FEDERAL ELECTION COMMISSION

[Notice 1983-26]

11 CFR Part 114

Trade Association Solicitation Authorization

AGENCY: Federal Election Commission.

ACTION: Transmittal of regulations to Congress.

SUMMARY: The Commission's regulations at 11 CFR 114.8(c)(2), (d)(2) and (d)(4) have been revised and transmitted to Congress pursuant to 2 U.S.C. 438(d). These regulations govern the request and receipt of solicitation authorizations that a trade association must obtain prior to soliciting its corporate members' stockholders and executive or administrative personnel. The revisions would permit trade associations to request and receive the authorizations prior to the calendar year in which the solicitation is to occur. Further information on the revised regulations is provided in the supplementary information which follows.

EFFECTIVE DATE: Further action, including the announcement of an effective date, will be taken by the Commission after these regulations have been before the Congress 30 legislative days in accordance with 2 U.S.C. 438(d).

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 1325 K Street, NW., Washington, D.C. 20463, (202) 523-4143 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission published a Notice of Proposed Rulemaking on these regulations on November 26, 1982. (47 FR 53396) The revised regulations are based in part upon the comments received in response to that Notice.

2 U.S C.S. 438(d) requires that any rule or regulation prescribed by the Commission to implement Title 2, United States Code, be transmitted to the Speaker of the House of Representatives and the President of the Senate. The Commission may prescribe the regulations in question after they have been before both Houses of Congress for 30 legislative days. The following regulations were transmitted to Congress on October 17, 1983.

Explanation and Justification

The Commission's Notice of Proposed Rulemaking on these regulations posed the following question: does 2 U.S.C. 441b(b)(4)(D) require trade associations to obtain the requisite solicitation authorization from their corporate members in the same year for which it is to be applicable, or may it be obtained prior to that calendar year?

Of the 80 comments received, all but one favored the Commission's proposal to permit trade associations to request and receive authorizations prior to the year for which they are designated.

Many of these favorable comments spoke of the difficulties trade associations encountered when trying to comply with the requirements of the current regulations. They complained of the months lost each year trying to get corporate members to return the solicitation approval before solicitation could begin. Since it is most economic for a trade association to solicit its members' employees at one time, some associations cited a loss of up to four months a year waiting for the approvals to come in. They also stated that corporate members were annoyed by the repeated requests for approvals and that these members would have preferred to submit more than one year's approval at a time.

The revisions to 11 CFR 114.8(c)(2) and (d)(4) should resolve many of the problems raised by the comments. The revised regulations permit trade associations to obtain solicitation approval from their members for several years at a time if they so choose. The approvals must still be obtained in accordance with 2 U.S.C. 441b(b)(4)(D), which requires that the solicitation be "separately and specifically approved" by the member corporation and that the member approve solicitations by no more than one trade association in any calendar year. This means that, for each year that a member corporation gives its approval to solicit, a separate authorization must be prepared even if several authorizations are prepared and transmitted to the trade association at one time. It should also be noted that the member corporation continues to have the right to withdraw its authorization at any time. If, however, any solicitation has been made for the trade association's separate segregated fund during that calendar year, the corporation may not approve solicitation by another trade association for that calendar year but it may give approval for future years.

Since these regulations allow corporate members to approve solicitation for several years at a time, the retention requirements of 11 CFR 114.8(d)(2) needed to be altered accordingly. Therefore, the Commission has also revised that section to require that each authorization be kept for three years from the year to which it applies rather than three years from the time it was approved. Otherwise, authorizations might be discarded before they even went into effect.

The negative comment was submitted by the National Association of Casualty and Surety Agents, which was concerned that the proposed changes would result in increased competition among trade associations in the same industry to obtain corporate approval earlier. While this may be an unfortunate result in some cases, the benefits to be gained by relaxing the requirement to obtain approval in the same year that the solicitation occurs, as noted by the majority of the comments, would seem to outweigh any such adverse effects.

List of Subjects in 11 CFR Part 114

Business and industry, Elections.

PART 114—[AMENDED]

11 CFR 114.8 is amended by revising paragraphs (c)(2), (d)(2) and (d)(4) as follows:

§ 114.8 Trade Associations

* * * * *

(c) * * *

(2) The member corporation has not approved a solicitation by any other trade association for the same calendar year.

* * * * *

(d) * * *

(2) A copy of each approved request received by a trade association or its separate segregated fund shall be maintained by the trade association or its fund for three years from the year for which the approval is given.

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(4) A separate authorization specifically allowing a trade association to solicit its corporate member's stockholders, and executive or administrative personnel applies through the calendar year for which it is designated. A separate authorization by the corporate member must be designated for each year during which the solicitation is to occur. This authorization may be requested and may also be received prior to the calendar year in which the solicitation is to occur.

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(2 U.S.C. 441b, 437d(a)(8))

Dated: October 17, 1983.

Danny L. McDonald,

Chairman, Federal Election Commission.

[FR Doc. 83-28551 Filed 10-19-83; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket 9143]

Dairymen, Inc.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Dismissal order.

SUMMARY: The Commission has issued a Final Order returning this matter to adjudication and dismissing the complaint issued against one of the nation's largest raw milk processors, holding that the record did not support a finding that Dairymen's 1978 acquisition of Farmbest Foods, Inc., violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DATES: Complaint issued July 31, 1980.* Final Order issued Sept. 20, 1983.

FOR FURTHER INFORMATION CONTACT: FTC/CS–6, Steven A. Rothman, Washington, D.C. 20580. (202) 724–1239.

SUPPLEMENTARY INFORMATION: In the Matter of Dairymen, Inc., a corporation.

List of Subjects in 16 CFR Part 13

Milk processors, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18)

[Docket No. 9143]

Final Order Returning Matter to Adjudication and Dismissing Complaint

In the Matter of Dairymen, Inc., a corporation.

On July 31, 1980, the Commission issued an administrative complaint alleging that Dairymen, Inc. ("Dairymen") and Munford, Inc. ("Munford") violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission when Dairymen acquired Farmbest Foods, Inc. ("Farmbest") from Munford in 1978. On November 4, 1982, this matter was withdrawn from adjudication so that the Commission could consider a proposed consent. On March 25, 1983, the staff of the Bureau of Competition and the Bureau of Economics forwarded their analyses and recommendations to the Commission regarding the proposed consent.

At the time this action was filed, the Commission had been monitoring the Class I milk processing industry for more than twenty-five years. In the first ten years of its corporate existence, Dairymen acquired over thirty-one Class I milk processing plants in the southern United States. None of these individual acquisitions were challenged either by the Commission or by the Department of Justice ("Department") under Section 7 of the Clayton Act; however, in 1973, the Department brought a civil action against Dairymen alleging that it violated Section 2 of the Sherman Act and Section 3 of the Clayton Act by various acts affecting the upstream raw milk industry.[1] This matter was in litigation throughout the development of the Commission's case concerning the Farmbest acquisition.

The Commission's complaint alleged that the Farmbest acquisition substantially lessened competition in the sale of Class I milk products in five standard metropolitan statistical areas ("SMSAs"): Johnson City-Kinsport-Bristol, Tennessee-Virginia; Knoxville, Tennessee; Birmingham, Alabama; Montgomery, Alabama; and Columbus, Georgia-Alabama. The evidence adduced in discovery to date, however, tends to support geographic markets of broader scope. For example, products were shipped 135 miles from the Bristol plant, 200 miles from the Montgomery plant, 140 miles from the Columbus, Georgia, plant and 195 miles from the Knoxville plant. The recent findings by the District Court on remand in *U.S.* v. *Dairymen, supra*, also suggest broader geographic markets at the processing level. In that case the evidence showed that raw milk handlers in the five southeastern states market have purchased milk outside of that territory—sometimes from as far away as Wisconsin and Minnesota.[2] On the other hand, our record does not conclusively rebut the plausibility of more confined markets. Shipments data are incomplete; thus, we are unsure of the frequency of or reason for the longer shipments. The proposed testimony of trial witnesses uniformly perceives the relevant geographic markets to be "local", although the scope of that definition is unclear.

The fact that the contours of the relevent geographic markets in milk processing are unclear raises the concern that the Farmbest acquisition has not had anticompetitive effects. Other factors strengthen that concern. The record indicates that entry barriers into milk processing are not high. A steady and substantial decline in the number of dairy processors for well over a decade has made numerous physical facilities available. Brand loyalty appears to be an insignificant competitive factor: Witnesses do not emphasize it and Flav-O-Rich has not used the Farmbest name since the acquisition. Thus, the apparent lack of entry into the market appears to be due to increasing scale economies, rather than to any market power exercised by Dairymen Inc.[3] These factors, coupled with the lack of other evidence of anticompetitive effects, have dissipated our initial concern about this acquisition. Therefore, because the record does not support a finding that the acquisition is likely to injure competition, the Commission no longer has reason to believe that respondent violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. Therefore,

It is ordered that this matter be returned to adjudication and

It is further ordered that the complaint issued in the matter be, and it hereby is, dismissed.

By the Commission. Chairman Miller did not participate in the decision of the

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* Copies of the Complaint filed with the original document.

[1] As part of the complaint, the Government alleged that eighteen of these acquisitions evidenced Dairymen's intent to monopolize the market in Grade A milk in the southeastern United States by foreclosing raw milk competitors from access to processing facilities and thereby forcing non-member producers either to join Dairymen's cooperative or to exit the raw milk market. The Government, however, did not seek to ban Dairymen from making future acquisitions in the relevant market. The District Court entered a supplemental judgment dismissing the attempted monopolization portion of the Government's complaint. The Sixth Circuit Court of Appeals in a *per curiam* opinion reversed the District Court's attempted monopolization holding, instructing the District Court in the correct legal standard and directing it to determine relevant geographic submarkets for evaluating the attempted monopolization allegation on the basis of "commercially significant areas in which [Dairymen's] customers could turn to other suppliers." *United States* v. *Dairymen, Inc.*, 660 F.2d 92 (6th Cir. 1981).

On remand, the District Court found that the Government had met its burden of showing that Dairymen had the requisite specific intent to monopolize a relevant submarket of five southeastern states (Kentucky, Tennessee, Georgia, Louisiana and Mississippi), but that the Government had failed to show a dangerous probability of success. The District Court held the evidence was insufficient to show that Dairymen had the power to control prices or exclude competitors in the relevant five-state market. *United States* v. *Dairymen, Inc.*, Civil Action No. C 7634A (W.D. Ky. June 9, 1983, slip op. at 14–15).

[2] *United States* v. *Dairymen, Inc., supra*, slip op. at 5.

[3] The District Court decision on remand in *Dairymen* also supports this view. The Court there held that Dairymen did not have the power to raise or fix prices or exclude competitors in the five Southeastern states market. *Dairymen, supra*, slip op. at 14–15.