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**The Promulgation and Implementation of
Federal Marketing Orders Regulating Fruit
and Vegetable Crops Under the Agricultural
Marketing Agreement Act of 1937**

by

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ARTICLES

THE PROMULGATION AND IMPLEMENTATION OF FEDERAL MARKETING ORDERS REGULATING FRUIT AND VEGETABLE CROPS UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

*Daniel Bensing**

INTRODUCTION

Federal “marketing orders” regulating the sale of various agricultural commodities, promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA),¹ have generated considerable controversy. Consumer advocates, economists and certain independent growers have sharply criticized, on a wide variety of public policy grounds, the size and maturity standards, volume control restrictions and generic advertising programs imposed by marketing orders.² A sig-

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The opinions expressed herein are exclusively those of the author and not those of any officer or agency of the United States government.

¹ Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

² See, e.g., JAMES BOVARD, *THE FARM FIASCO* 179-207 (1989); Carolyn Lochhead, *Forbidden Fruit: How California Cartels Keep Prices High and Frustrate Free Enterprise*, *INSIGHT*, July 29, 1991, at 12.

nificant, but less recognized, factor contributing to this controversy is the confusing and antiquated nature of the implementation and enforcement provisions of the AMAA itself. This New Deal-era statute is very unusual in the elaborate and complex nature of its administrative procedures as well as in the central role it gives to industry members, particularly cooperatives, in the formulation and administration of marketing orders.³

This article will survey and analyze the AMAA procedures for the adoption, administration, amendment, enforcement and termination of marketing orders regulating fruits and vegetables, with particular focus on a series of recent decisions by the Ninth Circuit Court of Appeals.⁴ A critical problem with the current Act is the tension between an exhaustion of administrative remedies requirement that routinely delays resolution of challenges to marketing order provisions for many years and the statutory mandate for immediate and universal compliance. Further difficulties arise from the conflict between the elaborate procedures of the AMAA and the more streamlined provisions of the subsequently enacted Administrative Procedure Act (APA),⁵ and the unique

³ The AMAA has not been the subject of extensive legal analysis or criticism over its 57-year history. The two principle treatises on the AMAA are: Marvin Beshore, *Agricultural Marketing Agreement Act of 1937*, in 9 NEIL E. HARL, *AGRICULTURAL LAW* §§ 70.01-70.07 (1993 & Supp. 1994); John H. Vetne, *Federal Marketing Order Programs*, in 1 *AGRICULTURAL LAW* 75 (John H. Davidson ed., 1981 & Supp. 1989). See also Sellers & Baskette, *Agricultural Marketing Agreement and Order Programs, 1933-44*, 33 *GEO. L.J.* 123 (1945).

⁴ *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682 (9th Cir. June 27, 1995) (rehearing petition pending) (the author is counsel for the government in this action). *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993); *Cecelia Packing Corp. v. United States Dep't of Agric.*, 10 F.3d 616 (9th Cir. 1993); *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992), *modified*, 985 F.2d 1419 (1993); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992); *Cal-Almond, Inc. v. United States Dep't of Agric.*, 960 F.2d 105 (9th Cir. 1992); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332 (9th Cir. 1990); *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190 (9th Cir. 1990).

⁵ Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). Compare 5 U.S.C. § 553 (1994) (APA) with 7 U.S.C. § 608c(15) (1994) (AMAA). The AMAA was enacted in 1937 during a period when Congress was receptive to the argument that more formalized, administrative procedures were necessary to protect the public from an arbitrary, and possibly unconstitutional, "headless fourth branch of government." See 1 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 1.7 (2d ed. 1978). The initial version of the APA, the Walter-Logan bill, sponsored by the American Bar Association, was vetoed by President Roosevelt in 1941. The APA, as enacted in 1946, allowed most government action to be implemented through informal rulemaking under 5 U.S.C. § 553.

and unsettled legal status of marketing order committees. Finally the article concludes with a series of recommendations for a comprehensive revision of the AMAA provisions relating to fruit and vegetable marketing orders to modernize, simplify and strengthen its procedural and enforcement provisions.

I. BACKGROUND: THE RATIONALE FOR REGULATION AND THE PURPOSES OF THE ACT

The AMAA is a direct statutory descendent of President Roosevelt's Agricultural Adjustment Act (AAA),⁶ a centerpiece of the New Deal's first 100 days. This Act authorized restraints on production, designed to halt the deflationary spiral of the Great Depression through the issuance of "licenses" required for the handling of agricultural commodities. The Agricultural Adjustment Act of 1935⁷ refined certain provisions of the AAA and attempted to address the Supreme Court's delegation doctrine cases that had invalidated certain New Deal regulatory programs.⁸ The Agricultural Marketing Agreement Act of 1937 reenacted the marketing order and agreement provisions of the 1935 AAA without substantial change.⁹ The statutory objectives identified in 7 U.S.C. § 602 focus on the twofold goal of seeking to achieve "parity prices" for agricultural commodities,¹⁰ and establishing and maintaining "orderly marketing conditions" for agricultural commodities.¹¹ The principal rationale of the AMAA is that government must provide a

⁶ Act of May 12, 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-605, 607-623 (1994)).

⁷ Act of Aug. 24, 1935, 49 Stat. 761 (codified as amended in scattered sections of 7 U.S.C.).

⁸ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry v. United States*, 295 U.S. 495 (1935). See also *United States v. Butler*, 297 U.S. 1 (1936).

⁹ See H.R. REP. NO. 468, 75th Cong., 1st Sess. 1 (1937).

¹⁰ Pursuant to 7 U.S.C. § 1301(a)(1), the USDA periodically publishes an official list of parity prices for agricultural commodities. Parity prices generally are determined through a calculation designed to give farmers the purchasing power equivalent to that during a base period (1910-14) and serve as a trigger price for the operation of various agricultural programs. See H.R. REP. NO. 468, 74th Cong., 1st Sess. 1241 (1937). A goal of the AMAA is to achieve parity prices in such a way as to "protect the interest of the consumer." 7 U.S.C. § 602(2) (1994). Prices have rarely achieved parity. The AMAA does not authorize any action which has as its purpose to maintain prices above parity. *Id.* § 602(2)(b).

¹¹ *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984) ("The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them.")

mechanism whereby select segments of the agricultural economy can work in concert to prevent the recurring cycles of oversupply and scarcity which caused such severe distress in the farm economy in the 1920's and 1930's. Marketing orders allow producers of specific farm commodities to implement programs to both encourage demand for their products, through promotional programs and quality control regulations, and regulate the flow to market of the commodity to promote price stability. While in theory both producers and consumers should benefit from the maintenance of "orderly marketing conditions" ensuring a stable supply of agricultural commodities, in practice the primary focus of the industry committees and the United States Department of Agriculture (USDA) has been to maximize return to the grower.

At 7 U.S.C. § 608c(6), the AMAA expressly authorizes several specific types of regulatory action that can be incorporated in fruit and vegetable marketing orders. The principle options are:

- (1) restrictions on the quantity of a commodity that can be sold, either through marketing allotments¹² or reserve pools;¹³
- (2) limits on the grade, size or quality of the commodity,¹⁴ or regulation of pack and container size;¹⁵ and
- (3) the option to institute market research, development, promotion and advertising programs.¹⁶

¹² 7 U.S.C. § 608c(6)(A)-(B)(1994). The recently terminated orders regulating California citrus authorized a weekly volume control program referred to as "prorate." See 7 C.F.R. pts. 907, 908, 910 (1994). Allotments must be "equitably apportioned" on the basis of a "uniform rule." 7 U.S.C. § 608c(6)(C) (1994). See *Vaughn-Griffin Packing Co. v. Freeman*, 294 F. Supp. 458, 463-65 (M.D. Fla. 1968), *aff'd* 423 F.2d 1094 (5th Cir. 1970). Also, allotment programs frequently contain elaborate provisions for loans, carryovers and special credits.

¹³ 7 U.S.C. § 608c(6)(E) (1994). Reserve pools are most commonly utilized with commodities that can be stored for long periods, such as California almonds. See 7 C.F.R. § 981.46 (1994).

¹⁴ 7 U.S.C. § 608c(6)(A) (1994). The marketing orders regulating California peaches and nectarines require that fruit reach a minimum level of maturity (i.e., ripeness) and size before it can be sold. See 7 C.F.R. §§ 916.356, 917.459 (1994). These programs are enforced through inspections implemented by the Federal-State Inspection Service, 7 U.S.C. § 608c(6)(F) (1994). Under 7 U.S.C. § 608e(1), the imposition of grade, size, quality or maturity restrictions on a specified list of 23 commodities will almost invariably result in the imposition of identical restrictions on imports of such commodities. See, e.g., *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971) (successful APA challenge to regulation restricting import of Mexican tomatoes); *Cal-Fruit Suma Int'l v. United States Dep't of Agric.*, 698 F. Supp. 80 (E.D. Pa. 1988), *aff'd* 875 F.2d 309 (3d Cir. 1989).

¹⁵ 7 U.S.C. § 608c(6)(H) (1994).

¹⁶ *Id.* § 608c(6)(I). This provision contains a discrete list of products for which

Generic advertising programs for select agricultural commodities are also authorized by several other commodity-specific statutes.¹⁷

The AMAA further requires that fruit and vegetable orders be restricted "to the smallest regional production areas . . . practicable" and consistent with the policy of the Act,¹⁸ and hence there may be different orders for the same commodity grown in different states.¹⁹ Additionally, the USDA is authorized and directed to cooperate with state programs for the regulation of agriculture,²⁰ and many states have statutes authorizing programs similar to federal marketing orders.²¹ There are 35 federal marketing orders in existence for fruit, vegetable and nut crops. These marketing orders range from simple and noncontroversial research programs to hotly-contested volume control, maturity and adver-

"marketing promotion including paid advertising" is authorized, and a more limited subset of commodities where the handler may receive a credit for direct expenditures for marketing promotion. The marketing order regulating California almonds provides a (controversial) example of an order with a significant advertising and promotional component. *See* Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429 (9th Cir. 1993) (generic advertising program invalidated as unconstitutional restriction on commercial speech); *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *6-*9 (9th Cir. June 27, 1995) (rehearing petition pending). *But see* *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (beef promotion program upheld against First Amendment challenge).

¹⁷ *See, e.g.*, Beef Research and Information Act, Pub. L. No. 94-294, 1976 U.S.C.C.A.N. (90 Stat.) 529 (codified as amended at 7 U.S.C. §§ 2901-2911 (1994)), *creating* Beef Promotion and Research Order, 7 C.F.R. pt. 1260 (1994); Egg Research and Consumer Information Act, Pub. L. No. 93-428, 1974 U.S.C.C.A.N. (88 Stat. 1171) 1341 (codified as amended at 7 U.S.C. §§ 2701-2718 (1994), *creating* Egg Research and Promotion Order, 7 C.F.R. pt. 1250 (1994). Ten other non-AMAA advertising orders (applicable to cotton, potatoes, mushrooms, watermelons, pecans, limes, soybeans, pork, honey, and a single program for wool and mohair) are contained in 7 C.F.R. pts. 1205-1270.

¹⁸ 7 U.S.C. § 608c(11)(B) (1994).

¹⁹ *E.g.*, *compare* 7 C.F.R. pt. 948 (1994) (Irish potatoes grown in Colorado) and *id.* pt. 950 (Irish Potatoes grown in Maine) *with id.* pt. 953 (Irish potatoes grown in southeastern states).

²⁰ 7 U.S.C. § 610(i) (1994). State and federal programs regulating fruits and vegetables can co-exist, unless the state program "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²¹ *See, e.g.*, California Marketing Act of 1937, 1937 Cal. Stats. 1343, ch. 404 (codified as amended at CAL. FOOD & AG. CODE §§ 58601-59281 (West 1986 & Supp. 1995)). Currently, the California marketing order regulating plums is administered by the same staff which administers the federal marketing orders regulating California nectarines and peaches.

tising programs.²²

The AMAA also authorizes marketing orders to regulate the sale of milk, an elaborate program generally designed to provide producers with a blended price reflecting the percentage that is sold as fresh fluid milk, (receiving a higher price) and for products such as butter and cheese, (which generally receive a lower price).²³ The analysis of milk marketing orders is beyond the scope of this article. However because both types of orders are authorized under the AMAA, milk precedents may affect fruit and vegetable orders.

A fundamental premise underlying the use of marketing orders is that regulatory restrictions must be placed on "handlers," i.e., packing houses and processing plants,²⁴ for the benefit, principally, of growers. While there may often be some overlap and community of interest between handlers and growers, the AMAA is the product of an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position.

The constitutionality of the AMAA was affirmed by the Supreme Court in *United States v. Rock Royal Coop.*²⁵ against New Deal-era delegation doctrine and due process attacks.²⁶ However these constitutional challenges have been periodically renewed, citing recent Supreme Court rulings addressing the delegation doctrine,²⁷ the due process

²² The most controversial marketing orders all regulate fruit and nut crops produced in California's San Joaquin Valley. See 7 C.F.R. pt. 981 (1994) (almonds); *id.* pt. 916 (nectarines); *id.* pt. 917 (peaches); and the recently terminated (59 Fed. Reg. 44,022 (Aug. 20, 1994)) California-Arizona citrus orders: *id.* pt. 907 (navel oranges); *id.* pt. 908 (Valencia oranges); *id.* pt. 910 (lemons).

²³ The specific statutory authority for milk marketing orders is at 7 U.S.C. § 608c(5), (18) (1994). See generally Zuber v. Allen, 396 U.S. 168 (1969).

²⁴ "Handle" is defined in each marketing order. Typical is the California nectarine order where handle means "to sell, consign, deliver or transport nectarines . . . between the production area and any point outside thereof." 7 C.F.R. § 916.11 (1994). "Handlers," who may be required to register with the administrative committee implementing the order, are either agricultural cooperatives or proprietary businesses which assess growers a fixed charge per carton to harvest, pack and sell growers' products.

²⁵ 307 U.S. 533 (1939).

²⁶ *Id.* at 568-78. *Accord* H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939); *Edwards v. United States*, 91 F.2d 767 (9th Cir. 1937); *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *15 (9th Cir. June 27, 1995) (rehearing petition pending). See also *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (AMAA regulation of intrastate milk sales is permissible regulation under commerce clause).

²⁷ *Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). *But see* *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989).

clause,²⁸ and the First Amendment protections for commercial speech.²⁹

II. THE STRUCTURE AND OPERATION OF THE AMAA

A. *Marketing Agreements—A Statutory Dead End*

The drafters of the AMAA evidently contemplated that the Secretary of Agriculture (hereinafter sometimes referred to as the “Secretary”) would frequently utilize the authority in 7 U.S.C. § 608b to enter into “marketing agreements” with handlers to regulate the affected commodity. The agreements could be adopted after simple notice and hearing and without any of the elaborate procedural requirements applicable to marketing orders. However with the exception of a single marketing agreement program for peanuts,³⁰ handlers have never been willing to voluntarily enter into marketing agreements, which by their very nature regulate handlers for the benefit of growers.³¹ Where a marketing order is in effect, however, the USDA will request handlers to sign marketing agreements which simply restate their obligations under the order. Action taken pursuant to agreements will receive the benefit of antitrust immunity when properly approved by the Secretary.³²

²⁸ Plaintiffs in *Cal-Almond, Inc. v. United States Dep’t of Agric.*, 14 F.3d 429 (9th Cir. 1993), claimed that the lengthy delay in resolving their challenge amounted to a denial of due process, citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). However the Ninth Circuit rejected that argument, noting that plaintiffs’ own litigation tactics explained much of the delay and that a “refund” of assessments found not to have been due would ensure a constitutional remedy. *Cal-Almond*, 14 F.3d at 448-49. See *infra* part II.G.

²⁹ See *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557 (1980) (test for regulation of commercial speech); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). See also *supra* note 16.

³⁰ 7 U.S.C. § 608b(b) (1994). The agreements cover all peanut production areas nationwide and permit the indemnification of participating handlers from losses due to aflatoxin, a mold making peanuts unfit for human consumption. This goal is not one of the authorized purposes for marketing orders under 7 U.S.C. § 608c(6); hence, marketing agreements are the only available option.

³¹ *Suntex Dairy v. Block*, 666 F.2d 158, 165 (5th Cir. 1982).

³² 7 U.S.C. § 608b. See *United States v. Borden Co.*, 308 U.S. 188 (1939) (Secretarial approval required); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332 (9th Cir. 1990) (lack of Secretarial disapproval not equivalent of approval).

B. Adoption and Amendment of Marketing Orders

1. Rulemaking Proceedings

Under the AMAA, a new marketing order is initiated by a petition from growers of a commodity who present proposals for the adoption of marketing orders containing one or more of the authorized regulatory tools. If, after a preliminary and informal investigation by staff of the Agricultural Marketing Service (AMS), an agency within the USDA, it appears that the proposed order might effectuate the purposes of the Act, a notice of a hearing on the proposal is published in the *Federal Register*.³³ The exclusion of certain proposals from consideration at the hearing has prompted suits seeking immediate injunctive relief to compel the Secretary to hold hearings on the rejected proposals.³⁴

The USDA takes the position that hearings to adopt or amend marketing orders must be conducted pursuant to the formal, on-the-record rulemaking proceedings of the APA,³⁵ and its rules of procedure and practice for the adoption of marketing orders³⁶ require an elaborate and detailed hearing procedure. This degree of procedural formality is almost certainly not required by the AMAA, however, since the Supreme Court held in *United States v. Allegheny-Ludlum Steel Corp.*³⁷ and *United States v. Florida East Coast Railway Co.*³⁸ that formal rulemaking is only required where the statute uses the phrase "on the record" or other language having the same meaning. The applicable

³³ 7 C.F.R. § 900.3 (1994). The consultation process leading up to a proposal for a hearing is described in some detail in AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., MARKETING AGREEMENT AND ORDER OPERATIONS MANUAL 20-24 (1986) [hereinafter *AMS Manual*] (copy on file with the *San Joaquin Agricultural Law Review*). Substantial support in the industry for the proposed order is considered particularly important by the AMS.

³⁴ Compare *Alabama Dairy Prods. Ass'n, Inc. v. Yeutter*, 980 F.2d 1421, 1423 (11th Cir. 1993) (injunction denied; handler may not interrupt administrative process but must exhaust remedies and challenge order pursuant to section 15 proceedings) and *Friends of the Hop Mktg. Order v. Block*, 753 F.2d 777, 778 (9th Cir. 1985) with *National Farmers Org. v. Lyng*, 695 F. Supp. 1207, 1213 (D.D.C. 1988) ("patently arbitrary action" by Secretary in excluding proposal of National Farmers Organization that was opposed by milk handlers).

³⁵ 5 U.S.C. §§ 556-57 (1994). Generally, formal rulemaking and adjudication under the APA involve on-the-record, evidentiary proceedings before an Administrative Law Judge (ALJ) who then issues a recommended decision that is reviewed and adopted (perhaps with modifications) by the head of the agency. See generally RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 279-284 (2d ed. 1992).

³⁶ 7 C.F.R. §§ 900.1-900.18 (1994).

³⁷ 406 U.S. 742, 756-57 (1972).

³⁸ 410 U.S. 224, 237-38 (1973).

provision of the AMAA, 7 U.S.C. § 608c(4), only requires that marketing orders be issued “after . . . notice and opportunity for hearing.”

In *Marketing Assistant Program, Inc. v. Bergland*,³⁹ Judge Harold Leventhal recognized that in the absence of the phrase “on the record” or its equivalent, a proceeding to adopt a milk marketing order only required notice and comment rulemaking.⁴⁰ A shift to informal rulemaking would greatly simplify and streamline the process for adoption or amendment of marketing orders, but until the USDA amends or repeals its existing procedural rules, it will be bound to use cumbersome, “formal” rulemaking procedures.

At the formal hearing before an ALJ, all interested persons can present oral and documentary evidence with full opportunity for cross examination.⁴¹ Not surprisingly, these hearings can take a great deal of time and generate enormous records. From this record, the Administrator of AMS must identify and publish in the *Federal Register* the terms of the order that “will tend to effectuate the declared policy of this chapter with respect to such commodity,” in the form of a “recommended decision.”⁴² The terms of this proposed order are then published in the *Federal Register*, with a request for comments and exceptions.⁴³

After review of these comments, the Secretary then publishes the proposed order (or amendments thereto), along with the statutorily-mandated “tendency finding,” that the order “will tend to effectuate the declared policy” of the AMAA.⁴⁴ Under ordinary administrative law principles, this would be the final rule, binding on the public 30 days

³⁹ 562 F.2d 1305, 1309 (D.C. Cir. 1977).

⁴⁰ *Id.* at 1309. “Notice and comment” rulemaking governed by 5 U.S.C. § 553 merely requires the publication of the proposed rule in the *Federal Register*, an opportunity for interested members of the public to submit written comments, and the publication of the final rule and a “statement of basis and purpose” explaining its terms 30 days before it is made effective.

⁴¹ The elaborate procedures are set forth in 7 C.F.R. §§ 900.4-900.11 and discussed in the *AMS Manual*, *supra* note 33, at 24-27.

⁴² 7 U.S.C. § 608c(4) (1994); 7 C.F.R. § 900.12 (1994) (Administrator’s recommended decision).

⁴³ 7 C.F.R. § 900.12(c).

⁴⁴ The “tendency” finding is required by 7 U.S.C. § 608c(4). This two-step process (i.e., recommended decision of the Administrator and final decision of the Secretary) is not mandated by statute, but is required by USDA’s procedural regulations (7 C.F.R. §§ 900.12, 900.13, 900.13a) unless the Secretary makes a finding that “timely execution of his functions imperatively and unavoidably requires . . . omission” of the recommended decision. *Id.* § 900.12(d).

after publication in the *Federal Register*.⁴⁵ However under 7 U.S.C. § 608c(9), the Secretary must make two additional determinations⁴⁶ and, most importantly, must receive the approval of a super-majority of producers of the affected commodity through a referendum on the proposed order.⁴⁷

2. Producer Referendum

Under the referendum process, the USDA issues a referendum order setting forth the period during which those who produced the commodity may be eligible to vote, as well as the procedures for the vote and the identity of the referendum agent.⁴⁸ AMS personnel then mail copies of ballots to all known producers and to cooperative corporations, who can vote on behalf of their producer members. AMS personnel, as the referendum agent, subsequently count and tabulate the ballots and announce the result by press release.⁴⁹ With the exception of California citrus orders, two-thirds of producers, or producers who account for two-thirds of the volume of the commodity, must vote to approve the marketing order.⁵⁰ The AMAA is relatively unusual in giving the supposed beneficiaries of a government program explicit veto power over the implementation and continuation of that program.

A critical provision of the AMAA permits any cooperative association of producers to "bloc vote" in the referendum on behalf of all its members, stockholders or those under contract with such cooperative.⁵¹

⁴⁵ 5 U.S.C. § 553(d) (1944). See generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 40-66 (1993).

⁴⁶ Both determinations effectively follow from the earlier "tendency" finding. First, the Secretary must determine that the refusal of the requisite number of handlers to sign marketing agreements "tends to prevent the effectuation of the declared policy of the Act." 7 U.S.C. § 608c(9)(A). Second, the Secretary must find that "the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy" of the Act, sometimes referred to as the "necessity" finding. *Id.* § 608c(9)(B). See generally *Suntex Dairy v. Block*, 666 F.2d 158, 161 (5th Cir. 1982).

⁴⁷ Producer referenda are mandated for new marketing orders, but not for amendments to orders. 7 U.S.C. § 608c(19). However, it is the practice of the USDA to hold referenda on amendments as well. See *AMS Manual*, *supra* note 33, at 27.

⁴⁸ *AMS Manual*, *supra* note 33, at 28.

⁴⁹ Referendum procedures for fruit and vegetable orders are set out at 7 C.F.R. §§ 900.400-900.407 and are discussed in the *AMS Manual*, *supra* note 33, at 27-30.

⁵⁰ 7 U.S.C. § 608c(9)(B). Three-fourths of producers (but still only two-thirds of volume) must approve an order applicable to California citrus fruits. *Id.* § 608c(9)(B)(i).

⁵¹ *Id.* § 608c(12).

This provision is consistent with the general policy of federal agricultural law to foster and encourage agricultural cooperatives.⁵² Because there will not infrequently be a single cooperative corporation that dominates the production of the commodity, this provision can effectively grant such cooperative veto power over the adoption or amendment of a marketing order when it elects to bloc vote. The cooperative's power is enhanced because, through its bloc vote, it can vote on behalf of those of its members who oppose a marketing order requirement as well as those who are apathetic and would not ordinarily vote.⁵³

In *Cecelia Packing Corp. v. USDA*,⁵⁴ the Ninth Circuit rejected First Amendment and Equal Protection challenges to the bloc vote by Sunkist in the 1991 orange order continuation referendum. The action was brought by independent orange handlers and anonymous "John Doe" Sunkist members. The court concluded that the First Amendment rights of Sunkist members were not infringed because, like any member of an organization, they retained the right to withdraw and vote independently or to act within the cooperative's governing structure to change its position.⁵⁵ The court further held that voting in a marketing order referendum is not a "bedrock of our political system," like voting in an election for national, state or local legislative representatives," and hence did not implicate strict scrutiny or one-person one-vote requirements.⁵⁶ Finally, the court easily concluded that given the congressional policy of fostering agricultural cooperatives, the authority to bloc vote had a rational basis and hence did not violate the Equal Protection component of the Fifth Amendment.⁵⁷

⁵² It is the declared policy of Congress to "encourage[] the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing . . ." 12 U.S.C. § 1141(a)(3) (1994). In addition, the Capper-Volstead Act specifically authorizes agricultural cooperatives (7 U.S.C. § 291 (1994)) and provides limited antitrust immunity (*id.* § 292). See *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1968).

⁵³ For example, in the 1991 referendum on the continuation of the navel orange and Valencia orange marketing orders (a continuance referendum every six years was required by the terms of the orders themselves (7 C.F.R. §§ 907.83, 908.83 (1994))), Sunkist Growers, Inc. the large agricultural cooperative, bloc voted on behalf of its entire membership, thereby accounting for over 80% of the votes (*Cecelia Packing Corp. v. United States Dep't of Agric.*, 10 F.3d 616, 620 (9th Cir. 1993)), notwithstanding that it only marketed approximately 50% of California oranges.

⁵⁴ 10 F.3d 616 (9th Cir. 1993).

⁵⁵ *Id.* at 621-23.

⁵⁶ *Id.* at 624 (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

⁵⁷ *Id.* at 625.

3. Critique of the AMAA Procedures for the Adoption and Amendment of Marketing Orders—Lessons from the California Citrus Orders

The process for the adoption or amendment of a marketing order thus requires six distinct steps: (1) industry petition for a proposed order; (2) formal rulemaking hearings on the proposed order; (3) issuance of a recommended order by the Administrator of AMS; (4) recommendation of a final order by the Secretary after notice and comment, accompanied by the required “tendency” finding on the recommended order; (5) producer approval on the recommended order through a referendum; and (6) final issuance of the order by the Secretary with the required “necessity” finding. An example of the sort of unexpected outcome that can result from the operation of this unusual and convoluted rulemaking process is presented in two recent decisions, *Sequoia Orange Co. v. Yeutter*⁵⁸ and *United States v. Sunny Cove Citrus Association*,⁵⁹ which in conjunction led to the termination of the controversial California citrus marketing orders in 1994, with legal consequences that may be retroactive to 1984.

In considering amendments to the marketing orders regulating California navel and Valencia oranges in 1984, the USDA adopted a new approach of requiring the producer vote to be on the entire order as amended, rather than allowing individual “line item” votes on each of the 21 proposed amendments. An up or down vote on the entire order had been the consistent practice with respect to milk orders because the nationwide coordinated pricing system for milk required that each milk order be consistent with pricing terms for adjacent milk orders,⁶⁰ but this was the first time the USDA utilized such an “all or nothing” approach in a fruit and vegetable order.

Announcement of this referendum procedure was accompanied by a “tendency finding” that the orders, as amended effectuated the purposes of the Act, and a press release stating that if all amendments were not adopted, the orange orders would be terminated.⁶¹ However

⁵⁸ 973 F.2d 752 (9th Cir. 1992), *modified*, 985 F.2d 1419 (9th Cir. 1993).

⁵⁹ 854 F. Supp. 669 (E.D. Cal. 1994). This decision is a ruling in three unconsolidated cases, on Sunny Cove Citrus Association’s numerous challenges to the orange marketing orders, in defense of a \$3 million civil penalty action brought against the association by the government.

⁶⁰ See *Freeman v. Hygeia Dairy Co.*, 326 F.2d 271, 274 (5th Cir. 1964).

⁶¹ 49 Fed. Reg. 29,071 (July 12, 1984). As the Ninth Circuit noted in *Sequoia Orange Co. v. Yeutter*, this “all-or-nothing approach to the slate of amendments . . . made at least an implicit value judgment that without the amendments the marketing

Sunkist, which dominated the California citrus industry, objected to this referendum procedure, which the Secretary evidently adopted to circumvent Sunkist's right to bloc vote on behalf of its membership to defeat those amendments that it opposed. Shortly after making the initial announcement that all amendments must pass for the orange orders to continue, Agriculture Secretary John Block succumbed to Sunkist's political pressure and reversed the USDA's position on the voting procedure—thereby allowing Sunkist to bloc vote in opposition to the amendments it opposed—without benefit of further notice and comment on this new referendum procedure.⁶²

After an administrative and judicial review process that consumed no less than *eight years*, the Ninth Circuit ruled in *Sequoia Orange Co. v. Yeutter* that the Secretary was bound to follow the APA in reversing his decision in the initial referendum order on how the amendments would be presented for producer approval.⁶³ The court remanded the matter to the Secretary, without any specific directions and the Secretary terminated the procedurally flawed amendment proceeding, concluding that the unamended orange orders remained in effect.⁶⁴

order should be terminated." 973 F.2d at 757.

⁶² 49 Fed. Reg. 32,080 (Aug. 10, 1984). The critical decision point is recounted in a declaration by then-Deputy Assistant Secretary John Ford (who subsequently became a lobbyist for Sunkist's opponents):

[T]he Secretary of Agriculture was in effect politically blackmailed into abruptly and without rational reason or legal justification changing the Final Decision. Despite three years, hundreds of thousands of dollars, and hundreds of thousands of hours on this proceeding, the basic decision and the resulting outcome of it was made in a one-minute or three-minute phone call from the president of Sunkist, R.L. Hanlin, to the Secretary.

Declaration of John Ford (Jan. 29, 1990) (copy on file with the *San Joaquin Agricultural Law Review*), filed in *Sequoia Orange Co. v. Yeutter*, No. CV-F-632 (E.D. Cal. Nov. 28, 1990), quoted in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 n.5 (9th Cir. 1992), modified, 985 F.2d 1419 (1993). Additionally, Congress was then in the process of enacting appropriations riders to prohibit USDA's use of "all-or-nothing" referendum procedures for non-milk orders. See Act of Aug. 22, 1984, Pub. L. 98-396, 1984 U.S.C.C.A.N. (98 Stat.) 1369; Act of Oct. 12, 1984, Pub. L. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1837.

⁶³ 973 F.2d at 757-59. The court's reasoning is somewhat undercut by the fact that the Secretary had not allowed notice and comment on the initial "all-or-nothing" referendum order either. The court rejected the government's argument that the AMAA provided no meaningful standards on which referendum procedures to use; hence, that determination was committed to agency discretion by law under 5 U.S.C. § 701(a)(2). *Sequoia Orange Co. v. Yeutter*, 973 F.2d at 756-57.

⁶⁴ 57 Fed. Reg. 49,655 (Nov. 3, 1992) ("In view of the passage of time, the level of contention in the industries concerning various proposed amendments, and the Ninth Circuit's decision that the amendments were not properly enacted under the APA, the

That decision was immediately challenged by non-Sunkist handlers in a new section 15 proceeding on a variety of grounds and in *United States v. Sunny Cove Citrus Association*,⁶⁵ Judge Oliver W. Wanger of the Eastern District of California accepted one of Sunny Cove's arguments. Notwithstanding the termination of the rulemaking proceeding in which it was issued, the court gave independent legal effect to the July 12, 1984 "tendency" finding; i.e., that without all 21 proposed amendments, the orders should be terminated. The court characterized this as the Secretary's "last valid act," and held that until that tendency finding was reversed or modified through notice and comment proceedings, all orange volume control regulations from 1984 through the end of regulation in 1992 could not be enforced.⁶⁶ The court then remanded for the Secretary of Agriculture to determine the status of the pre-amendment marketing orders.⁶⁷

Confronted with the need to revisit and retroactively reverse 1984's "implicit value judgment" that the orders needed all 21 amendments to continue, in light of a decade of controversial developments, Secretary of Agriculture Michael Espy elected instead to terminate the California citrus orders and dismiss all pending enforcement actions.⁶⁸

The *Sequoia/Sunny Cove* litigation highlights a significant problem with operating under a statute utilizing *sui generis* administrative procedures: it is difficult to predict what significance a court will give to unusual agency action such as a negative "tendency" finding. The orange litigation also underscores the difficult issues of control created where the dominant agricultural cooperative has effective veto power over the terms of a marketing order through its right to bloc vote. Finally, an administrative exhaustion requirement that contributes toward a decade's delay in obtaining a definitive ruling on the legality of a marketing order requirement is clearly counter productive.

[amendment] proceeding is hereby terminated. The orders will continue to operate without the 1985 amendments.").

⁶⁵ 854 F. Supp. 669 (E.D. Cal. 1994) (the author was counsel for the government in *Sunny Cove*).

⁶⁶ *Id.* at 694-98.

⁶⁷ *Id.* at 698. The court appeared to conclude that the AMAA authorized retroactive reversal of the 1984 tendency finding. *Id.* at 695 (citing *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 444 (9th Cir. 1995) (holding that the AMAA authorizes retroactive application of almond reserve obligation rules)).

⁶⁸ This decision was announced on May 16, 1994 in a letter to the House and Senate Agriculture Committees and described in an accompanying briefing paper (copy on file with the *San Joaquin Agricultural Law Review*). Formal termination occurred on August 20, 1994. 59 Fed. Reg. 44,022 (Aug. 20, 1994).

C. Implementation of Marketing Orders

1. Status and Responsibilities of the Committees

Under § 608c(7)(C), the Secretary may select an “agency” to administer the marketing order, recommend regulations and amendments to the order, and to oversee compliance. Fruit and vegetable orders are typically administered by a committee composed of members of the regulated industry, and occasionally a member of the public, who are appointed by the Secretary.⁶⁹ Frequently growers of the regulated commodity meet to nominate and vote for candidates to be recommended for membership on the committee.⁷⁰ The Secretary has always appointed such nominees. The committees are authorized to hire employees, enter into contracts and generally to administer the order on a daily basis.⁷¹ Because the committees’ primary responsibility is to administer the orders (although they also provide advice and recommendations to the Secretary), the Federal Advisory Committee Act (FACA) probably does not apply.⁷²

The precise legal status of committees and their members and staff has presented some difficulty. In “administering” marketing orders, committee members may take actions that can subject them to individual liability.⁷³ Because the orders provide the Secretary with uncondi-

⁶⁹ See, e.g., 7 C.F.R. §§ 916.20-916.27 (1994) (nomination and appointment procedure for California nectarine marketing order). Because committee members are appointed by the Secretary and may be removed by the Secretary at any time and for any reason (see, e.g., 7 C.F.R. § 916.62) they are government agents, not private parties. See generally Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegation of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62 (1990).

⁷⁰ *AMS Manual*, *supra* note 33, at 37-39.

⁷¹ See, e.g., 7 C.F.R. § 916.31 (duties of Nectarine Administrative Committee include: selection of a chair; appointment of employees; submission of a budget to AMS; keeping minutes, books and records; causing records to be audited each fiscal year; assembling data on market conditions; and investigating compliance.).

⁷² Federal Advisory Committee Act, Pub. L. No. 92-463, 1972 U.S.C.A.N. (86 Stat.) 892 (codified at 5 U.S.C. Appx. §§ 1-505 (1994)). Federal Property Management Regulations construe the Act not to apply to “[a]ny committee which is established to perform primarily operational as opposed to advisory functions.” 41 C.F.R. § 101-6.1004(g). *Accord* Natural Resources Defense Council v. EPA, 806 F. Supp. 275, 277 (D.C.C. 1992). *But see* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1488 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992) (suggesting, in dicta and without discussion, that the FACA might apply to marketing order committees).

⁷³ For example, prior to 1992, the California tree fruit marketing orders authorized a maturity subcommittee to grant a variance from maturity or size regulations. See, e.g., 7 C.F.R. § 916.356 (nectarines); *id.* § 917.459 (peaches); *id.* § 917.460 (plums).

tional authority to remove committee members and staff and to reverse any action taken by the committees,⁷⁴ courts have accorded committee members and staff the status of government officers or employees. Thus in *Saulsbury Orchards & Almond Processing v. Yeutter*,⁷⁵ the court concluded, without discussion, that members and staff of the Almond Board were "government officials performing discretionary functions," and hence entitled to the defense of qualified immunity.⁷⁶

In *Berning v. Gooding* the court avoided the need to focus on the nature of the governmental immunities available to members of the Hop Administrative Committee, concluding that the committee only makes non-binding recommendations to the Secretary which have no legal effect in themselves.⁷⁷ All orders contain a clause providing members with immunity "for errors in judgment, mistaken or other acts . . . except for acts of dishonesty, willful misconduct or gross negligence."⁷⁸

While the exact nature of governmental immunities available to committee members is somewhat unclear, the governmental nature of these entities has been recognized in numerous other contexts. In an unpub-

Currently the Federal-State Inspection Service is authorized to grant a variance "to reflect changes in crop, weather, or other conditions"

⁷⁴ For example, the nectarine order provides that members and employees of the committee "shall be subject to removal or suspension by the Secretary at any time[.]" and every decision of the committee "shall be subject to the continuing right of the Secretary to disapprove of the same at any time." 7 C.F.R. § 916.62.

⁷⁵ 917 F.2d 1190 (9th Cir. 1990).

⁷⁶ *Id.* at 1196. In pending litigation brought against members of the peach and nectarine committees, Judge Wanger affirmed the government's certification that the committee members and staff were "employees of the government" for purposes of 28 U.S.C. § 2679, thereby substituting the United States as defendant on plaintiffs' state law claims. *Wileman Bros. & Elliott, Inc. v. Giannini*, No. CV-F-88-251, slip op. at 14-19 (E.D. Cal. Apr. 5, 1993) (copy on file with the *San Joaquin Agricultural Law Review*) (the author is counsel for the federal defendants (committee members and employees) in this action). In *Wileman Bros. & Elliott, Inc. v. Espy*, the Ninth Circuit held that the maturity regulation which the court found to be ambiguous in *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 335-36 (9th Cir. 1990), did in fact authorize the maturity determinations challenged by plaintiffs in the *Giannini* antitrust action. *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *11-*12 (9th Cir. June 27, 1995) (rehearing petition pending).

⁷⁷ 820 F.2d 1550, 1552 (9th Cir. 1987).

⁷⁸ 7 C.F.R. § 916.70 (nectarine order). Some orders use slightly different language, dropping the phrase "willful misconduct or gross negligence" from the exception clause at the end of the section. *See, e.g.*, 7 C.F.R. §§ 981.85, 946.76. The legal authorization for this "regulatory immunity" clause is unclear, and it is of little value to committee members and employees in any event.

lished decision in *Jensen v. Almond Board*, Judge Wanger held that the Almond Board was an "agency" for purposes of the Freedom of Information Act.⁷⁹ And in another unpublished decision, *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*, Judge Wanger concluded that the Lemon Administrative Committee was an agency of the USDA and assessment funds paid to fund the marketing order are government funds for purposes of False Claims Act liability.⁸⁰

However in *Kyer v. United States*,⁸¹ the Court of Claims held that there could be no suit against the United States under the Tucker Act for breach of contract entered into by the Grape Crush Administrative Committee, because the committee was not authorized to expend *appropriated* funds, the essential prerequisite for Tucker Act jurisdiction.⁸² And the federal conflict of interest statute,⁸³ and whistleblower protection provisions of the Civil Service Reform Act,⁸⁴ do not apply to marketing order committee members and employees because they are not employees "appointed in the civil service" by a specified list of federal officials.⁸⁵

The limited antitrust immunity provided by 7 U.S.C. § 608b to parties to marketing agreements has been construed to apply to action

⁷⁹ No. CV-F-91-474 (E.D. Cal. Mar. 23, 1992) (copy on file with the *San Joaquin Agricultural Law Review*).

⁸⁰ *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*, No. CV-F-91-194, slip op. at 12-14 (E.D. Cal. May 4, 1992) (copy on file with the *San Joaquin Agricultural Law Review*). *Oxnard* is a single decision involving four consolidated *qui tam* actions brought by Sequoia Orange Co. against Sunkist-affiliated lemon handlers and Sunkist under the False Claims Act (*Oxnard Lemon Co.*, No. CV-F-91-194; *Mission Citrus Co.*, No. CV-F-91-195; *Ventura Pacific Co.*, No. CV-F-91-196; *Saticoy Lemon Ass'n*, No. CV-F-91-197). The author was counsel for the government in these actions.

⁸¹ 369 F.2d 714 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 929 (1967).

⁸² *Id.* at 718. While undoubtedly correct in its interpretation of the Tucker Act, *Kyer* does not alter the governmental status of the committee, since entities can be federal instrumentalities for purposes of sovereign immunity even if they operate on non-appropriated funds. *See Army & Air Force Exch. Serv. v. Sheehen*, 456 U.S. 728, 733-34 (1982) (military PX); *In re Sparkman*, 703 F.2d 1097, 1100-01 (9th Cir. 1983) (federally-chartered credit association).

⁸³ 18 U.S.C. § 208 (1994).

⁸⁴ 5 U.S.C. § 2302(a)(2)(C) (1994).

⁸⁵ *Id.* § 2105(a)(1). *Cf. Hamlet v. United States*, 14 Cl. Ct. 62 (Cl. Ct. 1988), *rev'd on other grounds*, 873 F.2d 1414 (Fed. Cir. 1989) (employee of state committee administering Agricultural Stabilization and Conservation Service (ASCS) programs is not employee appointed in civil service and, hence, cannot maintain a suit in claims court under the Back Pay Act).

taken pursuant to marketing orders as well.⁸⁶ However the broader question of the antitrust exposure of committee members and employees is unclear. Following allegations that members of the Raisin Administrative Committee engaged in illegal price-fixing and market division discussions with foreign producers,⁸⁷ the Antitrust Division of the United States Department of Justice, in conjunction with the USDA, issued "Antitrust Guidelines" in 1982, designed to advise marketing order committee members and employees of the extent of their antitrust immunity.⁸⁸ The Guidelines describe certain conduct that would almost invariably be unlawful (e.g., price-fixing and allocation of markets), and state that generally immunity is limited to "acts within the confines of . . . committee obligations" while "[c]onduct that falls outside the range of activities authorized by Federal marketing order regulations . . . may be subject to prosecution."⁸⁹

However these Guidelines may reflect an overly-expansive interpretation of the antitrust laws. The Supreme Court long ago held that the United States is not a "person" as defined in the Sherman Anti-Trust Act,⁹⁰ and courts have categorically held "that the United States, its agencies and officials, remain outside the reach of the Sherman Act."⁹¹ So long as a federal official is acting within the "outer perimeter of the authority vested in him by statute," he is acting on behalf of the sovereign and hence is not a "person" for purposes of Sherman Act liability,

⁸⁶ *United States v. Borden Co.*, 308 U.S. 188, 201-02 (1939); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 334-35 n.4 (9th Cir. 1990). *But see In re Midwest Milk Monopolization Litig.*, 380 F. Supp. 880, 885 (W.D. Mo. 1974).

⁸⁷ The Raisin Marketing Order, 7 C.F.R. pt. 989, was amended in 1981 to explicitly prohibit such conduct. *See* 46 Fed. Reg. 39,983 (Aug. 6, 1981) (adding new § 989.801 to the order).

⁸⁸ UNITED STATES DEP'T OF AGRIC., ANTITRUST GUIDELINES (1982) (copy on file with the *San Joaquin Agricultural Law Review*).

⁸⁹ *Id.* at 2. *Accord* 7 C.F.R. § 989.801 (1994).

⁹⁰ *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941). Congress later amended the Act to allow the United States to sue as a plaintiff (*see* 15 U.S.C. § 15a (1994)), but the Court's construction of the definition of "person" contained in 15 U.S.C. § 7 remained unaffected.

⁹¹ *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 246 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). *See also* *Rex Systems, Inc. v. Holiday*, 814 F.2d 994, 997 (4th Cir. 1987) (Navy contracting officer, sued in official capacity, is not a "person" under the Sherman Act); *Jet Courier Servs., Inc. v. Federal Reserve Bank of Atlanta*, 713 F.2d 1221, 1228 (6th Cir. 1983); *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1384 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 551 (1993) (district judges and U.S. trustee acting in official capacity not liable under Sherman Act); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288-89 (9th Cir. 1985); *Mylan Lab., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1064-65 n.12 (D. Md. 1991).

regardless of whether his actions are authorized by a regulation.⁹²

Finally, the scope of antitrust immunity available to cooperatives acting under the auspices of federal marketing orders is unclear and has resulted in litigation.⁹³

2. Implementation Through Informal Rulemaking

Under 7 U.S.C. § 608c(7)(C), the Secretary is authorized to implement marketing orders through the adoption of regulations. The ordinary requirements for informal rulemaking under the APA apply to such implementing rules, not the formal rulemaking provisions required to adopt or amend marketing orders.⁹⁴ In implementing certain orders, the USDA is required to act nearly every year to issue new or amended rules making minor changes in grade or size standards. In response to industry complaints about delay, a recent amendment to the AMAA requires the Secretary to complete informal rulemaking on committee recommendations within 45 days.⁹⁵ Another common issue in marketing order rulemaking is whether the rule has a significant impact on small businesses thereby triggering the need to do the analysis required by the Regulatory Flexibility Act.⁹⁶ The USDA typically certifies that its rules do not have such an impact.

Difficult issues have arisen where the rules are the product of committee recommendations and there is not time for ordinary APA notice and comment proceedings. In issuing weekly prorate (volume control) regulations under the California orange orders, the Secretary considered the Tuesday recommendations of the administrative committees before publishing the regulation in the *Federal Register* on Fridays,

⁹² *Alabama Power Co. v. Alabama Elec. Coop., Inc.*, 394 F.2d 672, 675 (5th Cir. 1968); *accord S & S Logging Co. v. Barker*, 366 F.2d 617, 619-20 (9th Cir. 1966). Both decisions relied on the "outer perimeter of line of duty" formulation for determining a government official's absolute immunity from common law tort claims established in *Barr v. Mateo*, 360 U.S. 564, 575 (1958).

⁹³ *See, e.g., In re Midwest Milk Monopolization Litig.*, 380 F. Supp. 880 (W.D. Mo. 1974); *Sunkist Growers, Inc. v. FTC*, 464 F. Supp. 302 (C.D. Cal. 1979).

⁹⁴ *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1015 (D.C. Cir. 1971). *See also Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 444-45 (9th Cir. 1993) (adequate statement of basis and purpose and response to public comments in adoption of almond reserve rule); *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *9-*14 (9th Cir. June 27, 1995) (minimum maturity and size regulations applicable to California tree fruit affirmed) (rehearing petition pending).

⁹⁵ 7 U.S.C. § 608c(1) (1994).

⁹⁶ Act of Sept. 19, 1980, Pub. L. No. 96-354, 1980 U.S.C.C.A.N. (94 Stat.) 1164 (codified as amended at 5 U.S.C. §§ 601-12 (1994)).

but consistently made a "good cause" determination to obviate the need for public proceedings and delayed effective date.⁹⁷ In *Riverbend Farms, Inc. v. Madigan*,⁹⁸ the court found procedural error in two respects (the failure to publish notice of the proposed rule in the *Federal Register* before the meeting and the failure to allow written comments), but affirmed the validity of the challenged regulation on a harmless error theory.⁹⁹

The *Riverbend* court noted that "all parties before us [five orange handlers], knew the ground rules" as to how the orange prorate regulations were issued each week, and "it was only after some handlers ran into trouble with the Department of Agriculture that, in looking for an escape, they came up with this challenge."¹⁰⁰ Thus, while rejecting the USDA's blanket assertion of the good cause exception, the Ninth Circuit treated the public meeting of the administrative committee as the de facto equivalent of notice and comment rulemaking for handlers who were aware of the meetings.

In recent amendments to the AMAA, a House committee report stated that "[t]o the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the AMAA and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of an industry in how best to market a crop."¹⁰¹ And in fact the Secretary has almost invariably adopted recommendations that are the product of an industry consensus; the difficulties have arisen, as in the California citrus orders, when there was no industry consensus.

⁹⁷ *E.g.*, 55 Fed. Reg. 1,171 (Jan. 12, 1990). The APA actually contains two good-cause provisions: one to allow the agency to dispense with published notice of the terms of the rule and the opportunity of the public to comment (*see* 5 U.S.C. § 553(b)(B)), and a second to allow the rule to become effective immediately rather than after 30 days (*see id.* § 553(d)). *See generally* AMAN & MAYTON, *supra* note 45, at 98-101.

⁹⁸ 958 F.2d 1479 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992).

⁹⁹ *Id.* at 1486-88. In reviewing agency action under the APA, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. *See* Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764-65 (9th Cir. 1986).

¹⁰⁰ *Riverbend Farms, Inc. v. Madigan*, 958 F.2d at 1487-88. *Accord* Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 443 (9th Cir. 1993) (harmless error in failing to provide notice and comment on almond assessment regulations adopted after public meetings of Almond Board); *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *5-*6 (9th Cir. June 27, 1995) (rehearing petition pending).

¹⁰¹ H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 193 (1985) (accompanying the Food Security Act of 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1297.

3. Funding Orders Through Handler Assessments

Under 7 U.S.C. § 610(b)(2) each handler is liable for “such handler’s pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and likely to be incurred” by the committee. The committees’ recommended budgets are submitted for approval by the Secretary, and based upon such budgets, the Secretary then issues annual regulations specifying the per-carton charge that each handler must pay to fund the operations of the committees. Frequently, the Secretary will not issue assessment regulations until the season is underway, and in *Cal-Almond, Inc. v. USDA*,¹⁰² the Ninth Circuit held that § 610(b) is one of those relatively rare statutes that expressly authorizes retroactive regulation.¹⁰³

Courts have not been demanding in the level of USDA scrutiny and review of the recommended budgets, which provide the basis for assessments, reasoning that “[u]nder the unique regulatory scheme of the Act, the Secretary may rely on the industry-led committees and their staff to do his homework for him and to provide up-to-date information.”¹⁰⁴ Moreover in nearly all fruit and vegetable orders, the committee must annually submit a “marketing policy” setting forth anticipated supply and demand as well as recommending appropriate regulatory proposals.¹⁰⁵

4. The USDA’s Audit and Investigative Powers

One of the duties of marketing order committees is to “receive, investigate and report to the Secretary of Agriculture complaints of violations of such order,”¹⁰⁶ and most committees require that handlers file reports with the committees,¹⁰⁷ and may employ auditors or investigators to monitor compliance by handlers. The committees have primary

¹⁰² 14 F.3d 429 (9th Cir. 1993).

¹⁰³ *Id.* at 442-43. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (held that rules having retroactive effect are not favored in the law and will only be allowed if authorized by Congress “in express terms”). There is some tension between *Georgetown* and the Court’s prior decision in *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696 (1974), that a new statute should be applied retroactively absent “manifest injustice.” See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

¹⁰⁴ *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *4 (citing *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992), cert. denied, 113 S. Ct. 598 (1992)).

¹⁰⁵ See, e.g., 7 C.F.R. § 916.50 (1994).

¹⁰⁶ 7 U.S.C. § 608c(7)(C)(iii) (1994).

¹⁰⁷ E.g., 7 C.F.R. § 916.60 (California nectarine handlers required to file reports describing date, quantity and destination of each shipment).

responsibility for ensuring compliance in the first instance.¹⁰⁸

The USDA has extensive authority to acquire information to ensure compliance with the AMAA, in particular 7 U.S.C. § 608d(1), which requires all handlers subject to an order to provide the Secretary with "such information as he finds to be necessary to enable him to ascertain" compliance with the order, whether the order is operating effectively, and whether "there has been any abuse of the privilege of exemptions from the antitrust laws." In addition, 7 U.S.C. § 610(h) grants the USDA the same sweeping administrative subpoena authority enjoyed by the Federal Trade Commission (FTC).¹⁰⁹

The AMS's Office of Compliance has a small staff of investigators which oversees the committees' compliance activities and assists directly in investigating serious problems. Until recently, AMS has not had, or needed, a particularly elaborate compliance program. Finally, the USDA's Office of Inspector General (OIG) has also assisted in investigating alleged violations of marketing order requirements in special cases.¹¹⁰

The AMAA provides that information obtained by the Secretary pursuant to § 608d "shall be kept confidential by all officers or employees of the Department of Agriculture" and may only be disclosed if the Secretary thinks the information relevant in a judicial or administrative proceeding brought by the Secretary or one to which he is a party.¹¹¹ There has been litigation over whether lists of the names and addresses of growers selling their produce through a particular handler are protected from disclosure under the AMAA. *Ivanhoe Citrus Association v. Handley*,¹¹² was a reverse Freedom of Information Act (FOIA) ac-

¹⁰⁸ *AMS Manual*, *supra* note 33, at 75-78.

¹⁰⁹ 15 U.S.C. §§ 48-50 (1994). This authority extends to permit the Secretary to obtain information relating to an investigation from persons who are not subject to regulation under the AMAA. *Freeman v. Brown Bros. Harriman & Co.*, 250 F. Supp. 32 (S.D.N.Y. 1966), *aff'd*, 357 F.2d 741 (2d Cir. 1966), *cert. denied, sub nom. Meyer Zausner Salves v. Freeman*, 384 U.S. 933 (1966).

¹¹⁰ Continued OIG investigative involvement in ordinary regulatory compliance matters may be called into question by a recent Fifth Circuit decision, *Burlington Northern R.R. v. Office of Insp. Gen.*, 983 F.2d 631 (5th Cir. 1993). In ruling on the enforceability of a subpoena issued by the OIG of the Railroad Retirement Board for records of tax compliance, the court held "that an Inspector General lacks statutory authority to conduct, as part of a long-term, continuing plan, regulatory compliance audits." *Id.* at 642. *But see* *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1117 (D.C.C. 1994).

¹¹¹ 7 U.S.C. § 608d(2) (1994). Typically, USDA will obtain the names and addresses of growers (essential for conducting the periodic referenda) and, in support of compliance cases, information relating to a handler's customers and business strategy.

¹¹² 612 F. Supp. 1560 (D.C.C. 1985).

tion¹¹³ brought by Sunkist-affiliated handlers to block disclosure of lists of orange growers provided to the USDA that were requested by Carl Pescosolido, an independent grower and handler. The court ruled that the lists were not exempt under the FOIA and that the confidentiality provisions of § 608d were inapplicable because the grower lists were obtained to conduct a referendum under 7 U.S.C. § 608c, not to monitor compliance.¹¹⁴

Congress responded with an appropriations rider prohibiting the expenditure of appropriated funds to “release information acquired from any handler” under the AMAA.¹¹⁵ Further litigation ensued, and ultimately, in *Cal-Almond, Inc. v. Yeutter*,¹¹⁶ the appropriations rider was held not to be an exempting statute under the FOIA, 5 U.S.C. § 552(b)(3).¹¹⁷ More dramatically however, the Ninth Circuit construed the AMAA to mandate release of grower lists in the government’s possession, holding that “implicit in the Act is the expectation that the Secretary would adopt procedures that are consistent with an open democratic process,” which would require that “lists of eligible voters be a matter of public record.”¹¹⁸

D. Termination of Marketing Orders

While the adoption or amendment of marketing orders is a procedural nightmare, the termination of orders is ridiculously easy. Under 7 U.S.C. § 608c(16), whenever the Secretary finds that an order obstructs or does not tend to effectuate the purposes of the AMAA, he shall terminate or suspend the order, and because such action is not considered an order under the Act,¹¹⁹ the Secretary may act without any administrative hearings or public comment.

In response to the Secretary’s action in terminating the hops marketing order in 1985, the first termination of a marketing order since the AMAA was enacted, Congress amended the AMAA to require 60 days

¹¹³ *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹¹⁴ *Ivanhoe Citrus Ass’n v. Handley*, 612 F. Supp. at 1565.

¹¹⁵ *See, e.g.*, Rural Development, Agriculture, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-460, § 630, 1988 U.S.C.C.A.N. (102 Stat.) 2229, 2262.

¹¹⁶ 960 F.2d 105 (9th Cir. 1992).

¹¹⁷ *Id.* at 108. The court rejected USDA’s argument that the nominal expenditure of government resources needed to direct the requester to the documents so that he could make copies with his own copying machine triggered section 630. “Surely there are enough lawyers in Congress for us to assure its familiarity with the maxim ‘de minimis non curat lex.’” *Id.*

¹¹⁸ *Id.* at 110.

¹¹⁹ 7 U.S.C. § 608c(16)(C) (1994).

notice to House and Senate Agriculture Committees prior to termination.¹²⁰ In the recent termination of the California citrus orders, the Secretary issued a letter to Congress and press release on May 16, 1994, announcing the intention to terminate the order and then published a termination notice in the *Federal Register* on August 26, 1994.¹²¹

In addition to his own authority to terminate, the Secretary must terminate an order whenever, during a periodic referendum, a majority of producers, by either number or volume of commodity, vote against the order.¹²² Thus, as with procedures for adoption, a majority of the regulated industry effectively has the power, equivalent to that of the Secretary, to compel termination of a government program.¹²³

Somewhat unclear is the scope of Secretary's authority under 7 U.S.C. § 608c(16)(A) to "suspend" the order or portions thereof. Two courts have held that the Secretary may not effectively amend a marketing order by suspending select provisions.¹²⁴

E. Judicial Review of Marketing Order Requirements

1. Producer and Consumer Standing to Challenge Marketing Orders

While the AMAA provides handlers with an elaborate and exclusive method of redress under 7 U.S.C. § 608c(15),¹²⁵ the right of growers or consumers to challenge marketing order requirements is greatly limited.

¹²⁰ 7 U.S.C. § 608c(16)(A)(ii). See H.R. REP. NO. 271, 99th Cong., 1st Sess. 195-96 (1985), reprinted in 1985 U.S.C.C.A.N. 1103, 1299-1300 ("Termination of an order without the approval of, or consultation with, the affected industry strikes the Committee as a drastic measure.").

¹²¹ 59 Fed. Reg. 44,020 (Aug. 26, 1994). The members of the committees were appointed as trustees to complete the order's unfinished business.

¹²² 7 U.S.C. § 608c(16)(B). Some marketing orders expressly authorize growers to petition the committee for a termination referendum and require the Secretary to hold such a referendum if the committee so recommends. *E.g.*, 7 C.F.R. § 916.64(d).

¹²³ In Congressional testimony on the 1935 amendments to the AAA, the Agricultural Adjustment Administrator described this industry power to compel termination as "a limitation on the Secretary's authority. It contemplates the assurance that the farmers will keep control over their own affairs, in any allotment or quota plan." *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 22-23 n.94 (D.C. Cir. 1979) (citing *Hearings on H.R. 5585 before the House Comm. on Agric.*, 74th Cong., 1st Sess. 16 (Feb. 26, 1935)).

¹²⁴ *Carnation Co. v. Butz*, 372 F. Supp. 883 (D.C.C. 1974); *Abbotts Dairies Div. v. Butz*, 389 F. Supp. 1 (E.D. Pa. 1975).

¹²⁵ See *infra* part II.E.2.

In 1944, the Supreme Court decided *Stark v. Wickard*,¹²⁶ holding that where producers had “definite personal rights” affected by a marketing order (funds being deducted by the USDA from minimum prices due from the sale of milk), they were implicitly authorized by the statutory scheme to bring suit against the Secretary.¹²⁷ In subsequent years, courts struggled to define the circumstances where “definite personal rights” authorized producer standing.¹²⁸

In 1984, the Supreme Court revisited this issue in *Block v. Community Nutrition Institute*,¹²⁹ and construed the AMAA to preclude judicial review by consumers. The Court noted that the AMAA contemplated that challenges to its comprehensive and elaborate regulatory program should be presented to the Secretary through a section 15 petition, and construing the Act to allow direct consumer suits would permit easy circumvention of that provision.¹³⁰ Since the *CNI* decision, some courts have adopted a narrow interpretation of the AMAA, precluding direct challenges by producers,¹³¹ but other courts have limited the *CNI* holding to suits by consumers and hence have continued to permit producer standing.¹³²

2. Administrative Exhaustion Required by Handlers

Handlers subject to a marketing order may only obtain review of its terms under 7 U.S.C. § 608c(15) by filing a petition with the Secretary and undergoing a formal hearing before an administrative law judge, with subsequent review of the ALJ’s recommended decision by the USDA’s Judicial Officer.¹³³ Within 20 days of the final decision by the

¹²⁶ 321 U.S. 288 (1944).

¹²⁷ *Id.* at 309. The Court noted that handlers were without standing to challenge this deduction from the fund and that the silence of the statute, in the absence of any provision for an administrative remedy, should not be construed as a complete preclusion of judicial review.

¹²⁸ *Compare* *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1067 (5th Cir. 1979) (producers have standing to bring a generalized “arbitrary and capricious” claim) *with* *Benson v. Schofield*, 236 F.2d 719, 723 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 976 (1957) (no producer standing to vindicate a general interest in the execution of the law).

¹²⁹ 467 U.S. 340 (1984) [hereinafter *CNI*].

¹³⁰ *Id.* at 346-48. *Accord* *Rasmussen v. Hardin*, 461 F.2d 595 (9th Cir. 1972), *cert. denied*, 409 U.S. 933 (1972) (no consumer standing).

¹³¹ *See, e.g.*, *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985).

¹³² *Minnesota Milk Producers Ass’n v. Madigan*, 956 F.2d 816, 818 (8th Cir. 1992); *Farmers Union Milk Mktg. Coop. v. Yeutter*, 930 F.2d 466, 474 (6th Cir. 1991).

¹³³ 7 U.S.C. § 608c(15)(A) (1994). The handler may seek a modification of the

Secretary on a handler's petition, the handler may obtain judicial review in any judicial district where the handler is an inhabitant or has its principle place of business.¹⁸⁴ Review of the final decision of the Judicial Officer rejecting the petition is pursuant to the APA, based on the record before the agency.¹⁸⁵

The AMAA clearly requires handlers to exhaust the section 15(A) administrative petition process prior to filing suit in district court under 7 U.S.C. § 608c(15)(B).¹⁸⁶ This provision cannot be avoided through a suit in state court to enjoin operation of a federal marketing order.¹⁸⁷ While the drafters intent in creating the section 15 process was "directed toward the effect of such an order upon an individual rather than toward the formulation of a general regulation,"¹⁸⁸ the requirement that all challenges by handlers be presented in the section 15 forum has channeled all challenges, whether handler-specific or generalized, into the cumbersome section 15 process.

Not surprisingly, there is no waiver of sovereign immunity in the AMAA to permit an award of compensatory damages for marketing order regulations found to be unlawful.¹⁸⁹ Nor have marketing order regulations that require the destruction of produce been found to constitute a taking of property entitling handlers to compensation under the Fifth Amendment.¹⁴⁰

order or the right to be "exempted therefrom." The procedural regulations governing section 15(A) proceedings are at 7 C.F.R. §§ 900.50-900.71 (1994).

¹⁸⁴ *Id.* § 608c(15)(B).

¹⁸⁵ *See* 5 U.S.C. § 706 (1994). In *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 444 (9th Cir. 1993), the court accepted without discussion the application of traditional APA standards of review to marketing order requirements.

¹⁸⁶ This point is critical because, in *Darby v. Cisneros*, 113 S. Ct. 2539 (1993), the Supreme Court held that absent explicit statutory or regulatory provisions requiring exhaustion of administrative remedies, section 10(c) of the APA (5 U.S.C. § 704) makes agency action immediately reviewable. Courts cannot impose additional exhaustion requirements. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

¹⁸⁷ *United States v. Superior Court*, 19 Cal. 2d 189 (1941).

¹⁸⁸ *Ashley Sellers & Jesse E. Baskette, Jr., Agricultural Marketing Agreement and Order Programs, 1933-44*, 33 GEO. L.J. 123, 132 (1945).

¹⁸⁹ *Cal-Almond, Inc. v. Yeutter*, 756 F. Supp. 1351, 1356 n.2 (E.D. Cal. 1991); *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 448 n.19 (9th Cir. 1993). Waivers of sovereign immunity must, of course, be "unequivocally expressed in the statutory text." *United States v. Idaho ex rel. Director, Idaho Dep't of Water Resources*, 113 S. Ct. 1893, 1896 (1993).

¹⁴⁰ *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1977), *aff'd*, 571 F.2d 1132 (9th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); *accord Carruth v. United States*, 627 F.2d 1068 (Ct. Cl. 1980). However, handlers continue to press

Due to the elaborate, "formal" proceedings under section 15, the administrative review process frequently consumes several years, during which the petitioning handler must continue to comply with all terms of the order or regulation under attack. The AMAA expressly provides that "[t]he pendency of proceedings instituted pursuant to [7 U.S.C. § 608c(15)] shall not impede, hinder or delay" any action to obtain injunctive relief to compel compliance with a marketing order requirement. This strict rule was affirmed by the Supreme Court in the seminal case *United States v. Ruzicka*,¹⁴¹ holding that a handler may not raise its challenges to the terms of an order as an affirmative defense to a government enforcement action. Justice Frankfurter's opinion stresses principles of deference to the expert judgment of an agency charged with administering a complex economic regulatory program which can only function if immediate and universal compliance is ensured:

Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements.¹⁴²

However, the Court limited its holding, stating, "we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such as was here brought by the United States."¹⁴³ While the courts have consistently re-affirmed the *Ruzicka* holding—comply now and litigate later—they have simultaneously recognized several significant loopholes in this crucial rule.¹⁴⁴

takings claims in light of recent Supreme Court decisions expanding the scope of the takings clause. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). See, e.g., *Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244 (Cl. Ct. 1994), *appeal pending*, No. 94-5084 (Fed. Cir. filed Mar. 7, 1994) (rejecting a takings claim to the requirement that handlers set aside as a reserve a portion of each almond crop).

¹⁴¹ 329 U.S. 287 (1946).

¹⁴² *Id.* at 293. Accord *United States v. Frame*, 885 F.2d 1119, 1135 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (beef promotion program made mandatory to prevent "free riders" from receiving the benefits without sharing the costs).

¹⁴³ *Id.* at 295. Accord *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) ("[A] federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1978). But see *United States v. Odessa Union Warehouse Coop*, 833 F.2d 172, 175 (9th Cir. 1987) ("Where an injunction is authorized by statute, and the statutory conditions are satisfied as in the facts presented here, the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury.')

¹⁴⁴ See *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1194 (9th Cir. 1990); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d

3. Defenses to Enforcement Actions

In principle, the only issues in a § 608(a)(6) action seeking to compel compliance with marketing order requirements should be whether the defendant is a handler subject to the order and is in violation of the order. Occasionally, however, courts have exercised their equitable discretion to allow milk handlers to raise, as an affirmative defense, issues that require little if any administrative expertise. For example in *United States v. Tapor-Ideal Dairy Co.*,¹⁴⁵ the defendant handler was allowed to raise accord and satisfaction as a defense to an action by the government to compel it to pay funds to a cooperative. In *United States v. Brown*,¹⁴⁶ defendants were allowed to contest their status as a "handler" under the milk marketing order (the defendant contended that it had structured its affairs such that it was either a grower or an independent contractor), and enforcement was stayed pending an administrative appeal that the defendants ultimately lost.¹⁴⁷

A more questionable line of authority involves rulings that a handler is entitled to a "refund" of assessments for the operation of the marketing order in the event that the handler is successful in its section 15 challenge. In *Navel Orange Administrative Committee v. Exeter Orange Co.*,¹⁴⁸ the Ninth Circuit cited *Ruzicka* in affirming injunctions compelling handlers to comply with marketing order requirements pending administrative exhaustion, but then dropped this explosive dicta:

If the ultimate determination of the administrative proceeding, emanating either from the Secretary of Agriculture or from the federal courts through the statutory right of appeal, should substantiate *Exeter et al.*'s challenges to the marketing orders, *then refund of any unpaid assessments found not to have been due would be in order.* (Emphasis added.)

No legal authority, much less an "unequivocally expressed" waiver of sovereign immunity,¹⁴⁹ was offered for the suggestion that the court could compel the payment of funds by a governmental entity. In *United*

449, 452 (9th Cir. 1983); *United States v. Lamars Dairy, Inc.*, 500 F.2d 84, 86 (7th Cir. 1974).

¹⁴⁵ 283 F.2d 869 (6th Cir. 1960), *aff'd per curiam*, *United States v. Tapor-Ideal Dairy Co.*, 175 F. Supp. 678 (N.D. Ohio 1959).

¹⁴⁶ 211 F. Supp. 953 (D. Colo. 1962), 217 F. Supp. 285 (D. Colo. 1963), *aff'd*, 331 F.2d 362 (10th Cir. 1964).

¹⁴⁷ *Brown v. United States*, 367 F.2d 907 (10th Cir. 1966), *cert. denied*, 387 U.S. 917 (1967).

¹⁴⁸ 722 F.2d 449, 452 (9th Cir. 1983) [hereinafter *NOAC*].

¹⁴⁹ *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992).

States v. Riverbend Farms, Inc.,¹⁵⁰ the Ninth Circuit again reaffirmed the *Ruzicka* principle in the context of a § 608a(5) forfeiture action, but extended the *NOAC* dicta one step further, suggesting that “the district court could exercise its equitable powers to stay distribution of the damage award until completion of the administrative proceeding.”¹⁵¹

It was not long before certain handlers took advantage of this loophole in *Ruzicka* to circumvent the explicit language of § 608c(15). In the pending *Wileman* litigation involving the California tree fruit marketing orders, the defendant handlers resisted government actions to compel payment of the statutorily-mandated assessments, arguing that in order for them to be assured of a “refund” of assessments that might be found not to have been due, the assessment collection actions must be stayed, with the assessments to be paid into a trust fund account. In 1989, Judge Edward Dean Price granted this motion for stay of the government’s collection actions, effectively overturning *Ruzicka*.¹⁵²

However it was in challenges to the almond marketing order that a “refund” of assessments was finally ordered. After sustaining the First Amendment challenge to the generic advertising program, the court of appeals in *Cal-Almond* remanded the case to the district court to ascertain the appropriate remedy: “Because of the fact-intensive nature of the inquiry, we find that [t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court.”¹⁵³ On remand, Judge Robert E. Coyle concluded that the question of whether *Cal-Almond* and the three other petitioners indirectly benefited from the advertising program, or whether the assessment charge was passed through to the *Cal-Almond* petitioners’ growers as part of their packing charges, was not the sort of “fact in-

¹⁵⁰ 847 F.2d 553 (9th Cir. 1988).

¹⁵¹ *Id.* at 559 n.7. *Accord* *United States v. Guimond Farms, Inc.*, 203 F. Supp. 471 (D. Mass. 1962) (defendant’s motion to stay government injunctive action to compel payment into producer settlement fund granted).

¹⁵² *United States v. Wileman Bros. & Elliott, Inc.*, No. CV-F-88-568 (E.D. Cal. July 6, 1989), *aff’d in part, rev’d in part*, *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682 (9th Cir. June 27, 1995) (rehearing petition pending). Subsequently, other California tree fruit handlers who opposed marketing order requirements also filed section 15 petitions and withheld assessment payments.

¹⁵³ *Cal-Almond, Inc. v. United States Dep’t of Agric.*, 14 F.3d 429, 449 (9th Cir. 1993) (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986)). In *Wileman Bros. & Elliott, Inc. v. Espy*, the court of appeals also remanded for a “fact intensive . . . remedial inquiry” to determine the amount of the refund of assessments used to fund the generic advertising program that the court found to be unconstitutional. *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *16.

tensive . . . inquiry” that the court of appeals contemplated. The district court ordered that the Cal-Almond plaintiffs could retain the \$1.7 million in assessments withheld and recover an additional \$2.6 million in assessments that were paid to the Almond Board or in creditable advertising expended by petitioners.¹⁵⁴ The court did not identify the source of this refund.¹⁵⁵

F. Enforcement of Marketing Orders

The AMAA contains a combination of criminal, civil and administrative penalty provisions that appear formidable on the surface but which have not been particularly effective when confronted with handlers who file challenges under section 15 and simultaneously embark on a determined policy of noncompliance.

Any handler (or officer, director, agent or employee) who violates the requirement of an order may be fined not less than \$ 50 nor more than \$5,000 for each violation.¹⁵⁶ However the pendency of a section 15 petition challenging the terms of the order, if brought in “good faith and not for delay” provides a complete defense to such prosecution. This provision has rarely been utilized¹⁵⁷ and, given the dramatic expansion of federal criminal liability in areas of substantially greater public concern, is not likely to be utilized in the future.

Volume control regulations are subject to a “strict liability” civil forfeiture provision contained in § 608a(5). Handlers exceeding a quota and “any other person knowingly participating or aiding in the exceed-

¹⁵⁴ Cal-Almond, Inc. v. United States Dep’t of Agric., No. CV-F-91-064 (E.D. Cal. Sept. 6, 1994) (copy on file with the *San Joaquin Agricultural Law Review*), *appeal docketed*, Nos. 94-17160, 94-17163, 94-17164, 94-17166, 94-17167, 94-17182 (9th Cir. Nov. 18, 1994).

¹⁵⁵ Because fruit and vegetable committees use assessments to fund each year’s program, they do not have a source of funds to pay this refund. Absent a specific appropriation, payment from the judgment fund created by 31 U.S.C. § 1304, is the only other possible source of such a “refund.” See Availability of Judgment Fund for Settlement of Cases or Payment of Judgments Not Involving a Money Judgment Claim, 13 Op. Off. Legal Counsel 118 (1989); 69 COMPTROLLER GEN. 114, 116 (1990) (judgment fund not available). Cf. Republic National Bank of Miami v. United States, 113 S. Ct. 554 (1992).

¹⁵⁶ 7 U.S.C. § 608c(14)(A)(1994). Filing a false report with the administrative committee (e.g., as to quality or volume of produce shipped) would also subject the handler to “false statement” liability under 18 U.S.C. § 1001.

¹⁵⁷ See *Panno v. United States*, 203 F.2d 504 (9th Cir. 1953) (alleged unconstitutionality of order cannot be raised as an affirmative defense); *United States v. Beatrice Foods Co.*, 224 F. Supp. 353 (W.D. Mo. 1963) (proof of intent or mens rea not required).

ing of such quota” are subject to a forfeiture equal to the “current market price for such commodity at the time of the violation.” This provision was amended in 1961 to delete the requirement that the handler have “willfully” violated the quota.¹⁵⁸ Handlers do not have immunity from civil forfeiture penalties during the pendency of a section 15 petition challenging the legality of the volume control regulation.¹⁵⁹

The scope of the aiding and abetting liability under § 608a(5) is unclear, and in the recent California citrus litigation, the United States sought to impose penalties on an agricultural cooperative, Sunkist Growers, Inc., for its conduct in facilitating its handlers’ violations.¹⁶⁰ The unique status of agricultural cooperatives, which generally have indemnity agreements with handlers who are subject to regulation,¹⁶¹ present unsettled issues of secondary liability under the current Act.

The California citrus litigation also produced a district court ruling that violations of volume control regulations are actionable as “reverse false claims” under the 1986 amendments to the False Claims Act (FCA).¹⁶² In a 1992 decision, in *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*,¹⁶³ Judge Wanger denied the government’s

¹⁵⁸ Agricultural Act of 1961, Pub. L. No. 87-128, § 141, 75 Stat. 294. The only reported case under this provision is *United States v. LoBue Bros.*, 274 F.2d 159 (9th Cir. 1959), where the United States was unable to prove that the handler’s conduct was willful.

¹⁵⁹ *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 555-57 (9th Cir. 1988).

¹⁶⁰ The government alleged that Sunkist knew that its handlers were engaged in widespread violations of volume control regulations and continued to issue invoices which contained incorrect shipment dates (based on the date provided to Sunkist’s billing department by its handlers), thereby knowingly aiding the handlers in covering up the violations. See Third Amended Complaint in *United States ex rel. Sequoia Orange Co. v. Magnolia Citrus Ass’n*, No. CV-F-89-056 (E.D. Cal. filed Mar. 21, 1994) (setting forth government’s allegations) (copy on file with the *San Joaquin Agricultural Law Review*). Sunkist denied all liability and the government elected not to pursue any civil penalty actions after it terminated the California citrus orders. The author was counsel for the government in this litigation.

¹⁶¹ Sunkist’s by-laws provide that Sunkist-affiliated handlers “shall severally indemnify and save Sunkist harmless against all loss, damage, injury, liability, cost and/or expense of whatsoever nature suffered . . . by Sunkist by reason of any claim . . . asserted . . . against Sunkist by reason of any act of commission or omission of such member.” SUNKIST GROWERS, INC., AMENDED ARTICLES OF INCORPORATION AND BY-LAWS 20, § 11.4 (Jan. 18, 1984).

¹⁶² False Claims Amendments Act of 1986, Pub. L. No. 99-562, 1986 U.S.C.C.A.N. (100 Stat.) 3153 (codified as amended at 31 U.S.C. §§ 3729-3733 (1994), 18 U.S.C. § 287 (1994)). The *qui tam* provisions, which permit citizen “whistleblowers” to bring suit on behalf of the United States and retain a portion of any recovery, are codified at 31 U.S.C. § 3730.

¹⁶³ See also *supra* note 80.

motion to dismiss the FCA claims, holding that by falsely reporting the amount of a commodity shipped, the handler has "made . . . a false record . . . to . . . avoid . . . an obligation to pay . . . money . . . to the Government[.]"¹⁶⁴ i.e., the AMAA forfeiture penalty. After re-intervening in the actions in an effort to settle the alleged violations, the government ultimately moved to dismiss the cases after the California citrus orders were terminated in 1994.

Finally, under § 608c(14)(B), the USDA may assess administrative penalties of up to \$1,000 per violation of any provision of an order, and each day in violation may be deemed a separate violation. This penalty may only be assessed after "agency hearing on the record," and any penalty must be pursued as a collection action in district court. Moreover, no civil penalty may be assessed if prior to the violation, the handler has filed an administrative petition challenging the order pursuant to 7 U.S.C. § 608c(15), and the petition was filed "in good faith and not for delay."¹⁶⁵

Recent experience suggests that a handler who wants to mount a determined challenge to any regulatory policy implemented under the AMAA can effectively avoid any consequences for its "civil disobedience" by: (1) filing a section 15(A) petition (thus avoiding both criminal and administrative liability); and (2) asking that the court exercise its equitable discretion to "stay" government injunctive actions brought to compel immediate compliance including payment of assessments. Thus the handler can opt out of the regulatory constraints of the marketing order until the completion of its section 15 challenges and may even win a "refund" of its assessments if it ultimately prevails.

G. The AMAA's Fatal Flaw: The Judicial Review-Enforcement Tension

It would be difficult to imagine a clearer departure from the intent of Congress than the *NOAC* and *Cal-Almond* decisions. Granting a "stay" of a government enforcement action pending the outcome of the handler's challenge is inconsistent with the plain language of 7 U.S.C. § 608c(15)(A): "the pendency of [administrative and judicial review] proceedings *shall not impede, hinder or delay* the United States . . .

¹⁶⁴ 31 U.S.C. § 3729(a)(7) (1994). The legislative history of this provision discusses its use in a contractual setting (e.g., falsely reporting low occupancy rates in government-owned housing to reduce obligation to remit funds to the United States), not as a penalty for regulatory violations. See S. REP. No. 345, 99th Cong., 2d Sess. 18-19 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5283-84.

¹⁶⁵ 7 U.S.C. § 608c(14)(B) (1994).

from obtaining [injunctive] relief” And awarding a “*refund of assessments* found not to have been due” is squarely inconsistent with the requirement in 7 U.S.C. § 610(b) that *each handler is liable for its pro rata share of expenses* incurred in the operation of the marketing order. Because the Ninth Circuit’s sweeping dicta on handlers’ right to a refund of assessments, is neither compelled by the Constitution nor consistent with the AMAA, it should be reconsidered or reversed by legislation.

At the outset, it is necessary to recognize that the question of the appropriate *remedy*, where a citizen has been assessed fees to fund an invalid regulation, is distinct from the issue of whether the reviewing court has discretion to make its ruling on the regulation purely *prospective* in effect. In *Harper v. Virginia Department of Taxation* the Supreme Court categorically held that “[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law *and must be given full retroactive effect*”¹⁶⁶ *Harper* overruled the three-part balancing test for determining whether to give retroactive effect to a new rule of law announced in a civil case—a principle which the Court had adopted in *Chevron Oil Co. v. Huson*,¹⁶⁷ and which had followed the Court’s determination that newly declared rules must be given full retroactive effect in all criminal cases pending on direct review.¹⁶⁸ However, the Court has also recognized that the requirement that a rule of federal law be given *retroactive effect* is distinct from the question of the appropriate *remedy* that should be ordered.¹⁶⁹

1. Remedy After APA Violation

Where a court sustains a challenge to agency action for procedural violations of the APA, it does not announce a new “rule of federal law,” but instead must generally remand the matter to the agency for

¹⁶⁶ 113 S. Ct. 2510, 2517 (1993) (emphasis added). See also *Reich v. Collins*, 115 S. Ct. 547 (1994); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991).

¹⁶⁷ 404 U.S. 97, 106-07 (1971).

¹⁶⁸ *Griffith v. Kentucky*, 479 U.S. 314 (1987), *overruled* *Linkletter v. Walker*, 381 U.S. 618 (1965).

¹⁶⁹ “A decision may be denied ‘*retroactive effect*’ in the sense that conduct occurring prior to the date of decision is not judged under current law, or it may be denied ‘*retroactive effect*’ in the sense that independent principles of law limit the relief that a court may provide under current law.” *American Trucking Ass’ns, Inc. v. Smith*, 496 U.S. 167, 209 (1990) (Stevens, J., dissenting); *United States v. Estate of Donnelly*, 397 U.S. 286, 297 (1970) (Harlan, J., concurring).

further proceedings.¹⁷⁰ Critically, the reviewing court has the equitable discretion to refrain from enjoining the invalid agency action pending completion of remand proceedings. For example, in *Western Oil & Gas Association v. United States Environmental Protection Agency*,¹⁷¹ the court left in effect procedurally flawed air quality regulations pending remand proceedings "from a desire to avoid thwarting in an unnecessary way the operation of the Clean Air Act in the State of California . . . [and] . . . the possibility of undesirable consequences which we cannot now predict . . ." ¹⁷² In *Schurz Communications, Inc. v. Federal Communications Commission*, the court invalidated as arbitrary and capricious the FCC's financial interest and syndication rules for television stations, but then considered five separate options (from complete deregulation to leaving the old rules in effect), and ultimately elected to leave the invalid rule in effect for a limited period during remand.¹⁷³ These decisions recognize that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice,"¹⁷⁴ working together to jointly effectuate the Congressional purpose and hence a reviewing court's remedial orders must be crafted to that end.

2. Remedy After Constitutional Violation

A more difficult question is presented where the reviewing court finds a constitutional infirmity, such as a violation of a handler's First Amendment commercial speech right as in *Cal-Almond. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* held that where the state penalizes taxpayers for failure to pay in a timely manner, federal due process principles require the state's post-deprivation procedures to provide a "clear and certain remedy."¹⁷⁵ *McKesson* did not in fact require that a tax refund must be provided, but rather remanded to the Florida courts for consideration of the appropriate remedy.¹⁷⁶ How-

¹⁷⁰ *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 143 (1982).

¹⁷¹ 633 F.2d 803 (9th Cir. 1980).

¹⁷² *Id.* at 813. Other circuits have also struggled with the appropriate remedy where the air quality regulations of the Environmental Protection Agency (EPA) did not comply with the notice and comment requirements of the APA. See *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (rule left in effect except as to specific designations contested by plaintiffs); *United States Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981) (same); *New Jersey v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980) (same plus court retained jurisdiction).

¹⁷³ 982 F.2d 1043, 1055-57 (7th Cir. 1992).

¹⁷⁴ *United States v. Morgan*, 313 U.S. 409, 422 (1941).

¹⁷⁵ 496 U.S. 18, 52 (1990).

¹⁷⁶ *Id.* In *James B. Beam Distillers Co. v. Georgia*, 111 S. Ct. 2439 (1991), the

ever in *American Trucking Associations, Inc. v. Smith*,¹⁷⁷ decided simultaneously, the Court, in a fragmented holding, denied retroactive relief.¹⁷⁸ The question is whether *McKesson* mandates a refund of all AMAA assessments used to fund “unconstitutional” marketing promotion campaigns, (and the corollary right to a stay of assessment collection actions), even if the effect of such rulings is to render marketing orders effectively unenforceable and patently unfair to those handlers who pay their assessments.

As a threshold matter, the *McKesson* line of authority, involving state taxes, has limited relevance to a federal regulatory program funded through industry assessments. In the *Head Money Cases v. Robertson*,¹⁷⁹ the Supreme Court recognized that the assessment of fees to fund an immigration program “is not the taxing power,” but “the mere incident of the regulation of commerce.”¹⁸⁰ Recent decisions have continued to recognize that “a levy to collect the costs of regulation from those regulated is not to be treated as a tax to which the limitations of Article I, section 8 apply.”¹⁸¹

Consequently, when an AMAA-mandated assessment is analyzed as an exercise of Congress’ power to regulate interstate commerce, general

Court held that a Georgia excise tax impermissibly discriminated against non-Georgia producers, yet reiterated that *McKesson* did not address the issue of remedy. *Id.* at 2448. Moreover, the *Beam* Court noted that on remand the state could “raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided” *Id.*

¹⁷⁷ 496 U.S. 167 (1990).

¹⁷⁸ 467 U.S. 187-88 (O’Connor, J., plurality opinion). The plurality is of limited relevance, as it relied on the now-rejected *Chevron Oil Co. v. Huson* formula. However, *McKesson* was an easier case to decide because that tax was clearly unconstitutional under settled Supreme Court authority, while *American Trucking* presented a closer question and, hence, less justification for full retroactive relief. See Richard H. Fallon, Jr. & Daniel J. Meltzer *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1754 (1991).

¹⁷⁹ 112 U.S. 580 (1884).

¹⁸⁰ *Id.* at 595. The challenged statute in these cases required ship owners to pay a levy of 50 cents for each passenger who was not a United States citizen and who was entering the United States from a foreign port. The proceeds were deposited in a special fund “to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States” *Id.* at 590 (quoting Act of Aug. 3, 1882, 22 Stat. 214, 214 (an Act to regulate immigration)).

¹⁸¹ *Union Pac. R.R. Co. v. Public Utility Comm’n*, 899 F.2d 854, 859 (9th Cir. 1990); accord *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1903 (1983) (“The imposition of assessments have [sic] long been held to be a legitimate means of regulating commerce.” (citing *Wickard v. Filburn*, 317 U.S. 111 (1942))).

principles of sovereign immunity should apply to shield the government from any claims for a refund of the user fees which funded that activity. The unique fact that marketing orders operate through industry assessments rather than appropriated funds should not dictate a different rule with respect to the application of sovereign immunity to claims for a refund of assessments, absent special circumstances.¹⁸² Because there is no entitlement to damages or refunds for federal programs found to be procedurally-flawed, unconstitutional or simply mis-guided, no handler should be entitled to a "refund" of assessments or "stay" of an enforcement action.

Yet there is an even more basic point relating to the appropriate remedy for a violation of constitutional rights in the marketing order context. In a recent article by Professors Richard H. Fallon, Jr. and Daniel J. Meltzer of Harvard Law School,¹⁸³ the authors argue that while American constitutional jurisprudence does not guarantee an individually-tailored remedy for every newly-identified constitutional violation, it does and should provide "an overall structure of remedies adequate to preserve separation of powers values and a regime of government under law."¹⁸⁴ Thus, sovereign immunity shields the federal government from damages claims arising out of Constitutional violations,¹⁸⁵ and qualified immunity frequently shield federal officers sued in their individual capacities for Constitutional violations, unless the right was "clearly established" at the time of the violation.¹⁸⁶ Yet

¹⁸² In *O'Connell Management Co. v. Massachusetts Port Auth.*, 744 F. Supp. 368, 378 (D. Mass. 1990), the court concluded that where the government frustrated the opportunity for a final administrative adjudication of the validity of the fees prior to coercing payment, due process required that there be an opportunity for a post-deprivation refund. The case involved an increase in landing fees, by the Port Authority at Boston's Logan Airport, which went into effect notwithstanding a request by the Department of Transportation (DOT) that the increase be delayed pending DOT's ruling on its legality.

¹⁸³ Fallon & Meltzer, *supra* note 178.

¹⁸⁴ Fallon & Meltzer, *supra* note 178, at 179.

¹⁸⁵ See *supra* note 139. See also *Arnsberg v. United States*, 757 F.2d 971, 980 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986); *Holloman v. Watt*, 708 F.2d 1399, 1401-02 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). Of course, Congress has waived sovereign immunity in numerous respects to allow tort actions against the United States for acts that would constitute Constitutional violations. See 28 U.S.C. § 2680(h) (1994) (Federal Tort Claims Act waiver of sovereign immunity extended to assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution by federal law enforcement officers).

¹⁸⁶ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (federal defendants immune where the right was not "clearly established" at the time of the violation); Fallon & Meltzer, *supra* note 178, at 1749-53, 1820-24.

notwithstanding the absence of a monetary remedy where the courts announce a new rule of Constitutional law, courts can always grant injunctive relief to halt ongoing Constitutional violations. In fact, under current principles of Constitutional remedies, retroactive monetary relief is only mandated where there has been a Fifth Amendment taking and possibly where state taxes are found to discriminate against foreign taxpayers.¹⁸⁷

Hence, in framing a remedial order after a handler has successfully challenged a marketing order provision, courts can ensure compliance with the rule of law, (without automatically ordering refunds and thereby rendering this program effectively unenforceable), by limiting the remedy to prospective injunctive relief. In any action to compel payment of assessments under 7 U.S.C. § 608a(6), a court would still have the equitable discretion to limit or condition the relief granted to the government.¹⁸⁸ However except in the rarest cases, handlers who have benefited by the services provided under fruit and vegetable marketing orders should pay their statutorily-mandated pro rata share of the order's expenses, without any right to a refund.¹⁸⁹

Bowen v. Massachusetts, which held that the Administrative Procedure Act authorized an *equitable* action against the United States for the "recovery of specific property or monies,"¹⁹⁰ has also been con-

¹⁸⁷ Additionally, the Court has also placed significant limits on the scope of the retroactive habeas corpus remedy where the petition is premised on a new rule of law. *Teague v. Lane*, 489 U.S. 288 (1989); Fallon & Meltzer, *supra* note 178, at 1738-49.

¹⁸⁸ *United States v. Ruzicka*, 329 U.S. 287, 295 (1946). Alternately, the USDA could grant a stay of certain regulatory requirements upon an appropriate showing, which its existing section 15(A) regulations appear to authorize. 7 C.F.R. § 900.70 (1994). See *La Verne Coop. Citrus Ass'n v. United States*, 143 F.2d 415, 419 (9th Cir. 1944).

¹⁸⁹ Some special treatment might be appropriate where the handler can demonstrate that due to its unique position in the industry, it did not benefit from the challenged activity on an equal basis with others. For example, the successful handlers in *Cal-Almond, Inc. v. United States Dep't of Agric.* presented evidence that the advertising program was directed toward the retail almond market, overwhelmingly dominated by a large cooperative, Blue Diamond Growers, Inc. 14 F.3d at 438-40. Conversely, Cal-Almond and others were denied credit for advertising to cereal companies and ice cream processors, their particular market niche. See 14 F.3d at 438, 440. However even here, the "fact-intensive . . . inquiry" ordered on remand might have shown that advertising increased total demand for California almonds from all markets, thereby indirectly increasing prices in Cal-Almond's ingredients market.

¹⁹⁰ 487 U.S. 879, 893 (1988) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). Generally, *Bowen* recognized the distinction between an action for money damages, generally actionable only under the Tucker Act, and an APA claim under 5 U.S.C. § 702 for declaratory and injunctive relief, which might

strued too expansively in support of claims for refunds of assessments.¹⁹¹ Moreover, *Bowen* and its progeny all involved cases of statutory entitlement to the payment of money by the government,¹⁹² whereas the AMAA contains no entitlement for a handler to receive a refund of the sums it is compelled to pay to implement this regulatory program. Marketing orders provide a program of immediate benefits to the regulated industry (e.g., inspections, advertising, research and data collection), paid for by pro rata assessments on all handlers. Even if some activity authorized under the marketing order is held to be unlawful, it will almost invariably be the case that all handlers will have benefited (or suffered) more or less equally from that activity and hence there is no *equitable* basis for one handler (the successful litigant), to obtain a refund of its assessments.

Moreover, *McKesson* recognizes that the right to a post-deprivation refund action may not be constitutionally-mandated if there is an adequate opportunity for pre-deprivation process.¹⁹³ It could be argued that the elaborate formal rulemaking proceedings which occur prior to the adoption of every marketing order, in conjunction with the opportunity of all handlers to express their views at the committee meetings that recommend budgets to the USDA for approval, provide ample pre-deprivation process. However, in the final analysis, these difficult constitutional issues could be largely avoided if handlers could be assured of prompt judicial review of challenged regulations—preferably before the onset of a harvest season and the associated compliance costs.

III. THE AGRICULTURAL MARKETING AGREEMENT ACT—A PROPOSAL FOR AMENDMENT

The recent marketing order litigation in California has highlighted a number of fundamental policy judgments implicit in the AMAA, that deserve to be reevaluated by Congress in any reauthorization of the AMAA. If the judgment is made to continue federal marketing orders for fruits and vegetables, several critical changes in the AMAA are es-

have the effect of requiring the payment of monies by the United States.

¹⁹¹ See, e.g., *Cal-Almond, Inc. v. United States Dep't of Agric.*, No. CV-F-91-064, slip op. at 3-9 (E.D. Cal. Sept. 6, 1994); *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *15-*16 (9th Cir. June 27, 1995) (rehearing petition pending).

¹⁹² See, e.g., *Dia Navigation Co. v. Pomeroy*, 34 F.2d 1255, 1266-67 (3d Cir. 1994).

¹⁹³ *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36-37 (1990). See also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (discussing trade-off between pre-deprivation and post-deprivation process).

essential to ensure the effective administration and enforcement of marketing orders.

A. Fundamental Policy Judgments

1. Do We Still Need This Program?

In *Riverbend*, Judge Kozinski noted that “[a]s governments elsewhere loosen their grip over commercial markets, the Secretary of Agriculture forges ahead with a government-mandated system of quantity restrictions adopted nearly four decades ago.”¹⁹⁴ After 58 years, it might be appropriate for Congress to comprehensively reconsider an economic regulatory program that was a centerpiece of the New Deal but which has generated increasing controversy. However, the undeniable popularity of marketing orders with small farmers, combined with the inherent instability of the agricultural economy, and the need for a mechanism for growers to cooperate, may still justify a comprehensive federal regulatory scheme.¹⁹⁵

2. Can This Governmental Function be Better Implemented at the State Level?

If some regulatory scheme for fruit and vegetable crops is appropriate, the federal government should defer to state-initiated programs wherever possible.¹⁹⁶ Both fundamental principles of Federalism, as well as the inherently localized nature of any fruit and vegetable program, would seem to suggest that marketing orders should, if possible, be the product of *state* rather than federal statutory authority. Only where there is no state authority for an equivalent program, or where it

¹⁹⁴ *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1489 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992). *Riverbend*, of course, involved the recently terminated marketing order authorizing volume control regulations on California oranges.

¹⁹⁵ See OLAN D. FORKER & RONALD W. WARD, *COMMODITY ADVERTISING: THE ECONOMICS AND MEASUREMENT OF GENERIC PROGRAMS* 268 (1993) (“[M]andatory assessments to support commodity promotion programs are in the public interest. They have the potential of enhancing producer and consumer welfare.”); NICHOLAS J. POWERS, *ECONOMIC RESEARCH SERV., U.S. DEP’T OF AGRIC., FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, NUTS AND SPECIALTY CROPS* (Agric. Econ. Rep. No. 629, 1990); Nicholas J. Powers, *Effects of Marketing Order Prorate Suspensions on California-Arizona Navel Oranges*, in 7 *AGRIBUSINESS* 203 (1991).

¹⁹⁶ As the Supreme Court noted in a case challenging the California marketing program for raisins, “the adoption of an adequate program by the state may be deemed by the Secretary a sufficient ground for believing that the policies of the federal act [the AMAA] will be effectuated without the promulgation of an order.” *Parker v. Brown*, 317 U.S. 341, 354 (1943).

is necessary to regulate production on a nation-wide basis (as with milk), should there be a federal marketing order.

3. What Type and Degree of Industry Participation is Appropriate?

Marketing orders allow growers, who have the most knowledge about industry conditions, to implement and oversee this very sensitive program. Due to their experience and reputation among their peers, industry representatives are generally in a far better position than ordinary federal employees to make the subtle market-related judgments necessary to effectively implement this program (e.g., when is fruit really mature and ready for the consumer). However giving industry leaders the authority to administer a program that regulates their competitors and themselves may result in at least an appearance of insider abuse and manipulation. The special role given agricultural cooperatives through their power to bloc vote raises especially difficult concerns, as indicated by the *Sequoia/Sunny Cove* litigation.

Consequently, a comprehensive Congressional reconsideration of the unique role provided for the regulated industry is warranted and more elaborate procedures for USDA oversight of committee decisions should be considered. Another critical question is whether consumers or other non-handlers should be given an explicit role in the regulatory program,¹⁹⁷ including standing to challenge marketing order restrictions.

B. Essential Procedural Changes in the AMAA

1. Resolve the Judicial Review/Enforcement Tension

The critical flaw in the existing statute is the conflict between the need for immediate compliance with regulations and the unfairness of delaying any resolution of a legal challenge for many years during the lengthy administrative and judicial appeal process required by 7 U.S.C. § 608c(15). Elimination of the section 15(A) administrative appeal requirement, in conjunction with a statutorily-mandated annual rulemaking subject to expedited judicial review, would solve this difficult judicial review/enforcement dilemma.

The AMAA should be amended to require the USDA to approve, through informal rulemaking, an annual "marketing policy statement"

¹⁹⁷ During the 1970's, several marketing orders were amended to add a "public" member to the administrative committee. *See, e.g.*, 43 Fed. Reg. 14,375 (Apr. 5, 1976) (public member added in Marketing Order 917).

for each and every fruit and vegetable marketing order. An opportunity for public comment on the committees' annual recommendations will conclusively foreclose claims of industry domination or insider abuse and ensure regular reconsideration of programs in light of changing marketplace developments. The marketing policy statement (effectively the recommendation of the committee), should comprehensively address the issues affecting the industry, describe the ongoing programs and the recommended budget and include a detailed justification for any regulatory program proposed, including the identification and analysis significant alternatives. Even if the committee elects to recommend little or no regulatory action, which typically would be subject to only the most cursory judicial review,¹⁹⁸ the pervasive nature of marketing order regulation suggests that any sudden shift to deregulation should be subject to some measure of public comment and associated judicial review. Finally, a marketing policy statement would provide a vehicle for the USDA to articulate and justify why each season's advertising and promotion program directly advances a substantial state interest, as is required for the regulation of commercial speech.¹⁹⁹

If each season's program is implemented through informal rulemaking on a marketing policy statement (and associated regulatory amendments), a record can be generated through the receipt of public comment and the agency can apply its expertise to the committee's recommendations, without need for the cumbersome and time-consuming section 15(A) administrative hearing.²⁰⁰ The inherently seasonal nature of most regulated commodities should provide the USDA with a sufficient time window for the completion of notice and comment before the commencement of a each harvest season.

A rough outline of a timetable to consider all significant actions (regulatory, advertising and budget) would be as follows:

September: End of harvest season: committees meet in noticed, public session to recommend regulations for next season.

October: The USDA issues notice of proposed rulemaking based on committee recommendations.

January: After a 30-day public comment period, internal review, and

¹⁹⁸ *Oil, Chemical and Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985); *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

¹⁹⁹ *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

²⁰⁰ *See, e.g., SEC v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 n.4 (9th Cir. 1981) (purpose of administrative exhaustion doctrine is to allow agency to build a record, apply its expertise and correct errors).

perhaps a public hearing, the USDA issues a final rule for upcoming season.

February: Any affected handler *must* challenge the newly issued regulations in district court. Handlers who fail to do so may not challenge its legality subsequently in a defense against an enforcement action.²⁰¹

April: If the AMAA is amended to require expedited consideration of such claims by the district courts,²⁰² a ruling should be feasible prior to the initiation of the harvest season.

This guarantee of an expedited rulemaking/judicial review schedule would eliminate any due process objection to the existing requirement that handlers comply immediately with marketing order requirements while pursuing any legal challenges.²⁰³ To remove all doubt, the statute should expressly provide that after a regulation is affirmed by the district court, all obligations, particularly the payment of assessments, are final, with no right to any "refund" of assessments if the district court's ruling is later reversed.

2. Additional Procedural Changes

a. Clarify the AMAA's Statement of Purposes

The declaration of policy contained in 7 U.S.C. § 602 focuses on the vague goals of attaining "orderly marketing conditions" and achieving "parity prices." Congress should clarify the purposes and goals of the AMAA and attempt to reconcile the potentially conflicting interests of

²⁰¹ Similar limitations on the timing of judicial review have been upheld by the Supreme Court. See *Yakus v. United States*, 321 U.S. 414 (1944); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978) (Powell, J., concurring) (albeit with some reservations where the challenge alleges a *constitutional* violation).

²⁰² Each court of the United States may determine the order and priority in which civil actions are heard, subject to certain limited actions commanding priority, i.e., habeas corpus actions under 28 U.S.C. §§ 2241-2255 and actions to compel testimony of a recalcitrant witness under 28 U.S.C. § 1826. See 28 U.S.C. § 1657 (1994). See also FED. R. CIV. P. 57 ("The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar."). Finally, the FOIA at one time contained a provision that FOIA cases would "take precedence" over other cases and should be "expedited in every way." 5 U.S.C. § 552(a)(4)(D), *repealed by* Act of Nov. 8, 1984, Pub. L. No. 98-620, § 403, 1984 U.S.C.C.A.N. (98 Stat.) 3335, 33361. The time-sensitive nature of marketing orders justifies a limited Congressional directive to the federal courts to expedite this class of cases.

²⁰³ 7 U.S.C. § 608c(15)(B) (1994). In *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36-37 (1990), the Supreme Court recognized that an opportunity for "pre-deprivation process" would relieve the state of any obligation to provide a refund.

growers, handlers and consumers. Regardless of what policies guide the new statement of goals, the concept of “parity pricing”—guiding American agricultural policy based upon the lodestar of the status quo of the farm economy during the Woodrow Wilson Administration—surely deserves a comprehensive reconsideration. Finally, the authorization for certain particularly controversial regulatory tools, such as volume control, should be reconsidered or perhaps held to a precisely articulated and demanding standard.

b. End Formal Rulemaking for Adopting and Amending Marketing Orders and Expedite Informal Rulemaking Proceedings

The existing AMAA rulemaking provisions for the adoption of a marketing order should be replaced with a generic procedure utilizing simple “notice and comment” rulemaking proceedings under 5 U.S.C. § 553. Except for the most significant regulatory changes, discussion at committee meetings and expedited notice and comment proceedings (i.e., no public hearing and a 30-day comment period) should suffice.²⁰⁴ The AMAA’s unique “tendency” and “necessity” findings will produce nothing but confusion, as the California citrus order litigation demonstrates, and should be abolished.

c. Clarify the Legal Status of Committee Members and Employees

The precise legal status of marketing order administrative committees and the rights and responsibilities of members and staff is not entirely clear under current law and constitutes an invitation to litigation. Legislation should confirm the status of the committees as federal instrumentalities and address the application of other statutes to the committees (e.g., the FOIA, the FACA and conflict of interest restrictions), clarify the employment protections and remedies of committee staff,²⁰⁵ and the official immunities enjoyed by committee members and staff.

²⁰⁴ The USDA must, of course, always respond to significant comments on the proposed rule. *See, e.g.*, *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). However, the principle arguments of producers and handlers typically will have already been raised and considered at committee meetings or in past rulemakings.

²⁰⁵ Congressional silence on the rights of employees of state committees which implement Agricultural Stabilization and Conservation Service (ASCS) programs caused one court to hold that a terminated ASCS employee could bring a *Bivens* action against his former supervisors. *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991), *after remand*, 4 F.3d 653 (8th Cir. 1993).

d. Reconsider the Circumstances When the USDA Must Seek Grower Approval Through a Supermajority Referendum

While the referendum process is valuable in ensuring the necessary level of grower support for marketing orders, not every regulatory change or amendment justifies a referendum. It would appear advisable that producer referenda be conducted: (1) at the initial adoption of a marketing order; (2) periodically thereafter; and (3) whenever the USDA concludes, in its unreviewable discretion, that an amendment making a significant policy change should be ratified by a producer referendum. Additionally, the AMAA should recognize that the grower referendum and the selection of committee members constitute political processes, which should be as open and as fair as possible.²⁰⁶

e. Require Notice, Comment and Judicial Review Prior to Termination of a Marketing Order

The current termination by press release and 60-day Congressional notice is not consistent with general principles of administrative law that "deregulation" should be subject to the same requirements of notice and comment and judicial review as an affirmative assertion of agency authority.²⁰⁷

f. Evaluate a Comprehensive Recodification of All Generic Agricultural Promotion Programs

In addition to the AMAA there are currently at least eleven commodity-specific statutes authorizing advertising programs to promote consumption of agricultural products.²⁰⁸ Moreover, the AMAA provides identical procedures for milk marketing orders, which are fundamentally different in purpose and administration from those which regulate fruit and vegetable crops.²⁰⁹ Congress should enact a single,

²⁰⁶ Access to growers lists is mandated in the Ninth Circuit after *Cal-Almond, Inc. v. Yeutter*, 960 F.2d 105 (9th Cir. 1992), but the assurance of open political processes is an important value worthy of Congressional attention. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁰⁷ *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

²⁰⁸ See *supra* note 17.

²⁰⁹ In particular, because milk orders frequently contain a "reserve" fund from which handlers may be compensated for any overpayment, courts have occasionally ordered refunds in milk marketing order cases. See, e.g., *Borden, Inc. v. Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976); *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 773 (D.C. Cir. 1971). However, the concept of a refund is incompatible with fruit and vegetable

comprehensive and generic procedural statute to establish ground rules for all non-milk agricultural marketing programs.

g. Clarify and Strengthen Civil and Administrative Enforcement Authorities

With the elimination of the cumbersome section 15(A) process and the assurance of prompt judicial review, the government's existing authority under 7 U.S.C. § 608a(6) to compel unconditional and immediate compliance with all marketing order requirements through injunctive relief should be sufficient. This authority could be supplemented through a reliable and tough civil or administrative monetary penalty provision to ensure that handlers do not benefit from any violation that occurs before the government can obtain an injunction. Finally, Congress ought to simply abolish any criminal penalties for marketing order violations as it is doubtful that any American jury is ever going to send a anyone to jail for selling "illegal" fruit.

CONCLUSION

Under the current state of the law—at least in the Ninth Circuit—fruit and vegetable marketing orders are fundamentally dysfunctional. There is no assurance of prompt judicial review, which is unfair to dissidents, and no assurance of prompt enforcement of legal obligations, which is unfair to supporters who should not be required to support free riders. Antiquated formal rulemaking proceedings, the cumbersome section 15(A) process and the ambiguous legal status of these committees compound the confusion and invite litigation.

This important economic regulatory program cannot tolerate the current level of procedural complexity, judicial uncertainty and delay if it is to survive. At a minimum, the fundamental judicial review-enforcement tension needs to be resolved before fruit and vegetable marketing orders can regain the "tendency to effectuate the purposes of the Act"—to ensure orderly marketing conditions that will reliably provide high quality agricultural products to consumers in exchange for a fair price to growers.

orders, which provide annual marketing services in exchange for the handler's pro rata share of the expenses incurred.