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From: Carson, Marlis [mailto:mcarson@ncfc.org]
Sent: Thursday, December 31, 2009 8:51 AM
To: ATR-Agricultural Workshops
Subject: Comment

To Whom It May Concern:

The National Council of Farmer Cooperatives is pleased to submit the attached comments in response to the request for comments on "Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy," 74 FR 43725 (08/27/2009).

Marlis Carson
General Counsel
Vice President, Legal, Tax and Accounting
National Council of Farmer Cooperatives
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NATIONAL COUNCIL OF FARMER COOPERATIVES

December 30, 2009

Legal Policy Section
Antitrust Division
U.S. Department of Justice
450 5th Street, NW, Suite 11700
Washington, DC 20001

RE: Response to Request for Comments on "Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy," 74 FR 43725 (08/27/2009).

To Whom It May Concern:

The National Council of Farmer Cooperatives (NCFC) is pleased to submit the attached comments in response to the request for comments on agriculture and antitrust enforcement issues.

NCFC is the national trade association representing America's farmer cooperatives. There are over three thousand farmer cooperatives across the United States, whose members include a majority of our nation's two million farmers.

We appreciate the opportunity to comment on this important topic and would be happy to provide witnesses for the upcoming workshops and to answer any questions you may have regarding the nature and role of farmer cooperatives in American agriculture.

Please direct your questions to Marlis Carson, General Counsel and Vice President, Legal, Tax and Accounting, at 202-879-0825 or mcarson@ncfc.org.

Sincerely,

Charles F. Conner
President and CEO

National Council of Farmer Cooperatives

Comments Regarding Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy, 74 FR 43725 (08/27/2009)

Executive Summary

- American agriculture is a modern-day success story, providing abundant and safe food to American consumers at the lowest prices in the world.

- Farmer cooperatives are an important part of the success of the nation's food and agricultural supply system. Farmer cooperatives handle, process and market almost every type of agricultural commodity, furnish farm supplies, and provide credit and related financial services, including export financing, to their farmer members.

- The *limited* antitrust immunity provided by the Capper-Volstead Act and other federal statutes enables farmers to join together to collectively process and market their products through farmer cooperatives, and thereby helps to level the playing field for farmers in an environment characterized by increasing concentration at the food wholesale and retail levels.

- Buyer power in the agricultural marketplace is as strong or stronger than it was in 1922, when the Capper-Volstead Act was enacted – the Capper-Volstead Act's protections are as critical today as they were nearly 100 years ago.

- Any action to eliminate or dilute the Capper-Volstead Act or other similar federal statutes would harm the success and effectiveness of farmer cooperatives, damage American agriculture and competition in the agricultural marketplace, and harm rural communities.

- Farmer cooperatives increase competition; provide a guaranteed home for their members' products; lower farmers' production costs; and increase farmers' incomes.

- The activities and earnings of farmer cooperatives are vital to the economies of the rural communities they serve.

- While cooperatives may help farmers countervail the market power of buyers and processors, cooperatives are subject to numerous practical constraints that prevent them from achieving monopoly power.

Introduction

American agriculture is a modern-day success story. American farmers produce the world's safest, most abundant food supply for consumers at prices that are the envy of the world. Innovative planting, fertilizing, harvesting, storage, and processing are the hallmarks of American agriculture and ensure a safe and affordable food supply for the nation's citizens.

According to the Department of Agriculture, United States households spend an average of 5.7 percent of household final consumption expenditures on food, the lowest percentage in the world.[1] A 2009 study by the United States Government Accountability Office determined that, while per capita food expenditures have increased since 1982, households now spend a smaller percentage of disposable income on food than they did more than 25 years ago.[2]

Farmer cooperatives -- businesses owned and controlled by farmers, ranchers, and growers -- are an important part of the success of American agriculture. Cooperatives differ from other businesses because they are member-owned and are operated for the mutual benefit of their members. Cooperative earnings are distributed on the basis of the quantity or value of business the cooperative conducts with the member, also known as "patronage." There are over 3,000 farmer cooperatives across the U.S., whose members include a majority of our nation's two million farmers.

Farmer cooperatives handle, process and market almost every type of agricultural commodity, furnish farm supplies, and provide credit and related financial services, including export financing, to their farmer members. Earnings from these activities are returned to their farmer members on a patronage basis, helping improve their income from the marketplace. In addition, farmer cooperatives are a vital part of the rural communities they serve, providing nearly 200,000 jobs in the United States, with net business volume of $165.3 billion,[3] and contribute significantly to the economic well-being of rural America.

Farmer cooperatives enhance competition in the agricultural marketplace by acting as bargaining agents for their members' products; providing market intelligence and pricing information; providing competitively priced farming supplies; and vertically integrating their members' production and processing.

For farmer cooperatives that market their members' products, the Capper-Volstead Act provides *limited* antitrust immunity that allows them to continue to operate effectively. Without this immunity, marketing cooperatives would not be able to function in today's challenging marketplace, which is characterized by relatively few, large buyers of agricultural products. The Act's limited immunity does not cover (among other things) illegal conspiracies or combinations with non-cooperative entities, or so-called "predatory" conduct of any kind.

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[1] USDA Economic Research Service, Table 7—Food expenditures by families and individuals as a share of disposable personal income, 2007, available at: http://www.ers.usda.gov/Briefing/CPIFoodAndExpenditures/data/Table_97/2007table97.htm
[2] Concentration in Agriculture, 2009, GAO-09-746R.
[3] USDA Rural Development Cooperative Statistics 2008, Service Report 69 (November 2009).

Since 1929 the National Council of Farmer Cooperatives (NCFC) has represented the business and policy interests of America's farmer cooperatives. As you explore the impact of market concentration in agriculture, NCFC asks that you recognize the unique and important role that farmer cooperatives play in the success of American agriculture and in providing farmers the best opportunity to compete in an increasingly challenging marketplace. We also ask that you recognize the importance both for farmers and consumers of preserving the Capper-Volstead Act's protections for cooperatives.

I. Overview of Capper-Volstead Act and Other Federal Statutes

Acting independently, individual farmers are too small and too numerous to deal effectively with larger agribusinesses in the supply, processing, and marketing sectors of agriculture. Consequently, in the late 19th and early 20th centuries, farmers joined forces to form cooperative associations to market their products and purchase farm-related supplies and services.

Contrary to the likely intentions of Congress, early court decisions held that these associations fell within the broad reach of the Sherman Act of 1890, which made "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . illegal."[4] To address this problem, Congress later enacted Section 6 of the Clayton Act, which exempted agricultural organizations from antitrust laws if they were established for mutual help, did not have capital stock, and were not operated on a for-profit basis.[5]

The language of Section 6 of the Clayton Act made it clear that forming a cooperative was not a violation of the Sherman Act, but Section 6 did not clearly specify the types of activities in which a cooperative could engage, nor did it apply to cooperatives organized on a stock basis. The shortcomings of the Clayton Act led to the passage of the Capper-Volstead Act in 1922.[6] The Supreme Court has noted: "From the standpoint of agricultural cooperatives, the principal defect in that exemption [Clayton Act Section 6] was that it applied only to non-stock organizations. The Capper-Volstead Act was intended to clarify the immunity for agricultural organizations and to extend it to cooperatives having capital stock."[7]

The Capper-Volstead Act gives agricultural producer organizations limited antitrust immunity "in collectively processing, preparing for market, handling, and marketing" their products and permits such organizations to have "marketing agencies in common." [8] The Capper-Volstead Act also gives the Secretary of Agriculture authority to prevent cooperatives from using their market power to unduly enhance the price of the products they market.[9]

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[4] 15 U.S.C. § 1.
[5] 15 U.S.C. § 17.
[6] 7 U.S.C. §§ 291-292.
[7] *Case-Swayne Co., Inc. v. Sunkist Growers, Inc*., 389 U.S. 384, 391 (1967).
[8] 7 U.S.C. § 291. In 1926, following *American Column & Lumber Co. v. U. S.*, 257 U.S. 377 (1921), Congress enacted the Cooperative Marketing Act of 1926, 7 U.S.C. §§ 451-457, which further clarified that cooperatives may exchange marketing and other economic information as part of their immunity.
[9] 7 U.S.C. § 292.

Without limited antitrust immunity for cooperatives, family farmers would find it virtually impossible to compete in a business economy in which farmers lack bargaining power in dealing with relatively few, large buyers, and would lack the ability to integrate into agricultural processing to compete with those entities. In addition, limited antitrust immunity promotes efficient integration in farming production and allows farming operations to survive in the market. As the Supreme Court has stated: "By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors."[10]

The limited antitrust immunity for agricultural cooperatives provided by the Capper-Volstead Act and other federal statutes is essential to the economic well-being of American farmers because it enables farmers to more efficiently market their agricultural products and integrate into agricultural processing. This limited immunity introduces more competitors into agricultural processing than would exist absent the immunity. It also permits local cooperatives to obtain the benefits of specialization by permitting them to join together in a federated cooperative that may carry out specialized functions not performed by the local cooperative. These functions include manufacturing production supplies, exporting, and large-scale advertising, activities that may be too complex and expensive to perform at the local cooperative or individual farmer level.

Congress also has declared its support for agricultural production and cooperatives through the Agricultural Marketing Act of 1929. In that Act, Congress declared the policy of Congress to be:

> [T]o promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products . . . by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.[11]

Congress further supports associations of agricultural producers through the Agricultural Marketing Agreement Act of 1937,[12] which grants the Secretary of Agriculture authority to enter into marketing agreements with associations of producers and to thereby help stabilize market conditions and assure consumers of adequate supplies of commodities. Marketing orders for dairy, poultry, fruits, vegetables, and livestock are currently in place. The terms of orders are developed through public hearings held by the Department of Agriculture, providing an opportunity for the public and other government agencies to comment prior to issuance. A recent study determined that orders do not prevent entry into the industry and "do not allow producers to set prices directly or even to set limits on pricing such as price floors."[13]

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[10] *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 826 (1978).
[11] 12 U.S.C. § 1141(a).
[12] 7 U.S.C.§ 608b-c.
[13] Sexton, Richards, and Patterson, *Retail Consolidation and Produce Buying Practices*, Giannini Foundation Monograph Number 45, p. 32 (December 2002).

The Agricultural Fair Practices Act of 1967 further illustrates Congressional support for associations of producers. The Act states that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organization . . ." and prohibits discrimination against a farmer because of membership in a cooperative.[14]

II. Farmer Cooperatives Promote Competition and Improve Farmers' Income

Farmer cooperatives are an essential component of American agriculture, providing their farmer-members an alternative for marketing products and procuring goods and services. They also offer a method for farmers to store raw and finished products in order to increase market favorability, bargain collectively over prices, and share in profits from the processing and marketing of products.

Farmer cooperatives by their very nature enhance competition in farm products and farm supply markets. They are neither formed nor operated to provide a return on investor capital. Instead, their purpose is to provide valuable products or services to their patrons at a competitive cost. Joint action among farmers originated as a defensive mechanism to combat exploitation and abuse from buyers and has expanded to include entry into agricultural processing, thereby increasing competition. Trends in farming – increased farm size, mechanization, and improved managerial and operational skills of farmers – have not changed the basic market structure of farmers, that of individual producers with relatively little bargaining power.

The bargaining power achieved by farmer cooperatives helps to offset a number of unique and challenging conditions experienced by farmers:

1) Thousands of small-scale farm firms sell to and buy from only a few large-scale non-farm firms, resulting in inequality in bargaining power;
2) Farmers must make production decisions long before demand for the product is known;
3) Once production decisions are made, they cannot be easily or quickly changed because of the long transition times between planting and harvest;
4) Weather, disease, insects, and other conditions may impact farming plans;
5) Due to the perishable nature of most farming products, farmers have few opportunities to delay selling and must sell at a time when many farmers in the region are bringing their product to market; and
6) Capital investments cannot be easily transferred to alternative production choices.

The Supreme Court has recognized the inherent and unique difficulties faced by farmers. In a 1929 opinion, Justice Sutherland, acknowledging the special treatment of cooperatives, wrote: "It is settled that to provide specifically for peculiar needs of farmers or producers is a reasonable

[14] 7 U.S.C. §§ 2301-2305.

basis of classification."[15] And in a case reviewing the constitutionality of a Texas antitrust law, Justice Frankfurter acknowledged that:

> [f]armers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen.[16]

In finding that Kentucky cooperative marketing statutes promoted the common interest, Justice McReynolds cited the lower court's finding that the statutes were enacted because producers were "at the mercy of speculators and others who fixed the price of the selling producer and ... the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the [producer] obtained a grossly inadequate price for his products." [17]

The processors, distributors, manufacturers, and other buyers to whom farmers sell their products today have grown increasingly concentrated and integrated. The USDA has described the squeeze this concentration has put on farmers and their cooperatives:

> Consolidation of firms at the processing, wholesale, and retail levels of the U.S. food marketing system continues unabated. Market influence and bargaining strength of even the largest cooperatives are limited as a consequence. Food retailers flex their market muscle by imposing coordination mechanisms that demand strict discipline and conformity from suppliers. Food processors exert greater control over distribution channels by integrating back into the production of raw materials through a variety of ownership and contractual arrangements. Such arrangements rob producers of decision-making authority and market choices.[18]

Indeed, one major, concentrated segment of farmers' buyer base has developed in recent decades -- the national or regional grocery store chain. To a large and increasing extent, the grocery industry is concentrated into large chains, such as Walmart and Costco, that exert enormous buying power. Industry estimates by *Supermarket News* indicate that the top ten grocery retailers and wholesalers account for more than two-thirds of U.S. grocery sales.[19]

The USDA has taken note of this trend:

> Consolidation among U.S. retail food marketers is continuous. It is augmented by the entry of foreign firms into the U.S. market through aggressive acquisition

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[15] *Frost v. Corporation Com'n of State of Okla.*, 278 U.S. 515, 535 (1929).
[16] *Tigner v. State of Texas*, 310 U.S. 141, 145 (1940).
[17] *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Marketing Ass'n*, 276 U.S. 71, 93 (1928).
[18] Dunn, *Agricultural Cooperatives in the 21st Century*, USDA Rural Business Cooperative Service, Cooperative Information Report 60 (2002), p. 4; and see, e.g., Harris, *The U.S. Food Marketing System, 2002*, USDA Economic Research Service, Agricultural Economic Report No. 811 (2002), at pp. 2, 6, 15, 17-19, 26-28, 32-33.
[19] Supermarket News Top 75 Retailers for 2009, see: http://supermarketnews.com/profiles/top75/2009-top-75/

> strategies . . . Retailers are positioned to dictate product requirements, prices, and other terms of trade to suppliers. Purchasing is centralized for logistical and pecuniary advantage as retailers seek to purchase as many products as possible from the fewest number of suppliers. Moreover, suppliers must be substantial enough to carry not only a nationwide presence, but also global networks of stores. As traditional supermarkets expand in size and scope, volume discounters and warehouse clubs are entering food retailing and becoming dominant market participants.[20]

Moreover, cooperatives face large-scale concentration and integration not only on the part of the businesses that buy farmers' products, but even among their direct competition at the producer level. Investor-owned firms are increasingly integrating vertically, operating at the levels of initial production, processing and marketing, and distribution and retailing. The USDA study concludes:

> As part of their response to the growth of consumer power, food processors and retailers are extending their influence over associated market channel activities. Firms that control key elements of the distribution and marketing system are attempting to control each level of the process, up to and including delivery to the consumer . . . Competition gives way to coordination, as large consolidated firms internalize transactions through ownership or other coordination mechanisms that give them greater control of variables affecting profitability. It also results in thinner markets where the disparity in bargaining power among the parties becomes even more pronounced.[21]

Cooperatives enable farmers to reduce the risks associated with price and income volatility. A Giannini Foundation study notes:

> Everyone knows farming is a risky business. Prices fluctuate from year to year, and production levels can be similarly volatile. These factors often combine to make farm income very unstable. … Thus, if marketing through a cooperative can reduce this risk, we have an additional benefit of integration through a marketing cooperative.[22]

Cooperatives also help farmers to reduce risk through diversification. A USDA report on dairy cooperatives explains:

> …[C]ooperatives have adapted to the situation and hedged the price risks by diversifying into multi-product and multi-plant operations, expediting inventory turnover, integrating and diversifying into consumer-product and niche markets, forming marketing agencies in common to share

[20] *Agricultural Cooperatives in the 21st Century* at p. 6.
[21] *Id*. at p. 5.
[22] Sexton and Iskow, "Factors Critical to the Success or Failure of Emerging Agricultural Cooperatives," Giannini Foundation Information Series No. 88-3, 1988, at p. 5.

> market information or coordinate dairy product marketing, and entering joint ventures with other firms to shift away some of the risks.[23]

Farmer cooperatives are the primary instrument to raise farm income and to improve farmers' well-being by correcting or alleviating such market or competitive weaknesses. It is the structural imbalance referred to above that originally spurred the formation of farmer cooperatives. Without the freedom to act in association with other producers, the farmer has almost no bargaining power and is at a competitive disadvantage.

Cooperatives play a vital role in reducing price fluctuations and other uncertainties by pooling, collecting, analyzing, and disseminating information on market conditions. For example, the California Citrus Growers Association establishes quality standards and shares information, and the Wine Service Cooperative "provides storage and shipping services, as well as inventory control and government reporting services. Similar cooperative ventures focused on services such as cotton ginning, prune drying, citrus packing and storage, are continuing to provide California producers with economies of scale." [24] By pooling information from farmers and from other levels of the supply and product chain, cooperatives can assist farmers in predicting future input and product prices. Cooperatives also can provide an assured market for member farmers' products when the cooperative stores and/or processes those products.

Cooperatives also reduce fluctuations in members' incomes by diversifying into new product and geographic markets in order to mitigate fluctuations in supply and demand. For example, Sunkist Growers, Inc. markets its products extensively abroad. Rather than selling only products of its members, Sunkist has purchased citrus from other countries in order to be a year-round supplier of a full line of citrus products.[25]

Another example of diversification exists in the fresh berry market, where cooperatives Naturipe and MBG/Michigan Blueberry Growers Association have joined a privately held company in Chile to ensure a year-round supply of fresh berries under the Naturipe brand. The arrangement gives the two cooperatives' members a more secure and broader customer base.[26]

By pooling the resources of their farmer-members, cooperatives also promote innovation and the creation of new products and packaging. Such innovation allows farmers to compete against major food and beverage manufacturers and to benefit from patronage generated by new revenue streams.

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[23] Ling and Liebrand, "Dairy Cooperatives' Role in Managing Price Risks," USDA Rural Business Cooperative Service Report 152, September 1996, at p. i.

[24] Shermain D. Hardesty and Vikas D. Salgia, "Comparative Financial Performance of Agricultural Cooperatives and Investor-Owned Firms," n. d. (2002 or later), unpublished paper, research supported by a Rural Cooperative Development Grant from USDA, p. 2.

[25] Hardesty, 2005, p. 238.

[26] Hardesty, 2005, p. 240.

Cooperatives serve another important function in allowing farmers to band together when dealing with large suppliers in oligopolistic markets for agricultural products.[27] Michael Cook, agricultural economics professor at the University of Missouri, notes that individual farmers acting alone may be the victims of market holdup and opportunism on the part of larger suppliers and buyers, but supply cooperatives allow farmers to work together "…to avoid monopoly power."[28]

Supply cooperatives can realize substantial savings in input procurement through volume discounts for consolidated purchases. Supply cooperatives provide more dependable supplies of high-quality input materials (crop protectants, feed, fertilizer, petroleum, seed, and other supplies) than would otherwise be available to their member farmers:

> Farmers [who belong to coops], especially those producing fruits and vegetables, have realized substantial savings in buying containers and packaging supplies. Savings of up to 10 percent of sales have been realized from volume discounts, brokerage allowances, or negotiated prices from consolidated purchases.[29, 30]

USDA researchers have found that the activity of cooperatives in supply markets increases the competitiveness of prices in these markets to the benefit of all, not just their members:

> Cooperatives inject competition into the system by providing services at cost to members. This leads to pricing adjustments by other organizations; thus the real benefit may be their day-to-day impact on market prices. Based on the competitive influence of cooperatives since they began operations, many leaders report that these economic benefits greatly exceeded the annual net margins of the cooperatives. [31]

Researches find similar outcomes in the "yardstick of competition theory," which assumes that farmers compare the prices charged by cooperatives for farm inputs and the prices paid by cooperatives for farm products to the prices offered by investor-owned firms. This analysis indicates that cooperatives may constrain the prices offered by investor-owned firms.[32] One economic model predicts that cooperatives involved in processing have lower processor-farmer

[27] Caves and Petersen, "Cooperatives' Shares in Farm Industries: Organizational and Policy Factors," *Agribusiness*, Vol. 2, No. 1, 1986, pp. 1–19 at p. 11 ("Cooperatives may be formed to avert the monopsony power of IOE ["investor-owned enterprises"] processors….").

[28] Cook, "The Future of U.S. Agricultural Cooperatives," *American Journal of Agricultural Economics*, Vol. 77, 1995, pp. 1153–1159, at p. 1155.

[29] Biser, "Cooperative Supply and Equipment Operations," Cooperative Information Report, USDA, 1989, at p. 17.

[30] See also Deller et al. (2009): "Many farmers purchase basic inputs such as seed, fertilizer, and farm chemicals from a cooperative. In other words, farmers collectively establish a firm to negotiate better terms of purchase for basic agricultural production inputs." Deller, Hoyt, Hueth, and Sundaram-Stukel, "Research on the Economic Impact of Cooperatives," University of Wisconsin Center for Cooperatives, 2009, at pp. 16-17.

[31] J. Warren Mather and Homer J. Preston, "Cooperative Benefits and Limitations," Cooperative Information Report, USDA, 1990, at p. 3.

[32] See Richard J. Sexton, "The Role of Cooperatives in Increasingly Concentrated Agricultural Markets," in *Cooperatives: Their Importance in the Future Food and Agricultural System*, Proceedings of a January 1990 Symposium sponsored by the National Council of Farmers Cooperatives and The Food and Agricultural Marketing Consortium, 1997, pp. 31-47 at p. 38. ("[I]f cooperatives are providing better services and prices to farmers than are competing for-profit firms, these firms must follow suit or lose patrons to the cooperative.")

price spreads than rival processors. The model suggests that open membership cooperatives are pro-competitive forces whose presence mitigates for-profit firms' opportunities to exercise monopoly or monopsony power.[33]

In some cases, cooperatives vertically integrate into production of farm inputs or the processing, and sale of food products. Such vertical integration allows cooperative members to eliminate the margin between the revenues and costs of an investor-owned processor and avoid transaction costs that arise when vertically related enterprises have different owners.

In addition to reducing production and processing costs, cooperatives may reduce marketing costs for their members. A USDA report notes that by pooling "sales, and handling and selling expenses, cooperatives can operate more efficiently—at lower costs per unit—than farmers can individually."[34] Accordingly, dairy cooperatives sometimes form marketing agencies to jointly market their milk, to achieve efficiencies, and to spread risk:

> In 1995, three dairy cooperatives in California joined forces to create Dairy America, Inc., a marketing agency in common to market the powdered milk they manufactured. Besides taking advantage of scale economies in sales operations, the common agency can better coordinate marketing of the product and spread market risks over a very large volume.[35]

Cooperatives also assist farmers with branding and advertising, activities that are extremely difficult and expensive for individual farmers. Sunkist Growers, Inc. notes:

> A cooperative of growers together can do many things that a grower alone cannot afford to do—develop a worldwide market, promote a brand name, access a global transportation system, develop comprehensive research capabilities, and gain governmental access to overseas markets—to name a few.[36]

Cooperatives may obtain better information about prevailing market conditions than farmers could obtain individually. Dairy cooperatives have formed marketing agencies in common as permitted under the Capper-Volstead Act. These marketing agencies provide a way for dairy cooperatives and their members to share market information on inventory levels and product movements of nonfat dry milk and whey powder. "This valuable information enables the cooperatives to make informed decisions on inventory management and marketing operations,"[37] USDA experts note.

Bargaining cooperatives also play an important role in reducing the costs of transactions between farmers and processors to which the farmers sell their products. Bargaining cooperatives are

[33] Sexton, "Imperfect Competition in Agricultural Markets and the Role of Cooperatives: A Spatial Analysis," *American Journal of Agricultural Economics*, Vol. 72, No. 3, Aug. 1990, pp. 709–720 at p. 718.
[34] Mather and Preston at p. 2.
[35] Ling and Liebrand at p. 7.
[36] "About Sunkist: The Sunkist Story," http://www.sunkist.com/about/cooperative.aspx, Sunkist website, accessed 11/17/09.
[37] Ling and Liebrand at p. 7.

active primarily in wholesale markets for agricultural products for which, prior to the growing season, a farmer and a processor enter into a contract setting the terms at which the farmer will supply its product to the processor and the processor will pay for that product. Such contractual relationships between farmers and processors are important for raw farm products for which storage and transportation are expensive or impossible.

Acting independently, producers of highly perishable or hard to transport products lack a competitive edge because there are few potential processors for any given farm's output of raw farm products. Also, farmers and agricultural cooperatives have much less bargaining power in dealing with processors once the farmers have invested in production, and particularly once the crop has been harvested. As a result, farmers have a strong preference for contracting prior to the growing season. For these products there are typically benefits to both farmers and processors from coordinating to produce output to the processors' specifications, in the quantities desired by the processors, and, insofar as possible, with the delivery dates desired by the processors.

Researchers at the University of Wisconsin Center for Cooperatives recently studied the negotiations between bargaining cooperatives representing growers of products such as fruits and vegetables and the processors that purchase their products in advance under contracts:

> Bargaining can offer benefits to all parties when it results in enhanced price discovery (or "information sharing"). This is most likely to be important in markets where contracts are the primary farm-to-market coordination device. Without a substantial 'spot market' of some kind, there is limited opportunity for information transmission across the various market participants regarding uncertain supply and demand conditions, and a bargaining association can help overcome this problem.[38]

Cooperatives also can reduce risk through adjustment of production or sales as demand changes. **"**If the cooperative controls a significant share of the relevant market and the commodity is storeable, it can reduce price fluctuations by maintaining buffer stocks of the raw commodity."[39] Cooperatives may be able to coordinate production among farmers so as to reduce variability in production and thus prices.[40]

These various activities by farmer cooperatives help to achieve lower food prices. USDA researchers have concluded: "Lowered production costs on the farm and marketing efficiencies brought about by cooperatives help hold down food costs to consumers."[41]

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[38] Brent Hueth and Philippe Marcoul, "An Essay on Cooperative Bargaining in U.S. Agricultural Markets," Journal of Agricultural & Food Industrial Organization, Vol. 1, No. 10, 2003, p. 9.
[39] Sexton and Iskow at p. 14.
[40] This is not necessarily an easy task. Caves and Petersen (1980) explain the challenges facing cooperatives that, for example, try to exercise monopoly power through output restrictions. In particular, cooperatives may not be able to restrict output due to the fact that payments of net savings to its members is in direct proportion to the volume of product contributed by the member. Caves and Petersen, "Cooperatives' Shares in Farm Industries: Organizational and Policy Factors," *Agribusiness*, Vol. 2, No. 1, 1986, pp. 1–19 at p. 10.
[41] Mather and Preston at p. 14.

One research study has found that where cooperatives sell products in retail markets in which brands sold by investor-owned firms have large market shares, the addition of the cooperative's product may lead to a reduction in the prices of competitors. The study concluded that "the prices of all brands in a market are affected by the presence of a co-op brand. Brands in markets with at least one co-op are 6 cents cheaper than a similarly positioned brand where no co-ops compete."[42]

While farmer cooperatives are able to reduce costs and thus reduce food prices, they also are able to increase incomes for farmers. A 2004 study indicated that when a farmer is a member of a supply cooperative, the farmer's annual income is $5,678 higher on average.[43] In fact, cooperatives increase farmer income in several ways, including raising the price paid to farmers for their products or lowering the level for supplies purchased; reducing per-unit handling or processing costs through economies of size or scale; distributing to the farmer-members the net savings made in handling, processing, and selling operations; and developing new markets for products.[44]

In addition, evidence shows that cooperatives may offer better investments for their members than some available alternatives. A USDA report measured the "extra value" of a cooperative by comparing its rate of equity return to a benchmark rate of return used by banks as a minimum threshold to make a loan. Over 30 percent of cooperatives beat the benchmark rate of return by over 5 percent in 1992-1996 and 27 percent exceeded the benchmark rate by over 5 percent in 2000-2004. More than 16 percent exceeded the benchmark rate by over 10 percent in those two time periods.[45]

III. Farmer Cooperatives Do Not Diminish Competition

While cooperatives may help farmers countervail the market power of buyers and processors, they are unlikely to achieve monopoly power.

As user-owned entities with a limited number of owner-investors, farmer cooperatives are subject to inherent practical constraints. Cooperatives typically do not seek capital from outside investors and their ability to raise additional capital from their producer members is limited, due to what one cooperative expert has identified as the "portfolio and horizon problems":

> The portfolio problem arises because producer-members are required to invest capital in an industry in which they already have significant investment in production capacity. The horizon problem occurs because, traditionally, cooperatives' residual earnings are contractually tied to their producer-members' current transactions, rather than to their

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[42] Haller, "Branded Product Marketing Strategies in the Cottage Cheese Market: Cooperative versus Proprietary Firms," Food Marketing Policy Center Research Report No. 16, January 1992, pp. 13–14.
[43] Mishra, Ashok K.; Fisseha Tegegne, and Carmen L. Sandretto (2004) "The Impact of Participation in Cooperatives on the Success of Small Farms," *Journal of Agribusiness*, 22, 1 (Spring 2004), pp. 31–48, at Table 2.
[44] Mather and Preston at p. 2.
[45] Liebrand, "Measuring the Performance of Agricultural Cooperatives," Research Report 213, USDA, 2007, at p. 8.

> investment. Since members are unable to recognize appreciation in their equity investment, they exert pressure on their cooperative to maximize current returns rather than investing for higher future returns.[46]

Such practical limitations on access to capital are a major hindrance to the activities of most cooperatives and make it difficult for such cooperatives to expand and approach significant market power, especially when operating and expansion expenses are increasing for such things as environmental compliance, expanding globalization, and corporate governance and accountability.

Further, the requirements for the favorable tax treatment of distributions of earnings by agricultural cooperatives to their members under Subchapter T of the Internal Revenue Code[47] impose significant practical limitations on the activities of cooperatives. In order to distribute earnings as patronage distributions under the provisions of Subchapter T, such earnings must be from activities with or on behalf of the members and must be related to the agricultural activities of the members. These restrictions mean that agricultural cooperatives cannot expand or move away from a close connection with such agricultural activities without losing the benefits of Subchapter T.

In addition, the distribution of cooperative earnings to producer members may cause producers to view the distribution as a signal to produce more product. Increased production then forces the cooperative to expand output, thereby reducing prices. In contrast, corporations simply distribute dividends to shareholders who are not input suppliers to the enterprise and the dividend distribution does not encourage additional production. Numerous industrial organization economists have pointed out that, because of this feedback mechanism, cooperatives have a self-correcting supply enhancement in profitable times that makes it unlikely for cooperatives to achieve market power.[48]

Cooperatives also are unlikely to achieve market power because members can leave to compete against the cooperative, to form another competing cooperative, or to become a supplier to a proprietary firm – and, of course, farmers who were never members of the cooperative can do all of this, too.

Because of these inherent constraints and practical limitations, there is no need to eliminate or dilute the Capper-Volstead limited antitrust immunity. Such action could unintentionally result in purchases of the processing assets of marketing cooperatives by proprietary firms or the introduction of non-farmer stockholders into restructured agricultural enterprises. In addition, if cooperatives could not freely federate with other cooperatives to perform processing or marketing functions, they would be left with the stark choice of dealing only with proprietary

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[46] S. Hardesty, *Positioning California's Agricultural Cooperatives for the Future*, Agricultural and Resource Economics Update, Vol. 8, No. 3 (Jan./Feb. 2004).

[47] 26 U.S.C. §§ 1381, *et seq.*

[48] Y. J. Youde and P.G. Helberger, *Marketing Cooperatives in the U.S.: Membership Policies, Market Power, and Antitrust Policy*, Journal of Farm Economics 48 (1966) *and* P. Helmberger and S. Hoos, *Economic Theory of Bargaining in Agriculture*, Journal of Farm Economics 45 (December 1963). *See also*, Mueller, Helmberger and Paterson, "The Sunkist Case: A Study in Legal-Economic Analysis" (Lexington Books, 1987).

firms. This would lead to the further consolidation of processing assets, as large proprietary firms would purchase the assets of cooperatives that could no longer compete efficiently.

Further, while other of the activities engaged in by agricultural cooperatives may be allowable under antitrust laws, the Capper-Volstead limited immunity provides a significant benefit to farmers. Without Capper-Volstead, marketing cooperatives would have to incur the substantial costs of proving that their activities do not violate antitrust laws in "rule of reason" proceedings, which often involve tremendous legal expense. The threat and actuality of such additional costs could be used by larger competitors to harass cooperatives with limited resources. In addition, loss of a bright-line Capper-Volstead immunity will result in additional lawsuits by plaintiffs' law firms seeking treble damages under federal antitrust law. Removal of the limited immunity would result in a reduction in the number of competitors in the agricultural marketplace and reduced investment in agriculture.

IV. Farmer Cooperatives Enhance Rural Communities

In addition to improving competition and increasing farmers' income levels, farmer cooperatives also provide essential economic and social benefits to rural communities. Cooperatives generate income, provide employment, and provide tax revenues across the United States. According to a USDA report:

> Most of the additional income farmers get through cooperatives is spent with hometown firms for goods and services. Successful cooperatives also have substantial payrolls and their employees' patronage of local businesses adds to the economic well-being of the community. The cooperatives also spend money for supplies, utilities, insurance, and local taxes.[49]

Cooperatives also provide a sense of community and are essential in helping rural communities remain viable:

> In small towns, the cooperative often is the major or only business. Without it, people would have to go elsewhere for goods and services. A majority of the farmer cooperative plants and other facilities are located in rural areas—a plus value in stimulating home ownership and retaining rural industry. Participation in cooperatives often encourages participation in other community projects and in State and local government.[50]

A 2002 study collected survey data from 189 agricultural cooperatives in Minnesota reporting $5.4 billion in revenues.[51] The researcher estimated that "[t]hese 189 cooperatives generate $8.4 billion in economic impacts" through "direct effects attributable to the firm, those [effects]

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[49] Mather and Preston at p. 10.
[50] *Id*., at p. 11.
[51] Joe Folsom (2003), "Measuring the Economic Impact of Cooperatives in Minnesota," RBS Research Report 200, Rural Business–Cooperative Service, USDA, December 2003, pp. 6, 8.

resulting from purchases made by the firm, and the induced effects as a result of local spending by firms attributable to the demand change resulting from a firm's actions."[52] The study's "best estimate of the total economic impact of agricultural cooperatives in the State [of Minnesota] using the USDA data is $17.2 billion with $647 million attributable to the cooperative business structure."[53]

A second study presents similar statistics from 1999 for 42 agricultural cooperatives in Wisconsin. There, researchers found:

> Agricultural marketing cooperatives employ 5,900 people, providing a significant source of employment in Wisconsin's rural areas. Once the multiplier effect is considered, these cooperative businesses generate an additional 2,395 jobs. They produced $163 million in direct income, which when cycled through the local economy amounted to $263 million in income.[54]

A 2009 study surveyed about fifteen thousand cooperatives of different types operating in the U.S., including farm supply and marketing cooperatives.[55] Extrapolating their sample to the total number of such cooperatives in the U.S., they calculate that farm supply and marketing cooperatives annually generate over $119 billion in revenue and directly employ nearly 150,000 people who earn over $6 billion in wages.[56]

Conclusion

America's agricultural sector feeds the nation's consumers at a fraction of the cost incurred by citizens in other countries. Farmer cooperatives play an essential role in the production of food and fiber and in the success and well-being of individual farmers and of rural communities. Any action that would limit the effectiveness and efficiency of farmer cooperatives would harm

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[52] *Id*, at pp. 8, 1.
[53] *Id*, at p. 9.
[54] Zeuli, Kimberly, Greg Lawless, Steven Deller, Robert Cropp, and Will Hughes (2003), "Measuring the Economic Impact of Cooperatives: Results from Wisconsin," RBS Research Report 196, Rural Business–Cooperative Service, USDA, August 2003, p. 6.
[55] Deller et al. use "farm supply and marketing cooperatives" to refer to "cooperatives [that] perform a wide variety of functions in agricultural and food markets. Often these functions are grouped into two broad categories, 'marketing,' and 'supply.' …[Some marketing cooperatives] provide processing and marketing services to farmers, and also the necessary logistical support to aggregate farm supply. Other marketing cooperatives are much leaner organizations, providing only marketing services to assist farmers get product to market, to pool risk, or to negotiate sales as a group to a single buyer or a small number of buyers. Supply cooperatives provide service and inputs to farmers to help them produce their goods." Deller, Hoyt, Hueth, and Sundaram-Stukel, "Research on the Economic Impact of Cooperatives," University of Wisconsin Center for Cooperatives, 2009, at p. 16.
[56] Deller, Hoyt, Hueth, and Sundaram-Stukel, "Research on the Economic Impact of Cooperatives," University of Wisconsin Center for Cooperatives, 2009, at p. 16. The $119 billion revenue estimate appears to include total revenue for farm supply and marketing cooperatives measured at the stage at which the product leaves the coop. Thus, it seems to include revenue generated by selling farm inputs to farmers as well as revenue from selling farmers' products to processors, etc.

American agriculture and rural communities and would result in a less reliable food supply and higher food prices.

The long-standing limited antitrust immunity provided by the Capper-Volstead Act and other federal statutes evidences the consistent recognition by Congress and our courts of the need to enable farmers to join together to collectively process and market their products and thereby to give family farmers bargaining power in an economy increasingly dominated by relatively few, large buyers. Congress has recognized the need for farmers to join together and has expressed its intent to promote associations of producers through the Clayton Act, the Capper-Volstead Act, the Agricultural Marketing Act, the Agricultural Marketing Agreement Act of 1937, and the Agricultural Fair Practices Act of 1967.

The Supreme Court also has recognized the importance of placing farmers in the same position as the purchasers of their products and their competitors:

> We believe it reasonably clear from the very language of the Capper-Volstead Act, as it was in Section 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage – and responsibility – available to businessmen acting through corporations as entities.[57]

Any action to eliminate or dilute the effectiveness of the Capper-Volstead Act would increase risk to farmer cooperatives and their farmer-members. Such action also would cause a decrease in the number of farmer cooperatives as farmers would be required to seek out other methods of marketing their products in a highly competitive environment dominated by large buyers such as Walmart, Costco, and others. The resulting damage to farmers and their ability to achieve bargaining power would damage American agriculture and would harm consumers.

[57] *Maryland and Virginia Milk Producers,* 362 U.S. 458, 466 (1960).