

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

**This document is from the files of the Office of  
the Maine Attorney General as transferred to  
the Maine State Law and Legislative Reference  
Library on January 19, 2022**

# STATE OF MAINE

Inter-Departmental Memorandum Date October 25, 1972

To Maynard C. Dolloff, Commissioner Dept. Agriculture  
From Martin L. Wilk, Assistant Dept. Attorney General  
Subject Proposed amendments to statutes relating to Milk and Milk Products

This is in response to your memorandum dated October 19, 1972, inquiring whether the Maine Revised Statutes relating to Milk and Milk Products (7 M.R.S.A. §§ 2901 et seq.) may be amended so as to provide you with authority to amend the statutory definitions of the terms "milk", "milk products" and other terms by conforming such definitions to those established and adopted by the Food and Drug Administration of the United States Department of Health, Education and Welfare (HEW). You indicate that the authority to modify the definitions from time to time would provide you with flexibility you presently do not have to change definitions to meet federal standards. Presently, the only method by which the changes may be made is by having the State legislature enact the modifications you deem necessary.

A copy of your memorandum, which sets forth the precise language of the amendments you propose, is annexed hereto for convenient reference. For the reasons which follow, we do not feel that these amendments would be valid.

The legislative power, which has been described as the power to make, alter and repeal laws, is vested exclusively in the legislature. State v. Butler, 105 Me. 91, 73 A. 560 (1909); 16 Am Jur. 2d § 227, p. 476, note 13 and cases cited therein. Accordingly, any legislation purporting to delegate the power to amend or modify statutory milk product definitions would be invalid as an unlawful delegation of legislative power.

A second difficulty with the proposal set forth in your memorandum is that it may be construed as an attempt to incorporate by reference into Maine law definitions which are dependent upon future enactments of HEW. The law is well settled that to the extent that an act purports to incorporate future enactments of a federal agency (any agency without the direction and control of the State Legislature), such incorporation constitutes an unlawful delegation of legislative power. 1949-50 Atty Gen. Reports 230; State v. Vino Medical Co., 121 Me. 438, 117 A. 588 (1922); Hutchins. v. Mayo, 143 Fla. 707, 197 So. 495 (1940).

NOT A FORMAL OPINION

There is an alternative method to achieving flexibility while retaining state control which you may wish to consider. There is a substantial body of case law which recognizes that the regulation of milk and milk products is an area which may properly be delegated to a regulatory agency, provided there are sufficient standards to guide the agency in its activities. Maine Milk Commission v. Cumberland Farms Northern, Inc., 160 Me. 366, 205 A.2d 146, appeal dismissed 85 S. Ct. 1333, 380 U.S. 521. Accordingly, if the legislature were to repeal the existing statutory definitions which you desire to be in a position to modify from time to time, and simultaneously enact legislation providing you with appropriate power to establish definitions for those terms, you may achieve the flexibility you desire.

It should be emphasized that any broad grant of legislative power, such as the foregoing, must be accompanied by sufficient standards to guide you in establishing "new" definitions; without meaningful standards, the delegation of power would be subject to serious attack. It would also be well for such legislation to provide that the "new" definitions would be established pursuant to and in accordance with the State Administrative Code, so that there would be appropriate review procedures with respect to the adoption of definitions.

Finally, it should be noted that while the present statutory pattern is apparently somewhat cumbersome to modify, it has been in existence for many years and has a strong presumption of constitutionality. A drastic departure from the statutory scheme of the kind we described, however artistically drawn, may precipitate attacks in the Courts which may have been avoided by simply proceeding as you have in the past.

If you have any further questions, please let us know.

JLW/mf

NOT A FORMAL OPINION