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200 C Street, SW
Washington DC

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April 11, 2000

To: All Regional Food and Drug Directors Attn: Regional Milk Specialists

From: Milk Safety Branch (HFS-626)

Subject: Importation of Pasteurized Milk Ordinance (PMO Defined Dairy Products)

This memorandum provides guidance that States can use to respond to inquiries regarding the importation of "Grade A" dairy products from other countries. This guidance document represents the agency's current thinking on this subject and it does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulation or both.

Background Information

International trade agreements to which the United States is signatory allow countries to establish measures to ensure safety of food within their countries. The measures, however, must be applied in a manner so that they do not arbitrarily discriminate between products from different countries or treat domestic products more favorably than imported products without justification.

The World Trade Organization's (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) also obligates the over 160 member countries to consider the equivalence of another country's food protection measures if an exporting country requests such consideration. The determination of equivalence is made by the importing country based on whether the exporting country's measures meet the level of protection deemed appropriate by the importing country, as provided by its own measures. Because the WTO agreements only went into effect in 1995, the concept of equivalence is only now beginning to be utilized in international trade. Nevertheless, Article 4. Equivalence of the SPS Agreement exists as an obligation for all WTO Member governments.

The system of controls used to provide the U.S.'s appropriate level of protection for "Grade A" dairy products is described in the current edition of the "Grade A Pasteurized Milk Ordinance" (PMO) and related documents. Since the early 1950's, States and FDA using a system of ratings and check ratings have verified the level of protection provided by the PMO in domestic (interstate) commerce. The requirements for these ratings and check ratings are specified in the current edition of the "Procedures Governing the Cooperative State-Public Health Service/Food and Drug Administration Program of the National Conference on Interstate Milk Shipments" (Procedures).

In a 1977 Memorandum of Understanding (MOU) with the National Conference on Interstate Milk Shipments (NCIMS), FDA accepted the standards, requirements and procedures of the NCIMS to manage the public health risks associated with "Grade A" milk and milk products. FDA considers this NCIMS milk safety program to be adequate for the protection of the health and safety of the consumer.

Current Status

FDA and the NCIMS have identified and mutually accepted three options which are consistent with NCIMS "Procedures" and which will allow States to receive PMO defined "Grade A" products produced outside of the United States.

These options are:

1. A dairy firm outside of the United States could contract with any current NCIMS member's regulatory/rating agency to provide the "Grade A" milk safety program in total. This would include the regulatory licensing, dairy farm and milk plant inspection and sampling, pasteurization equipment testing, laboratory certification and rating/NCIMS listing certification. To use this option the firm would be required to abide by all applicable NCIMS regulatory and rating requirements and the regulatory/rating agency would have to agree to treat the firm as if it were located within its jurisdiction for all purposes, including inspection and enforcement. Ratings of the firm would be check-rated by FDA.
2. The importing country, or a political subdivision thereof, may become a full member of the NCIMS subject to all NCIMS rules and enjoying all privileges of a U.S. State. This would require, among other things, that the milk regulatory agency (ies) of the importing countries adopt and enforce rules and regulations which are the same as those required in the United States and abide by all applicable NCIMS regulatory and rating requirements. Their ratings would be check-rated by FDA in the same way as State ratings. FDA would certify their rating, sampling surveillance and laboratory evaluation officers.
3. FDA can evaluate the importing country's system of assuring the safety of dairy products and compare the effect of that system with the effect of the

United States system on the safety of dairy products produced domestically. The NCIMS has adopted a procedure to accept FDA findings of equivalence and to allow NCIMS member States to accept products produced within the scope of such a finding.

Emerging International Issue

As trade barriers are removed and trade between countries increases, there are more frequent requests to allow the importation of “Grade A” defined products that originate in other countries. The most common concern is how an adequate level of safety can be verified.

Under current Federal law and regulation, FDA can only take action on imported food products based on a violation of the Federal Food, Drug, and Cosmetic Act (FFDCA). Importation of milk products without adhering to any of the three options described above, is NOT, in and of itself, a violation of the FFDCA.¹

Based on the 1977 MOU, milk protection measures in the United States have been set by the combined efforts of FDA and the States under the NCIMS milk safety program.

Under this program the States must adopt as law and enforce the provisions of the PMO as specified in the “Procedures”. Their collective actions are intended to insure that milk marketed in the United States meets the U.S. appropriate level of protection.

FDA works with the States to verify that the U.S. level of protection is met under authority of the Public Health Service Act (42 U.S.C.). Under this act FDA has a broad mandate to assist States technically and to evaluate their performance under the Procedures . However, current regulations promulgated under this act do not provide an adequate base for direct FDA enforcement of the PMO.

If the U.S. level of protection, as currently met by consistent State enforcement of the PMO, is to continue to be met, it must be accomplished by States continuing to collectively require this level of protection.

Under U.S. trade agreements products imported from another country must be treated by States and by FDA, no less favorably than those products imported from another State.

The three options in this memorandum can be used by States to assure that the same level of safety for “Grade A” defined products is achieved for products produced in other countries.

In order for the agency to function within the provisions of the MOU and fulfill its food safety responsibility, FDA will note, in State program evaluations, if a State is not

¹ Milk or cream may also need a permit under the provisions of the Federal Import Milk Act.

requiring the NCIMS “Grade A” level of protection in interstate or international commerce.

If after a reasonable opportunity to correct this situation, a state still does not provide their citizens with this level of protection, FDA may declare that the state is not in substantial compliance under the “Procedures...”

Copies of this memorandum are enclosed for your distribution to District Milk Specialists, State milk regulatory agencies, State Laboratory Evaluation Officers and State Milk Rating Officers in your region. This memorandum is also available on the FDA Prime Connection Computer bulletin board system (Internet address: <http://www.cfsan.fda.gov>), and should be widely distributed to representatives of the dairy industry and other interested parties.

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