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QUARTERLY DAIRY INDUSTRY LEGAL UPDATE





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Quarterly Dairy Legal Update Series

#2 in the series - covering the 4th quarter of 2020

#1 in the series - is available for viewing [here](#)

Tuesday, January 26, 2021

12 noon – 1 pm EST

Materials available [here](#)





Agenda:

- Round-up of the past quarter's legal and regulatory developments impacting the dairy industry
- Focused topic of interest to dairy producers and professionals:

Dairy Exports and Trade Agreements

Guest: ***Becky Rasdall***

V.P. of Trade Policy and International Affairs

International Dairy Foods Association (IDFA)

Thanks to Our Partners

The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information. This material is provided as part of that partnership and is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.





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Agricultural Law Weekly Review

The Agricultural Law Weekly Review provides an update of recent agricultural law developments from local, state, national, and international levels. Subscribe at pennstateaglaw.com.

Agricultural Law Weekly Review—week ending December 18, 2020

Pesticides/Herbicides: Punitive Damages Reduced to \$60 Million in Bader Farms Dicamba Case

On November 25, 2020, the U.S. District Court for the Eastern District of Missouri issued an [opinion and order](#) on post-trial motions reducing to \$60 million the February 2020 jury award of \$250 million in punitive damages against Monsanto/Bayer and BASF as a result of dicamba-caused property damage to a Missouri peach producer's orchards in Bader Farms, Inc. v. Monsanto Company, No. 1:16-cv-00299. For more background, see [ALWR—February 20, 2020](#), "Missouri Federal Jury Returns \$265 Million Verdict in Dicamba [...]"

December 21st, 2020 | Tags: [Agricultural Labor](#), [Biotechnology](#), [Invasive Species](#), [Pesticides/Herbicides](#)

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Agricultural Law Weekly Review—week ending December 11, 2020

Dean Foods Bankruptcy: Pennsylvania Milk Marketing Board Negotiates Nationwide Solution to Preference Payment Claims

On December 9, 2020, the Pennsylvania Milk Marketing Board (PMMB), partnering with the Pennsylvania Office of Attorney General, [announced](#) that it had negotiated with the St. Paul, Minnesota, law firm representing the Chapter 11 bankruptcy estate of Dean Foods, ASK LLP. As a result, the PMMB prepared, and posted on the PMMB website, forms which can be downloaded, completed by producers and milk haulers in any state in the country, and mailed to ASK LLP as soon as possible as a response to the [...]"

December 15th, 2020 | Tags: [Agribusiness](#), [Animal Health](#), [Conservation Programs](#), [Dairy Policy](#), [Food Labeling](#), [Industrial Hemp](#), [International Trade](#)

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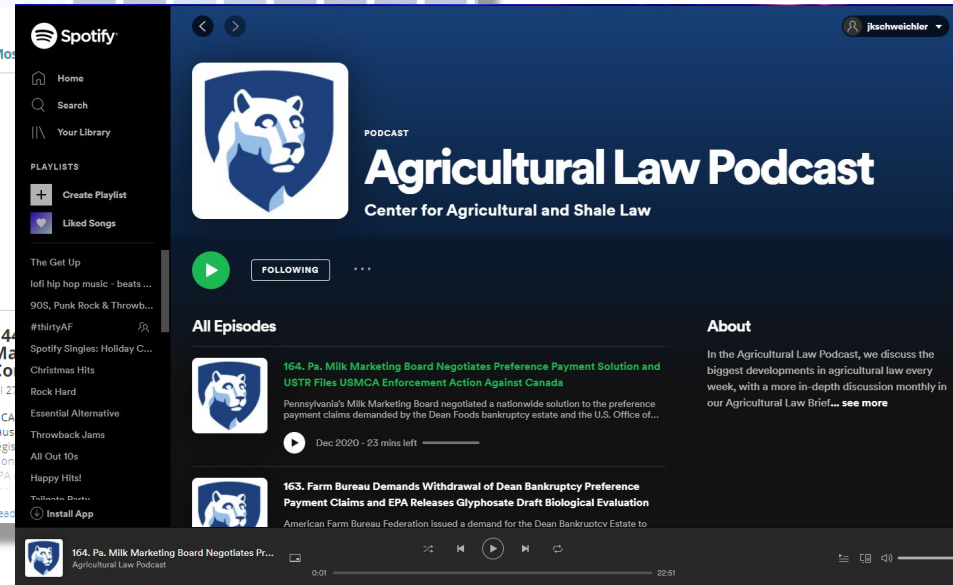
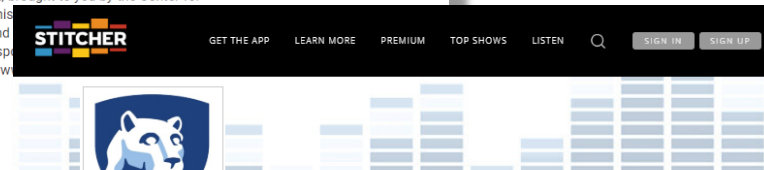
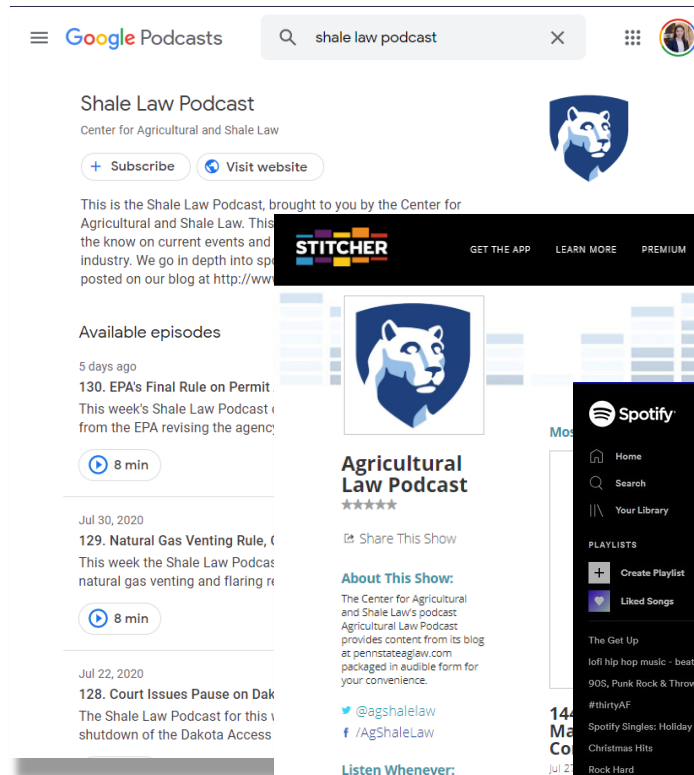
[> The CASL Ledger](#)





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Pennsylvania Agricultural Mediation Program



- Who can request mediation?
 - USDA-related issues:
 - Agricultural Loans
 - Wetlands determinations
 - Compliance with farm programs, including conservation programs
 - National organic program established under the Organic Foods Production Act of 1990
 - Agricultural Credit
 - Rural water loan programs
 - Grazing on National Forest System land
 - Pesticides
 - Non-USDA issues:
 - Lease issues; including land leases and equipment leases.
 - Family farm transition.
 - Farmer-neighbor disputes



Pennsylvania Agricultural Mediation Program

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First USMCA Enforcement Action Filed Against Canada

On December 9, 2020, The Office of the U.S. Trade Representative (USTR), [announced](#) that it was providing official notice to Canada that the United States is commencing the process to enforce the United States-Mexico-Canada Agreement (USMCA) by [letter](#) to Canada's Minister of Small Business, Export Promotion and International Trade Mary Ng. The letter formally requests "consultations" with the government of Canada to discuss Canada's allocation of dairy tariff-rate quotas (TRQs) (the allocation of an imported commodity allowed at a reduced tariff rate). The Dairy TRQs reserve a large share of each dairy TRQ for "processors," and "further processors," which the USTR letter alleges is inconsistent with multiple provisions of the USMCA. The USTR alleges that Canada has undermined the ability of American dairy farmers and producers to utilize the agreed-upon TRQs and sell a wide range of dairy products to Canadian consumers. Requesting consultation is the first step in the dispute resolution process contained in the USMCA.

- *The Canadian response has not been made public. Presumably, negotiations are on-going.*



Dean Foods Bankruptcy Estate Threatens Dairy Producers with Lawsuits to Recoup Alleged “Preference” Payments

On November 24, 2020, a law firm named ASK LLP, headquartered in St. Paul, Minnesota and hired to represent the Southern Foods Group, LLC formerly d/b/a Dean Foods (“Dean”) Chapter 11 bankruptcy estate, mailed [demand letters asserting legal claims for the repayment of milk check proceeds](#) against thousands of dairy producers (including cooperatives) throughout the United States. The claims seek the recovery of milk checks received from Dean within ninety days preceding Dean’s filing of bankruptcy (i.e. between August 14, 2019 and November 12, 2019). The payments are alleged to be so-called “preference payments” recoverable under Section 547 of the U.S. Bankruptcy Code. Section 547 states, among other things, that a person or entity that receives payment (in this case for milk delivered) from a bankrupt entity within ninety days prior to a bankruptcy filing may be compelled to return that money to the bankruptcy estate under certain conditions. This provision is designed to allow the bankruptcy trustee the discretion to recoup payments that may have been made outside the normal course of business which result in some unsecured creditors receiving preferential treatment by the debtor in the 90 days leading to bankruptcy (i.e. receiving an unfair advantage over other unsecured creditors weren’t paid). The amount claimed against each dairy producer in the demand letters varies depending upon the history of deliveries and payments in the 90-day window.

(Continued on next slide)



(Dean Foods Bankruptcy - Continued from previous slide)

The claims asserted range from thousands of dollars to hundreds of thousands of dollars. The demand letters state that if a “compromise” amount of 90% of the amount claimed to be due is not paid by December 24, 2020, or the dairy producer does not respond with certain requested information by December 15, 2020, a lawsuit (called an “avoidance action”) to collect the amount claimed to be due will be filed during the week of December 28, 2020, against the dairy producer in the United States Bankruptcy Court for the Southern District of Texas located in Houston, Texas. A Disclosure Statement for Dean’s Chapter 11 Plan filed with the Bankruptcy Court on November 30, 2020, states that as of that date, 2,500 demands for the return of alleged preference payments were mailed, but only a portion of those would have been directed to dairy producers. Excluding non-dairy producers and excluding the demand letters sent to a cooperative (treated as one producer), it is estimated that nationwide somewhere in excess of 500 demand letters may have been directed to independent producers selling to Dean plants. In Pennsylvania, between 100-150 independent producers sold to Dean plants. This is the only known recent usage of Bankruptcy Code Section 547 to try to recover milk check payments from dairy producers as the result of a dairy processor bankruptcy. There are multiple complete legal defenses to the claims for repayment and the [American Farm Bureau Federation issued a public letter to legal counsel for Dean Bankruptcy Estate on December 4, 2020](#) demanding that all demands be withdrawn within ten (10) days and stating that “AFBF will consider all remedies that it can seek as an advocate of the producers, including asking the Court to enjoin any litigation against the Producers and to hold any funds received by the Debtor in settlement in escrow.”



Pennsylvania Milk Marketing Board Negotiates Nationwide Solution to Preference Payment Claims

On December 9, 2020, the Pennsylvania Milk Marketing Board (PMMB), partnering with the Pennsylvania Office of Attorney General, [announced](#) that it had negotiated with ASK LLP, the St. Paul, Minnesota, law firm representing the Chapter 11 bankruptcy estate of Dean Foods. As a result, the PMMB prepared, and posted on the PMMB website, [forms which can be downloaded, completed by producers and milk haulers in any state in the country, and mailed to ASK LLP](#) as soon as possible as a response to the demand letters asserting claims for the repayment of thousands of dollars of milk check proceeds. Depending upon the content, accuracy and completeness of the information provided, the forms provide information that the bankruptcy estate's legal counsel has agreed may be sufficient to prove all payments from Dean were made in the normal course of business and as required by law, and sufficient to have the claims for repayment completely withdrawn.



Dairy Pricing: PMMB Enters Order Requiring Milk Dealers to Pay Cooperatives' Milk Procurement Costs for PA-produced, PA-processed and PA-retailed Class I Milk

On December 2, 2020, the Pennsylvania Milk Marketing Board (PMMB) issued [Official General Order No. A-1010 and an accompanying decision](#), titled "Cooperative Procurement Cost," concluding a multi-year administrative proceeding to include in the PMMB's producer/wholesale pricing structure an obligation for milk dealers to reimburse dairy cooperatives for certain procurement costs avoided when buying cooperative milk. The cost for things such as field, laboratory and calibration services, producer payroll, sales invoicing, and dispatch and logistics are incurred by milk dealers when buying milk from independent producers but not when buying from dairy producer cooperatives who provide those services. Effective January 1, 2021, the price of milk utilized in Pennsylvania as Class I, and which is produced and sold to a milk dealer by a cooperative in Pennsylvania, shall include \$0.24 per hundredweight (cwt) as reimbursement of cooperative procurement costs. That amount shall be recoverable by dealers in the minimum wholesale price obtained from retailers. This is believed to be the first instance of government-mandated producer and wholesale pricing including a specific amount for, and recovery of, cooperative procurement costs which are avoided when milk dealers buy from cooperatives.

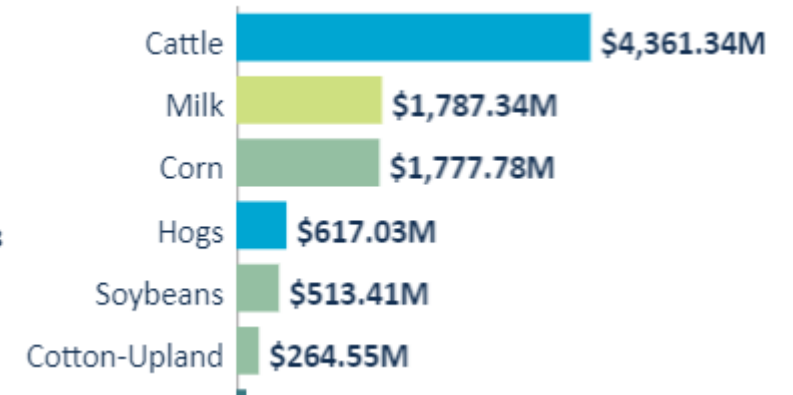
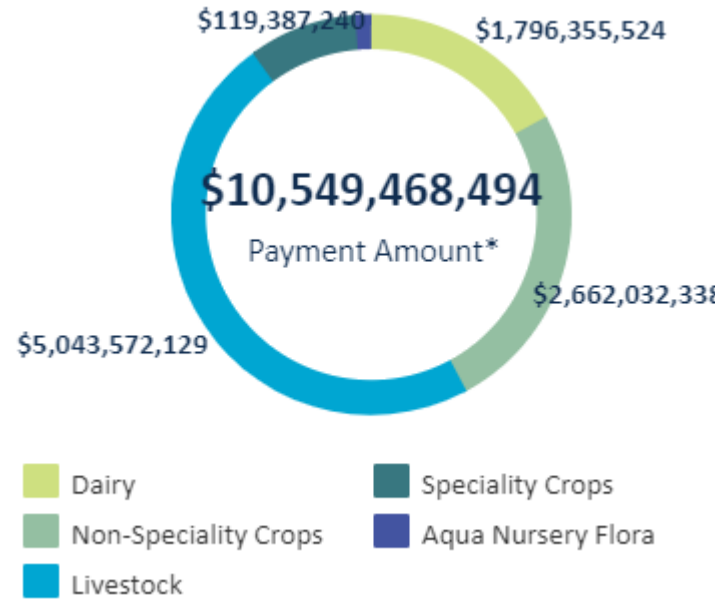


COVID-19: Pennsylvania's CARES Act-funded Dairy Indemnity Program Uses \$7.6 Million of \$15 Million and Unused Balance is Re-appropriated

On November 24, 2020, Pennsylvania Agriculture Secretary Redding [announced](#) that the state's Dairy Indemnity Program, created by the Pennsylvania General Assembly and funded by an appropriation of federal CARES Act funds, has paid \$7.6 million, out of the appropriated \$15 million, to 1,550 Pennsylvania dairy producers. Under the program, producers who experienced enumerated losses between March 6, 2020 and September 30, 2020 were eligible for an initial \$1,500 payment, followed by a subsequent payment dependent upon remaining program funds and proof of loss. According to the enabling legislation, all payments were to be made by November 30, 2020. As a result of legislation enacted on November 23, 2020 as [Act 114 of 2020](#), all unused funds from the initial \$15 million appropriation will be transferred and appropriated to the Department of Corrections to meet payroll expenses for public safety, health care or similar employees substantially dedicated to mitigating or responding to the COVID-19 public health emergency.

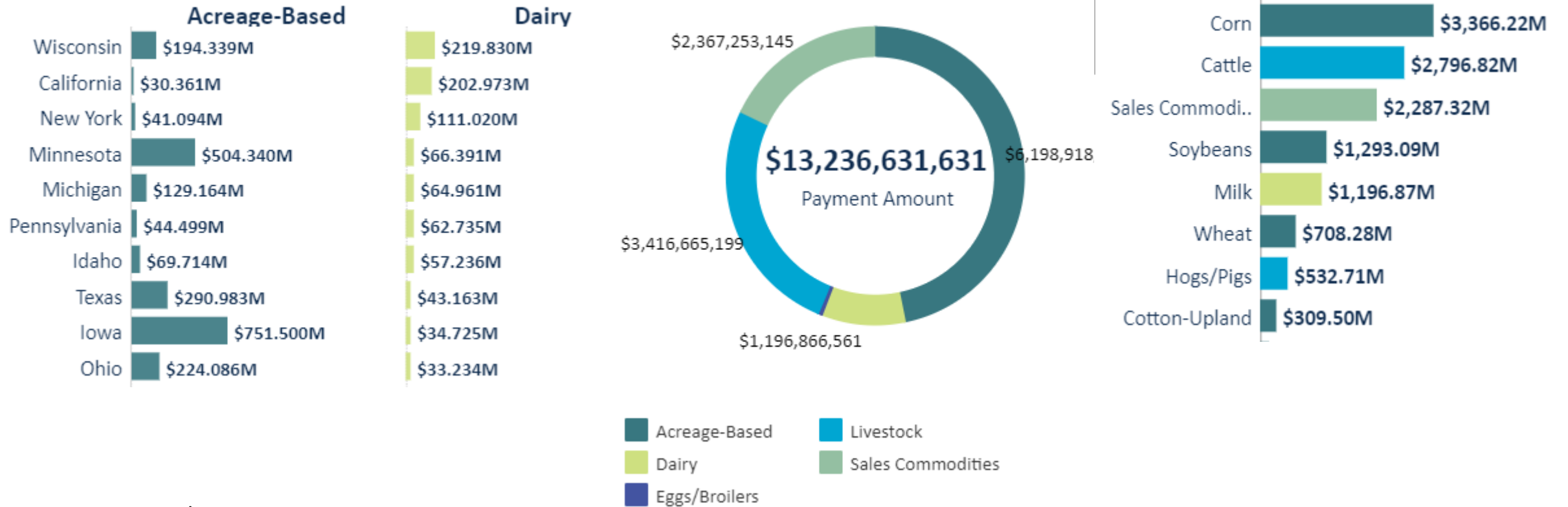


CFAP 1 – closed 9/11/21



Milk production ranking: CA, WI, ID, NY, TX, MI, PA, MN, NM, WA

CFAP 2 – closed 12/11/21



Note the \$ and ranking of MI and PA



CFAP 2 Reopened (1/19/21 – 2/26/21)

- Did not impact dairy; no new dairy applications
- CFAP 3? When will plan be formulated to push out \$11.2B in funding in new 2021 Appropriations Act?

Additional Aid

- **USDA Announces Section 32 Purchases of Milk and Butter**
On December 4, 2020, the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) [announced](#) that, under USDA's [Section 32 Program](#), it will purchase \$60 million in fluid milk and \$50 million in butter, which it will distribute to various food nutrition programs. According to the announcement, USDA will solicit fluid milk in December 2020 and February 2021 for distribution in the first and second quarters of 2021, and will solicit butter in May and August 2021 for distribution in quarters three and four.
- **Farm to Families Food Box Program** continues with [5th round](#) of funding (\$1.5B)



Miscellaneous

International Trade: USTR and USDA Release Report on Agricultural Trade Under the U.S-China Trade Agreement

On October 23, 2020, the Office of the U.S. Trade Representative (USTR) and the U.S. Department of Agriculture (USDA) [announced](#) publication of an [interim report](#) on agricultural trade under the January 15, 2020 Economic and Trade Agreement Between the United States of America and the People's Republic of China. According to the report, China has fulfilled 71% of its 2020 target purchases and bought \$23.6 billion in agricultural goods for the 2020 year since the agreement became effective February 14, 2020, although it is yet to be determined whether the country will meet its target.

Food Labeling: International Dairy Federation Publishes Dairy Terminology Standards Update

On November 18, 2020, the International Dairy Federation (IDF) [announced](#) the publication of an update to its General Standard for the Use of Dairy Terms (GSUDT), titled [IDF Bulletin 507/2020: The Codex General Standard for the Use of Dairy Terms—Its nature, intent, and implications](#). IDF specifies in the bulletin that milk “refers to normal mammary secretion of milking animals obtained from one or more milkings” and that “dairy terms are reserved to milk and milk products conforming to this definition.” Along with the bulletin, which is intended as a guide for legislators and those working in food law, IDF also published a [position paper](#) outlining the importance of proper dairy product naming and examples of misleading terminology.



Miscellaneous

International Trade: USDA and FDA Sign MOU to Coordinate, Collaborate on Dairy Exports

On October 1, 2020, the U.S. Department of Agriculture's (USDA) Foreign Agricultural Service (FAS), Agricultural Marketing Service (AMS), and the U.S. Food and Drug Administration (FDA) [announced](#) their establishment of a Memorandum of Understanding ([MOU 225-20-017](#)), indicating their intent to cooperate and collaborate regarding the export of milk and milk products from the United States. Under the MOU, FAS will lead communications with foreign governments while AMS will facilitate exports and issue dairy sanitary certificates. Additionally, FDA will verify the regulatory standing of milk producers and processors and issue the export certificates required by the importing nations. The MOU became effective upon signature of the parties and will be evaluated at least every 5 years.

Organic Agriculture: USDA-NASS 2019 Organic Survey Released

On October 22, 2020, the U.S. Department of Agriculture (USDA) National Agricultural Statistics Service (NASS) [issued](#) the results of the [2019 Organic Survey](#). The last NASS Organic Survey was performed in 2016. Among many other notable results, Pennsylvania led the nation in organic broiler chicken sales with \$360,059,291 and organic egg sales (chicken) with \$104,000,815.815.

Table 18. Certified Organic Livestock Products and Poultry Products Sales: 2019

[For meaning of abbreviations and symbols, see introductory text.]

Commodity and geographic area	Farms	Quantity	Dollars
MILK FROM COWS (POUNDS)			
United States	3,100	5,122,684,816	1,585,156,721
Alabama	3	2,107,322	881,000
Arizona	1	(D)	(D)
California	150	889,290,462	273,122,038
Colorado	8	276,652,358	(D)
Connecticut	1	(D)	(D)
Florida	3	8,450,000	3,556,295
Georgia	2	(D)	(D)
Idaho	29	364,524,076	124,539,806
Illinois	13	8,908,903	2,351,701
Indiana	246	142,678,892	43,428,429
Iowa	105	70,705,742	19,103,218
Kentucky	47	24,326,365	7,165,635
Louisiana	9	32,807,401	11,794,678
Maine	88	61,387,355	19,724,215
Maryland	26	34,262,091	11,872,002
Massachusetts	14	8,976,752	3,142,398
Michigan	93	66,684,699	20,019,826
Minnesota	125	138,891,803	38,244,305
Mississippi	19	56,400,333	20,487,730
Missouri	21	14,850,197	3,799,984
Montana	1	(D)	(D)
Nebraska	2	(D)	(D)
Nevada	1	(D)	(D)
New Hampshire	20	7,952,950	2,642,417
New Mexico	5	166,387,834	46,780,589
New York	607	386,732,234	121,421,791
North Carolina	9	5,181,342	1,615,203
Ohio	260	128,388,287	38,977,023
Oklahoma	1	(D)	(D)
Oregon	40	321,420,989	103,404,214
Pennsylvania	362	215,797,929	64,899,446
South Dakota	6	4,259,524	896,742
Tennessee	3	6,700,000	2,180,000
Texas	9	821,868,224	261,307,470
Utah	4	7,535,000	2,305,234
Vermont	172	202,401,003	66,720,125
Virginia	20	16,227,452	5,232,880
Washington	45	136,897,016	39,243,624
West Virginia	5	4,307,000	1,618,175
Wisconsin	525	440,963,146	125,728,786



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Thank you!

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