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Attorney General Jeff Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: Response to U.S. Department of Justice, Antitrust Division, Public Roundtable Discussion Series on Regulation & Antitrust Law

Dear Attorney General Sessions:

The National Council of Farmer Cooperatives (NCFC) would like to respond to testimony and comments relating to recently held roundtables on antitrust law and policy, specifically the March 14, 2018, roundtable on immunities and exemptions from antitrust laws, and the May 31 session on anticompetitive regulations.

At the March 14 roundtable, in written and oral statements, hearing participants asserted that there is no longer a need for the Capper-Volstead Act, and that the statute has been abused by farmers and their cooperatives. As the national trade association representing America's farmer cooperatives, many of whom rely upon the limited antitrust immunity provided under the Act, NCFC strenuously objects to those characterizations of the Capper-Volstead Act and 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. Farmer cooperatives are an important part of the nation's food and agricultural supply system. They 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 Capper-Volstead Act provides limited antitrust immunity for farmer cooperatives that market their members' products¹. The purpose of this immunity, which is also embodied in Section 6 of the Clayton Act, one of the original foundations of U.S. antitrust law, is to allow farmers to join together and improve their collective economic position in the face of much more concentrated and monolithic buyers of agricultural products. This situation has not changed. Indeed, if anything, the power of the purchasers of agricultural products, which includes large retail grocery store chains, club stores, and large food processors, have become even more concentrated. And agricultural markets remain volatile and subject to strong downward pricing pressure from those purchasers.

¹ 7 U.S.C. §§ 291-292.

Contrary to the assertions made in testimony at the roundtable, the Capper-Volstead Act is an essential protection for today's farmers and ranchers. 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, which are owned and governed by their farmer-members, serve many important functions. They increase competition, provide a guaranteed home for their members' products, lower farmers' production costs, and increase farmers' incomes. Farmer cooperatives' earnings are passed through to their farmer-members and are vital to the economies of rural communities.

The long-standing limited antitrust immunity provided by the Capper-Volstead Act and other federal statutes are evidence of 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 increase their bargaining power. For example, the Agricultural Fair Practices Act of 1967² 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. Other federal statutes and marketing orders illustrate strong and ongoing Congressional support.³ Put differently, the Capper-Volstead Act is not some "special industry exemption", rather it is a key part of the overall framework of the U.S. antitrust laws at their original enactment, which were designed to allow laborers and farmers to join together to counterbalance the then-growing, and now very large, companies who were the purchasers of that labor or farm products.

The Capper-Volstead 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. 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.

NCFC would also like to respond to written testimony submitted by the Cato Institute for the March 14 roundtable. In that testimony, the Cato Institute asserts that government pricing intervention has caused U.S. sugar prices to increase to nearly double the price on the world market. In fact, the world market price is so distorted that it is currently running at just over half the world average cost of production. LMC International of Oxford, England, estimates the current average cost of producing raw sugar at 22 cents per pound, yet the current world market price is just 12 cents per pound.

The International Sugar Organization's global survey of wholesale refined sugar prices revealed the developed-country average for the past decade to be 41 cents per pound. Last year the U.S.

² 7 U.S.C. §§ 2301-2305.

³ For example, the Agricultural Marketing Act of 1929, 12 U.S.C. § 1141(a); the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608b-c, and marketing orders for dairy, poultry, fruits, vegetables, and livestock, which are ongoing.

average wholesale refined sugar price was just 31 cents per pound, resulting in foreign food manufacturers' cost for sugar to be 32% higher than in the U.S. In addition, SIS International's survey of global retail refined sugar prices found the world average to be 20% higher than the U.S. and the developed-country price to be 28% higher than U.S. consumer prices. Thus, the data show that U.S. food manufacturers and consumers derive a significant economic benefit, and not a cost, from U.S. sugar policy.

At the May 31 roundtable, Assistant Attorney General Delrahim derided milk marketing orders as anticompetitive and market distorting. He suggested further study is needed to determine whether they are justified. Of course, this is a process that the U.S. Department of Agriculture pursued back in 2000 when it restructured the federal orders. Milk marketing orders serve several purposes. According to the USDA, the orders help ensure that dairy farmers receive a "reasonable minimum price for their milk throughout the year" and "prevent wild fluctuations in price through periods of heavy and light milk production." Such protections are essential in a marketplace dominated by a small number of dominant retail food marketers. These justifications remain valid today – milk is the most perishable of agricultural products. It must be harvested by milking the cow two or three times a day, and then it must be processed within 48 hours.

This extreme initial perishability can cause tremendous distress in the absence of assured markets and established prices for the milk. The milk marketing orders attempt to lessen the potential for opportunistic behavior by raw milk purchasers by setting in a market-oriented minimum price for the milk. In addition, milk production and demand varies from day-to-day and supply rarely equals demand on any given day. Dairy farming also requires a large capital investment, which is a potential barrier for entry and makes it difficult for a producer to shut down its operations when in a low milk price cycle. This puts producers in a difficult market position that, without federal orders, has the potential to lead to incredible instability in the price of milk. It can also affect consumers' ability to have a dependable supply of quality milk. The milk marketing orders are designed to stabilize market conditions and allow producers to be paid uniform prices for milk.

NCFC would welcome the opportunity to provide more information regarding the importance of farmer cooperatives and their farmer-members to the nation's agricultural sector, and to respond to the statements made in oral and written testimony at the recent roundtables.

Please direct any questions to Marlis Carson, General Counsel and Senior Vice President, at 202-879-0825 or mcarson@ncfc.org.

Sincerely,



Charles F. Conner
President and CEO

cc: Assistant Attorney General Makan Delrahim, U.S. Department of Justice, Antitrust Division.