



October 17, 2018

Mr. Ronald G. Hayes, Div. Director  
Weights, Measures & Consumer Protection  
Missouri Dept. of Agriculture  
P. O. Box 630  
Jefferson City, MO 65102

Dear Mr. Hayes:

Re: Proposed Rescission of 2 CSR 90-38.010 through 38.050

The Missouri Dairy Products Association (MDPA) is a nonprofit created to represent dairy processors, distributors and allied trades to promote harmonious relations between the several branches of the dairy industry, to cooperate with public officials and others interested in the welfare of the general public and to advance Missouri's dairy industry. The MDPA vigorously opposes the proposed rescission of the above-referenced regulations implementing the Unfair Milk Sales Practices Act for the following reasons.

**The Proposed Rescission is contrary to the statutory directive to the Department of Agriculture.**

Section 416.460 (RSMo) states, "The director [of the Department of Agriculture] is authorized and directed to promulgate rules and regulations to carry out the purposes of sections 416.410 to 416.560 [the Unfair Milk Sales Practices Act]." (emphasis added).

Section 416.450 (RSMo) specifically directs, "In any case in which a complaint is made in writing to the director [of the Department of Agriculture]...because milk products are being offered for sale or sold in violation of the provisions of sections 416.410 to 416.560...the director shall forthwith cause an investigation to be made..."

According to the Purpose statement of the proposed rescission, two of the reasons the Department offers for eliminating these regulations are (1) to allow processors, distributors and retailers to set their own product prices and compete on a level playing field with other states and (2) this "disruptive" and "burdensome" regulation will allow the program to focus on other statutory mandates.

The MDPA does not believe the Department possesses the authority to override the General Assembly or unilaterally alter economic policy established by statute, even if the statute was enacted 59 years ago; the Unfair Milk Sales Practices Act does not have a sunset provision.

In addition, while the MDPA understands that the Division may find its duties under Section 416.450 burdensome, we note that the appropriation to the Division in HB 2006 for

Fiscal Year 2019 was nearly \$25,000 more than the Department requested; we assume the Department considered all of its statutory mandates in the budget request for the Division. Moreover, MDPA does not believe that the mere fact the Department finds a statute burdensome to enforce gives it authorization to unilaterally repeal that law.

In summary, the proposed rescission is contrary to state statute.

**Former Governor Greitens Executive Order 17-03 does not and cannot mandate the rescission of 2 CSR 90-38.010 to 38.050.**

The MDPA acknowledges that Governor Greitens' executive order fails to direct the various departments and rule-making agencies of the State to consider or report whether a regulation is mandated by state law. However, we would also posit that it is axiomatic that a Governor does not have the authority to ignore or violate existing laws, even by means of an Executive Order.

However, Executive Order 17-03 certainly does not direct or authorize the Division to implement a new economic policy for the State of Missouri such as the one proposed by the Department's Purpose statement; it is contrary to the specific words and to the intent of the Unfair Milk Sales Practices Act, Sections 416.410 to 416.560 (RSMo) for the Department to propose that processors, distributors and retailers set their own product prices without restraint and without the Department engaging in the legal obligation to enforce the statutes.

In summary, Executive Order 17-03 does not authorize the Division or the Department to ignore its statutory obligations by rescinding its regulations.

**The proposed rescission does not achieve the Purpose asserted by the Department.**

The Purpose clause in the proposed rescission of each rule declares the Department's conclusion that, "Consumers will also benefit from rescission of this rule due to lower prices on milk and dairy products (emphasis supplied)." The MDPA, by this objection, requests pursuant to Chapter 610 (RSMo) that the Department produce all documents, testimony, opinion, or other data, in any form, on which the Department relied in reaching this conclusion.

The Unfair Milk Sales Practices Act is in the chapter of the Revised Statutes of Missouri entitled, "Monopolies, Discriminations and Conspiracies" for a reason, it is intended to prevent both processors and retailers from developing monopolies to the ultimate harm to both producers and consumers. The statute is intended to prevent the predatory or preferential pricing at the processor or distributor level that would result in the elimination of competitors and ultimate control of the market. The statute and the current regulations provide the "level playing field" you claim to seek by requiring competition based on the efficient and cost-conscious operations of the processors and distributors. Rather than leveling the playing field as the Purpose statement suggests, this proposed rescission would allow out-of-state processors to use out-state revenues to support below-cost sales to eliminate Missouri-based processors. It would also allow major retail chains to negotiate "special deals" with processors so the big retailers can enhance their ability to drive the Mom-and-Pop grocery stores out of business. While this "price-war" may result in a short-term benefit to consumers, once the smaller competition is eliminated, the consumer will no longer reap the benefits of below-cost selling?

Rescission also harms the dairy farmers, the producers, and Missouri taxpayers. Producers already face downward pressure on prices because they are not protected by the prohibition on selling below cost, as their market shrinks from three to two to one processor, their bargaining position continues to diminish. However, these producers will have a potential revenue support from the federal government which has been enhanced as part of the adoption of

the Missouri Dairy Revitalization Act; if the producers have paid the premiums, the taxpayers of Missouri will cover their loss, but provide them with little or no profit to motivate them to continue in business.

In summary, the Department has provided no public disclosure of the bases for its decision, the decision is contrary to legislative mandate, there has been no public hearing on or offered on this issue and MDPA disputes the “findings” by the Department.

**The fiscal note assertion that the proposed rescission will not cost private entities more than \$500 in the aggregate is false.**

MDPA maintains that the Department’s failure to comply with a statutory directive by rescinding these regulations and by adopting a policy in direct contravention of a statute will entail a substantial expense to private entities.

While MDPA acknowledges that challenging the authority of the Department to rescind regulations mandated by statute may not be a factor in the effort to assess the cost to private entities, the economic impact assessment should consider the economic burden on private entities faced with enforcing a law that the Department has chosen to disregard. Since the statute does not provide the investigative abilities to anyone but the Department, we would anticipate that complaints from “persons claiming to be injured” (Section 416.450 (RSMo)), which we assume would be “private entities”, would be borne by those complainants. While facing expenses well in excess of \$500 would curtail many, if not most complainants, we are confident that the few who might pursue enforcement of the statutes would incur expenses well in excess of \$500.

However, since the Department finds compliance with its statutory obligations “disruptive” and “burdensome” despite its enhanced ability to investigate, we feel certain that the potential cost to private entities is greatly in excess of “\$500 in the aggregate”.

In summary, MDPA also challenges the basis for the fiscal evaluation of the proposed rescission, without including the longer-term financial impact discussed above.

**The proposed Rescission is merely a sop in response to Executive Order 17-03, but should be acknowledged as such.**

In legal effect, the rescission of 2 CSR 90-38.010 to 38.050 is merely eliminating regulations largely reciting statutes the Department is mandated to enforce by statute. However, the Department’s declaration of the “Purpose” of the rescission raises the specter that the Department of Agriculture intends to act without legislative direction or authority to promote a new economic policy.

MDPA opposes the Department’s rescission of these regulations primarily because it evidences intent to minimize the Department’s efforts to comply with the “disruptive” and “burdensome” requirements of the Missouri Unfair Milk Sales Practices Act based on the Department’s Purpose statement. If that is truly the Department’s intent, we are willing to meet and work with you toward legislation that would address your complaints. However, to the extent the Department seeks to eliminate six decades of law from the statutes, or shift the statutory responsibility to the citizens, MDPA opposes that effort as contrary to the interests of consumers, producers, retailers, as well as processors.

In conclusion, MDPA urges the Division and the Department to rescind its proposed rescission of 2 CSR 90-38.010 to 38.050. We maintain that the Department of Agriculture does not have the statutory authority to proceed with the rescission, that an Executive Order does not

give the Department of Agriculture the authority to violate a statutory mandate and that a rescission of these regulations is not in the interest of the dairy industry or the general public.

Sincerely,

Michael Dorrian  
President  
Missouri Dairy Products Association

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