



## 2022 Annual Dairy Legal Update

Below is a listing of legal and regulatory developments impacting the dairy industry during the 2022 calendar year.

### 1. Pennsylvania Milk Marketing Board (PMMB) Actions

#### **Pennsylvania Milk Marketing Board (PMMB) Continues Pennsylvania Order-Premium Despite Pennsylvania Farm Bureau Opposition**

On March 2, 2022, the Pennsylvania Milk Marketing Board (PMMB) [held](#) its regularly scheduled twice-annual [public hearing](#) to receive evidence on the level and duration of its Class I Over-Order Premium (OOP). This was the first such occasion since the Pennsylvania Farm Bureau (PFB) adopted a recommendation that the OOP be eliminated (along with the minimum wholesale and minimum retail price) in its [2022 Policy Book](#). The PMMB received pre-submitted and live testimony from various stakeholders with overt criticism and opposition to the continuation of various aspects of the OOP and its administration, as well as entertaining and disposing of [motions to strike](#) some testimony as beyond the scope of a hearing to determine the amount of an OOP and instead addressing aspects of its continued administration. Most notably, this included testimony from PFB [Executive Committee and Board Member John Painter II](#), that: (a) "PFB believes that, while the over-order premium does benefit some dairy farmers, its time has passed . . .;" (b) " . . . an over-order premium system that cannot be meaningfully changed without inviting a swift rebuke by way of the federal Commerce Clause is not a system capable of structural fairness and equity . . .;" and (c) " . . . [PFB] therefore requests that the upcoming over-order premium be set at \$0.00 indefinitely for all milk marketing areas." Ultimately, on March 22, 2022, the PMMB [issued](#) Official General Order No. A-1013, 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 (6) months, effective April 1, 2022, until September 30, 2022, and stated therein, "While there may be issues with the over-order premium, we are more persuaded by the testimony regarding the positive impact of the over-order premium than we are by testimony regarding issues with the over-order premium." The \$1 over-order premium has remained the same since April 2019.

#### **Pennsylvania Milk Marketing Board (PMMB) 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 (PMMB) 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](#).

### **Pennsylvania Milk Marketing Board (PMMB) Conducts Hearing and Issues Adjudication on Pennsylvania Department of Agriculture’s Petition to Reconsider “Existence, Level, and Duration” of Pennsylvania Over-Order Premium**

On July 11, 2022, the Pennsylvania Milk Marketing Board (PMMB) entered an [order](#) scheduling a hearing commencing on August 30, 2022, to take evidence on the May 27, 2022 petition filed by the Pennsylvania Department of Agriculture on “the existence, level and duration” of Pennsylvania’s current over-order premium (OOP). The hearing concluded on August 30 and on September 21, 2022, the PMMB entered a new 90-day over-order premium (OOP) order ([OGO No. A-1014](#)), as opposed to its customary 180-day order. The order continues Pennsylvania’s current OOP at \$1.00 per hundredweight for the period October 1, 2022, through December 31, 2022. The current Pennsylvania OOP mandates a producer price premium over the federal order price through a calculation intended to approximate the volume a producers’ milk utilized as Class I fluid milk. The hearing aired recurring complaints that (1) the current OOP calculation allows retailers and wholesalers to receive a mandated minimum wholesale and retail price, respectively, on higher volumes of milk than the volumes on which they are required to pay the over-order premium, or its equivalent as a pass-through, in the mandated producer and minimum wholesale price; and (2) the OOP is only paid to producers deemed to be contributing to in-state Class I fluid milk sales. The PMMB’s written decision states, “Section 801 of the Law requires the Board to establish minimum producer prices that allow producers to recover their cost of production plus a reasonable profit ... We believe that the current over-order premium system should be examined and modified, as and if necessary, to ensure all Pennsylvania producers receive a minimum producer price that approaches section 801’s requirements.” The Board went on to explain that legislative changes would be needed to allow it to act to achieve that goal, stating that it “believes House Bill 224 would provide additional tools ... to implement Section 801’s minimum producer price requirement in a way that would better align minimum retail prices with the amount received by producers ... The specific method or methods developed may take any number of forms, but we first need the tools and framework House Bill 224 would provide to begin to develop those specifics.” Barring any further action by the Pennsylvania General Assembly and/or the PMMB, Pennsylvania’s current OOP will cease on January 1, 2023.

### **Pennsylvania State Senators Oppose Expanding Milk Marketing Board Authority, Demand Continued Over-Order Premium**

On October 26, 2022, Pennsylvania State Senators Elder Vogel, Jr. and Judith Schwank sent a [letter](#) to the Pennsylvania Milk Marketing Board (PMMB) “implor[ing]” the PMMB to extend beyond December 31, 2022, the expiration date of its state-mandated “over order” producer price premium (OOP), currently \$1.00 per hundredweight over the federal order price for fluid milk volumes “produced, processed and sold at wholesale” in Pennsylvania. On September 21, 2022, the PMMB ordered the December 31, 2022, expiration date in [OGO No. A-1014](#) as part of the adjudication of a petition to reexamine OOP administration. The PMMB historically sets the OOP in six-month increments, but this order only carries a 90-day term. The expiration date is part of PMMB’s overall approach to changing the OOP’s administration, which includes gaining additional statutory authority through Senate passage of HB 224 by the simultaneous expiration date of the Pennsylvania General Assembly’s 2021-2022 Legislative Session. Senators Vogel and Schwank are the majority and minority chairs of the Pennsylvania Senate Agriculture and Rural Affairs Committee where HB 224 has been pending since April 2022 (following passage by a 198-0 vote in the Pennsylvania House). The letter articulates various reasons for Senators Vogel and Schwank’s opposition to HB 224 and states “it is imperative that this premium be maintained until further examination and consideration may be made” during the 2023-2024 Legislative Session commencing after January 1, 2023. On November 2, 2022, in response to a petition filed by Pennsylvania Grange, the PMMB entered an [order](#) scheduling a hearing “concerning the level and duration” of the OOP for December 7, 2022.



## **Pennsylvania Milk Marketing Board (PMMB) Continues \$1 Over-Order Premium Until June 30, 2023**

As the result of a hearing conducted on December 7, 2022 on a petition by Pennsylvania State Grange to extend the expiration date of Pennsylvania's Over Order Premium, on December 14, 2022, the Pennsylvania Milk Marketing Board (PMMB) [published](#) General Order No. A-1015, extending the expiration of its over-order premium (OOP) of \$1.00 per hundredweight for fluid milk produced, processed, and sold at wholesale in Pennsylvania from January 1, 2023, through and including June 30, 2023.

## **2. U.S. Department of Agriculture (USDA) Actions**

### **The U.S. Department of Agriculture (USDA) Publishes Study on Cost of Processing Cheese, Whey, Butter, and Nonfat Dry Milk**

On February 14, 2022, the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) [announced](#) the release of a study titled "[Cost of Processing in Cheese, Whey, Butter and Nonfat Dry Milk Plants.](#)" The study may assist dairy stakeholder in the analysis and evaluation the so-called "make allowance" calculations incorporated into FMMO pricing. Using data from fifty-seven (57) plants across the United States – eight (8) plants from the Northeast, twenty-five (25) plants from the Midwest, and twenty-four (24) plants from the western United States – about 80% of which were cooperatively owned and operated, the study sought to answer the following questions: 1) what is included in the cost of processing, or the costs of "transforming milk and other dairy ingredients into the dairy products of interest," and 2) how are costs allocated across the products produced. The study focused only on processing costs and did not consider the cost of the milk and dairy ingredients or the value of the final products or try to estimate the profits of the plants. The researchers collected data on ten (10) cheese plants, eight (8) whey plants, twelve (12) butter plants, and twenty-seven (27) nonfat dry milk plants. To control for the differences in processing complexity, the researchers assigned product transformation values to the various products ranging from one (1) to ten (10), with milk and wet whey having a value of one (1), butter a value of six (6), cheese a value of eight (8), and nonfat milk powder a value of nine (9). The study found that the cost of processing for nonfat dry milk ranged from \$0.21-0.43 per pound, butter from \$0.11-0.23 per pound, cheddar cheese from \$0.14-0.38 per pound, and dry whey \$0.19-0.35 per pound.

### **The Office of Management and Budget (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.

### **The U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) Releases 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.”

### **The U.S. Department of Agriculture (USDA) Announces \$300 Million for New Organic Transition Initiative, Including \$100 Million in Specified Markets, Such as Dairy**

On August 22, 2022, the U.S. Department of Agriculture (USDA) announced \$300 million for a new [Organic Transition Initiative](#) to provide mentoring, direct assistance, and supply chain support for farmers transitioning to organic production. As a prerequisite to organic certification, lands or animals generating organic-certified commodities must be free from prohibited inputs for 36 months, during which time “farmers face challenging technical, cultural, and market shifts,” said USDA Secretary Tom Vilsack. The USDA will provide \$100 million in funds to support organic supply chains in specified markets – including organic grain and feed– to improve organic capacity and infrastructure, market access, and supply organic ingredients.

### **The U.S. Department of Agriculture (USDA) Announces \$2.8 Billion for 70 Climate-Smart Partnership Projects, Including Project from the Dairy Farmers of America, Inc.**

On September 14, 2022, the U.S. Department of Agriculture (USDA) [announced](#) \$2.8 billion for [70 selected projects](#), ranging from \$5 million to \$100 million, from the first wave of funding under the [Partnerships for Climate-Smart Commodities program](#). USDA states that it will announce projects from the second funding pool later this year. Although USDA initially allotted \$1 billion for the program, the agency states that the strength of the first-round proposals—more than 450 projects submitted by more than 350 entities from every state as well as tribal lands, D.C., and Puerto Rico—led the agency to increase the funding. Many of these projects involve dairy.

### **Enrollment Begins for 2023 Dairy Margin Coverage**

On October 17, 2022, the U.S. Department of Agriculture (USDA) Farm Service Agency (FSA) [announced](#) the opening of enrollment in the 2023 [Dairy Margin Coverage](#) (DMC) Program. FSA administers DMC as “a voluntary risk management program that offers protection to dairy producers when the difference between the all-milk price and the average feed price (the margin) falls below a certain dollar amount selected by the producer.” A variety of coverage levels are offered by the DMC, including that “catastrophic coverage” option free to producers and “buy-up” supplemental coverages. USDA’s Risk Management Agency (RMA) also offers traditional dairy insurance products, such as the [Dairy Revenue Protection](#) (DRP) and the [Livestock Gross Margin](#) (LGM), available through [private crop insurance agents](#).

### **The U.S. Department of Agriculture (USDA) Receives Petition from Dairy Cooperative Marketing Association to Amend Federal Milk Marketing Orders 5, 6, and 7**

On October 27, 2022, the U.S. Department of Agriculture’s (USDA) Agricultural Marketing Service (AMS) received a [Federal Milk Marketing Order \(FMMO\) Petition](#) from the Dairy Cooperative Marketing Association (DCMA) requesting a hearing to amend FMMOs 5, 6, and 7, and listing five proposed amendments. According to the submitted materials, the proposed amendments would “update the cost reimbursement factors in the current transportation credit balancing funds in Orders 5 and 7” and “add Distributing Plant Delivery Credits through a Distributing Plant Delivery Credit Fund to be established in Orders 5, 6, and 7,” which would “reimburse costs of delivery to distributing plants from in-area farms and year-round supplying farms which currently are not eligible for reimbursement from the Transportation Credit Balancing Funds.” DCMA members and their corresponding FMMOs are as follows:

- Appalachian Dairy Farmers Cooperative (5)
- Cobblestone Milk Cooperative, Inc. (5 & 7)
- Cooperative Milk Producers Assoc. (5)
- Dairy Farmers of America, Inc. (5, 6, & 7)



- Lanco Dairy Farms Co-op (5 & 7)
- Lone Star Milk Producers, LC (5 & 7)
- Maryland and Virginia Milk Producers Cooperative Assoc., Inc. (5 & 7)
- Select Milk Producers Inc. (5 & 7)
- Southeast Milk, Inc. (5, 6, & 7)

### **2023 Dairy Margin Coverage Deadline Extended – January 31, 2023, Last Day to Enroll**

On December 8, 2022, the U.S. Department of Agriculture (USDA) [announced](#) an extension of the deadline to enroll in the Dairy Margin Coverage (DMC) program for the year 2023. The deadline has been extended to January 1, 2023. The DMC is a risk management program for dairy producers that provides protection when the all-milk price and average feed price drop below a set dollar amount.

## **3. National Dairy Stakeholders' Actions & Issues**

### **The International Dairy Foods Association (IDFA) Releases Working Paper on 'Modernizing US Milk Pricing'**

On January 25, 2022, the International Dairy Foods Association (IDFA) [announced](#) the publication of a new commissioned working paper titled '[Modernizing US Milk Pricing: An Exploration](#).' Written by Dr. Marin Bozic and Blimling & Associates, the paper describes challenges to current Class I fluid milk pricing system, opportunities and obstacles for dairy exports, and potential pricing models from other countries. According to the paper, the current pricing system, which incentivizes the sale of beverage-ready Class I fluid milk, is unsustainable as fluid milk sales decline and milk used for manufacturing increases. In addition, the paper found that, although multiple opportunities exist for increasing export demand, milk pricing in the United States, which does not easily accommodate long-term fixed prices for overseas buyers, is not as flexible as its EU and New Zealand competitors. The paper also notes that the milk regulations in other countries focus more on trade, sustainability, and information services, as opposed to the United States, which [a]mong major exporters ... is the only country that attempts to implement minimum price regulation."

### **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 impermissible 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?”

### **Center for Dairy Excellence Announced Grants for Pennsylvania Producers**

On August 31, 2022, the Center for Dairy Excellence [announced](#) three competitive grant opportunities for Pennsylvania dairy producers. The [Dairy Excellence Grant program](#), open September 1-30, 2022, matched recipient funds up to \$5,000 for improvement projects to increase cow comfort, milk production, and overall operation efficiency. The [Technical Assistance Grant program](#), open September 1 through October 15, 2022, provided fifteen (15) \$5,000 grants to producers in Pennsylvania, Maryland, Delaware, and New Jersey for marketing and branding consultation. The [Dairy Processing Grant program](#), open from September 1 through November 1, 2022, to Pennsylvania dairy processors receiving milk from at least two Pennsylvania producers will match recipient funds up to \$10,000 for processing expansions or improvements.

### **National Dairy FARM Program Opens Comment Survey on Animal Care Version 5 Standards**

On September 12, 2022, the National Dairy Farmers Assuring Responsible Management (FARM) Program [announced](#) the opening of a comment survey on revisions to its [Animal Care Version 5 Standards](#), which FARM revises every three years. The FARM Program provides standards and accountability measures to demonstrate dairy farmers’ commitment to provide best practices in animal care and dairy product production. The proposed standards will be reviewed by the FARM Animal Care Task Force and the National Milk Producers Federation (NMPF), Animal Health and Well-Being Committee. The NMPF Board of Directors provides the final approval for the revised standards. Dairy industry stakeholders may [submit comments](#) on the standards until 5:00 PM EST on October 28, 2022. Any revised standards are proposed to become effective July 1, 2024, through June 30, 2027.

## **4. Regional Dairy Actions & Issues**

### **Stonyfield CEO Establishes “Northeast Organic Family Farm Partnership” Program**

In January 2022, Gary Hirshberg, Stonyfield co-founder and CEO, [launched](#) the Northeast Organic Family Farm Partnership in response to Danone’s August 2021 organic producer contract terminations. The endeavor aims to establish a partnership between Northeast organic dairy farmers and processors, consumers, grocers, restaurants, and institutional food service sites to generate demand for products from the region’s family operated organic dairy farms. The partnership encourages entities and individuals to pledge to purchase at least one quarter of their weekly dairy products from [brand partners](#) using Northeast organic milk.

### **New Jersey Law Directs State Department of Agriculture to Reimburse Paid Annual Premiums to Dairy Farmers**

On January 18, 2022, New Jersey Governor Phil Murphy [signed into law](#) S.3465, an Act appropriating \$125,000 to the state Department of Agriculture to reimburse enrolled New Jersey dairy farmers their annual premiums paid for coverage under the federal Dairy Margin Coverage Program. More specifically, the Act provides that the reimbursement would cover “up to the amount of the premium for coverage for the first 5,000,000 pounds of annual milk production per farm, the first tier of coverage under the program.” The Department of Agriculture is responsible for developing rules and procedures for disbursement of funds. The Act provisions became effective on the date of enactment.



### **North Dakota Waives Hours of Service for Milk Haulers Due to Driver Shortage**

On January 25, 2022, North Dakota Governor Doug Burgum [issued](#) Executive Order (EO) 2022-02, waiving hours of service requirements for truck drivers delivering milk in North Dakota under Federal Motor Carrier Safety Administration (FMCSA) Regulations and North Dakota state law. According to a [corresponding announcement](#), the governor issued the order in response to a North Dakota milk distributor's closure due to a lack of certified drivers. Additionally, the administration states that drivers with an expired commercial driver's license (CDL) are not required to meet new federal Entry Level Driving Training qualifications to renew their licenses and that both Governor Burgum and North Dakota Agriculture Commissioner Doug Goehring intend to send a letter encouraging those with expired CDLs to renew their licenses. Under the order, effective for thirty (30) days and drivers must comply with all other state and federal operational requirements and North Dakota Milk Marketing Board milk hauler regulations.

### **Organic Valley Offers Letters of Intent to 80 Northeast Organic Dairy Producers**

On March 8, 2022, Vermont Agency of Agriculture, Food and Markets (VAAF) [announced](#) that Wisconsin-based CROPP Cooperative (d/b/a *Organic Valley*) has issued letters of intent to eighty (80) Northeast organic dairy farms offering "a market for their milk." Organic Valley's actions follow the Danone (d/b/a *Horizon Organic*) August 2021 announcement that it would terminate over one hundred (100) Northeast organic dairy farms as raw milk suppliers. According to Organic Valley, ten Northeast organic dairy producers had already become members of Organic Valley at the time of the announcement.

### **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.

### **Dairy Farmers of America, Inc. Sued for Alleged "Monopsony" in Northeast Dairy**

On July 29, 2022, dairy producer S.R.J.F, Inc. filed a [federal class action lawsuit](#) against Dairy Farmers of America, Inc. (DFA) in the United States District Court for the District of Vermont alleging that dairy farmer cooperative DFA attempted to, or actually created, a monopsony in the CASL Pub. No. LU22-014 (October 2022) 3 market for raw Grade A milk in the Northeast suppressing competition in violation of antitrust law. *S.R.J.F., Inc. v. Dairy Farmers of America, Inc.*, Case # 2:22-cv-147. A monopsony is a market in which there is only one buyer for a product. DFA in recent years has greatly expanded its dairy processing operations, most notably in acquiring and operating processing assets of Dean Foods. Using publicly available data, Plaintiffs highlighted a divergence in 2020 between DFA's average sales price and the average price DFA paid to its members. Additionally, Plaintiffs allege that DFA reduced competing dairy farms and cooperatives' access to raw milk processors, thus reducing the number of potential buyers for raw Grade A milk in the Northeast region. The putative class in this case includes any dairy farmers who produced and sold raw Grade A milk within the Northeastern United States, as defined by DFA's Northeast Area, any time from May 10, 2016, to the present. DFA's Northeast Area region includes Vermont,



New Hampshire, Maine, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Maryland, Delaware, and most of Pennsylvania.

### **Additional Farms Join Organic Valley Cooperative, Organic Dairy Organizations Request USDA Assistance**

On September 20, 2022, Organic Valley Cooperative [announced](#) the addition of “nearly a dozen” farms who lost their organic milk markets in August 2022. According to a [media account](#) of a statement from Travis Forgues, Executive Vice President of Membership for Organic Valley/CROPP Cooperative, the twelve producers were dropped by [Amish Country Farms](#) of Totowa, New Jersey. This addition follows Organic Valley’s [August 3, 2022, announcement](#) of fifty (50) new cooperative members and fifteen (15) additional new members earlier in 2022, all stemming from the August 2021 announcement by Horizon Organic, owner of Danone, of its termination of the organic dairy producers. Additionally, on September 13, 2022, the Northeast Organic Dairy Producers Alliance and several other organic dairy organizations sent a [letter](#) to Scott Marlow, U.S. Department of Agriculture (USDA) Farm Service Agency (FSA) Deputy Administrator for Farm Programs, and Zach Ducheneaux, FSA Administrator, requesting emergency payments to offset the cost of production continuing in excess of producer prices in the organic dairy sector.

### **Pennsylvania Enacts \$120 Million in Tax Credits for New Dairy Processing Facilities**

On November 3, 2022, Pennsylvania Governor Tom Wolf signed into law [H.B. 1059](#), amending the Pennsylvania Tax Code to, among other actions, provide \$15 million per year for eight years – up to \$120 million – in first come, first-served tax credits for the operation of a new milk processing facility built with at least a \$500 million capital investment and subject to several other conditions, including creating “1,200 new jobs and permanent jobs.” The credits may not be applied to receive a refund, or carried back or forward, but may be assigned or sold. After the facility begins operations, the company may claim the tax credit at the rate of five cents per gallon of milk “purchased and produced from sources exclusively within” Pennsylvania.

### **California Dairies to Acquire DairyAmerica, Inc.**

On November 29, 2022, California Dairies, Inc. (CDI), a California-based farmer-owned cooperative, [announced](#) the acquisition of DairyAmerica, Inc., a leading supplier of skim milk powder, co-owned by Agri-Mark and O-AT-KA Milk Products. CDI acquired all ownership rights. In a press release, CDI clarified that “[u]nder the new structure, DairyAmerica will continue to market milk powders produced by Agri-Mark, Inc. and O-AT-KA Milk Products.” The acquisition will be effective on January 1, 2023.

## **5. International Dairy Issues**

### **Panel Finds Canada’s Tariff-Rate Quota (TRQ) Allocation in Violation of USMCA Agreement and Canadian Government Proposes New Allocation and Administration Changes as a Result**

On January 4, 2022, U.S. Trade Representative Katherine Tai [announced](#) that a dispute settlement panel, convened under the United States-Mexico-Canada Agreement (USMCA), found that Canada’s practice of reserving most of the country’s dairy tariff-rate quotas (TRQs) to Canadian processors was in violation of the USMCA. In accordance with the USMCA, Canada maintains fourteen (14) dairy TRQs, which allow for reduced import tariffs on those products. According to the panel’s [final report](#), since 1995, Canada has reserved access to 85-100% of those dairy TRQs exclusively for Canadian dairy processors, a supply side party in Canada’s dairy market and simultaneously disallowed equal TRQ access to retailers, a demand side party. The panel found that Canada’s practice of reserving TRQs for processors was in violation of USMCA [Article 3.A.2.11\(b\)](#) in failing to “ensure that” the country’s practice “does not ... limit access to an allocation to processors.” Thereafter, the Canadian government [issued](#) a proposal outlining new ways of allocating and administering Tariff Rate Quotas (TRQs) for U.S. dairy imports in order to comply with the recent USMCA panel ruling. In a [news release](#) dated March 3, 2022, the National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) expressed their concerns over the Canadian proposal, claiming that the proposed changes still do not offer fair treatment to



U.S. dairy importers, and urged “the administration to demand that Canada go back to the drawing board until it can genuinely deliver on providing the U.S. dairy industry the full benefit of USMCA.” According to the [Edge Dairy Farmer Cooperative](#), “the proposed changes ... would not allow U.S. exporters to ship directly to the lucrative retail sector ...” and that “it [is] clear Canada is not seeking to provide actual market-based allocations.”

### **The United States Twice Rejects Canada’s USMCA Dairy Tariff-Rate Quota (TRQs) 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.

### **New Zealand Submits Formal Request for Panel Hearing on Canada’s Tariff-Rate Quota (TRQ) Dispute**

On November 7, 2022, New Zealand’s Ministry of Foreign Affairs and Trade [submitted](#) formal notification to Canada requesting the establishment of a panel to hear New Zealand’s challenge to Canada’s practice of reserving its dairy tariff rate quotas (TRQs) for Canadian dairy processors, which New Zealand claims violates the [Comprehensive and Progressive Agreement for TransPacific Partnership \(CPTPP\)](#). Previously, on May 12, 2022, New Zealand [announced](#) that it had [requested formal consultations](#) with Canada, which the countries held in June 2022, but which New Zealand states, “did not resolve matters.” Also [announced](#) by the New Zealand government, New Zealand’s panel request notice described the trade effects of Canada’s dairy TRQ allocation practices, stating that they “encourage chronic underfill of [Canada’s] dairy TRQs, reduce their commercial value for exporting CPTPP Parties, and undermine the market access negotiated under CPTPP.” The United States is also in dispute with Canada over its dairy TRQ practices as violative of the United States-Mexico-Canada Agreement (USMCA), which remains unresolved.

### **The U.S. Trade Representative (USTR) Expands USMCA Dispute Resolution Consultation Request Challenging Canada’s Dairy Tariff-Rate Quotas (TRQs)**

On December 20, 2022, the U.S. Trade Representative (USTR) [announced](#) an expanded [request](#) for new dispute resolution consultations with Canada under the United States-Mexico-Canada Agreement (USMCA) to address Canada’s administration of its dairy tariff rate quotas (TRQs). This new request broadens a [previously pending consultation request](#) from May 2022 to address claims that Canada violates the USMCA by favoring dairy processors over other potential importers in its market-share allocation of TRQs among entities eligible for the reduced tariff rates on imported U.S. dairy products. In 2021, the United States first challenged Canada’s administration of its dairy TRQs by restricting eligible entities to processors. In that initial dispute resolution proceeding, a USMCA arbitration panel, in January 2022, [determined](#) that Canada’s restriction of eligibility to processors violated [Article 3.A.2.11\(b\)](#) of the USMCA. Following this finding, Canada implemented



one change by adding distributors as eligible parties, but not retailers or other potential importers. This change in eligible importing parties has remained unsatisfactory to the United States and spurred the May 2022 request. The latest request includes the same grounds as the May 2022 request but also includes the market-share allocation challenge.

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