

AGRICULTURAL LAW *Update*



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Dairy Quarterly Legal Update: April–June of 2021

Below is a listing of legal and regulatory developments impacting the dairy industry during the second calendar quarter of 2021. Additionally, recently published dairy resources of interest are included at the end of this update.

Multiple Federal Milk Marketing Order Reform Proposals Announced, Producer Groups Ultimately Do Not File Emergency USDA Hearing Petitions

On April 23, 2021, the National Milk Producers Federation (NMPF) [announced](#) its intention to file a petition with USDA for an emergency hearing on a request to alter the method of calculating the final monthly Class 1 producer price (called the “Class I Mover”). NMPF’s petition would seek to keep the current calculation as the “floor” but allow modifications every two years based on market conditions over the prior 24 months that may be unexpectedly driving the Class I producer price below the Class III price as has occurred over the preceding nine months. Ultimately, NMPF’s petition was not filed. NMPF replaced their webpage dedicated to their emergency petition with general content on the [problems with the current Class I Mover](#). *For more info, see NMPF/Milk/Peter Vitaliano Podcast, [NMPF’s Pricing Proposal First Phase of Adjustments](#) (dated April 28, 2021).* On April 27, 2021, a coalition of producer groups from Wisconsin, Minnesota and Nebraska, and Edge Dairy Farmer Cooperative announced their intention to file an emergency petition to pursue their FMMO reform proposal, called [Class III Plus](#). This proposal would eliminate Class I advanced pricing and USDA would calculate the Class I skim milk price by starting with the Class III skim milk price and adding a Class I skim milk price adjuster which would be established each September for the forthcoming calendar year. This petition was also held and ultimately was not filed with USDA.

U.S. Initiates Formal USMCA Trade Dispute with Canada Over Tariff-Rate Quotas

On May 25, 2021, the Office of the U.S. Trade Representative [requested the initiation of a dispute settlement panel](#) under the terms of the United States-Mexico-Canada Agreement (USMCA) to challenge Canada’s allocation of dairy tariff-rate quotas (TRQs), i.e. the ability to apply for reduced-tariff Canadian import of enumerated U.S. dairy products, to only processors and not retailers, an action which the United States alleges is in violation of the USMCA. Canadian processors would be direct competitors of U.S. dairy product manufacturers and unlikely to be interested in utilizing the TRQs set aside in the USMCA to import U.S. dairy products. The trade dispute, the subject of a December 9, 2020 request for consultation made to Canada, will now be decided by formal USMCA dispute resolution procedures. For more background, see [Agricultural Law in the Spotlight \(December 10, 2020\)](#), [Office of U.S. Trade Representative Disputes Canada’s Tariff-Rate Quotas for Dairy Products in First USMCA Enforcement Action](#).



Suit Challenges Dietary Guidelines

On April 28, 2021, a group of medical doctors called Physicians Committee for Responsible Medicine, and others, filed a [Complaint](#) in the United States District Court for the Northern District of California against USDA and the U.S. Department of Health and Human Services, alleging that the 2020 Dietary Guidelines are not based upon current scientific and medical knowledge in recommending, and not disclosing “the ill effects of,” consumption of meat and dairy. The Complaint also alleges that USDA has a conflict of interest in serving as the administrative lead for the Dietary Guidelines process while also having a statutory duty to develop and expand markets and uses for all agricultural products, including dairy and meat. [*Physicians Committee for Responsible Medicine et al v. Vilsack et al*](#), 21-cv-03088.

Pennsylvania's Dairy Producer Termination Notice Requirement Increased to Ninety Days

On May 12, 2021, the Pennsylvania Milk Marketing Board (PMMB) [submitted](#) to the Independent Regulatory Review Commission (IRRC) for approval [final form regulation 47-18](#) titled “[Transactions between dealers and producers; Termination of dealer-producer contract.](#)” [51 Pa.B. 2963](#). It amends 7 Pa. Code § 143.31 to increase from twenty-eight to ninety the number of days’ notice required to be provided to a dairy producer by a milk dealer when terminating an agreement or course of dealing to purchase that producers’ raw milk. The final form regulation provides for exceptions for financial distress, insolvency, insufficient customer sales and catastrophic events, all of which are defined very specifically in the regulation. Dealers may negotiate an agreement containing a lower (or higher) number of days’ notice. *Update:* IRRC [approved](#) the regulation on June 17, 2021. It was submitted to the PA Attorney General on June 22, 2021. For related content from forty-three years ago, see *Pennsylvania Farmer*, May 13, 1978:

**Farm news
and comment**
by CURT HARLER

21-day notices may change to 60 days

The sudden shock of having to find a milk handler in 3 weeks time may be eased for farmers. Milk Marketing Board, with the support of Pennsylvania Farmers Association, has proposed lengthening the 21 day period to 60 days.

Earl Fink, MMB's executive secretary, tells me the change could become effective early in June. Farmers and dealers have until June to comment on the proposal. Since the 21 day period was a Board regulation, the Board has the power to change it on its own. Farmers quitting a handler also would have to give 60 days notice.

"This will give both dealers and producers more time to seek alternatives in case of changes," Fink points out. It will eliminate panic for farmers who do get notices. It will help handlers maintain level supplies. It's a good idea all around.



Milk Donations or Discounted Sales Do Not Violate Pennsylvania Mandatory Minimum Wholesale Prices

On May 12, 2021, the Pennsylvania Milk Marketing Board (PMMB) issued Bulletin No. 1594, titled [Policy Regarding Charitable Donations And Charitable Sales Of Price-Controlled Packaged Products](#), which permanently expresses the PMMB policy that donations or discounted charitable sales of milk below Pennsylvania's mandatory minimum prices are permissible if made to 501(c)(3) corporations and for bona fide charitable purposes. PMMB reporting and recordkeeping parameters are also specified. This does not apply to sales to the USDA pursuant to its various food purchasing programs, including for The Emergency Food Assistance Program (TEFAP). The recently announced \$400 million USDA [Dairy Donation Program](#) is not specifically addressed. Bulletin 1594 becomes effective upon the expiration of Pennsylvania Governor Wolf's COVID-19 Proclamation of Disaster Emergency and will then replace April 10, 2020's [Bulletin No. 1573](#) which temporarily accomplished the same outcome.

EU Parliament Considers Legislation Prohibiting Use of Dairy Terms with Non-Dairy Products

Currently, legislation pending in the European Parliament may prohibit the use of dairy terms to describe non-dairy products. [Amendment 171](#), part of legislation package [2018/0218\(COD\)](#) to amend the Common Agricultural Policy (CAP) from 2021–2027, would revise [Annex VII](#), Part III, point 5 of [Regulation \(EU\) 1308/2013](#) to specify that the listed dairy terms "shall be protected from any direct or indirect commercial use . . . for comparable products or . . . substitute[] [products]." The amendment further prohibits the use of the dairy terms with modifiers such as style, type, method, as produced in, imitation, flavour, substitute, like, or similar terms. The listed dairy terms in Reg. (EU) 1308/2013 include milk, whey, cream, butter, buttermilk, butteroil, cheese, yogurt, and kefir, among others. The text of 2018/0218(COD) was adopted by the Parliament on October 23, 2020, although the amendments are still "awaiting Parliament's position" in the first reading. On February 9, 2021, multiple industry stakeholders issued a [letter](#) in opposition to Amendment 171, stating that the legislation would prohibit the terms soy milk and vegetarian cheese. *Update:* According to the May 26, 2021, [Dairy Reporter](#) and [Euronews](#), the European Union Parliament has "withdrawn" Amendment 171, which would have prohibited the use of dairy terms for non-dairy products.

Court Denies Challenge to Butter Pasteurization Regulation

On May 24, 2021, the U.S. District Court for the District of Columbia issued an [opinion](#) granting summary judgment in favor of the U.S. Food and Drug Administration (FDA) in a challenge to the agency's authority to require the pasteurization of butter in interstate commerce under 21 CFR [§1240.61](#), *Mandatory pasteurization for all milk and milk products in final package form intended for direct human consumption*. [McAfee v. U.S. Food and Drug Administration](#), No. [1:19-cv-03161](#). The case was brought by the Farm-to-Consumer Legal Defense Fund (FTCLDF) and Mark McAfee, the owner of California-based Organic Pastures Dairy, which sells raw milk nationally labelled as [pet food](#) under its brand "Raw Farm." The Plaintiffs claimed that the FDA lacked statutory authority to mandate butter pasteurization and requested that the agency remove butter from the definition of milk products under 21 CFR [§1240.3](#) but the court found that the pasteurization rule was authorized by FDA's broad authority under the Public Health Service Act (PHSA) to protect the public against the spread of communicable disease and in deference to the agency accepted FDA's rationale that only pasteurization destroys disease-causing pathogens. *Update:* On July 26, 2021, the FTCLDF and McAfee filed a Notice of Appeal of the Court's decision to the D.C. Circuit U.S. Court of Appeals.



FDA Issues Final Rule Establishing a New Single Standard of Identity for Yogurt

On June 11, 2021, the U.S. Food and Drug Administration (FDA) posted in the Federal Register a final rule titled, "Milk and Cream Products and Yogurt Products; Final Rule to Revoke the Standards for Lowfat Yogurt and Nonfat Yogurt and To Amend the Standard for Yogurt" ([86 FR 31117](#)). Also announced by the agency on June 9, 2021, the final rule revokes the separate standards of identify for lowfat and nonfat yogurt and establishes their parameters as "nutritionally modified versions" of a "traditional standardized food" under FDA's [§ 130.10](#) general definition and standard of identity. FDA issues this final rule more than a decade after publishing the proposed rule on January 15, 2009 ([74 FR 2443](#)). The compliance date for the final rule is January 1, 2024.

Pennsylvania "Best By" or "Sell By" Milk Labeling Bill Delivered to Governor

On June 30, 2021, after both chambers of the Pennsylvania General Assembly concurred, [SB 434](#), now known as [Act 62 of 2021](#), was signed by the Pennsylvania Governor into law. The act revises Title 3 (Agriculture) of Pennsylvania law by adding a new subchapter C to Chapter 57, Food Safety (not the Milk Sanitation Law). It provides for milk "sell by" or "best by" date labeling. The law would allow milk processors to choose either a mandatory "sell by" date, or an alternative "best by" date label, both to be set no more than 17 days after pasteurization and both prohibiting sale after the date indicated. However, individual processers, for specific types of milk, may apply to the Pennsylvania Department of Agriculture (PDA) to be approved to label for a period longer than 17 days, with an accompanying approval, laboratory testing and continuing compliance process, that proves bacterial counts remain within regulatory limits. Exemptions from the entire new subchapter can be individually PDA-approved for ultra-pasteurized milk, cultured milk, aseptically processed milk, milk that has undergone higher heat shorter time pasteurization, and milk sold or offered for retail sale on the same premises at which it was processed.

Agricultural Labor: U.S. Supreme Court Rejects Tort Suit Against Cocoa Purchasers for Contributing to Child Slavery

On June 17, 2021, The Supreme Court of the United States issued an [opinion](#) reversing and remanding the Ninth Circuit's [decision](#) that the Alien Tort Statute (ATS) allowed six Malian individuals to bring suit in the U.S. against Nestlé USA, Inc., and Cargill, Inc. on allegations that the companies' cocoa purchases aided and abetted child slavery. [Nestlé USA, Inc. v. John Doe I, et al.](#), No. [19-416](#); [John Doe v. Nestlé, S.A.](#), No. [17-55435](#) (9th Cir.). The plaintiffs alleged that they were enslaved as children and trafficked into Côte d'Ivoire, where they were forced to work in cocoa production. Although neither of the companies own or operate the cocoa farms where the plaintiffs were enslaved, they purchase cocoa from the farms and supply them with technical and financial resources. The court found that nearly all the operative conduct occurred outside the U.S. and mere corporate presence does not draw a sufficient connection between the cause of action and domestic conduct. The ruling will likely be legally distinguishable from, and not directly support dismissal of [Coubaly, et al. v. Cargill, et al.](#) No. [21-00386](#), a first-of-its-kind [class action lawsuit](#) filed in U.S. District Court for D.C. on February 2, 2021 against Hershey Foods, Mars, Nestle, Cargill and multiple other U.S. cocoa purchasers, based upon nearly identical acts pursuant to a more specific federal statute, the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595 et. seq. The TVPRA was not made retroactive to the time of the Malian John Doe plaintiffs' enslavement. Also pending before the U.S. Custom and Border Protection Service (CBP) is a [petition](#) filed in February 2020 seeking to have CBP issue a Withhold and Release Order (WRO) to prevent companies importing cocoa products from Côte d'Ivoire that are "manufactured in any part with" child slave labor.



Additional Dairy Resources of Interest

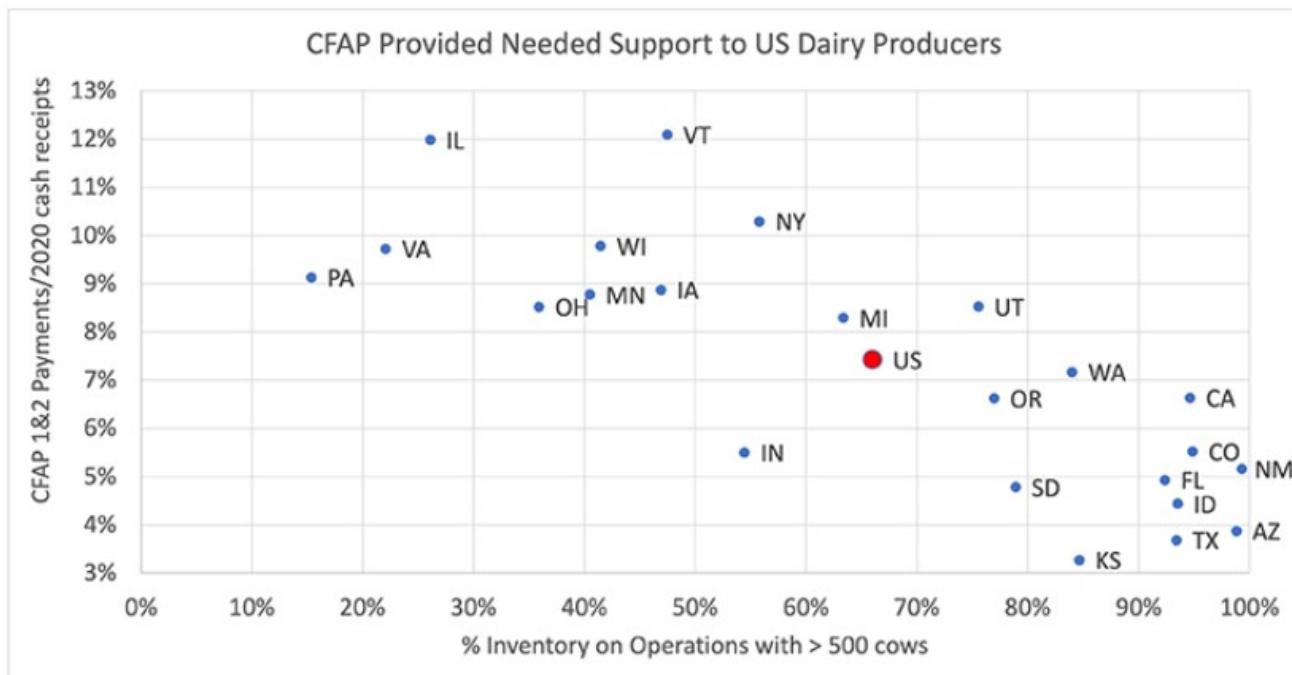
The Economic Impact of Agriculture in Pennsylvania: 2021 Update

PA Region Dairy Sales and Operations by State, 2017

State	Dairy Sales (\$M)	Rank in US (by Sales)	Number of Dairies	Avg Sales/ Operation
Pennsylvania	\$1,979.4 M	6	6,100	\$325,000
Delaware	\$16.8 M	46	30	\$558,000
Maryland	\$174.5 M	28	390	\$449,000
New Jersey	\$24.0 M	42	70	\$347,000
New York	\$2,528.3 M	3	4,000	\$635,000
Ohio	\$1,001.5 M	11	2,400	\$417,000
West Virginia	\$22.8 M	43	100	\$238,000
United States	\$36,724.4M		40,336	\$910,000

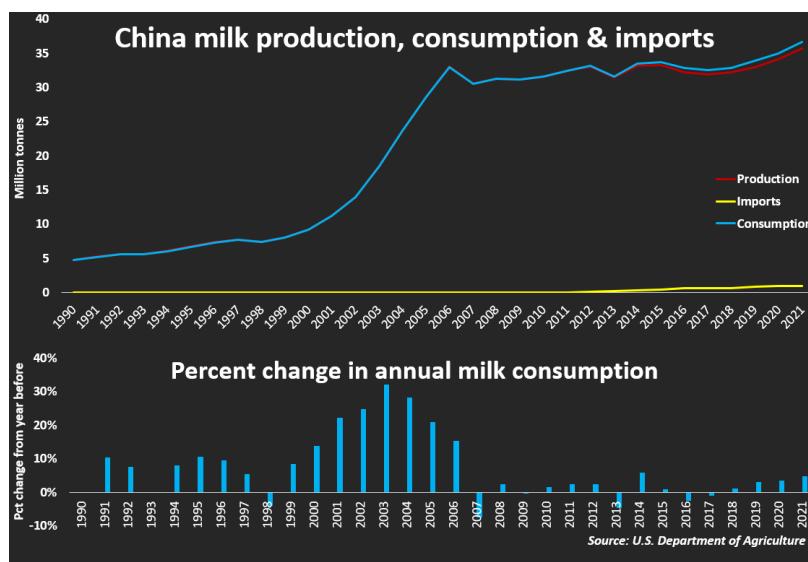
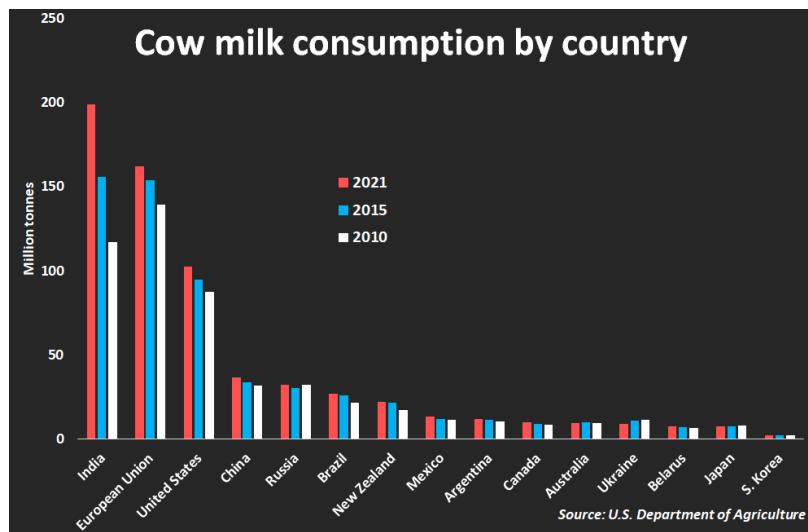
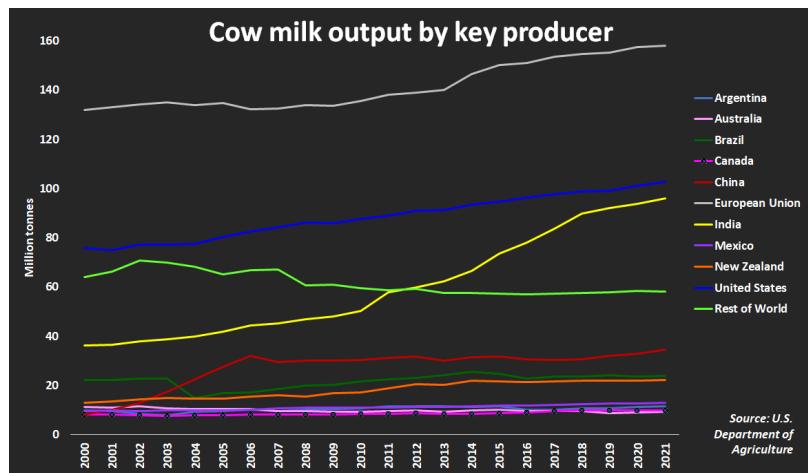
(Source: National Agriculture Statistics Service, 2017 Agricultural Census)

Hoard's Dairyman, [Did CFAP payments help dairy farmers in 2020?](#) (May 17, 2021)





Farm Policy News (U. of Illinois), [A Spike in Chinese Milk Demand](#)





USDA/ERS, [Price Spreads from Farm to Consumer](#)

Whole milk, one gallon ¹	Retail price	Farm value	Farm share
Year	Dollars	Percent	
2000	2.78	1.23	44
2001	2.88	1.46	50
2002	2.76	1.18	43
2003	2.76	1.22	44
2004	3.16	1.52	48
2005	3.19	1.47	46
2006	3.08	1.26	41
2007	3.50	1.81	52
2008	3.80	1.81	48
2009	3.11	1.24	40
2010	3.26	1.57	48
2011	3.57	1.90	53
2012	3.49	1.76	50
2013	3.46	1.88	54
2014	3.69	2.26	61
2015	3.42	1.65	48
2016	3.20	1.51	47
2017	3.23	1.65	51
2018	2.90	1.51	52
2019	3.04	1.69	56
2020	3.32	1.70	51

¹Estimates of farm value are based on minimum prices reported by USDA, Agricultural Marketing Service for Class I products. They do not account for over-order payments.

Sources: USDA, Economic Research Service calculations using data on retail prices from U.S. Department of Labor, Bureau of Labor Statistics, and data on farm-gate prices published by USDA agencies.

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