

July 27, 2020

DSHS Milk & Dairy Unit

Via email: milk.regulatory@dshs.texas.gov

Dear DSHS Staff:

The Farm and Ranch Freedom Alliance (FARFA) appreciates the opportunity to submit informal comments on the draft rules amending Title 25, Chapter 217, Subchapters A and B.

While we recognize that this is the first step in a long process, as a preliminary matter, FARFA objects to the lack of sufficient notice to the affected dairies. The rules were posted online on July 14, 2020, and the deadline for submitting comments is July 28, 2020. While the Department sent a letter *dated* July 14 to the licensed dairies notifying them of the draft rule, it is unclear when the letter was mailed. And while the Department has email addresses for most, if not all, of the dairies, it is also unclear when email notifications were sent. At least one dairy did not receive any notification from the Department until July 22, less than a week before the comment period closes. Given the complexity and scope of the proposed changes, this was insufficient.

I. The definition of “sale” is overly broad, vague, and ambiguous.

FARFA supports changing the definition of the term “sale” in the current regulations because it is circular, overbroad, and ambiguous. Unfortunately, the new draft definition in §217.1(87) contains overly broad and ambiguous terms. **If anything, the draft definition has even greater problems than the existing regulations.**

There is a clear, simple dictionary definition of the word sale: the exchange of a commodity for money. Adding bartering and trading to the definition is a logical and reasonable modification to the dictionary definition in the context of regulating a product.

The Department should not go beyond such clear, accepted definitions of the term “sale.” At a minimum, if it does, it must ensure that the additional scope of the term is clear and reasonable.

The draft rule does **not** do that. Below are the key problems with the draft definition:

- The subsection that defines “sale” as the “acquisition” of milk is directly **contrary** to the normal meaning of those terms. Acquisition means purchasing or otherwise procuring an item, which is what the *purchaser* does, not the seller.
- What does “conveyance” mean in the draft rule? Will anyone who conveys a gallon of milk in their car for a friend now be considered to be selling milk?
- What does “supplying” mean in the draft rule? Will anyone who brings raw milk to a friend’s house for a social event now be considered to be selling raw milk? What about when advocates like FARFA provide free samples to legislators?
- What does “transfer or acquisition of milk through a contribution system” mean? Outside of pension law, we have never encountered the phrase “contribution system” in any law or regulation, and it has no clear meaning. Is it intended to cover herd shares, despite the lack

of any statutory provision covering them? Or will consumers who coordinate with each other to address the burden of picking up milk on the farm be considered to be “selling” milk? Or is there some other meaning? The Department needs to be clear about who and what it is regulating, rather than creating new regulatory provisions with ambiguous definitions.

FARFA urges the Department to delete the draft definition and instead propose the following definition for “sale,” which is consistent with its common, understood meaning:

“Sale – the term “sale” or “sell” means a monetary transaction, barter, or trade that involves the transfer of milk, milk products, raw milk, raw milk products, dairy products, or frozen dessert products.”

II. The new requirement to provide consumer lists is burdensome on farmers and intrudes on consumers’ privacy.

Section 217.33(7) would require raw milk farmers to provide the Department a customer list that includes not only the customers’ information, but also the amount and types of products sold to them. This is an outrageous requirement, and FARFA objects based both on the burden placed on the farmers and on the intrusion of privacy for the consumers.

For the farmers, this requirement imposes an undue burden. It takes time and effort to collect and maintain all this information. Until other retail entities, including grocery stores and restaurants, are required to collect and maintain equivalent information on all their customers who purchase sushi, raw oysters, or bagged leafy greens – all of which having caused far more illnesses than raw milk in our state – the Department has no grounds to require this of raw milk farmers.

Even more egregious is the intrusion into consumers’ privacy. People who choose to drink raw milk should not have to have their names and buying information provided to the government. This is intrusive on its face.

Moreover, given the past actions of the Department and local government entities, the intrusion poses a genuine threat of harassment. Consider what happened in 2016. The Department informed the City of Austin health department about a consumer raw milk drop point. Acting at the Department’s encouragement to crack down, the city brought armed police officers to the individual’s home. A government vehicle blocked-in a car in the private driveway that had children sitting in it. When the owner, their mother, hesitated to answer the health inspector’s questions, they began taking photos of her children in her car. The City of Austin ultimately decided not to pursue any charges against the raw milk driver, but at no time has the Department or the City apologized to the raw milk consumers who were harassed, or even acknowledged that this behavior was inappropriate in any way. And now the Department wants the names of every person who buys raw milk, how much they buy, and how often.

Draft § 217.33(7) needs to be removed in its entirety.

III. The provision for delivery, while a step in the right direction theoretically, is unduly narrow.

FARFA has long supported changing the law to allow raw milk farmers to deliver to their customers, and FARFA is glad to see the Department take steps in that direction. But the draft §217.31(b) contains confusing and problematic provisions.

The most significant problem is that the draft rule limits delivery to the Department's "Retail Foods jurisdiction," which generally covers only rural areas. Given that the vast majority of Texas residents live in an urban center that has a local health department, this provision makes the new ability to deliver of very limited use.

No other state regulation is limited in this way. Local governments can ban the sale of raw milk within their borders if they so choose, just as Ft. Worth has done. There is no reason for DSHS to pre-emptively make the decision to ban the delivery of raw milk to any urban center in the state.

Second, in practical terms, the geographic scope of the Department's retail food jurisdiction is difficult to determine. There does not appear to be any information on the Department's website or in any guidance document that would inform farmers what areas are covered by the retail food department and what areas are not. When FARFA inquired, we were directed to a list of local health departments at <https://dshs.texas.gov/regions/lhds.shtm>. Yet not all those local departments issue retail food permits, nor does the list show the scope of their jurisdiction. While it is clear that the draft rule would not allow farmers to deliver within the city limits of major urban centers, in many suburban and peri-urban areas the farmer would have to call each local health department to determine if a specific consumer's address was within the Department's retail food jurisdiction or not.

Third, the draft rule's provision in §217.31(b)(3) for a "temperature control sample" creates burdens without any benefit to food safety. The section states that the farmers must "provide" a sample, but to whom? Is the sample provided to the customer who is receiving the milk (and thus does not need a sample to know the temperature of the product)? Or is the farmer supposed to keep all the samples and then provide them to his or her inspector during the next farm inspection (at which point, it is meaningless, since it wouldn't show the temperature during delivery)?

In contrast, the Department's 2015 draft rules, which were never published, provided for delivery statewide. In addition, they included provisions to address temperature control without the unnecessary requirement for samples. FARFA encourages the Department to propose the following provision, which was written by its own staff in 2015:

217.32. Selling of Raw Milk to the Consumer.

- (a) Raw milk may be sold by the milk producer to the consumer at the farm or by delivery, provided that such producer has been issued a Grade A Raw for Retail Milk Permit in accordance with §217.91 of this title (relating to Permits) or registration*,

and complies with all the sections in this chapter relating to Grade A raw for Retail Milk.

- (b) Raw milk and milk products may be delivered to the consumer provided that the permitted or registered producer
 - (1) ensures that all raw milk and milk products are delivered in [**] equipment that maintains an internal temperature of 45 degrees Fahrenheit,
 - (2) develops policies and procedures for the delivery that identify the process by which temperature control is maintained,
 - (3) maintains temperature records for each shipment to verify that raw milk and milk products were delivered at the required temperatures,
 - (4) maintains and provides to the Department, upon request, records that demonstrate the following are routinely employed:
 - (A) procedures for the monitoring of temperature control points;
 - (B) monitoring of the temperature control points; and
 - (C) necessary corrective actions if there is a failure at the temperature control points.

* The reference to “registration” is to a provision in the 2015 draft rules that would have exempted very small-scale raw milk farmers from the permitting requirements. See Section IX(c), below, for more discussion.

[**] The Department’s 2015 provision included the word “refrigerated,” which FARFA does not support if it is intended to require mechanical refrigeration only, as opposed to allowing temperatures to be safely maintained using coolers and ice.

IV. The prohibition on freezing raw milk is baseless and unnecessary.

Draft §217.31(b)(2) adds a new prohibition on freezing raw milk. We can identify no health or safety reason for this ban.

Goat milk is often frozen to allow for safe storage over a longer period of time. While cows’ milk is less often frozen due to changes in the fat consistency, skim cow milk freezes well. Freezing the milk allows producers to better manage the varying levels of production and demand, which do not always match up every day, while maintaining quality and safety.

Draft §217.31(b)(2)’s ban on freezing milk should be deleted.

V. The warning label is unnecessary for on-farm sales.

FARFA has no objection to the wording of the proposed warning label. It is, indeed, the language that we have supported in the legislative bills to allow raw milk to be sold at farmers' markets and through delivery. However, it does not make sense to require a warning label when the Department is continuing to require that the sale occur on-farm. The people who are buying raw milk on the farm are knowingly seeking it out.

A warning label only makes sense if *potentially uninformed* consumers are being presented with bottled raw milk, such as at a grocery store or in a farmers' market. If and when the Department allows raw milk farmers to sell off the farm, as the agency has authority to do, **then** a warning label should be instituted.

VI. Frequency of inspections and testing should be specified, at least within a range.

The draft rules move away from the current set frequency for inspections and testing, to "a frequency determined by the department." This has concerning potential at both ends of the spectrum.

If the Department were to significantly reduce inspections and testing, such as to only once a year, then there would be concerns that raw milk producers are not being held to a safe standard. This is not an impossible scenario given the budget issues and past comments by the Department about how expensive it is to do regular inspections and testing of raw milk farmers. At the other extreme, FARFA would object to bi-weekly testing as being overly burdensome and harassing for small farmers.

FARFA urges the Department to set both a minimum and a maximum frequency in the proposed rules.

VII. Butter should not be excluded from the definition of "raw milk products".

In §217.1(42)(B), the Department excludes butter from the list of Grade A raw milk products. Yet the definition of "dairy product" in §217.1(21) *includes* butter. And, aside from salt, butter has no other ingredients besides heavy and/or sour cream – both of which **are** on the list of Grade A raw milk products. There is no apparent reason to exclude butter.

In addition, unlike cheese and frozen desserts, which are also excluded from the definition, there is no specific permit for butter. Thus, the Department appears to be effectively prohibiting the sale of raw butter.

There is not a sufficient food safety justification for restricting the sale of raw butter in comparison to other raw milk products. In 2016, the Farm-to-Consumer Legal Defense Fund conducted a search of the CDC's Foodborne Outbreak Online Database (FOOD Tool). The FOOD Tool provides information on foodborne outbreaks reported to the CDC since 1998. As set out in the table below, the database listed 10 outbreaks in which butter was one of the listed food vehicles for the outbreak. In most of these outbreaks, other food vehicles were also listed that were much higher risk and more likely to have been the source of the outbreak, such as

seafood or pork. Even if butter were responsible for all these cases, which is highly unlikely, that still reflects only 242 illnesses in a period of 18 years, or an average of fewer than 14 illnesses per year in the entire country.

Moreover, these numbers include both pasteurized and raw butter. The CDC database listed only **one** outbreak in which the butter appears to have been produced from raw milk: a 2007 outbreak in Utah. Since Utah regulations outlaw the sale of raw milk products such as butter and cheese,¹ these products must have been made at home from the milk, not commercially prepared and sold.

In summary, there appear to have been no foodborne illness outbreaks between 1998 and 2016 linked to butter commercially prepared from raw milk. Only a small number of outbreaks have been linked to **any** butter, prepared from pasteurized or raw milk. Particularly considering the hundreds of millions of pounds of butter that Americans consume annually, this reflects a remarkably low risk of foodborne illness from this food.²

Due to the short comment period provided for commenting on these draft rules, FARFA was unable to update this data through a new search of the CDC database, but we do not know of any outbreaks linked to raw milk butter since 2016.

Table 1: Outbreaks listing butter as a possible food vehicle³

Year	State	Genus species	Illnesses	Hospitalizations	Deaths	Food vehicle	Contaminated Ingredient
1998	PA		21	0	0	Salad; butter; water	
1998	PA		20	0	0	Seafood soup/stew; butter; soda	
1998	PA		11	0	0	Soda; butter; seafood	
2002	FL		2	0	0	Hollandaise sauce	Butter
2002	WA	<i>Bacillus cereus</i>	8	0	0	Butter; bread; pork	
2002	TN	<i>Staphylococcus aureus</i>	9	0	0	Butter; vegetable dip; bread	
2005	GA	<i>Salmonella</i>	34	7	0	Hollandaise sauce	Butter; egg
2007	UT	<i>Campylobacter jejuni</i>	62	4	0	Unpasteurized whole cow milk, goat milk, butter, and goat cheese/chevre	Milk; milk; butter; cheese
2009	CO	<i>Staphylococcus aureus</i>	4	0	0	Fish, ono; bok choy; sweet potato	Fish; leafy green; butter; cream; sweet potato
2012	MI		71	0	0	Butter; soda	Butter; n/a

¹ UTAH ADMIN. CODE R70-330-5G (2015).

² For example, in the U.S., butter production was reportedly 800,000 tons in 2011. H. GHODDUSI & B. OZER, DAIRY MICROBIOLOGY AND BIOCHEMISTRY 245-270 (2014).

³ According to the FTCLDF, the search was conducted on March 11, 2016, using the search term “butter.” The table reflects the exact language downloaded from the FOOD database, with the following exceptions: Outbreaks linked to peanut or other nut butters were deleted. Outbreaks in which the causative agent was norovirus were also deleted, since the illnesses were likely the result of human transmission, either directly or when an infected food handler touched ready-to-eat foods. See Centers for Disease Control and Prevention, Norovirus Transmission, <http://www.cdc.gov/norovirus/about/transmission.html>. Outbreaks due to “paralytic shellfish poison” or “other chemical/ toxin” and that involved shellfish were deleted, as these clearly stemmed from food vehicles other than butter. Last, an outbreak which listed butter as one of multiple food vehicles, but specifically identified only egg as the contaminated ingredient, was deleted.

VIII. Additional definitional problem: “Veterinary products”.

In §217.1(1)(B), the term “veterinary products” as a basis for finding that milk is abnormal is vague and overbroad. It could easily encompass vitamin and mineral supplements provided by a vet, as well as other products that would not cause any human health problem when a dairy animal is treated with them.

IX. Additional changes should be made.

The comments above focus on problems contained in the draft rules. The following comments address problems with the current rules that were not addressed in the draft rules.

a. The coliform count limit should be raised.

The draft rules that the Department developed in 2015, which were never published, raised the allowable coliform levels to 40 coliform/ml. Coliforms are not pathogens, but rather an indicator of the overall cleanliness of the operation. The current 10 coliform/ml limit is arbitrary and unnecessarily stringent.

b. Standards for handling samples should be included in the section setting standards for raw milk samples.

In setting the standards that raw milk samples must meet, the Department should also set standards for how these samples are handled. FARFA has had reports from farmers across the state of inspectors who show up without ice to keep the samples cold. There have been instances where the samples have not reached the lab until the next day, but there is no record showing maintenance of safe temperatures during the 24+ hours of transportation. Poor temperature control can cause an otherwise conforming sample to fail the required tests, potentially resulting in the suspension of the farm’s permit.

It is not reasonable for the Department to set strict standards that farmers must meet, without simultaneously ensuring that the Department’s staff handle the samples in a manner that will not cause them to fail.

c. The Department should consider exempting micro-dairies.

The draft rules written by the Department in 2015 amended §217.24 to create a dual-level system of permits and registration. The Department classified the following as “low risk operators”: (1) cow dairies milking herd fewer than 6 animals, or (2) goat dairies milking herd fewer than 12 (or 9, depending on which draft) animals. Low risk operators were to be required to register with the Department but did not have to obtain a permit.

FARFA urges the Department to revisit this option and consider such a scale-appropriate regulatory approach.

d. The Department should legalize sales at farmers' markets.

While both the Texas House and the Texas Senate have, on separate occasions, passed a bill to legalize the sale of raw milk at farmers' markets, it does not actually require legislative action to make this change. There is **no** prohibition on the sale of raw milk at any location in the statute. Rather, the restriction to selling on-farm is an arbitrary provision that was inserted by the Department.

In legislative hearings, members of the Department have explicitly stated that the reason for the on-farm restriction is to limit the number of people who have access to raw milk. By that reasoning, the Department should also be restricting sales of raw oysters to at-the-boat only. Indeed, raw oysters have sickened far more Texans than raw milk. Circumscribing consumer access to a legal product is not a valid justification for regulation.

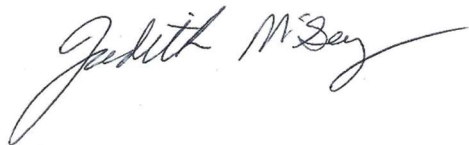
Department staff have also claimed that the on-farm restriction is intended to ensure that consumers see the conditions that the food is produced under. If that rationale were applied consistently, meat could only be sold direct from slaughterhouses.

As evidenced in both the current rules and the draft ones, the Department's regulation of raw milk is comprehensive, from setting standards for its quality to requiring temperature controls and supporting documentation. A warning label, as is proposed in the current draft rules, would ensure that consumers are informed of the risks before purchasing raw milk. It is past time for the Department to get out of the business of regulating consumers' decisions.

Conclusion

FARFA urges the Department to make the changes discussed above to the draft rules before formally proposing them. We stand ready to provide additional information on any of these points, and we would welcome the opportunity to discuss the issues with the staff.

Sincerely,

A handwritten signature in cursive script, reading "Judith McGeary". The signature is written in dark ink and is positioned above the printed name and title.

Judith McGeary
Executive Director