



**International Dairy Foods Association**  
Milk Industry Foundation  
National Cheese Institute  
International Ice Cream Association

**Before Kansas Department of Agriculture  
Public Hearing on Proposed Regulation 4-7-723  
Statement By Clay Hough  
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December 2, 2008**

On behalf of hundreds of dairy processors across this nation, and the eight dairy processing companies with facilities in the State of Kansas, the International Dairy Foods Association 1/ opposes the Proposed Regulation 4-7-723 and strongly urges that the regulation not be adopted. Although we appreciate the changes that were made by this version, the new proposed regulation still does not adequately address the serious policy implications and industry concerns that bring us here today.

This proposed regulation is not wanted by consumers, is unnecessarily burdensome for processors, and is unlikely to restore a market for dairy farmers who use synthetic hormones. IDFA is unaware of any public demand in the State of Kansas to mandate the appearance and content of current labels used to identify milk that comes from cows not treated with synthetic hormones. To the contrary, our experience in other states is that thousands of consumers have voiced opposition to similar efforts to restrict the ability of dairy processors to label milk as not coming from cows that have been treated with artificial hormones.

As is the case in other states that have proposed similar labeling restrictions, the only apparent supporters of this proposed regulation appear to be dairy farmers who are realizing that there is less demand for milk from cows treated with artificial hormones. As such, the primary goal of your proposed rule appears to be to address dairy farmer income. Imposing labeling restrictions upon dairy processors and unnecessarily limiting

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1 The International Dairy Foods Association (IDFA) represents our nation's dairy manufacturing and marketing industries, and their suppliers. We have approximately 530 members representing more than a \$110 billion a year industry. Our 220 dairy processing members operate more than 600 plants that range from large multi-national corporations to single plant companies. Together they represent more than 85 percent of the milk, cultured products, cheese, and frozen desserts produced and marketed in the United States. Our membership includes eight dairy processing companies in Kansas including Kraft Foods, Dean Foods, and the Kroger Company.

their ability to market products is simply not the way to address that issue and may in fact only serve to decrease demand for milk and milk products.

Proposed regulation 4-7-723 creates barriers that effectively eliminate nearly every label with an absence claim currently being made in Kansas. Specifically, it will:

- restrict unfairly the right of Kansas businesses to commercial free speech and to market dairy products using truthful, and not misleading, labels about the use of synthetic hormones
- prevent consumers from receiving information about the use of synthetic hormones by making it difficult and impractical to include such information on dairy labels
- impede commerce in your state by creating a patchwork of labeling requirements that are inconsistent across state lines
- harm the entire dairy industry in Kansas, both farmers and processors, by reducing demand for dairy products

There is no need or demand for this new proposal. In fact, it will upset a carefully constructed solution to this issue; one that has provided balanced information to consumers for more than 13 years. Recombinant bovine somatotropin, or rbST, was approved for use by the FDA in 1993. Its purpose is to stimulate greater milk production in lactating dairy cows. The following year, the FDA issued guidelines to give dairy processors a “safe harbor” that would allow them to convey desired information regarding rbST to consumers in a truthful and not misleading manner.

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. IDFA does not oppose the requirement for the disclaimer and we have instructed our members to include such a disclaimer on their labels for over a decade. But, our members should have the freedom to market products in accordance with well-settled rules governing this controversial issue.

The dairy industry in Kansas and across the United States has been relying upon FDA's guidance and safe harbor. Our nation's fifty states have followed these guidelines, with only very limited exceptions, for more than a decade. Under the guidelines, processors nationwide understand what can and cannot be placed on a label regarding the use of synthetic hormones. The Federal guidelines allow processors to market products locally, regionally and nationally.

The proposed regulation will not benefit consumers. Today's consumers want more choices in the dairy case – not fewer. Public surveys all confirm that there is a growing segment of consumers who want dairy products from cows that have not been treated with rbST.

Let's be clear about this -- the reason why processors are marketing products with absence claims is because consumers are demanding it. Per capita fluid milk

consumption has been declining in this country for three straight decades. Producers, processors, and state agriculture agencies should be working together to reverse the decline in milk consumption -- that's what will benefit Kansas's dairy farmers and increase demand for milk. Instead, you are considering a rule which will tie our hands when it comes to listening to consumer preference and developing products that consumers want to purchase.

This proposal is a clear impediment to interstate commerce and will have a major impact on national marketers, such as Kraft or Ben & Jerry's ice cream that do business in your state. Most dairy processors market across state lines yet this proposed regulation is not uniform with labeling requirements in your neighboring states. With different rules across states lines, companies may simply choose not to undertake an expensive re-labeling proposition.

The Department has done a better job than we have seen in other states in providing an estimate of the costs of compliance if this proposal is adopted. Yet, even your estimate allows that costs could easily exceed \$300,000 if a company markets numerous products. We believe, however, that even that estimate may be low and those imposed costs are an unnecessary burden on good corporate citizens of Kansas.

The proposed regulation will harm Kansas's dairy farmers as well. Consumers have spoken regarding their desire to know if a dairy product has been produced with milk from cows treated with artificial hormones and the answer is clear -- many base their decision to purchase dairy products on that information.

Denying or frustrating the right of dairy processors to provide this information to consumers will not change their concerns, but 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.

Restricting dairy labels will not work to achieve its goal and will not bring back a strong market for milk from cows treated with synthetic hormones. Nearly every major fluid milk processor now purchases only milk from cows not treated with artificial hormones. Wal-Mart recently announced that it will not sell any dairy product that is derived from milk from cows treated with rbST.

In sum, this proposed regulation will likely harm the very dairy farmers you are trying to protect, the dairy industry as a whole, and the millions of consumers who choose to buy milk and dairy products.

The proposed regulation has significant defects.

- The proposal requires a disclaimer statement that is exactly the same font, style, case, size, and color as a production claim. The Food and Drug Administration

does not require this - - in fact, with one exception, no other state requires a disclaimer in such a manner.

- The proposed regulation requires that the disclaimer, without exception, must be contiguous to the production claim. It is simply impossible to do this on many labels as some are simply too small to include all that information at one place.
- The proposed regulation makes no provision for additional statements intended to catch the consumer's attention to the required claim and disclaimer. In this regard, the proposed regulation fails to incorporate the well-established FDA policy of reviewing the "label as a whole" and not unnecessarily focusing on one particular statement read out of context from the entire label.
- The proposed regulation improperly imposes disclaimer and substantiation requirements on organic dairy processors who are subject to the Organic Food Production Act of 1990 and the resultant regulations of the National Organic Program.

As you may know, the proposed regulation is very similar to a rule that was adopted by the State of Ohio earlier this year. IDFA, on behalf of our membership, has challenged the legality of that rule on the basis that it violates our member's right to commercial free speech and on the basis that it violates the Commerce Clause of the Constitution. The Organic Trade Association joined IDFA as plaintiffs in that case.

IDFA v. Boggs was brought in the Federal District Court for the State of Ohio. IDFA has asked for summary judgment as has the State of Ohio. All briefs have been filed and the motion is currently awaiting a decision by the judge of that court.

Given that court's decision could and most likely will determine the legality of a similar regulation, the Kansas Department of Agriculture should not proceed with this proposal until the court issues an opinion. We will gladly provide the Department with copies of the briefs and other filings in that case. IDFA believes that the arguments we have presented to the court are sound and that the Ohio rule will be found to violate the Constitution.

IDFA remains unaware of the Department encountering any problems with labels that have not followed FDA guidance on this issue. If false or misleading claims are being made in the marketplace, the Department should use its existing authority to police that activity. Taking such action would likely eliminate the necessity of a new state regulation in this area.

Proposed Regulation 4-7-723 is unnecessary and should not be adopted. In light of all the above, we urge the Department to reject this proposal and to continue to allow dairy product labels using the guidelines provided by FDA.

Thank you.