14

For these reasons I am requesting on behalf of Select Milk Producers, Inc. and Continental Dairy Products, Inc. that USDA notice the two alternative proposals for producer handlers.

Sincerely yours,

YALE LAW OFFICE, LP



Benjamin F. Yale



March 16, 2009
Ms. Dana Coale
Re: Proposal for changes to Producer Handler Definition
Page 7 of 14

SELECT/ CONTINENTAL ALTERNATIVE I
[Providing grandfather exemption for existing producer handlers up to 3 million pounds of production]

Proposed Language
Submitted by Select Milk Producers, Inc. and Continental Dairy Products, Inc.

1. Add the following provision to 7 CFR Part 1000.

§1000.10 Pool-exempt Own-farm Production of Distributing Plants.

Any handler operating a plant subject to regulation as a pool distributing plant, as defined in section _____.7 of any milk marketing order, or as a partially regulated distributing plant under any milk marketing order, may make a one-time election to exempt the handler's own farm milk production from the volume of producer milk receipts otherwise subject to producer-settlement fund payment obligations under sections _____.71 and _____.72 of the milk marketing order, or section 1000.76 of the General Provisions. Such election and exemption shall be subject to the following conditions and limitations:

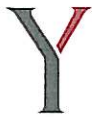
(a) Volume limitation for pool-exempt own-farm milk production. The volume of own-farm milk production that a distributing plant handler may elect to exempt under this section shall, for any month, be the lesser of -

(1) A monthly volume based on the daily average milk production marketed from the handler's own farm(s) during any three consecutive months of production, as designated by the handler and subject to verification by the market administrator, from January 2007 through February 2008, or,

(2) A daily average production of 100,000 pounds times the number of days in the month to which the exemption may apply.

Own-farm production of the handler in excess of the exempt volume shall be subject to producer-settlement fund payment obligations in the same manner as milk produced by any dairy farmer.

(b) Limitations based upon prior operations of handlers eligible elect exemption for own-farm milk production. Handlers with own farm production are not eligible to elect pool exemption for such production under this section unless -



March 16, 2009

Ms. Dana Coale

Re: Proposal for changes to Producer Handler Definition

Page 8 of 14

(1) The handler operated a distributing plant supplied with milk from his own farm(s) during at least three consecutive months from January 2007 through February 2008, and

(2) Milk produced by the own farm(s) that supplied the handler's distributing plant was not received as producer milk at the pool plant of any other handler under any federal milk marketing order at any time after February 2008.

(c) Limitations based upon ownership in the handler's plant and farm facilities. Handlers with own farm production are not eligible to elect own farm pool exemption under this section unless all of the ownership of the handler as plant operator and all of the ownership of the dairy farm(s) is owned by the same person or persons, and their ownership in the producer is at least 95 percent identical with their ownership in the handler. Additionally,

(1) Owners of the handler and associated producer shall not exceed 10 individual persons or owners of equitable interest in the handler or producer business entity,

(2) For purposes of this section, a "person" or "persons" includes the spouse, or other persons of lineal consanguinity of the first or second degree or collateral consanguinity to the fourth degree, and their spouses, and includes an adopted child the same as a natural child and kindred of the half blood equally with those of the whole blood of the owner and ownerships by persons so related shall be considered single ownership by one person.

(3) For purposes of this section, property pledged or hypothecated in any manner to others shall nevertheless be considered "owned" if equitable ownership with management and control remain with the persons operating the plant and associated dairy farm(s).

(d) Date upon which, and manner in which, the one-time election must be exercised. The market administrator shall provide timely notice in writing to handlers with own farm production who are or may be eligible to elect a pool exemption for such production under this section. The election for pool-exempt own farm production shall be exercised by an eligible handler by giving notice of election in writing to the market administrator, which notice shall contain facts upon which the handler claims to qualify under this section , on or before –

(1) Thirty days after the effective date of this provision, or



March 16, 2009
Ms. Dana Coale
Re: Proposal for changes to Producer Handler Definition
Page 9 of 14

(2) For a handler with own farm production on the effective date of this provision, but without route disposition in any federal milk marketing area for twelve months preceding the effective date, thirty days following first route disposition in the marketing area, or fifteen days after notice by the market administrator, whichever is later.

(e) Applicability of minimum classified prices to handlers with pool-exempt own farm milk. Exemption from payment obligations in §§ ____.71 and ____.72 for own farm milk under this section shall not constitute an exemption for own farm milk from compliance with minimum classified priced price obligations. For payment purposes, the handler will be deemed to have paid to its own farm a price for pool-exempt own farm milk equal to its butterfat and skim milk (or skim components) value, as provided by calculations for “handler’s value of milk” in § ____.60 of the marketing order.

(f) Waiver or loss of eligibility for pool-exempt own farm production. The own farm production of any handler

(1) who has failed to make the election provided by this section,

(2) who, after making the election, fails to conform with any limitation or requirement for such exemption for any period in which it fails to so conform, or

(3) who has given notice in writing to the market administrator that it no longer wishes to exempt its own-farm production from the pool,

shall be regulated and priced in the same manner as milk produced by any dairy farm not eligible for pool exemption, and the handler shall not thereafter be eligible to exercise the exemption provided herein.

2. In each of the ten marketing orders replace existing language under 1----.10 with.

See §1000.10.



March 16, 2009

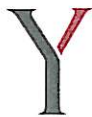
Ms. Dana Coale

Re: Proposal for changes to Producer Handler Definition

Page 10 of 14

3. Amend section _____.60 of each order by adding a new subsection to the end thereof to read as follows (this would be new section 1124.60(j) in the Pacific Northwest Order):

(j) For purposes of calculating the producer price differential in section _____.61, or a handler's obligation to or from the producer settlement fund in sections 71, 72, and 76, the value and volume of pool-exempt own-farm milk of the handler qualified for exemption pursuant to section _____.10 shall not be included as part of the "total value" of milk, "total hundredweight" of producer milk, or "total pounds" of milk components wherever those



March 16, 2009
Ms. Dana Coale
Re: Proposal for changes to Producer Handler Definition
Page 11 of 14

SELECT/CONTINENTAL ALTERNATIVE II

Proposed Language

Submitted by Select Milk Producers, Inc. and Continental Dairy Products, Inc.

4. Add the following provision to 7 CFR Part 1000.

§1000.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route disposition within the marketing area during the month not to exceed 3 million pounds and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

(a) Requirements for designation. Designation of any person as a producer-handler by the market administrator shall be contingent upon meeting the conditions set forth in paragraphs (a)(1) through (5) of this section. Following the cancellation of a previous producer-handler designation, a person seeking to have their producer-handler designation reinstated must demonstrate that these conditions have been met for the preceding month.

(1) The care and management of the dairy animals and the other resources and facilities designated in paragraph (b)(1) of this section necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) are under the complete and exclusive control, ownership and management of the producer-handler and are operated as the producer-handler's own enterprise and its own risk.

(2) The plant operation designated in paragraph (b)(2) of this section at which the producerhandler processes and packages, and from which it distributes, its own milk production is under the complete and exclusive control, ownership and management of the producer-handler and is operated as the producer-handler's own enterprise and at its sole risk.

(3) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes, or distributes at or through any of its designated milk handling, processing, or distributing resources and facilities other source milk products for reconstitution into fluid milk products or fluid milk products derived from any source other than:

(i) Its designated milk production resources and facilities (own farm production); (ii) Pool handlers and plants regulated under any Federal order within the limitation specified in paragraph (c)(2) of this section; or (iii) Nonfat milk solids which are used to fortify fluid milk products.



March 16, 2009
Ms. Dana Coale
Re: Proposal for changes to Producer Handler Definition
Page 12 of 14

(4) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(5) No milk produced by the herd(s) or on the farm(s) that supply milk to the producer-handler's plant operation is:

(i) Subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program under the authority of a State government maintaining marketwide pooling of returns, or (ii) Marketed in any part as Class I milk to the non-pool distributing plant of any other handler.

(b) Designation of resources and facilities. Designation of a person as a producer-handler shall include the determination of what shall constitute milk production, handling, processing, and distribution resources and facilities, all of which shall be considered an integrated operation, under the sole and exclusive ownership of the producer-handler.

(1) Milk production resources and facilities shall include all resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk which are solely owned, operated, and which the producer-handler has designated as a source of milk supply for the producer-handler's plant operation. However, for purposes of this paragraph, any such milk production resources and facilities which do not constitute an actual or potential source of milk supply for the producer-handler's operation shall not be considered a part of the producer-handler's milk production resources and facilities.

(2) Milk handling, processing, and distribution resources and facilities shall include all resources and facilities (including store outlets) used for handling, processing, and distributing fluid milk products which are solely owned by, and directly operated or controlled by the producer-handler or in which the producer-handler in any way has an interest, including any contractual arrangement, or over which the producer-handler directly or indirectly exercises any degree of management control.

(3) All designations shall remain in effect until canceled pursuant to paragraph (c) of this section.

(c) Cancellation. The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraphs (a)(1) through (5) of this section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (2) or (3) of this section. Cancellation of a producer-handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.



March 16, 2009

Ms. Dana Coale

Re: Proposal for changes to Producer Handler Definition

Page 13 of 14

(1) Milk from the milk production resources and facilities of the producer-handler, designated in paragraph (b)(1) of this section, is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the milk production facilities and resources designated in paragraph (b)(1) of this section, except that it may receive at its plant, or acquire for route disposition, fluid milk products from fully regulated plants and handlers under any Federal order if such receipts do not exceed 150,000 pounds monthly. This limitation shall not apply if the producer-handler's own-farm production is less than 150,000 pounds during the month.

(3) Milk from the milk production resources and facilities of the producer-handler is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing plan operating under the authority of a State government.

(d) Public announcement. The market administrator shall publicly announce:

(1) The name, plant location(s), and farm location(s) of persons designated as producer-handlers; (2) The names of those persons whose designations have been cancelled; and (3) The effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) Burden of establishing and maintaining producer-handler status. The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.27 that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of the designation do not exist.

(f) Any producer-handler with Class I route dispositions and/or transfers of packaged fluid milk products in the marketing area described in § 1131.2 of this chapter shall be subject to payments into the Order 1131 producer settlement fund on such dispositions pursuant to § 1000.76(a) and payments into the Order 1131 administrative fund provided such dispositions are less than three million pounds in the current month and such producer-handler had total Class I route dispositions and/or transfers of packaged fluid milk products from own farm production of three million pounds or more the previous month. If the producer-handler has Class I route dispositions and/or transfers of packaged fluid milk products into the marketing area described in § 1131.2 of this chapter of three million pounds or more during the current month, such producer-handler shall be subject to the provisions described in § 1131.7 of this chapter or § 1000.76(a).



| www.yalelawoffice.com

March 16, 2009

Ms. Dana Coale

Re: Proposal for changes to Producer Handler Definition

Page 14 of 14

5. In each of the ten marketing orders replace existing language under 1----.10 with.

See §1000.10.