

330 CMR: DEPARTMENT OF FOOD & AGRICULTURE

330 CMR 21.00: SUPERVISION OF MILK PRICING AND SUPPLY

Section

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21.01: Definitions

(1) Except as otherwise specified in the following provisions, all terms within 330 CMR 21.00 shall conform to the definitions appearing in M.G.L.c. 94A, § 1, and shall draw their practical meaning from the operation of 330 CMR 21.00.

(2) The ensuing terms, not appearing in the statutory definitional section, shall take the following meanings:

Campaign Notice: a notice sent on a form provided by the Department of Agricultural Resources by a milk dealer notifying the Department of an intention to offer a coupon in a marketing or promotion campaign within the Commonwealth of Massachusetts.

Coupon: any method or device, whether physical, electronic or otherwise, that rebates, returns, or reduces the price of packaged fluid milk.

Drop: a delivery of milk to a retailer, store or subdealer.

Fair Market Area: a geographic area surrounding a Producer Dealer designated as that Producer Dealer's marketing area which overlaps the geographic area identified in a Campaign Notice.

License: any permit or authorization which M.G.L. chs. 94 and 94A empower the Department of Food and Agriculture to issue.

Marketing Campaign: a plan of a milk dealer to market, sell, or distribute fluid milk for consumer use and benefit within the Commonwealth of Massachusetts through the use of a coupon.

Notice of Determination: written notice of the commissioner's approval disapproval or approval with conditions of a promotion or marketing campaign and conditions placed thereon.

Predatory Campaign: the use of the methods described in M.G.L. c. 94A, §§ 14(d) or 14(e) with the effect, whether intentional or not, of unfairly diverting trade from a producer dealer or otherwise injuring or of destroying a producer dealer.

Producer Dealer: a producer who processes milk produced on the farm for retail sale.

Promotion Campaign: a plan or intention of a milk dealer to promote fluid milk for consumer use and benefit within the Commonwealth of Massachusetts through the use of a coupon.

Subdealer: any person or entity engaged in the business of distributing to wholesale or retailer purchasers milk previously pasteurized, processed and packaged by a separate dealer.

Units: any recognized measurement of milk volume including, but not limited to, quarts and gallons, and fractions thereof.

21.02: Mandatory Common Recordkeeping

To enable determination of processing, packaging and distribution costs by product and package size, all processors and dealers of milk licensed by the Department of Agricultural Resources (the Department) shall maintain the following books and records for a period of three years from their creation.

- (a) Weekly route loadout and settlement records, including:
 1. route number, driver's name and date;
 2. beginning inventory of saleable units of milk and milk products;
 3. number of units of milk and milk products loaded on truck;
 4. number of saleable units of milk and milk products;
 5. number of returned units of milk and milk products with specific reference to the number of spoiled units of milk and milk products;
 6. number of units of milk and milk products sold;
 7. amounts of cash and charge sales stated separately;
 8. route collections or charge accounts listed showing customers and amounts;
 9. amount of route money short or over;
 10. details of any expenditures made from amounts listed in 330 CMR 21.02(a)7. and 8.
- (b) Appropriate records showing the names and addresses of all retail and wholesale customers served on the route. These records shall reflect all sales and/or deliveries to each customer and shall be available for inspection at all times when the trucks are being used to service customers. On wholesale routes, a copy of the delivery slips to all customers may be maintained in the truck and the addresses maintained in the office of the dealer or subdealer.
- (c) Detailed daily cash and charge sales records of deliveries and sales, including the number of units and prices of all products sold or delivered to customers with the value of each product extended and totaled. The foregoing extensions and totals may be consolidated into weekly, biweekly or monthly records so long as daily records are maintained.
- (d) Accounts receivable records, including but not limited to:
 1. a detailed accounts receivable record showing customer name, address and identifiable charges and credits. This shall be so maintained and detailed as to permit ready determination of the composition and age of the balances outstanding;
 2. charges are to be posted in such a manner as to be readily proved to invoices or other posting documentation or records;
 3. a record of loans or notes receivable so maintained and detailed as to permit ready determination of the composition and age of the balances outstanding.
- (e) Cash receipt and disbursement records, including but not limited to:
 1. all cash received, from whatever source, pertaining to the licensed business, shall be entered into a detailed daily record of cash receipts which shall be traceable to a specific deposit made or other disposition of the cash received. This shall include but not be limited to collections for deliveries to accounts and other miscellaneous cash sales or income. It shall also show individual customer or other accounts affected and be supported by original documentation showing the nature of the cash receipt transaction;
 2. all monies expended, relating to the licensed business, including but not limited to payments for purchases, expenses, rebates, and so forth, shall be entered into a detailed record of cash disbursements. These entries shall be supported by original documentation, including invoices, receipts and bills of sale or other documentation. Records of rebates, if any, are to be maintained and are to indicate details of the basis for such rebates as applied to each customer;
 3. records required shall also include daily detailed deposit slips, voided and cancelled checks and monthly bank statements or passbooks for all bank accounts affecting the licensed business, including bank debit and credit memoranda, check stubs or duplicates, and bank reconciliations.
- (f) Purchase and expense records distinguishing clearly those costs attributable to plant processing operations and those attributable to distribution of product. The records for processing and for distribution each shall include, but not be limited to:
 1. a detailed daily record of all purchases relating to the licensed business, including purchases of milk and milk products and all other items of cost and expense. These entries shall be supported by original documentation from vendors or others with whom the transactions originate;

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2. a detailed record of all assets purchased, including refrigeration and storage units;
 3. detailed payroll and personnel records showing all employees and their individual earnings, as well as any other reimbursed expenses of officers and employees.
- (g) A general ledger, posted monthly, showing the summary of all transactions reflected in the cash receipt and disbursement records, the sales records, the purchase records, and the adjustments or other financial records.
- (h) Agreements. Copies of and any all agreements pertaining to the licensed business, including but not limited to sales or leases of property and/or equipment, rentals of property and/or equipment, loans received or granted, routes lease, sold or purchased, and contracts relating to the sale or purchase of milk or milk products.
- (i) Inspection. The Department shall enforce the foregoing recordkeeping requirements by means including, but not limited to, its' inspection powers under M.G.L. c. 94A, § 13.

21.03: Monthly Dealer System

(1) The Commissioner may require any licensed processors and dealers (including handlers, producer-handlers, subdealers and producer-dealers and including, as applicable, companies whose processing and retailing operations are vertically integrated) to file reports on forms supplied by the Department as follows:

On or before the 15th of the month for the preceding month a report of the following:

- (a) Loans of money, including any guarantee or procurement of another to guarantee or any underwriting of any financial obligation of any customer served by licensee or solicited by the licensee.
- (b) Sales, loans, or rentals (including lease purchase agreements) of any refrigeration equipment to any customer served by the licensee or solicited to be served by the licensee. A processor or dealer shall report any such equipment supplied on behalf of its subdealers.
- (c) Names of all wholesale customers, including dealers, acquired and/or lost during the previous month. This information shall include trade names, addresses, current milk license numbers (if applicable) and, for lost accounts, the reason given for the change.
- (d) The lowest net prices charged (after all rebates, discounts and allowances) during the month for milk and orange juice delivered to stores in the Commonwealth and the lowest net prices charged to dealers and stores for milk sold at the plant dock.
- (e) Information whether the dealer is purchasing milk from independent producers; and the quantity of such purchases.
- (f) The Department requires monthly reports showing no activity, if appropriate.
- (g) The following licensees shall be exempt from the reporting requirements of 330 CMR 21.03:
 1. subdealers selling only to home-delivery customers;
 2. dealers and subdealers with fewer than 20 wholesale accounts and less than \$200,000 per month of annual average monthly sales.
- (h) In accordance with M.G.L. c. 94A, § 13(d), the Department shall treat as confidential competitive information all reports received under 330 CMR 21.03 and shall not disclose such information except as otherwise provided by law.

21.04: Notice of Intent to Change Supplier

The Department may require from any store, retail outlet or subdealer licensed for the sale of milk the following notice of its intent to alter or to add any processor or dealer as a supplier of milk. This requirement shall apply to all stores and retail outlets which receive milk supplies in a volume of 25 cases per drop or more.

- (a) a two week written notice sent to the Department by certified mail upon a form furnished by the Department for that purpose. The store or retail outlet shall forward a copy of the written notice simultaneously to the existing supplier.
- (b) The noticed change or addition of supplier may go forward as planned unless the Department otherwise notifies the store, retail outlet or subdealer within two weeks of receipt of notice.
- (c) The foregoing notice shall not be required in advance of the change or addition of a supplier:

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1. if the existing supplier is failing to provide adequate service; or to supply products desired by the store, retail outlet or subdealer; or to supply milk in compliance with minimum health standards; or
2. if the store, retail outlet or subdealer must immediately supplement normal supplies in response to an unanticipated increase in demand or in response to an emergency.

In such instances the regulatee shall report the change or addition to the Department not later than two weeks thereafter.

- (d) The Department may deny approval to change supplier(s) if it determines:
 1. that such change would violate legislation or regulations prohibiting pricing below cost or discriminatory pricing by processors or dealers (including handlers, producer- handlers, subdealers and producer-dealers);
 2. that, as of the time of change, the store, retailer or subdealer will owe any supplier a substantial level of indebtedness for milk products received.
- (e) In furtherance of the purpose of this provision, including the preservation of the financial stability of producer farmers and the continuous, adequate supply of milk to the consuming public, all licensed milk dealers shall give written notice of 90 days to the Department and to any affected producer of an intent to terminate a producer as a supplier of raw milk. For urgent reasons stated in writing to the Department and to the producer, a dealer may terminate a producer more promptly. In such instances the Department, upon a determination of the validity of the reasons, may disallow the termination until completion of the 90 day notice period prescribed by 330 CMR 21.03.

21.05: Presumptive Minimum Cost

After a duly noticed public comment hearing, the Department may establish and promulgate a presumptive minimum cost of each unit volume of wholesale milk sold by dealers to customers upon the basis of information gathered from dealer reports, recordkeeping, independent studies, and other reliable sources. A dealer may sell at a price below the presumptive minimum wholesale cost if it can first demonstrate to the Department that its price reflects a corresponding lower actual cost.

21.06: Campaign Notice

To offer a coupon, a Milk Dealer shall submit a Campaign Notice at least 30 days prior to the start of the Marketing or Promotion Campaign. The Campaign Notice shall include a description of the Marketing or Promotion Campaign, including the method or device by which the coupon is offered. In addition, the notice shall contain the following:

- (a) type of campaign
- (b) geographic area in which the coupon shall be offered
- (c) product targeted
- (d) price analysis
 1. price without campaign
 2. price with campaign
 3. cost of campaign

21.07: Approval Procedure

(1) The Department shall have ten business days from receipt of the Campaign Notice to review and respond with a request for additional information if necessary or issue a Notice of Determination. The review shall determine whether the coupon will result in a below cost sale of milk, and whether the Marketing or Promotion Campaign is a predatory campaign.

(2) In making a determination regarding a below-cost sale of milk, the Department shall consider the analysis provided for in M.G.L. c. 94A, § 14(d) and any amendments thereto and the price impact of the coupon.

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(3) Criteria used to make a determination whether the Marketing or Promotion Campaign is a Predatory Campaign include the existence of a Fair Market Area, the quantity and category of milk included in the Campaign Notice, the method or device used as a coupon and the degree to which the applicant has demonstrated that the Marketing or Promotion Campaign is not a predatory campaign.

(4) If the Department fails to issue a Notice of Determination within ten business days, the coupon shall be deemed approved without restriction.

(5) Notice of Determination shall state the approval, approval with restrictions, or disapproval of a coupon identified in the marketing campaign notice. Restrictions may include Fair Market Areas, methods or devices, quantities and categories of milk, methods or devices employed, value of the coupon or price of the milk. Disapprovals may result from the below cost sale of milk or due to a determination that the Marketing Campaign is a Predatory Campaign.

21.08: Enforcement

Violation of any of 330 CMR 21.00 shall subject the regulatee to the revocation, suspension, or conditioning of any license granted to it by the Department and to any other remedies, legal and equitable, available to the Department. A fair hearing opportunity shall precede any license sanction in accordance with M.G.L. c. 94A, §§ 6 and 7.

21.09: Severability

The Department intends each provision and subsection of 330 CMR 21.00 to remain severable from every other. So far as practicable, the invalidity of any such provision or subsection shall not affect the validity and operation of any other.

REGULATORY AUTHORITY

330 CMR 21.00: M.G.L. c. 94A, §§ 2 and 14.

NON-TEXT PAGE