



**International Dairy Foods Association**

Milk Industry Foundation

National Cheese Institute

International Ice Cream Association

**Before Ohio Joint Committee on Agency Rule Review  
Public Hearing on April 21, 2008  
Statement on Refiled Rule 901:11-8-01  
Jerry Slominski, Senior Vice President for Legislative Affairs  
International Dairy Foods Association**

I am here today on behalf of the International Dairy Foods Association, which represents 85% of the nation's milk, cheese and ice cream makers, to express our continued opposition to the State of Ohio's campaign to restrict labeling on the use of artificial growth hormones in the production of milk. IDFA has twenty-two members doing business in Ohio, including Kroger, Smith Dairy, Reiter Dairy, Kraft and Dannon. Those companies employ more than 5,000 people in your state.

We appreciate the opportunity to convey the impact your Department of Agriculture's Refiled Rule 901:11-8-01 will have on the dairy industry in Ohio and nationwide. We have previously testified before the Ohio Department of Agriculture in opposition to the original emergency rule and submitted testimony in opposition to the first revised version of this rule. IDFA and its members remain uniformly opposed to the third and latest version of this rule.

Local and national opposition to this rule continues to grow. In addition to Ohio's dairy processors, opponents of this rule now include the Grocery Manufacturers Association, the Midwest Dairy Foods Association, the Organic Trade Association and others such as Ben and Jerry's and, quite recently, Wal-Mart. And, on this issue, the consumer groups, such as Consumers Union and the Consumers Federation of America have worked along side processors and businesses to oppose the Department's actions. These groups combined have generated thousands of contacts to the Department, Governor Strickland, and perhaps some of you.

On the other side, the only apparent supporters of the labeling restrictions appear to be a few dairy farmers who want to expand the use of artificial growth hormones yet feel threatened that they are losing the demand for milk from their cows. If it was the right thing to do, the right policy, we would commend the Department for standing up for a few Ohioans at the expense of many. But, it is not the right thing to do. Imposing labeling restrictions upon dairy processors and unnecessarily limiting their ability to market products is not the way to address this issue. Doing so will only serve to decrease demand for milk and milk products.

This rule will have a significant negative impact upon the dairy industry. Most significantly, it erects barriers that effectively eliminate nearly every label with a hormone absence claim being made in Ohio prior to the Department's efforts. In addition, it will:

- harm the entire dairy industry in Ohio and nationwide, both farmers and processors, by reducing demand for dairy products
- significantly increase costs for processors that market across state lines or nationally by either forcing all labels to be changed or by creating a separate label and marketing plan for products sent to Ohio
- force dairy processors to incur additional costs due to redesigning and relabeling products
- restrict unfairly the right of Ohio businesses to commercial free speech and to market dairy products using truthful, and not misleading, labels about the use of synthetic hormones
- impede commerce in your state by creating a patchwork of labeling requirements that are inconsistent across state lines

We are here today to make three points. First, there is no reason or legitimate basis for this rule. It is unwanted by consumers, unnecessarily burdensome for processors and unlikely to restore a market for dairy farmers who use synthetic hormones. Second, the Department, by grossly underestimating the costs of this rule, has not provided the Committee with a complete and accurate fiscal analysis. And, third, the Department, by proposing a rule that most likely violates the United States Constitution and is not in accordance with Federal law, has acted outside of its legal authority. For these reasons, we are asking the Committee to vote to invalidate this rule.

Although the Committee has a limited scope of review, it is important to know why dairy processors have been joined a larger coalition of businesses and consumers in opposition to this proposed rule.

The Department says that it is representing consumers with this new rule. Yet, there has been no public outcry for the State to undo the Federal rbST labeling standards that have been working fine for over 13 years. To the contrary, the Department and Governor Strickland have heard from hundreds, probably thousands, of consumers who have voiced opposition to the State of Ohio's campaign to restrict dairy labels and very few proponents, by comparison. By claiming to be an advocate for consumers, the Department is misleading the public.

By imposing this rule, the Department is misleading Ohioans into thinking that there has been a major problem with processors making false and misleading statements on our labels. But, where is the evidence? The Department has not to our knowledge taken any actions to enforce existing guidelines against labels that are false or misleading. In fact, the Federal Trade Commission, as recently as last summer, investigated complaints by Monsanto Company that processors nationwide were making misleading

labeling claims and found that there was no reason to take any enforcement action after locating only a few instances, voluntarily corrected, where there was a problem.

The Department is also misleading dairy farmers into thinking that restricting dairy labels will bring back a strong market for milk from cows treated with artificial growth hormones. But, forcing processors to change their labels will not change the national trend away from using rbST. Milk from cows not treated with artificial growth hormones is indisputably what people want to buy. As such, major retailers such as Kroger, and quite recently Wal-Mart, have indicated that they will only sell milk from cows not treated with rbST. Other major processors and retailers across the country are making the same decision.

Just a few weeks ago, there was an editorial in Cheese Reporter that stated it is beginning to look like the end of the synthetic hormone era in the dairy industry. The editorial also states:

"What it really boils down to is that BST/BGH is a production tool, but it's hardly a marketing tool. Indeed, *it's been more of a marketing nightmare for the dairy industry*, and if that nightmare ends some day, that's probably not a bad thing." (Emphasis added)

Reversing three continuous decades of declining per capita milk consumption should be our common goal. Instead, this rule, by severely curtailing the right of dairy processors to provide information to consumers, it may very well change what they buy. Dairy farmers should be as concerned as dairy processors that consumers will leave the dairy case entirely and move to less nutritious substitutes. Sports drinks, sodas, and flavored waters already crowd the aisles of grocery stores. Declining milk consumption means less demand for milk and, ultimately, fewer dairy farmers.

Our next major concern deals with costs. The Department's fiscal analysis is neither complete nor is it accurate and callously disregards the interests of Ohio's dairy processors. IDFA has consulted with several of our members about the potential costs of compliance with this rule and believe that the Department's Fiscal Analysis grossly underestimates the impact of this rule, particularly for processors who market across state lines and who will need to develop packaging and distribution for an Ohio-specific label. Several of our members, as well as the Organic Trade Association, have submitted letters to the committee but let me summarize a few of their points.

First, the Department's determination that the costs of compliance will be "nominal" and around \$250 to \$350 is insultingly low. As I mentioned earlier in this testimony, nearly every label being used in Ohio will need to be redesigned and reprinted. Although the Department is now allowing time to make these changes, doing so is not without considerable expense. Here are some examples:

- Ben and Jerry's has submitted a letter that estimates costs at closer to \$200,000, not \$250.

- Shamrock Farms sent a letter to the Department estimating costs at "tens of thousands" of dollars.
- Smith Dairy estimates that the costs of compliance will be close to \$40,000.

Second, the Department's fiscal analysis fails to consider that many companies may be forced to develop and use one label for products in Ohio and a different label for products in other states. Not only will there be extra costs in designing and printing different labels, processors will be forced to incur the costs of segregating products destined for different states. Such costs will easily top tens of thousands of dollars.

Consider the impact upon Ben and Jerry's. They have five facilities across the country and each processes ice cream destined for Ohio as well as other states. They will incur substantial and "prohibitive" costs if they are forced to separately label and segregate ice cream.

Third, the Department has suggested that labels acceptable in Ohio will be acceptable in other states. We do not see that as an acceptable solution but where is the cost estimate of such an impact. They simply did not consider the costs of changing labels, not to mention marketing strategies, for products being sold regionally or nationwide.

Fourth, the Department has not considered that the new rule may actually keep new products from being marketed, not only in Ohio, but nationwide. We are unaware that the Department contacted any of our companies to determine if the rule would impact their total sales, their marketing plans or the development of new products. In fact, it would appear that keeping certain products from being marketed is exactly the intent of this new rule.

Fifth, the Department did not determine if the rule would impact milk sales and consumption. As mentioned earlier, there are dozens of products that compete with milk. Consumers have clearly indicated a preference for milk from cows not treated with rbST yet the practical impact of the rule is that some processors may simply stop labeling products as not from cows treated with rbST. Has the Department conducted surveys or studies to determine if overall milk sales will decline as we suggest will happen?

Although the Department has not analyzed the impact of this rule on dairy consumption, they have considered information - not disclosed or provided as part of the fiscal analysis - of the economic and environmental impact of continuing or increasing the use of artificial growth hormones in the production of milk. As the reason for this rule has much more to do with the continued use of artificial growth hormones by Ohio's dairy farmers than it does with misleading label statements, the Department should reveal the controversial economic and environmental claims that were presented to the Department and subject them to open debate as part of this process.

Our final point is that the rule most likely violates the United States Constitution as well as existing Federal law. Therefore, the Department has acted outside of its statutory authority. We urge the Committee to consider that the Department does not have the authority to violate the Constitution of the United States, yet its rule tramples on the free speech rights of dairy processors and impedes interstate commerce. The Department also lacks the authority to impose regulations in areas that have been preempted by existing Federal law.

Our nation's retailers and businesses have the right to make truthful advertising claims provided they are not misleading. And, it is settled legal doctrine that a government restriction on commercial free speech must be "narrowly tailored" and no more restrictive than necessary to achieve its purpose. This doctrine has been established in the U.S. Supreme Court and applied repeatedly in the United States Court of Appeals for the Sixth Circuit, which includes Ohio. 1/ Even as changed, the details of the Department's rule remain too restrictive and go well beyond the careful compromise that was crafted by the FDA guidance on this issue.

It is also well-settled constitutional law under the Commerce Clause that a state may not impose an unreasonable impediment to interstate commerce. Indeed, a state regulation like the Ohio Refiled Rule, which would prohibit label claims from being made in Ohio that are readily accepted by most other states, would be particularly vulnerable to legal challenge, especially given the multi-state and even national distribution of many dairy products.. This standard has also been articulated by the U.S. Supreme Court and applied in the Sixth Circuit as well as other jurisdictions. 2/

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1/ Under settled precedent, restrictions on lawful commercial speech, such as rBST-absence claims, that are not narrowly tailored to directly advance a substantial government interest constitute unconstitutional prohibitions on free speech. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-565 (1980) (holding that restrictions on commercial speech must be "narrowly drawn" and thus "may extend only as far as the interest [they] serve[ ]"); *Silverman v. Summers*, 28 Fed. Appx. 370, 375, 2001 WL 1671072, \*5 (6th Cir. 2001) (holding that a state statute restricting chiropractor solicitations was "not [a] sufficiently narrowly tailored" restriction on protected commercial speech); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 472 (6th Cir. 1991) (holding Cincinnati ordinance banning distribution of commercial handbills unconstitutional because there was no "reasonable fit" between the government interests and regulatory means chosen to advance them), *aff'd*, 507 U.S. 410 (1993); *Parker v. Commonwealth of Ky., Bd. of Dentistry*, 818 F.2d 504, 511 (6th Cir. 1987) (holding dental advertising restrictions unconstitutional because they were "not narrowly tailored to meet the state's concern").

2/ Under the dormant Commerce Clause, state regulations that impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits" are unconstitutional. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333 (1977) (North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers may not be identified by any grade other than the federal grade overly burdened interstate

The Department has also stepped into an area that has been preempted by Federal law and in doing so has again exceeded the scope of its statutory authority. As shown by the letter and White Paper that has been submitted by the Organic Trade Association, the Department's rule violates the Organic Trade Production Act by regulating labeling statements that are otherwise allowed under that law. Just as the Department lacks the authority to violate the United States Constitution, it cannot overrule Federal law that has preempted the issue.

In sum, the Department's rule fails in many respects to meet the criteria that the Committee is authorized to use to review the proposal. And, as such, the rule should be rejected by the Committee and a recommendation should be made to the General Assembly that it be invalidated.

And, finally, what is particularly disturbing about this situation is that a fair, reasonable and responsible solution is readily available. What is wrong with enforcing existing FDA guidance that processors have followed, with few violations, for over a decade? IDFA has long supported the FDA guidance document and has advised its members to follow that document. The FDA guidance allows production claims, such as "from cows not treated with rbST", and suggests that a "prominent" disclaimer also be provided "in reasonable proximity" to the claim.

The difficulties with the Department's rule are that it does not allow flexibility in the placement of the disclaimer, that it is unduly restrictive in the ability to make a production claim, and that it does not allow processors to rely upon sworn affidavits from producers as proof that they do not use growth hormones. Existing FDA guidance already defines and prohibits labeling claims that are false or misleading. There have been no legitimate rationale or policy provided by the Department why dairy processors in Ohio should not have the freedom to market products in accordance with well-settled rules governing this controversial issue.

Thank you for your attention to this critical issue.

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commerce by preventing Washington apple growers from applying well known grading system); *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 238 (6th Cir. 1986) (holding Michigan public utilities securities regulation law unconstitutional under dormant commerce clause because "the burdens of expense, delay, and administrative hassle of 'advance approval' securities regulation far outweigh the benefits, if any, of Michigan's interests in protecting consumers and investors"), *aff'd on other grounds*, 485 U.S. 293 (1988); *Kraft Foods N. Am., Inc. v. Rockland County Dep't of Weights & Measures*, No. 01-6980, 2003 WL 554796, at \*9 (S.D.N.Y. Feb. 26, 2003) (food labeling requirement different from FDA's excessively burdened interstate commerce).