

Quarterly Dairy Legal Update: April – June of 2022

Below is a listing of legal and regulatory developments impacting the dairy industry during the second calendar quarter of 2022. Additionally, recently published dairy resources of interest are included at the end of this update.

[Dairy and Dairy Products Law](#) – the Center’s Newest Virtual Resource Room

During the second quarter of 2022, the Penn State Center for Agricultural and Shale Law went live with a new Virtual Resource Room on its website at aglaw.psu.edu titled, “Dairy and Dairy Products Law.” No commodity is surrounded by as complex a regulatory structure in terms of production requirements, sanitation and food safety, and pricing controls and income support mechanisms, both at a federal level and through robust state regulatory involvement. This virtual resource room endeavors to collect a representative set of resources for legal and other researchers’ access, acknowledging that it is a selected set of resources organized in one chosen format.

1. Pennsylvania Milk Marketing Board (PMMB) Actions

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

On March 22, 2022, the Pennsylvania Milk Marketing Board (PMMB) issued [Official General Order No. A-1013](#), continuing the then-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 April 1, 2022, through September 30, 2022. The over-order premium, which is set in 6-month intervals, has remained at \$1.00 since April 2019.

Pennsylvania Milk Marketing Board Petitioned to Consider Alternatives to Current Over-Order Premium

On May 27, 2022, the Pennsylvania Department of Agriculture (PDA) filed a [petition](#) with the Pennsylvania Milk Marketing Board (PMMB) requesting a hearing on “alternatives to the over-order premium (OOP) as currently imposed and administered” to be held before the Board next considers the level and duration of the current OOP which expires on September 30, 2022. This petition acts as a follow-up to issues raised at the March 2, 2022, public hearing on the level and duration of the OOP during which testimony and evidence pertaining to alternatives to the current distribution and administration of the OOP was excluded from consideration by [Board Order](#).

Hearing Scheduled on “Existence” Of Pennsylvania’s Over-Order Premium

On July 11, 2022, the Pennsylvania Milk Marketing Board (PMMB) entered an [order](#) scheduling a hearing beginning on August 30, 2022, and continuing through and including September 1, 2022, if necessary, to adjudicate the May 27, 2022, petition filed by the Pennsylvania Department of Agriculture. The initial order was subsequently [amended](#) to change the location to the DEP Building on Elmerton Avenue, Harrisburg, PA. According to the Order, the PMMB will take evidence on “the existence, level and duration” of Pennsylvania’s current over-order premium.



2. U.S. Department of Agriculture (USDA)/Food & Drug Administration (FDA) Actions

USDA AMS Release Report Analyzing Milk Handled Through Federal Orders

On May 18, 2022, the United States Department of Agriculture, Agricultural Marketing Service, published a report titled "[Measures of Growth in Federal Orders](#)" which analyzed 2021 activity in Federal Milk Marketing Order markets, as follows: "Total Receipts of milk pooled under Federal Milk Marketing Orders totaled 136.8 billion pounds marketed by 23,292 dairy producers across all Federal orders in 2021. Total receipts were 0.7 percent lower than 2020. Pooled producer numbers were 6.5 percent lower than 2020. The average daily delivery of producer milk per pooled producer was 6.4 percent higher compared to 2020. In 2021, milk marketed through Federal orders accounted for 61 percent of all milk sold and 61 percent of fluid grade milk sold to U.S. plants and milk dealers."

OMB Reviewing Draft Guidance on Plant-Based Dairy Alternative Labeling

On March 31, 2022, the Office of Management and Budget (OMB) received a notice for review from the U.S. Food and Drug Administration (FDA) titled "[Labeling of Plant-Based Milk Alternatives and Voluntary Nutrient Statements; Draft Guidance for Industry](#)," which is now pending review with OMB. Although the text of the notice has not been published by FDA or OMB, in September 2018, FDA requested public comment ([83 FR 49103](#)) to instruct the agency's approach on plant-based product labeling and dairy food names. The request, which received nearly [12,000 comments](#), called for information on how consumers understand terms like "milk," "cultured milk," "yogurt," and "cheese," when used on plant-based product labels and how consumers use plant-based products with dairy names. The 2018 comment request also sought to discover whether consumers understand and are aware of differences in the "basic nature, characteristics, ingredients, and nutritional content" of dairy products and like-named plant-based products. FDA stated that the draft guidance is one of a [series of actions of FDA](#) over the past four years to further regulate standards of identity and plant-based labeling. OMB lists [six completed stakeholder meetings](#) regarding FDA's submitted draft guidance: June 16- Earthjustice; June 13- VanScoyoc Associates; June 1- VanScoyoc Associates; May 23-The Good Food Institute; May 16- Watson Green, LLC (on behalf of NMPF); May 5-Plant Based Foods Association.

3. National Dairy Stakeholders' Actions & Issues

Federal Court Affirms Denial of Interstate Raw Butter Sales Petition

On June 10, 2022, the District of Columbia (D.C.) U.S. Circuit Court of Appeals issued an [opinion](#) affirming the 2020 decision of the lower federal court and the U.S. Food and Drug Administration (FDA) to deny a 2016 petition for rulemaking filed by California dairy producer Mark McAfee requesting FDA change the federal regulatory scheme to permit the interstate sale of butter manufactured from unpasteurized milk (raw butter). According to the opinion, in 1938 Congress codified the standard of identity for butter as "made exclusively from milk or cream, or both" and that "[n]o [other] . . . standard of identity. . . shall be established for. . . butter. . ." 21 U.S.C. § 321a and 341. The federal Public Health Service Act authorized the FDA in 1987 to ban the interstate distribution of "any milk or milk product" that has not been pasteurized. 21 C.F.R. § 1240.61. In 1992, FDA confirmed that "milk product" includes butter. 57 F.R. 343. McAfee's argument on appeal was that by imposing the pasteurization requirement on butter in 1987 it had impermissibly altered butter's 1938 Congressionally established standard of identity. The Circuit Court disagreed and noted that simply because the FDA cannot alter the standard of identity of butter does not mean it cannot regulate butter for other purposes, such as distribution, pursuant to the Public Health Service Act.

Comment Period Opens on 2025 Dietary Guidelines Scientific Questions

On April 15, 2022, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA) published a notice in the Federal Register requesting [comments](#), due May 16, 2022, in response to a list of [proposed scientific questions](#) that will guide the upcoming 2025-2030 edition of the Dietary Guidelines for Americans ([87 FR 22540](#)). The departments' notice, also announced by [HHS](#) and [USDA](#) (and authored by Asst. Sec. of Health Dr.



Rachel Levine), begins the five-step process to develop and publish 2025-2030 Dietary Guidelines. The departments' scientific questions build directly on the 2020 Dietary Guidelines Advisory Committee's [future directions](#) (published as part of the committee's the [Scientific Report of the 2020 Dietary Guidelines](#)). Among several recommendations, the future directions called for future departments to "investigat[e] the relationships between the consumption of sugar-sweetened beverages and juice during the complementary feeding period and obesity in childhood and other measures of growth, size, and body composition" because the systemic reviews used by the 2020 committee "identified limited evidence about intakes of sugar-sweetened beverages and juices and their relationship with growth, size, and body composition." One of the proposed scientific questions is "What is the relationship between beverage consumption (beverage patterns, dairy milk and milk alternatives, 100% juice, low- or no-calorie sweetened beverages, sugar-sweetened beverages, coffee, tea, water) and (1) growth, size, body composition, risk of overweight and obesity, and weight loss and maintenance? (2) risk of type 2 diabetes?"

4. Regional Dairy Actions & Issues

Lawsuit Claims Dairy Farmers of America and Select Milk Conspired to Suppress Member Payments

On April 4, 2022, six New Mexico dairy cooperative members filed a [complaint](#) in the U.S. District Court for the District of New Mexico against Dairy Farmers of America (DFA) and Select Milk Producers, Inc. (Select), alleging that the defendant dairy cooperatives conspired to depress members' raw milk price in violation of the Sherman Act ([15 U.S.C. § 1](#)). *Othart Dairy Farms, LLC v. Dairy Farmers Of America, Inc.*, No. [2:22-cv-00251](#). The plaintiffs claim that DFA and Select—who the plaintiffs state control at least 75% of the Southwest dairy market—have used their market share to suppress dairy prices by sharing and coordinating pricing information and decisions and by "selective[ly] . . . nonpooling" milk, which the plaintiffs claim "allow[s] the cooperatives as entities to market members' milk at higher prices without passing those increases on to farmers." The plaintiff dairy producers further claim that the monthly rates DFA and Select pay their respective members "are almost always within a few pennies of each other," which the plaintiffs state "would not be the case absent the conspiracy alleged herein." On May 31, 2022, all Defendants filed a Motion to Dismiss For Failure to State a Claim on which briefing has not been completed.

5. International Dairy Actions & Issues

U.S. Twice Rejects Canada's USMCA Dairy Tariff-Rate Quota Proposals

On May 5, 2022, U.S. Trade Representative Katherine Tai [met](#) with Canadian Minister of Trade Mary Ng in Ottawa and thereafter publicly announced, amongst other things, the "importance of Canada fully meeting its USMCA commitments, including its allocation of dairy tariff-rate quotas." This was the first meeting of the top trade officials from each country since the January 4, 2022, disclosure of the [December 20, 2021 USMCA Arbitration Panel Final Report](#) concluding, in response to U.S. allegations, that Canada breached Article 3.A.2.11(b) of the United States-Mexico-Canada Agreement (USMCA) by reserving dairy tariff-rate quotas exclusively for the use of Canadian dairy processors. This was also the first public statement by Tai that Canada's first attempt to satisfy U.S. demands to cure the breach, a March 1, 2022 [proposal of revised TRQs allocation and policy changes](#), had been formally rejected. [Congressional](#) representatives and the [National Milk Producers Federation and U.S. Dairy Export Council](#) have urged a public rejection. According to [media accounts](#), on May 14, 2022, after meeting with Canadian Agriculture Minister Marie-Claude Bibeau earlier that day, USDA Secretary Vilsack confirmed that the Canadian proposal had been rejected and again failed to include an allocation of TRQs to retailers. Further details have not been made public. Canada's TRQ application process proceeded. On May 25, 2022, Ng [stated](#), "Canada has met its obligations under CUSMA to ensure that our TRQ system is compliant. We respect the right of the United States to initiate the dispute resolution mechanism as part of the agreement." Canada's TRQ application process proceeded. On May 12, 2022, New Zealand filed an identical [request for consultation](#) alleging Canada has breached the Trans-Pacific Partnership (TPP) trade agreement by limiting its TRQs to processors' use.



Additional Dairy Resources of Interest

PSU Extension:

- [Dairy Revenue Protection - July 2022](#)
- [Dairy Revenue Protection—May 2022](#)
- [Dairy Sense: Do Not Leave Cash on the Table – Revisit Milk Components](#) (May 31, 2022).
- [Where Do You Get Your Farm's Antibiotics?](#) (May 31, 202).
- [Tracking Milk Prices and Feed Costs](#) (May 12, 2022).
- [Dairy Outlook: April 2022](#)

Dairy Management Inc. (DMI) & National Milk Producers Federation (NMPF)

- [Dairy Market Reports](#)
 - [June 2022](#)
 - [May 2022](#)
 - [April 2022](#)

National Milk Producers Federation (NMPF):

- [Regulatory Register Vol. 24, Issue 2, Spring 2022](#)
- [2021 NMPF Annual Report](#)
- News for Dairy Co-ops:
 - [Vol. 79, Issue 4, April 5, 2022](#)
 - [Vol. 79, Issue 5, May 13, 2022](#)
 - [Vol. 79, Issue 6, June 2, 2022](#)

Hoard's Dairyman

- [Does fluid milk warrant a price premium?](#) Christopher Wolf (July 13, 2022)
- [Just 61 percent of milk moved through orders](#), Corey Geiger (June 13, 2022)
 - Analysis of USDA AMS' [Measures of Growth in Federal Orders](#) (May 18, 2022)
- Webinar: [Dairy's path to climate neutrality](#) (June 13, 2022)
- [DairyLivestream July 20, 2022: Where will interest rates and inflation take dairy?](#) with Tanner Ehmke (Lead Economist for dairy and specialty crops, CoBank), Skip Hardie (Owner, Walnut Ridge Dairy and Hardie Farms), Nate Donnay (Director of Dairy Market Insight, StoneX Group), and Andy Novakovic
- [DairyLivestream June 15, 2022: Let's talk Federal Order fixes](#) with Roger Cryan (Chief Economist, American Farm Bureau Federation), Mike Brown (Dairy Supply Chain Director, Kroger Co.), Mark Stephenson, and Andy Novakovic
- [DairyLivestream May 18, 2022: Can dairy product exports power through port problems?](#) with Andrew Hwang (Manager of Business Development and International Marketing, Port of Oakland), Gabriel Sevilla (Vice President of Sales and Marketing, Proliant Inc.), Shawna Morris (Senior Vice President of Trade Policy, National Milk Producers Federation), and Mark Stephenson
- [DairyLivestream April 27, 2022: Will dairy demand hold throughout 2022?](#) with Ted Jacoby (CEO, T.C. Jacoby & Company), Mike Brown (Dairy Supply Chain Director, Kroger Co.), Ted Galloway (Vice President, Galloway Company), and Andy Novakovic
- [DairyLivestream April 6, 2022: Will high milk prices cover the growing expenses?](#) with Ben Laine (Vice President, RaboResearch-Dairy), Sam Miller (Managing Director of Agricultural Banking, BMO Harris Bank), Steve Martin (founder, NDMCmilk), and Chris Wolf

Dairy Stream, [Future of your milk check: Edge unveils milk pricing reform priorities](#) (July 1, 2022).

Edge Dairy Farmer Cooperative, [Milk Pricing Reform Priorities](#) (June 2022).

Progressive Dairy, [Edge proposes two-track path toward dairy reforms](#) (June 28, 2022).



Southern Ag Today, [The Economic Costs of Canadian Dairy Quota Restrictions Under USMCA](#), K. Aleks Schaefer, (June 16, 2022)

U.S. House Ag. Comm. Hearing, [A 2022 Review of the Farm Bill: Dairy Provisions](#) (recorded June 22, 2022)

[SDA Awards \\$80 Million, Makes Another \\$22.9 Million Available to Support Dairy Initiatives](#) (June 20, 2022)

[87 FR 35465 Proposed Rule: "National Dairy Promotion and Research Board Reapportionment; Re-Opening of Comment Period"](#) (June 10, 2022)

Nat'l Ag. Law Ctr., [What is an Organic Dairy Cow?](#), Jana Caracciolo (Apr. 26, 2022)

[Agriculture Secretary Highlights \\$1.75 Million Support for New, PA Dairy-Based Infant Nutrition Operation Creating 50 Jobs](#) (Apr. 28, 2022)

Hoard's Dairyman, [Volatility a Factor in Class I Mover Debate](#), Scott Brown (Apr. 11, 2022).

Edge Dairy Farmer Cooperative, [Study on Dairy Cheese and Plant-based Foods That Mimic Cheese – Project Report](#) (Mar. 2022)

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