



Quarterly Dairy Legal Update: July–September of 2021

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

1. PMMB-Related Actions

Pennsylvania Milk Marketing Board Enters Consent Order Against Upstate Niagara Cooperative for TEFAP Fluid Milk Sales Below Pennsylvania Minimum Wholesale Price

On August 11, 2021, the Pennsylvania Milk Marketing Board (PMMB) [voted](#) to accept a [proposed consent order](#) with Upstate Niagara Cooperative (Upstate) acknowledging Upstate's below Pennsylvania minimum price sales from its northern Pennsylvania plant, formerly Schneider Valley Farms, in violation of Pennsylvania's Milk Marketing Law and consenting to Upstate's citation settlement payment of \$36,240. In May 2021, Upstate was awarded USDA contracts to supply fluid milk for The Emergency Food Assistance Program (TEFAP) based on bids below PMMB minimum prices. According to PMMB's [Sunshine Meeting minutes](#), PMMB will continue monitoring bid solicitations for compliance. On August 23, 2021, PMMB Secretary Carol Hardbarger [published](#) an account of the incident and other related facts and comments in *Lancaster Farming*.

Pennsylvania Milk Marketing Board Issues Bulletin Clarifying Enforcement of Minimum Prices in USDA Milk Purchase

On September 8, 2021, the Pennsylvania Milk Marketing Board (PMMB) issued [Bulletin 1597](#), titled "Wholesale Sales to the United States Department of Agriculture, Minimum Price Enforcement Policy." This bulletin was issued in response to a recent incident where a Pennsylvania sale to the U.S. Department of Agriculture (USDA) for The Emergency Food Assistance Program (TEFAP) was made by a Pennsylvania-licensed dealer at lower than PMMB-established minimum prices.

Pennsylvania Milk Marketing Board Issues \$1.00 Over-Order Premium

On September 22, 2021, the Pennsylvania Milk Marketing Board (PMMB) issued [Official General Order No. A-1012](#), continuing the current \$1.00 per hundredweight over-order premium (OOP) for all Class I milk produced, processed, and sold in Pennsylvania for the next six months, effective October 1, 2021, through March 31, 2022. The over-order premium, which is set in 6-month intervals, has remained \$1 since April 2019.



2. USDA-Related Actions

Small Milk Distributing Plants Petition to be FMMO-Exempt

On July 19, 2021, a group of small milk distributing plants filed a [petition](#) with USDA to exempt all Class I handlers with monthly route distribution sales below three (3) million pounds per month from pooling obligations under Federal Milk Marketing Orders. Current FMMO regulations require Class I distributing plants with monthly route distribution sales above 150,000 pounds to participate in FMMO pools. A similar exemption was approved in 2010 for producer-handlers with sales of under three (3) million pounds per month. The justification stated is the negative impact on small Class I handlers of recent market conditions (negative Producer Price Differentials) in the form of increased pool obligations and constrained supply availability. No action on the petition has been announced by USDA.

The U.S. Department of Agriculture Announces Pandemic Market Volatility Assistance Program for Dairy Producers

On August 19, 2021, the U.S. Department of Agriculture [announced](#) the [Pandemic Market Volatility Assistance Program](#). The program will initially distribute \$350 million in dairy producer lost revenue reimbursement suffered in July-December 2020 due to: (a) dairy market and pricing abnormalities; (b) the unintended consequence of large negative Class I producer price differential calculations from a change in price formula made via the 2018 Farm Bill; and (c) precipitous Class I and Class II federal pool revenue shortfalls under existing Federal Milk Marketing Orders (FMMO). USDA stated that the program in its entirety will ultimately provide over \$2 billion for dairy industry pandemic relief and will be administered under the umbrella of USDA-Agricultural Marketing Service's [Dairy Program](#). The initial eligible reimbursement will be for 80 percent of the revenue difference per month (based on annual production) on volume up to 5 million pounds. The payment rate will vary by FMMO based on the actual losses on pooled milk. USDA will make payments through agreements with independent handlers and cooperatives, who will be reimbursed for administrative costs and will distribute the monies on the same basis as July-December 2020 producer payments were made. USDA will communicate with eligible handlers and cooperatives on participation terms and will distribute payments within 60 days of entering into agreement. Producer payments must be made in 30 days thereafter.

The U.S. Department of Agriculture (USDA) Announces \$400 Million Dairy Donation Program Details

On September 1, 2021, the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) [published](#) in the Federal Register a final interim rule providing details of the \$400 million [Dairy Donation Program](#) (DDP). Under the program, dairy cooperatives and processors who partner with the charitable food system for milk and dairy product donations or discounting may apply for processing, transportation, and other cost reimbursements. Due to the availability of reimbursement, tax deductibility of any amounts is uncertain. The rule became effective on September 2, 2021, and will expire within two years unless extended.

3. U.S. Regional Dairy Issues

California Dairy Producers' Referendum Fails to Terminate Quota System

On July 2, 2021, the California Department of Food and Agriculture (CDFA) [released](#) the results of the California Market Milk Producers' referendum vote on whether to eliminate the state's Quota Implementation Plan (QIP) effective March 1, 2025. 733 of the 933, or 78.56% of the eligible producers voted in favor of the referendum, meeting the 51% participation requirement. Elimination of the QIP required an affirmative vote from either 65% of the voters who produce 51% of the total milk or 51% of the voters who produce 65% of the total milk. However, only 49.25% of the voters



who produced 54.47% of the total milk voted to eliminate the QIP, thus falling short of the needed votes to pass the referendum. California's quota system, which collects an assessment on Class I sales and distributes it to quota purchasers, will remain in place and be administered as it has since Federal Milk Marketing Order No. 51 was implemented in 2018.

Danone Terminates Horizon Organic Producers

On August 25, 2021, Maine Governor Janet Mills and its Department of Agriculture, Conservation, and Forestry (DACF) [announced](#) that it is researching ways to assist fourteen (14) Maine organic dairy producers that received termination letters from Danone, owner of Horizon Organic, effective August 2022. According to the announcement, Danone has also terminated an unspecified number of producers in New Hampshire, Vermont, and New York. Unconfirmed additional information, including alleged statements of Danone about its actions taken regarding 89 existing dairy producers in multiple New England states, can be read [here](#) on the website of an organization called Northeast Organic Dairy Producers Alliance. Caution is advised regarding this information unless confirmed by a primary source such as Danone or a government agency.

4. Dairy Labeling Issues

Federal Court Rules Plant-Based Company May Use "Butter," Products Not Misleading

On August 10, 2021, the U.S. District Court for the Northern District of California [issued](#) an order granting summary judgment in favor of plant-based food producer Miyoko's Kitchen and determining that the state of California may not regulate the company's use of the terms "butter," "lactose free," "cruelty free," and "revolutionizing dairy with plants." *Miyoko's Kitchen v. Ross*, No. 3:20-cv-893. Miyoko's [filed](#) the lawsuit in February 2020 after receiving a [letter](#) from California's Department of Food and Agriculture (CDFA) ordering the company to remove the terms from its "Cultured Vegan Plant Butter" label and take down pictures of "animal agriculture" from its website. CDFA claimed that the words and images were misleading and that the dairy-free, plant-based product was misbranded because 21 U.S. Code § 321a, enacted in 1923, defines "butter" as a product "made exclusively from milk or cream, or both, with or without common salt ... and containing not less than 80 per centum by weight of milk fat." The court found that the statutory definition "alone cannot doom commercial speech" and rejected California's argument that the age of the statute bears heavily on consumers' understanding of "butter," stating "[q]uite simply, language evolves."

5. International Issues

The European Union Postpones Dairy Export Health Certificate Deadline until January 2022

On August 10, 2021, the European Commission entered [Implementing Regulation \(EU\) 2021/1329](#), which extends the deadline by which U.S. dairy product imports must be accompanied by health certificates from August 21, 2021, to January 15, 2022. According to an [announcement](#) dated August 13, 2021, from the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS), AMS will issue the new health certificates through its [EU Dairy Export Certification Programs](#). AMS will require producers and "entities throughout the supply chain" to maintain records showing that milk products produced for European Union (EU) export comply with either [Grade "A" Pasteurized Milk Ordinance](#) or [USDA AMS Milk for Manufacturing Purposes](#) program requirements. AMS states that it will inspect existing records and certify milk sources during compliance audits for current EU Somatic Cell Count and Bacteria Standard Plate Count requirements.



Additional Dairy Resources of Interest

Dairy Management Inc. / National Milk Producers Federation, [Dairy Market Report](#) (July 2021)

DairyLivestream, [USMCA: Is Canada really limiting U.S. dairy sales?](#) (Jul. 1, 2021)

Hoard’s Dairyman, [How Milk Gets Sent North of the Border](#) (Jul. 5, 2021)

Guardian, Part I: [Small Farms Vanish Every Day in America’s Dairyland: ‘There Ain’t No Future in Dairy’](#) (Jul. 21, 2021)

Guardian, [Part II: ‘It’s Five Years Since a White Person Applied’: The Immigrant Workforce Milking America’s Cows](#) (Jul. 25, 2021)

Dairy Management Inc. / National Milk Producers Federation, [Dairy Market Report](#) (August 2021)

Progressive Dairy, [Exports Overtaking Fluid Products in Moving U.S. Milk Solids](#) (Aug. 5, 2021)

Robert Goodling, [Dairy Outlook: August 2021](#), Penn State Extension (Aug. 20, 2021)

Dairy Herd Management, [Dairy’s Future: Who Will the Top Dairy States be in the Next Decade?](#) (Aug. 31, 2021)

Dairy Management Inc. / National Milk Producers Federation, [Dairy Market Report](#) (September 2021)

Center for Dairy Excellence, [Dairy Industry Conference Call on Pandemic Market Volatility Program and DMC](#) (recording) (Sep. 14, 2021)

UCDavis CLEAR Center, [Pathway to Climate Neutrality for U.S. Beef and Dairy Cattle Production](#) (Sep. 14, 2021)

AFBP Market Intel, [A Guide to Class I Milk Formula Options](#) (Sep. 23, 2021)

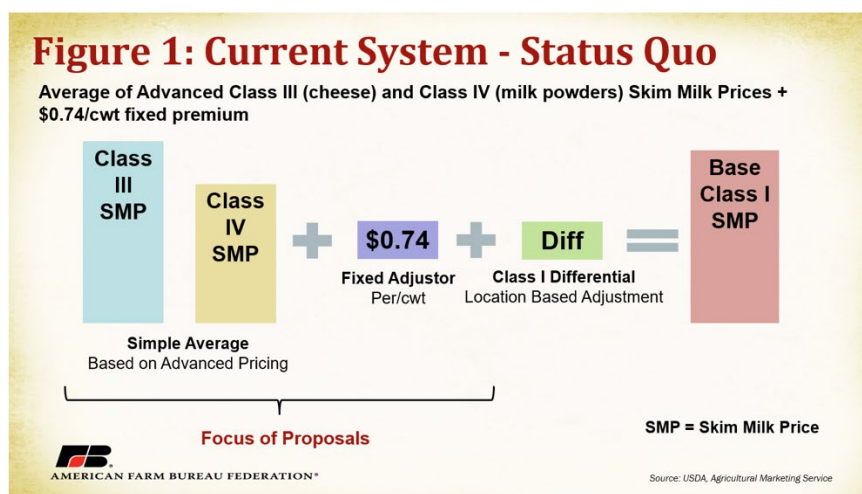
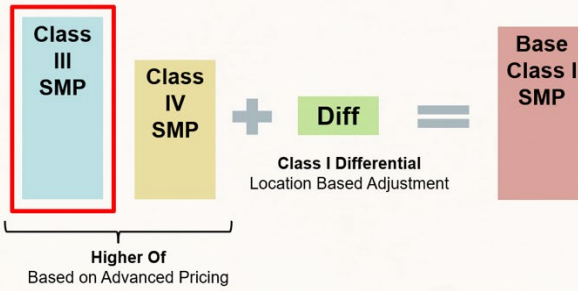




Figure 2: Return to the Higher-of

Higher of Advanced Class III (cheese) and Class IV (milk powders)

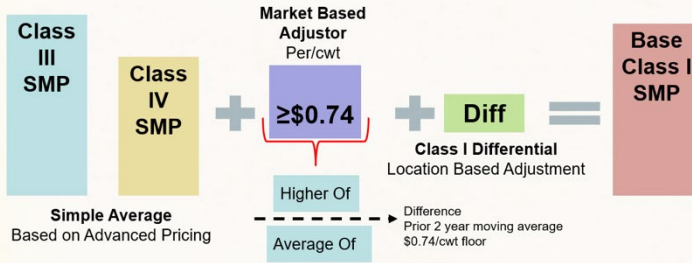


SMP = Skim Milk Price

Source: USDA, Agricultural Marketing Service

Figure 5: NMPF Option

Keep current system with flexible, 2-year market-based adjustor

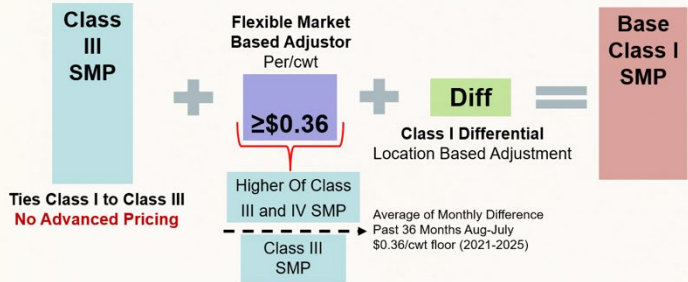


SMP = Skim Milk Price

Source: USDA, Agricultural Marketing Service

Figure 8: Class III Plus Option

Tie Class I to Class III + 3-year market-based adjustor | Remove advanced pricing



SMP = Skim Milk Price

Source: USDA, Agricultural Marketing Service



TABLE 1 Estimated total milk solid utilization, fluid products versus exports, January-May 2021		
Milk production ¹	(million pounds)	95,961
Total solids production ²	(percent)	13.00%
	(million pounds)	12,470
Fluid product sales ³	(million pounds)	18,736
Fluid sales portion of total milk production	(percent)	19.5%
Total solids used in fluid products		
Fluid product total solids content ⁴	(percent)	11.36%
Total solids used in fluid products	(million pounds)	2,129
Portion of total solids used in fluid products	(percent)	17.1%
Total solids exported ^{5, 6}		
	(metric tons)	983,803
	(million pounds)	2,169
Portion of total solids exported	(percent)	17.4%

¹Monthly USDA Milk Production reports

²Based on Federal Milk Marketing Order five-month averages of 4% butterfat and 9% nonfat solids.

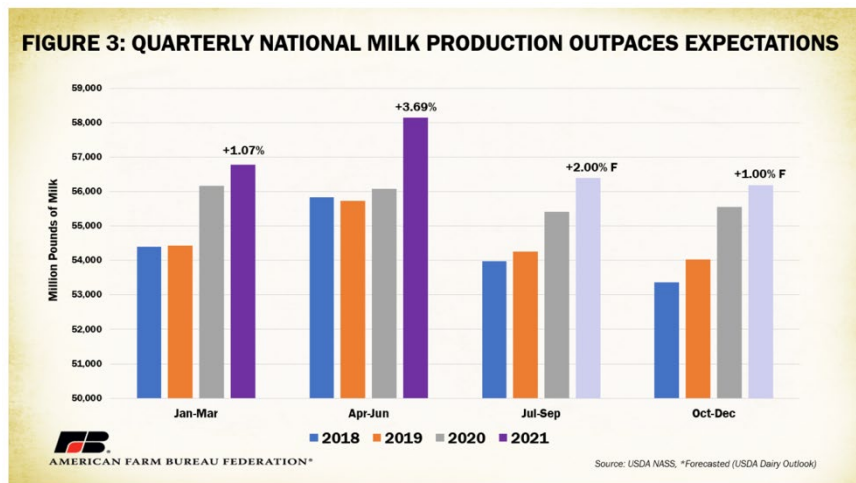
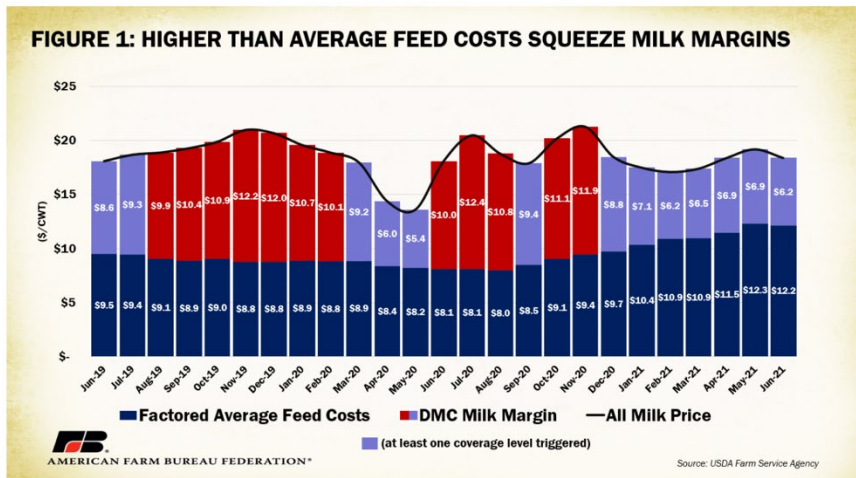
³Monthly USDA Ag Marketing Service packaged fluid sales reports

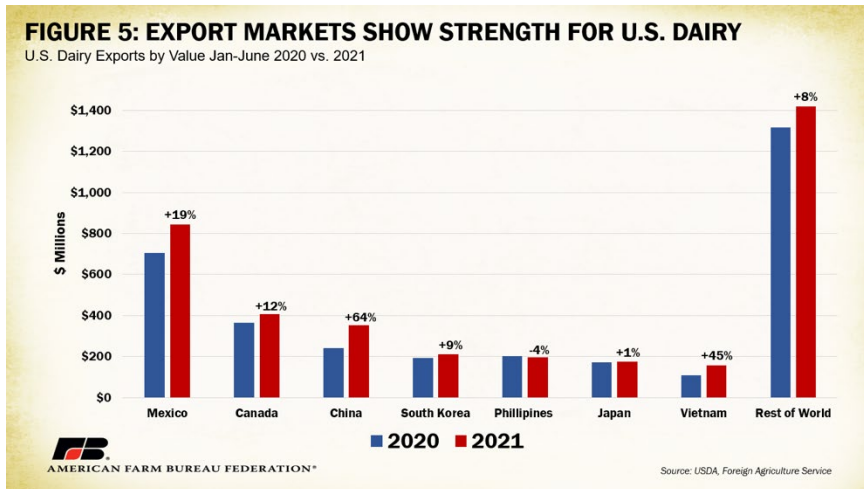
⁴Based on Federal Milk Marketing Order five-month averages of 2.2% butterfat and 9.16% nonfat solids

⁵Monthly U.S. Dairy Export Council reports

⁶Metric ton equals about 2,205 pounds

Dairy Margin Coverage Payments Triggered for Seventh Consecutive Month





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CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. 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.

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