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**STATE OF NEW YORK**

**Department of  
AGRICULTURE AND MARKETS**

**Albany, NY 12235**

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**CIRCULAR 918**

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Article 21 of the Agriculture and  
Markets Law Relating to

**MILK CONTROL**

(Chap. 48, Laws of 1922, as amended)  
and

Article 21-AA of the Agriculture and  
Markets Law Relating to

**DAIRY PROMOTION**

Chap. 1008, Laws of 1969, as amended)

(Revised 1993)

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**NEW YORK STATE AGRICULTURE AND MARKETS LAW**

**ARTICLE 21 -- MILK CONTROL**

**SECTION:**

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**ARTICLE 21-AA-DAIRY PROMOTION ACT**

**SECTION:**

- 258-aa. Declaration of policy.

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<sup>1</sup> Section enacted without catchline which has been supplied by editor.

## **252. Division of milk control**

There shall be in the department a division to be known as the division of milk control. The head of the division shall be a director who shall be appointed by the commissioner and serve during his pleasure. The functions, powers and duties of the department, as provided by this article, and by article four of this chapter, shall be exercised and performed therein by and through the division of milk control. The commissioner may delegate any of his powers to, or direct any of his duties to be performed by the director of the division of milk control.

## **253. Definitions**

As used in this article unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

1. "Division" means the division of milk control created by this article. (Subd. 1 so numbered by Chap. 59, Laws of 1959.)

2. "Director" means the director of the division of milk control. (Subd. 2 so numbered by Chap. 59, Laws of 1959.)

3. "Person" means any person, firm, corporation, co-partnership, association, cooperative corporation or unincorporated cooperative association. (Subd. 3 so numbered by Chap 59, Laws of 1959; amended by Chap. 712, Laws of 1962; and Chap. 935, Laws of 1971, effective July 1, 1971.)

4. "Milk dealer" means any person who purchases, handles or sells milk, or bargains for the purchase or sale of milk, including brokers and agents. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary and affiliate of such corporation similarly engaged, shall be deemed a milk dealer within the meaning of this definition. A hotel or restaurant which sells only milk consumed on the premises where sold, or a producer who delivers milk only to a milk dealer, or a person who purchases milk from licensed dealers to be combined by him with non dairy products in the manufacture of candy, soup or other food products (except melloream) shall not be deemed a milk dealer. (Subd. 4 so numbered by Chap. 59, Laws of 1959; amended by Chap. 712, Laws of 1962; Chap. 469, Laws of 1967; Chap. 1087, Laws of 1968; and Chap. 935, Laws of 1971, effective July 1, 1971.)

5. (Repealed Chap. 540, Laws of 1987, effective April 1, 1988.)

6. "Licensee" means a licensed milk dealer. (Subd. 6 so numbered by Chap. 59, Laws of 1959.)

7. "Milk", for the purposes of this article, means all skim milk resulting from the separation of butterfat from whole milk, or resulting from reconstituting or recombining nonfat milk solids

with water, and all butterfat in the form of or contained in milk, homogenized milk, vitamin D milk, vitamin-mineral fortified milk, flavored milk, standardized milk, concentrated milk in consumer packages, fluid skim milk, modified skim milk, skim milk drinks, buttermilk, fresh cream, half and half, or any product or products having the appearance and taste of any of the above, regardless of the name by which they are labeled or represented. It includes such skim milk and butterfat contained in melloreem whose appearance, odor or taste is similar to any of the aforesaid. In each instance where quantity is referred to the intent is to include the combined product pounds of skim milk and butterfat contained therein. (Subd. 7 formerly unnumbered; was amended by Chap. 852, Laws of 1956; was so numbered by Chap. 59, Laws of 1959; amended by Chap. 712, Laws of 1962; Chap. 1087, Laws of 1968; and Chap. 935, Laws of 1971, effective July 1, 1971.)

8. "Producer" means a person producing milk. (Subd. 8 so numbered by Chap. 59, Laws of 1959.)

9. "Consumer" means any person other than a milk dealer who purchases milk for fluid consumption. (Subd. 9 so numbered by Chap. 59, Laws of 1959.)

10. "Store" means an individual business establishment at one location including a grocery store, hotel, restaurant, soda fountain, dairy products store, automatic milk vending machine, gasoline station or a similar mercantile establishment offering goods and/or services at retail to individual consumers. The commissioner may after due notice and public hearing define as a store such other mercantile establishment as he finds conforms to the definition as herein provided. (Subd. 10 amended by Chap. 247, Laws of 1976, effective June 1, 1976. )

11. "Milk broker" means any person who buys and sells milk for licensees on a fee or commission basis or who arranges for or negotiates contracts to buy or sell milk among licensees. (Subd. II added by Chap. 938, Laws of 1965.)

#### **254. General powers**

The department through the commissioner is hereby vested with the powers heretofore conferred with respect to milk gathering stations, manufactories and plants, including the following:

(a) To supervise and regulate the entire milk industry of New York State, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York; provided, however, that nothing contained in this article shall be construed to abrogate or affect the status, force or operation of any provision of the public health law, the public service law, the state sanitary code or any local health ordinance or regulation.

(b) To investigate all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the state of New York. The commissioner shall have the power to subpoena milk dealers, their records, books and accounts, and any other person from whom information may be desired to carry out the purpose and intent of this chapter and may issue commissions to take depositions of witnesses absent from the state. Any designated employee may sign and issue subpoenas and may administer oaths to witnesses and conduct hearings and investigations. A subpoena issued under this section shall be regulated by the civil practice law and rules. (As amended by Chap. 310, Laws of 1962, effective September 1, 1963.)

(c) The commissioner may act as mediator and arbitrator in any controversy or issue that may arise among or between producers, among or between producers and milk dealers, among or between milk dealers, as between themselves or that may arise between them as groups. (As amended by Chap. 397, Laws of 1962, effective April 9, 1962.)

(d) The operation and effect of any provisions of this article conferring a general power shall not be impaired or qualified by the granting by this article of a specific power or powers.

#### **254-a. Milk marketing advisory council**

1. There shall be established a milk marketing advisory council to advise the commissioner in planning, programs and policy pertaining to milk marketing. The council will be convened at the request of the commissioner not less than two times per year.

2. This advisory council shall consist of not less than seven members who shall be appointed by and serve at the pleasure of the commissioner. The commissioner shall designate one member to serve as chairman of the council. The membership of the council shall include, but not be limited to milk producers, milk dealers, representatives of general farm organizations and dairy farmer cooperative associations, and representatives of milk consumers and representatives of milk retailers. The members shall serve without salary, but shall be entitled to reimbursement of their ordinary and necessary travel expenses.

3. The duties and responsibilities of the milk marketing advisory council shall be prescribed by the commissioner and he may specifically delegate to the council any or all of the following duties and responsibilities:

(a) The recommendation to the commissioner of proposed rules and regulations to effectuate the purposes of this article.

(b) The recommendation to the commissioner of changes or amendments to rules and regulations.

(c) The recommendation to the commissioner of policy positions with respect to proposed federal legislation and regulations affecting milk marketing within the state.

(d) Assisting the commissioner in the collection and assembly of information and data necessary for the proper administration of this article.

(e) Study of milk marketing matters pertaining to the administration of this article and inform the commissioner of their findings.

(f) The performance of such other duties relating to the administration of this article as the commissioner shall designate. (Section effective June 5, 1978, pursuant to L.1978 236, Sec. 1; amended L.1982, c. 328, Sec. 1.)

### **255. Rules and orders**

The commissioner may adopt and enforce all rules and all orders necessary to carry out the provisions of this article. Every rule or order shall be filed in the office of the department of state, except an order directed only to a person or persons named therein which shall be served by personal delivery of a copy, or by mailing a copy in a sealed envelope with postage prepaid to each person to whom such order is directed, or, in the case of a corporation, to any officer or agent of the corporation upon whom a summons may be served in accordance with the provisions of the civil practice law and rules. The filing of any rule and of any order, not herein required to be served, in the office of the department of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule when duly filed as provided in this section shall have the force and effect of law. (Amended Chap. 235, Laws of 1986.)

### **256. Entry, inspection and investigation**

Any employee designated for the purpose shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured, or where milk or milk products are being bought, sold or handled, or where the books, papers, records or documents relating to such transactions are kept, and shall have power to inspect and copy the same in any place within the state, and may administer oaths and take testimony for the purpose of ascertaining facts which in the judgement of the commissioner are necessary to administer this chapter.

#### **256-a. Audits of books and accounts of milk dealers and cooperatives**

It shall be the duty of the commissioner to examine and audit from time to time, as the commissioner deems necessary and proper, the books and accounts of milk dealers and cooperatives licensed or subject to license under this article, for the purpose of determining how payments to producers for the milk handled are computed, whether the amounts of such payments are fair, and whether any provisions of this chapter affecting such payments,

directly or indirectly, have been or are being violated, and for the purpose of determining the costs of the handling, distribution and marketing of milk and milk products, and for the purpose of determining the manner of disposition of the total income of each and every milk dealer and cooperative.

For the purposes hereof, the commissioner or any employee designated for that purpose shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured or where milk and milk products are being bought, sold or handled, and where books, papers, records or documents relating to such purchase or sale are kept, and shall have power to inspect and copy and audit all of said books and accounts. No person or corporation shall in any way hinder or delay the commissioner or any employee in conducting such examination or audit. The commissioner may reveal any of the findings of such examination or audit to the producers interested therein, or may publish all or any part of such findings, as in his judgement will best serve the public interest and accomplish the purposes of this chapter.

#### **256-b. Accounting of milk dealers and cooperatives to producers**

1. For purposes of this section, any corporation or association of persons engaged in the production of agricultural products and operating for the mutual benefit of its members in conformity with the requirements of the Capper-Volstead Act, and any federation of such corporations or associations, shall be deemed to be a cooperative.

2. Every milk dealer and cooperative, subject to license or regulation under this article, in making payments to producers for milk sold or delivered to such dealer or cooperative, shall clearly set forth the unit price for such milk, whether determined pursuant to federal or state market order or pursuant to agreement, together with the amount of all premiums, subsidies or differentials, all deductions, service fees, hauling charges, supply expenses, costs or adjustments of any nature whatsoever, in such a manner as to fully disclose to the producer the rate, basis and manner of computing such payment.

3. Each cooperative subject to license or regulation pursuant to this article shall, prior to its annual meeting, mail or personally deliver a copy of a written report of audit, prepared in the form and manner prescribed under section seventy five of the cooperative corporations law, to each member of the cooperative and to individual producer members of any constituent cooperatives. The printing of such report in a publication regularly distributed to the cooperative's entire membership shall satisfy the delivery requirement.

4. Each milk producer who applies for membership in such a cooperative shall, prior to issuance of a membership certificate

or entry into a milk marketing agreement with the cooperative, be provided with the following documents of such cooperative and of any federation of cooperatives of which it is a member: (a) a copy of the cooperative's written report of audit required to be provided to the cooperative's membership, pursuant to subdivision three of this section, for the fiscal year preceding the date of such application; (b) a copy of the certificate of incorporation; (c) a copy of the bylaws in effect at the time of such producer's application for membership; and (d) a written statement of the current equity requirements and policy on the allocation of net margins and losses.

5. The commissioner may make or permit disclosure of a written report of audit made pursuant to subdivision three of this section for any cooperative subject to license or regulation pursuant to this article.

6. The commissioner may promulgate rules and regulations necessary to assure such uniform requirements as will carry out the provisions of this section. (Section 256-b added by Chap. 489, Laws of 1964; amended by Chap. 923, Laws of 1981; amended by Chap. 171, Laws of 1984, amended Chap. 540, Laws of 1987.)

## **257. Licenses to milk dealers**

1. No milk dealer shall buy milk from producers or others or deal in, handle, sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter.

2. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less.

3. A store shall be exempt from the license requirements provided by this article if such store does not engage in the customary functions of a milk dealer and meets all the following conditions:

(a) Sells no milk other than that purchased or received from a duly licensed milk dealer, or a milk dealer exempted by official order of the commissioner from the license requirements of this article.

(b) Does not operate a milk pasteurizing plant.

(c) Delivers no milk to hotels, restaurants, lunch counters, soda fountains, or any eating establishment to be consumed on the premises.

(d) Sells not more than three thousand pounds of milk in any month for off-premises delivery.



(e) Does not deliver or transport or cause to be delivered or transported milk to a store or stores, except milk delivered to such store by a licensed milk dealer or milk dealers.

(f) Does not sell milk to other stores.

(g) Does not purchase, buy, sell or deal in milk received from unlicensed dealers. (Subd. 3 amended by Chap. 247, Laws of 1976, effective June 1, 1976.)

4. Farmers (including individuals and partnerships but not corporations) selling not more than one hundred quarts daily average of milk, or any amount of milk pasteurized on the farm where produced, to customers coming there for it shall be exempt from the license requirements provided by this article. (Subd. 4 amended by Chap. 926, Laws of 1958, effective April 22, 1958.)

5. (Repealed Chap. 540, Laws of 1987, effective April 1, 1988.)

## **258. Application for license**

An applicant for a license to operate as a milk dealer shall file an application upon a blank prepared under authority of the commissioner. An applicant shall state such facts concerning his circumstances and the nature of the business to be conducted as in the opinion of the commissioner are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The commissioner may, for the purpose of establishing the rate of license fees and otherwise carrying out the duties of the commissioner under this chapter, classify licenses and issue licenses to milk dealers to carry on a certain kind of business, including but not limited to the purchase of milk, sale or distribution of milk, processing or manufacture of milk, bargaining and collecting for the sale of milk, dealing in or brokering milk, and hauling milk. Upon a finding that the applicant qualifies for a license under the standards set forth in section two hundred fifty-eight-c of this article, the commissioner shall issue such applicant a license.~ A license shall be for a period not exceeding one year. An application for renewal of license must be duly made at least sixty days before the expiration of such license by all milk dealers then doing business. (Amended by Chap. 831, Laws of 1961, effective April 1, 1961, amended Chap. 540, Laws of 1987.)

### **258-a. License fees**

1. A milk dealer receiving, purchasing, handling or selling during any of the twelve calendar months immediately preceding the period for which the license is issued a daily average total quantity of milk not exceeding four thousand pounds shall pay a license fee of one hundred dollars; and for each additional four thousand pounds of milk or fraction thereof received, purchased, handled or sold, the license fee shall be increased forty dollars.

In no event, however, shall a license fee in excess of seven thousand five hundred dollars be required.

2. An applicant who has not previously engaged in such business shall pay the minimum license fee as provided herein for the type of business which he proposes to conduct. Any such applicant who during any calendar month of the first year covered by his license receives, purchases, handles or sells a greater quantity of milk than that upon which the license fee paid by such milk dealer was based shall for each additional four thousand pounds of milk or fraction thereof pay an additional license fee of forty dollars.

3. It is not the intent that milk utilized by the applicant or licensee or sold by him in the form of manufactured products shall be included in the determination of the amount of license fee. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee.

4. The commissioner may, by rule or order, provide for licensing, at any rate of license fee less than the rates herein fixed, any milk dealer or class of milk dealers which he is authorized to exempt from license requirements.

5. A milk dealer who neither buys nor sells milk but who operates a plant in which milk is pasteurized, processed or handled shall pay a license fee of one hundred dollars.

6. A milk dealer which is a producers' bargaining and collecting cooperative and does not operate milk plants or handle milk physically or operate farm bulk tank milk routes shall pay a license fee of one hundred dollars.

7. A milk dealer who neither buys nor sells milk but who operates a plant in which milk is manufactured shall pay a license fee of one hundred dollars.

8. A milk broker shall pay a license fee of one hundred dollars.

9. A milk dealer who is not a cooperative corporation and who does not buy or sell milk but who hauls milk for other milk dealers shall pay a license fee of one hundred dollars.

10. Notwithstanding any law to the contrary, all receipts of the department pursuant to this section shall be deposited in an account in the miscellaneous special revenue fund and shall be available solely for the administration of this article. The comptroller is authorized and directed to permit interest earnings on any balances to accrue to the benefit of this account. (Amended L. 1973, c. 831, subd. 2; L.1975, c. 607, subd. 1; L.1987, c. 540, subd. 5,19; L.1989, c. 62, subd. 4.)

**258-b. Prompt payment for milk purchases; security funds; bonding of milk dealers**

1. Scope of coverage.

(a) For purposes of this section, a cooperative corporation or association of producers shall be deemed to be a producer and not a dealer with respect to the milk of its producer members under contract with such cooperative, and shall be deemed to be a dealer with respect to milk purchased or received from non-member producers.

(b) Notwithstanding any other provision of this section, sales or other transfers of milk between cooperatives shall not be subject to bond or assessment under the security provisions of this section.

(c) Any corporation or association of persons engaged in the production of agricultural products which is operated for the mutual benefit of its members and which qualifies as such under the provisions of the Capper-Volstead Act shall be deemed to be a cooperative corporation or association for purposes of this section.

2. Prompt payment for milk.

(a) Every milk dealer shall: on or before the last day of each month, pay for all milk received from producers during the first fifteen days of such month based upon not less than the lowest class price for the preceding month, as determined by the commissioner and every such milk dealer shall, on or before the twentieth day of each month, pay the balance owed producers for milk received during the preceding month provided, that a dealer buying from a cooperative shall transmit payment by any method whereby the cooperative receives cash or cash equivalent no later than the payment dates above prescribed, or receives a check no later than two days before the payment dates above prescribed.

(b) Any producer who does not receive payment for milk sold or delivered to a milk dealer, within the time prescribed in paragraph (a) of this subdivision, shall promptly notify the commissioner of such fact.

(c) The commissioner may, if he finds it is necessary, promulgate after hearing rules and regulations prescribing the period within which stores, restaurants, hotels, public institutions and other wholesale purchasers of milk shall pay for milk purchased or received from a licensed dealer. No milk dealer or cooperative shall sell or deliver milk, except on a cash on delivery basis, to any wholesale purchaser who has failed to make full payment within the period prescribed in regulations promulgated by the commissioner pursuant to this paragraph.

3. Payments to security funds.

(a) Fund and filing of surety bonds. Any milk dealer, except a cooperative, who has not filed a bond or other security in full satisfaction of the requirements of subdivision six or seven hereof and who buys, receives or otherwise handles milk received from producers, shall, unless entitled to offsetting credits under paragraph (b) of subdivision four hereof, pay monthly to the

commissioner during each fiscal year an amount up to one and one-half tenths of one percent of the average uniform price per hundredweight of milk for the previous calendar year, as determined and announced by the commissioner on or before the thirty-first day of March of each year, on each hundredweight of all such milk purchased, received or handled. Such payments by dealers shall be deposited in the milk producers security fund established by subdivision four hereof.

(b) Whenever the commissioner determines that the balance in the milk producers security fund exceeds five percent of the value of milk purchases covered by the fund, the maximum rates established by paragraph (a) of this subdivision shall be reduced from one and one-half tenths of one percent to one-tenth of one percent.

(c) (1) In addition to making such payments for deposit in the milk producers security fund, any such dealer shall file with the commissioner a mandatory minimum surety bond, executed by a surety company authorized to do business in this state and approved by the commissioner, conditioned for the prompt payment of all amounts due to producers for milk sold or consigned by them to such dealer during the license year and all amounts due to the equalization or producer settlement fund of any order promulgated by the commissioner pursuant to section two hundred fifty-eight-m or two hundred fifty-eight-n of this article. The bond shall be twelve times the amount equal to (i) the value of milk purchased or received from producers in the two consecutive months during the preceding twelve months in which the dealer purchased or received the highest aggregate value of milk divided by the number of days in those two months and (ii) the amount owed in the same two-month period to the equalization or producer settlement fund, divided by the number of days in such months.

(2) Upon an application of a dealer and pursuant to regulations promulgated to effectuate the provisions of this paragraph, the commissioner shall examine the financial condition of the applicant and may exempt the applicant from the provisions of this paragraph if the commissioner finds that the granting of the application would not materially affect security for producers or the viability of the milk producers security fund; provided however, that for any applicant where the amount calculated in subparagraph one of this paragraph multiplied by forty-three is less than two hundred fifty thousand dollars, the commissioner shall exempt such applicant from the provisions of this paragraph unless the commissioner finds that the granting of the application would materially affect security for producers. Rules and regulations to effectuate the provisions of this subparagraph shall specify the criteria to be used in reviewing the applicant's financial condition, the viability of the milk producers security fund, and the effect of the proposed exemption on the security afforded to producers delivering milk to the applicant.

(d) The commissioner may require a milk dealer, in addition to making payments to the producers security fund and filing such mandatory minimum surety bond, to execute and file such further additional surety bond or other security as he may deem acceptable and sufficient, at any time the commissioner finds (1) that the

milk dealer has insufficient property located within this state upon which to levy, pursuant to paragraph (e) of subdivision five of this section, in the event of a default by a dealer making two monthly payments for forty days purchases of milk, or (2) that the dealer's participation in the fund and filing such mandatory minimum surety bond will not otherwise afford adequate security to all producers protected by the fund.

4. Milk producers security fund.

(a) There is hereby established in the joint custody of the comptroller and the commissioner of taxation and finance a fund to be designated as the milk producers security fund. The commissioner shall deposit all monies received by him from milk dealers pursuant to paragraph (a) of subdivision three hereof into the fund. The funds so received and deposited in such milk producers security fund shall not be deemed to be state funds. The comptroller shall be empowered to invest such funds pursuant to section ninety-eight-a of the state finance law consistent with the purposes of this section. The commissioner is hereby authorized to draw upon such funds, in his discretion, to purchase credit insurance for the benefit of the milk producers security fund. The expense of administering the provisions of the milk producers security fund and of administering subdivision one hereof shall be paid from the fund to the commissioner on vouchers certified by the commissioner with the approval and consent of the director of the budget. Such payments from the fund shall not exceed two and one-half percent of the total fund or one hundred thousand dollars per annum, whichever is greater. The commissioner shall make an annual report of the receipts to and disbursements from the fund, including the cost of administration of the fund, which report shall be made available to each milk dealer and to any other person having an interest in the fund. A copy of such report shall be forwarded to the director of the division of the budget, the chairman of the senate finance committee and the chairman of the assembly ways and means committee.

(b) After the milk producers security fund shall have equaled five million dollars or such greater or lesser amount up to five percent of the value of milk purchases to be covered by the fund, calculated upon the basis of the average value of the milk covered by the fund during the preceding calendar year, as the commissioner may determine is sufficient to protect the interests of producers, he shall administer the fund in the manner prescribed herein. Periodically, but at least twice each year, he may credit each milk dealer with an amount which bears the same relationship to the total money in the fund as that dealer's payments to the fund bear to the total payments to the fund by all dealers. If the amount so credited to a milk dealer is greater than that due from such milk dealer, the excess shall be paid or credited to such milk dealer by the comptroller. No such credits or payments shall be made unless the commissioner finds that the fund can be maintained at a level which is sufficient to protect the interests of producers. Any such credit to a milk dealer's account shall not be considered as payments to the fund in computing further credits of such nature.

(c) If a milk dealer participating in the security fund elects to terminate his participation therein, he shall give notice in writing to the commissioner six months prior to the expiration of the license year and file a surety bond or other security on the first day of the second month before the end of the license year. He may thereupon apply for the return of his pro rata share of the monies in the security fund, less administrative costs, based upon his payments to the fund. Upon being satisfied that the dealer is not in default in any payments to producers or cooperatives and upon renewal of the license, the commissioner shall authorize the comptroller to pay to such milk dealer his pro rata share in six equal monthly payments.

(d) If a milk dealer who participated in the milk producers security fund ceases to do business as a milk dealer or sells or transfers his business to another milk dealer, he may apply for the return of his payments in the same manner as provided in paragraph (c) above, or he may assign his interests to the buying dealer with the approval of the commissioner.

(e) Any milk dealer who first elects to participate in the milk producers security fund shall make an initial payment to the fund, at the rate most recently announced by the commissioner, pursuant to subdivision three of this section, for milk purchased, received or handled from producers during the six months immediately preceding the date that notice of such election is given the commissioner, pursuant to subdivision ten of this section. Upon the payment of the initial deposit into the fund and filing of the mandatory minimum surety bond, as required herein, a milk dealer electing to participate in the fund may apply to the commissioner for termination or adjustment of an existing bond or the return or adjustment of any existing alternative security filed with the commissioner. If there have been no prior purchases, receipts or handling of milk by the dealer, such initial payment and the amount of such bond shall be based upon an estimate of the purchases, receipts or handling of milk by such dealer for the first six months following entry into the fund. After the first six months, the commissioner may adjust such bond and initial deposit so that the amount of the initial deposit and bonds are based upon the actual deliveries.

##### 5. Claims against mandatory minimum surety bond and milk producers security fund.

(a) If the commissioner has reason to believe that a licensed milk dealer who is participating in the milk producers security fund has defaulted in making payments for milk to producers, the commissioner shall give reasonable notice to the producers believed to be affected to file verified claims and may fix a reasonable time within which such claims must be filed. Upon learning of such default, the commissioner shall immediately examine the records of the defaulting dealer and shall identify the amounts which are reasonably estimated to be owed to producers. Within thirty days of the receipt of a claim by a producer and on the basis of such estimates, the commissioner may authorize the comptroller to pay any such producer up to seventyfive percent of such estimate. In connection with such

payment, the commissioner may make provisions for the recovery for the benefit of the fund of any payments made pursuant to this paragraph.

(b) No claims against the producers security fund shall be allowed for: (1) sales of milk to dealers not licensed by the State of New York, (2) sales of milk by a producer to a milk dealer subsequent to its failure to pay within the time periods prescribed in subdivision two, where the commissioner finds, after due notice and opportunity of hearing, that such extension of credit, whether direct or indirect, to such milk dealer by the producer did not constitute a reasonable exercise of business judgement. Claims shall be limited to the appropriate uniform price of the milk, and in no event shall a claim be allowed for deliveries of milk in excess of the amount owed for milk sold or delivered within the first forty consecutive day period for which payment was not received from a dealer. Claims filed by a market administrator may be allowed for amounts owed by a dealer to a producer settlement or equalization fund of an order promulgated under section two hundred fifty-eight-m or two hundred fiftyeight-n of this article.

(c) The commissioner shall examine the claims so filed, determine after hearing upon reasonable notice to the claimant and to the defaulting dealer the amount due upon such claims, and certify the amount due each claimant, provided, however, that no hearing shall be required with respect to a claim in which the defaulting dealer does not dispute liability and the claimant and defaulting dealer agree and stipulate to the amount found by the department to be payable on said claim. In determining the amount payable on any claim against a surety bond or the milk producers security fund, the commissioner may allocate any payments for milk made by a milk dealer to a claimant subsequent to its failure to pay within the prescribed time period, to the earliest debt owed such claimant by the milk dealer. Any amounts determined to be payable on a claim will be chargeable first against the mandatory minimum surety bond and any additional surety bond or other security filed pursuant to subdivision three of this section. In the event the amount of the mandatory minimum surety bond and any additional surety bond are not sufficient to pay the amount owed the producers for the deliveries of milk made in the first forty consecutive days for which payment was not received from a dealer, a claim against the producers security fund may be allowed in an amount not to exceed the difference between the amount recoverable on such bonds, and the amount owed for milk delivered in such applicable period.

(d) The commissioner's determination certifying the amount due each claimant shall be final unless the defaulting milk dealer or the claimant shall institute a proceeding pursuant to article seventy-eight of the civil practice law and rules within thirty days from the date of personal service of a copy of the written determination upon the milk dealer and producer affected thereby. If after the expiration of the thirty day period the commissioner's determination has not been stayed by the supreme court in a proceeding instituted to review it, the commissioner shall bring an action on the bond or bonds and proceed to obtain

from any other security filed funds with which to pay the claims and, to the extent that such funds are insufficient to pay the amount due, direct the comptroller to pay the claimants from the monies available in the milk producers security fund. For the purposes of any action brought on a bond, the commissioner's determination shall be presumptive evidence of the facts stated therein.

(e) If any claim is paid from the producers security fund, the defaulting dealer shall be liable to the commissioner for the benefit of the fund for the amount of claims so paid. After service by first class mail upon the defaulting dealer of the commissioner's certification of payment of a claim from the fund for which the dealer has been found liable to the claimant, the commissioner may issue a warrant under seal of the department directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the defaulting dealer, found within his county, for the payment of the amount of such claim with interest and the cost of executing the warrant, and to return such warrant to the commissioner and pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The commissioner may file with the clerk of any county a copy of such warrant, and thereupon the clerk shall enter in the judgement docket, in the column for judgement debtors, the name of the defaulting dealer designated in the warrant, and in appropriate columns the amount of the dealer's liability to the commissioner for claims, interest and costs, and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon and shall bind the real and personal property and chattels real of the person against whom it is issued in the same manner as a judgement duly docketed in the office of such clerk. The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgements of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. Upon such filing of a copy of a warrant, the commissioner shall have the same remedies to enforce the dealer's liability as if he had recovered judgement against the dealer for the amount of the warrant.

(f) In the event that the surety company who shall have executed a bond for a milk dealer shall fail to make prompt payment of all amounts due producers for milk sold or consigned by them to such milk dealer during the license year and all amounts due to the equalization or producer settlement fund of any order promulgated by the commissioner pursuant to section two hundred fifty-eight-m or two hundred fifty-eight-e of this article such surety company shall, in addition to making such payment on the bond, pay interest at the rate provided for in section 5-501 of the general obligations law on the amounts so owed from the date of the claim together with reasonable attorneys' fees and court costs.



6. Surety bonds.

(a) Each milk dealer who buys, receives or otherwise handles milk received from producers may execute and file with the commissioner a surety bond in lieu of participation in the milk producers security fund and the filing of a surety bond or bonds pursuant to subdivision three of this section. The bond shall be executed by a surety company authorized to do business in this state and shall be approved by the commissioner. The bond shall be conditioned for the prompt payment of all amounts due to producers for milk sold or consigned by them to such milk dealer during the license year and all amounts due to the equalization or producer settlement fund of any order promulgated by the commissioner pursuant to section two hundred fifty-eight-m or two hundred fifty-eight-e of this article.

(b) The bond shall be in an amount equal to (1) the value of milk purchased or received from producers in the two consecutive months during the preceding twelve months in which the dealer purchased or received the highest aggregate value of milk, divided by the number of days in those two months and multiplied by forty, and (2) the amount owed in the same two-month period to the equalization or producer settlement fund, divided by the number of days in such months and multiplied by forty.

7. Alternative security. Each milk dealer buying milk from producers may in lieu of filing a surety bond pursuant to subdivision three or six of this section provide an equal amount of protection for the producers from whom he purchases or receives milk, in one or more of the following forms:

(a) Cash deposited with a bank or trust company and held under an escrow agreement with the commissioner whereby it is solely for the protection of producers until such time as the commissioner finds that it is no longer needed for that purpose; or

(b) Bonds of the United States or of the State of New York actually deposited with the commissioner; or

(c) An irrevocable letter or letters of credit for the account of the milk dealer authorizing the commissioner to draw on a bank or trust company or banks or trust companies authorized to do business in the State of New York. Such letter or letters shall contain such terms and conditions as the commissioner may require.

8. Additional bond or alternative security. Whenever the commissioner shall determine that the value of milk purchased or received from producers by a dealer who is not participating in the producers security fund has increased, or that such increase may reasonably be anticipated, so that the total amount of security does not comply with the formula set forth in subdivision six hereof, as applied to any consecutive two month period during the current year, the commissioner shall require such additional surety bond or securities in lieu thereof as will afford producers the protection intended by this section.

9. Claims against bond or alternative security. Claims by producers against a dealer who had filed a bond or alternative

security shall be processed by the commissioner in the same manner as is provided in subdivision five hereof with respect to claims against the producers security fund and such claims shall be subject to the same limitations. The Commissioner's determination certifying the amounts due claimants shall be subject to judicial review in the same manner and subject to the same limitations. In the case of a dealer who has filed alternative security, the commissioner shall proceed to obtain from such security the funds with which to pay the claims. If recovery upon the alternative security is not sufficient to pay all claims, the amount recovered shall be divided pro rata among claimants. In the case of a dealer who has filed a surety bond, the commissioner may bring an action on the bond, and for the purposes of such action his determination certifying the amounts due shall be presumptive evidence of the facts therein stated. In the event that recovery on such bond has not been made within sixty days of the commissioner's certification of the amounts due producers covered by the bond, the commissioner shall direct the comptroller to pay such amounts to claimants from whatever monies are available in the milk producers security fund. In the event that recovery against the bond has not been made within one hundred eighty days of certification of the amounts due claimants, each and every dealer having filed a bond pursuant to subdivision six of this section shall pay monthly to the commissioner an amount not to exceed one-half of one-tenth of one percent of the average uniform price per hundredweight of milk for the previous calendar year, as determined by the commissioner on or before the thirty-first day of March of each year, on each hundredweight of such milk purchased, received or handled. Such payments shall continue for such period of time as the commissioner deems necessary in order to return to the fund, no later than three years from the date of such payment therefrom, the total amount paid as a result of the default of such dealer plus interest, at the rate provided for in section 5-501 of the general obligations law on the amount of such payment from the date of such payment. In the event of a recovery on the bond after the commencement of such payments, the commissioner shall authorize the comptroller to pay to each dealer making such payments its pro rata share of the amount by which the total of such payments exceeds the difference between the amount received and the total amount paid to claimants.

10. Time for providing security. Surety bonds or securities, whether filed in addition to or in lieu of participation in the fund, for the license year shall be filed with the commissioner not later than the first day of the second month before the beginning of each license year. Whenever an additional surety bond or alternative security is required to be filed, pursuant to paragraph (a) of subdivision three of this section, such bond or alternative security shall be filed with the commissioner within the time limits fixed by the commissioner. A milk dealer who elects to participate in the security fund and file a bond or bonds pursuant to subdivision three of this section, in lieu of filing a surety bond or alternative security pursuant to subdivision six of this section, shall notify the commissioner not

later than three months prior to the date on which such change is to be made, and shall file the bond or bonds and make the initial payment, as required by paragraph (e) of subdivision four of this section, not later than two months before such change is to be made.

11. (a) Notice of failure to provide security. Whenever a milk dealer fails to pay into the producers security fund or to file any surety bond or alternative security, as provided pursuant to this section, within the time or times fixed by this section or the commissioner's demand for additional security, the commissioner shall publish in a newspaper or newspapers having circulation in the area or areas in which the producers whose milk is sold or delivered to such milk dealer reside, a notice stating that he made such demand or request of said milk dealer; that the milk dealer has failed to comply; that the commissioner does not have on file such surety bond or alternative security as demanded, or that he has not paid monies due the producers security fund as required by him; and that adequate security to protect such producers may not be available to them as provided in this section. In addition to such published notice to producers, the commissioner shall send by certified mail a copy of such notice to each producer delivering milk to such milk dealer as he may be able to determine from records available to him and such notice shall be addressed to such producer's last known place of residence. In addition to providing such notice, the commissioner shall issue a notice of hearing directing the licensee to appear within twenty-four hours or such longer period as he may direct and show cause why an order should not be entered revoking such dealer's license or denying the renewal thereof for failure to provide required security.

(b) Payments to farmers. (1) It is hereby determined and declared that the assurance of prompt and full payment to dairy farmers is for the benefit of all the people of the state, and is so directly related to the public interest, the public health and general welfare that it is an essential government function.

(2) The commissioner shall annually no later than November first, assess the status of the milk producer security fund, the anticipated payments from and receipts to the fund for the following fiscal year and, in connection with such assessment, estimate the additional amounts, if any, which may be needed by the fund to meet the fund's objectives in assuring prompt and full payment to dairy farmers. The commissioner shall transmit this information in a report to the governor for his use in the preparation of the budget, and to the speaker of the assembly and the president pro tempore of the senate for use in the consideration of the budget for such fiscal year.

(3) In the event an appropriation is made for the purposes of this paragraph and, thereafter, upon certification by the commissioner, with approval of the director of the budget, that a further sum is required by the milk producers security fund to meet its obligations and accomplish the purposes of this section, the comptroller shall, within the limits of such appropriation, draw a warrant for the payment to the milk producers security fund

of an amount up to the amount of such sum. Such amount shall be a liability of the milk producers security fund and shall be repaid to the general fund pursuant to a plan of repayment. Prior to the institution of such a plan, a copy thereof shall be forwarded to the chairman of the senate finance committee and the chairman of the assembly ways and means committee, for use in the consideration of the budget for such fiscal year.

(4) Whenever the comptroller draws a warrant for payment to the milk producers security fund as provided in subparagraph three hereof, the commissioner shall implement the plan of repayment by promulgating through regulation after hearing an increase in the amount of assessment imposed under subdivision three of this section to an amount not exceeding two-tenths of one percent of the average uniform price for the previous year.

12. Expired.

13. Expired.

14. Repealed.

15. Prohibitions and violations. It shall be unlawful for a milk dealer to purchase or receive milk from producers or from other dealers for resale or manufacture unless such dealer files a surety bond or bonds as required pursuant to this section and makes prompt payment of any assessment as required pursuant to this section. It shall also be unlawful for a milk dealer to sell milk to another milk dealer, if he has been notified by the commissioner that the buying dealer has failed to make prompt payment to producers, to the producer settlement fund or equalization fund or to the milk producers security fund, or if such buying dealer has exceeded the credit period as provided pursuant to subdivision two of this section and the sale was not made upon the basis of cash on delivery.

In addition to penalties imposed by other provisions of this article a violation of this section shall subject a milk dealer to a penalty in the sum of one hundred dollars for each day that he is late in making payment into the milk producers security fund the assessment required by this section, for each day he sells milk to a milk dealer after being notified by the commissioner of that milk dealer's failure to make any required payment into the milk producers security fund, or for each day a milk dealer sells milk to another milk dealer who has failed to make payments for milk purchased as provided pursuant to subdivision two of this section. Any person who buys or sells milk in violation of the credit period provided in subdivision two of this section, shall be liable for a civil penalty of one hundred dollars a day for each day of violation.

16. Rules and regulations. The commissioner after due notice and public hearing may promulgate rules and regulations to carry out the provisions and intent of this section.

(Added L.1975, c.526, Sec. 2, amended L.1981, c.924, Secs. I to 6; L.1984, c.506, Secs. 1, 2, 3, 5; L.1985, c.432, Sec. 1; L.1987, c.540, Secs. 6 to 8; L.1988, c.326, Secs. 1, 2; L1991 C.353, Sec 1.)

### **258-c. Granting and revoking license.**

No license shall be denied to a person not now engaged in business as a milk dealer, or for the continuation of a now existing business, and no license shall be denied to authorize the extension of an existing business by the operation of an additional plant or other new additional facility, unless the commissioner finds after due notice and opportunity of hearing to the applicant or licensee, that the applicant is not qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business, provided, however, that no new application shall be denied solely for the reason of inadequate equipment if it is shown that provision has been made for the acquisition of same. The commissioner may also decline to grant or renew a license or may suspend or revoke a license already granted in whole or in part, upon due notice and opportunity of hearing to the applicant or licensee, when he is satisfied of the existence of any of the following reasons:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased or has rejected without reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased.

(c) That the milk dealer has committed any act injurious the public health or public welfare.

(d) Where the milk dealer is insolvent or has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgement has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the commissioner of his inability or unwillingness properly to conduct the business of receiving or selling milk or to satisfy the commissioner of his intent to deceive or defraud producers or consumers.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A cooperative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws<sup>1</sup> and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor

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<sup>1</sup> See Cooperative Corporations Law.

shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers, or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law. The provisions of and the remedies provided by this subdivision, section and article shall be in addition to and shall not preempt or displace the provisions of article twenty-two of the general business law.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commissioner.

(h) Where it is shown that any material statement upon which the license was issued is or was false or misleading or deceitful in any particular.

(i) Where the applicant or licensee has been convicted of a felony.

(j) Where the applicant is a partnership or a corporation and any individuals holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the milk dealer has violated any of the provisions of this chapter.

(l) Where the milk dealer has been duly required to give a bond or an additional bond and has failed to do so, or has failed to make timely payment to the producers security fund if he has elected to participate therein, or to the cooperative security fund if required to make payments thereto.

(m) Where the required permit from the local health officer has terminated or been revoked.

(n) Where the milk dealer has ceased to operate the milk business for which the license was issued.

(o) Notwithstanding any provision of this article to the contrary, no license shall be granted by the commissioner in the event an applicant for such license is buying or accepting the business of another dealer until the applicant has furnished the commissioner sufficient evidence that all payments due producers for milk delivered to the selling dealer have been made in full or that a portion of the purchase price reasonably sufficient to satisfy such claims has been placed in an escrow account with the commissioner.

(p) Assumption of business by licensed dealer. No licensed dealer purchasing the assets or assuming the operation of another licensed dealer may distribute milk in the area served by the dealer whose assets are being purchased or whose operation is being assumed unless such dealer purchasing the assets or assuming such operation has furnished the commissioner sufficient evidence that all payments due producers for milk delivered have been made in full or that a portion of the purchase price reasonably sufficient to satisfy such claims has been placed in an escrow account with the commissioner.

The commissioner may grant or renew a license or may decline to suspend or revoke a license conditionally, or upon the agreement of the licensee or applicant to do or omit to do any definite act, but such condition and/or agreement must have some appropriate relation to the administration of this article.

Whenever a milk dealer's license is denied or revoked or any application for an original license is denied, there shall be filed in the office of the division of milk control a memorandum by the commissioner, which memorandum shall state the reasons for the denial of the application or the denial or revocation of the license. There shall also be filed a transcript of the testimony taken at the hearing given to the applicant or licensee. A transcript of the testimony taken at the hearing shall be given to the applicant or licensee for whom the hearing was held. In addition, the said memorandum as filed in the office of the division of milk control shall set forth findings of fact and the conclusions upon which the said commissioner shall base his denial or revocation. The use of the word license in this article shall include the application for or denial of an extension of license. Upon the filing of the memorandum in the office of the division of milk control a copy thereof shall be mailed forthwith to the applicant or licensee and to his attorney if the applicant or licensee has appeared by attorney.

The commissioner shall notify an applicant for a license within thirty days of receipt of the application as to whether all information required by the commissioner is stated within the application. Upon receipt of a completed application, the commissioner shall conduct any investigation and hearing and shall make a final determination on a license within one hundred twenty days or, if a hearing has been held with respect to such license, within one hundred eighty days. Where the commissioner finds that a final determination cannot be made within such period, he shall indicate his reasons for extending the application review period by not more than one hundred twenty days to the license applicant. Any delay resulting from adjournments granted at the request of the applicant, or as the result of a judicial order, shall not be counted toward any time period provided for in this paragraph. (Subd. 2 amended by Chap. 117, Laws of 1964, effective March 16, 1964; subd.(1) as amended by Chap. 526, Laws of 1975; Subds. (o) and (p) added by Chap. 918, Laws of 1984; amended Chap. 540, Laws of 1987.)

#### **258-d. Proceedings to review**

The action of the commissioner in refusing to grant or renew a license, or in revoking or suspending a license, or in conditioning or limiting the granting or renewal of a license, may be reviewed in the manner provided by article seventy-eight of the civil practice law and rules, and the decision of the commissioner shall be final unless within thirty days from the date of service thereof upon the party affected thereby a court proceeding is instituted to review such action. The pleadings upon which such

review proceeding is instituted shall be served upon the commissioner or upon an assistant commissioner, personally, in the manner provided for the personal service of a summons in an action unless a different manner of service is provided in an order to show cause granted by the supreme court. (As amended by Chap. 310, Laws of 1962, effective September 1, 1963.)

#### **258-e. Violations; remedies**

1. The commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of the statutes, rules and orders committed to his administration, and in addition to any other remedy under article three of this chapter or otherwise may apply for relief by injunction if necessary to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist. Such application may be made to the supreme court in any district or county as provided in the civil practice law and rules, or to the supreme court in the third judicial district.

2. In addition to remedies provided by subdivision one of this section:

Whenever the commissioner has reason to believe that any person has been or is engaged in conduct which violates any provision of this article or of any regulation promulgated thereunder he may issue a complaint specifying the charges and giving reasonable notice of a hearing thereon.

Whenever the commissioner has reason to believe that any milk dealer, whether licensed or subject to license under this article, has been or is engaging in any conduct for which a license may be declined or revoked pursuant to section two hundred fifty-eight-c, the commissioner may issue a complaint specifying the charges and giving reasonable notice of a hearing thereon.

The person so complained of shall appear and show cause why an order should not be entered by the commissioner requiring such person to cease and desist from the conduct charged, or to perform those acts which will constitute a discontinuance of the conduct charged. After due notice and opportunity of hearing or after default of such person to appear and proceed, if the commissioner shall find such person to have violated any provision of this article or any regulation promulgated thereunder or to have engaged in conduct for which a license may be declined or revoked pursuant to section two hundred fiftyeight-c, he shall enter an order requiring such person to **cease and** desist from the acts, practices or omissions so found or to perform acts as aforesaid, and imposing such civil penalty as he deems appropriate within the limits of subdivision four.

3. The order of the commissioner issued pursuant to subdivision two of this section shall be final subject to review proceedings under subdivision five of this section, and shall not be stayed by any court except as provided in such subdivision five. Upon failure of such person to obtain a stay as herein provided, the commissioner may apply to the supreme court of



Albany County for an order directing compliance, and if such order is issued, any failure to obey such compliance order may be punished as a contempt of court.

4. Any civil penalty imposed by an order issued pursuant to subdivision two of this section shall be in an amount not less than one hundred dollars, or more than one thousand dollars for each violation of this article or any regulation promulgated thereunder. In determining the amount of any penalty to be assessed under this subdivision, the commissioner shall consider, but not be limited to consideration of: (i) the seriousness of the violation for which the penalty is to be imposed and (ii) the nature and extent of any previous violations for which penalties have been assessed against the person. Each day's violation may, in the discretion of the commissioner, be deemed to constitute a separate offense. If, after the expiration of the thirty day review period prescribed by subdivisions three and five of this section, such order has not been stayed by the supreme court in a proceeding for judicial review thereof, the commissioner may file with the clerk of any county the original or a certified copy of the order directing payment of a civil penalty, and thereupon the clerk shall enter in the judgement docket, in the column for judgement debtors, the name of the person against whom the penalty was assessed by such order, and in appropriate columns the amount of such person's liability for such penalty, together with interests and costs, and the date that such order is filed. Upon such filing, the amount of the penalty so docketed shall become a lien upon and bind the real and personal property of the person against whom it is issued in the same manner as a judgement duly docketed in the office of such clerk, and the commissioner shall have the same remedies to enforce such liability as if a judgement in a court of record had been recovered against such person.

5. Any person aggrieved by final order of the commissioner made pursuant to this section may within thirty days after service of such order upon him, institute a proceeding for a review thereof pursuant to article seventy-eight of the civil practice law and rules; provided, however, that no stay shall be issued, unless applied for within seven days after the effective date and unless the applicant makes a clear and convincing showing of present, substantial and irreparable injury, **clearly** over-balancing the public interest in immediate compliance which is hereby declared as the policy of this act. (Amended by Chap. 310, Laws of 1962; Chap. 856, Laws of 1972, effective July 1, 1972; amended by Chap. 540, Laws of 1987.)

#### **258-f. Records**

The commissioner may require milk dealers to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butterfat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefore.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butterfat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the commissioner may deem necessary for the proper enforcement of this article.

### **258-g. Reports**

Each milk dealer shall, from time to time, as required by rule or order of the commissioner, make and file a verified report on forms prescribed by the commissioner of all matters on account of which a record is required to be kept, together with such other information or facts including an audited financial statement as may be pertinent and material within the scope of the purpose and intent of this chapter. Such report shall cover a period of time specified in the order. (Amended by Chap. 506, Laws of 1984.)

### **258-h. Bond or director and financial officer**

(Repealed by Chap. 10, Laws of 1971).

### **258-i. Disposition of license fees**

The commissioner shall deposit to his credit all license fees and other moneys collected by the division under this chapter in a responsible bank, banking house or trust company in the city of Albany which shall pay the highest rate of interest for such deposit. On or before the tenth day of each month the commissioner shall pay over to the department of taxation and finance, division of finance, all license fees received by the division from those to whom licenses were issued during the preceding month and all other moneys received by the division during the preceding month. Such money shall be paid into the state treasury to the credit of the general fund. On or before the tenth day of each month the commissioner shall make a verified and detailed report to the department of taxation and finance of all receipts of the division for the preceding month. (See Section 258-a(10).)

### **258-j. Construction, exceptions and limitations**

The license required by this article shall be in addition to any other license required by this chapter or otherwise required by law. This article shall apply to the city of New York, but shall not be construed to conflict with, alter or repeal laws in force relating to the board of health or the department of health of the

city of New York, nor the health code in force in such city or any amendments thereof duly adopted nor shall any provision of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the health code or the regulations of the board of health or the department of health of the city of New York, apply to the city of New York, or to the production and transportation of milk for said city. No milk dealer shall hereafter accept for sale or distribution in a marketing area or at a plant supplying such marketing area when such marketing area is regulated by a state milk marketing order, milk from any premises on which milk is produced or from any plant in which milk is handled unless such premises constitute a milk production area dairy farm as defined by section two hundred fifty-eight-1 or unless the milk from such plant has been received for sale or distribution in such marketing area or at a plant subject to such order within the past two full calendar years without first satisfying the commissioner that such proposed added milk supply is reasonably needed for such marketing area, and that the acceptance of such added milk supply will not deprive any municipality or any other marketing area of a supply, present or future, more conveniently related to it. If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgement shall have been rendered. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. Technical, legal and other assistants and employees in the service of the milk control board at the time such transfer takes place shall be transferred to the division, subject to qualifying examinations to be conducted by the civil service commission as soon as convenient after transfer, and in the meantime they shall serve without examination. The civil service commission shall designate, upon advice of the commissioner the positions which it is not practicable to fill by competitive examinations, including the director, assistant director, counsel and assistant counsel. (As amended by Chap. 982, Laws of 1962; Chap. 576, Laws of 1964; Chap. 407, Laws of 1969; Chap. 655, Laws of 1978.)

#### **258-k. Declaration of Policy**

For the purpose of implementing the provisions of section two hundred fifty-eight-k through section two hundred fifty-eight-e of this article, it is hereby declared that the dairy industry is a paramount agricultural industry of this state and the normal processes of producing and marketing milk have become an enterprise of vast economic importance to the state and of vital interest to the consuming public which ought to be safeguarded and protected in the public interest; that it is the policy of this

state to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled cooperative associations and to promote, foster and encourage as an incident of such marketing, the maintenance, by such associations, jointly or in cooperation with other cooperative associations of programs designed, by means of advertising, publicity, education or otherwise, to promote increased demand for and consumption of milk and dairy products; that unfair, unjust and destructive demoralizing trade practices have been and are likely to be carried on in the production, sale, processing and distribution of milk and that it is a matter of public interest and for the public welfare for the state to promote the orderly exchange of commodities and in cooperation with the federal government or other states in the regulation of interstate commerce, to take such steps as are necessary and advisable to protect the dairy industry and insure an adequate supply of milk for the inhabitants of the state; that for such purpose public interest requires, as necessity therefor has arisen or may arise, the fixing of prices of milk to be paid to producers and associations of producers where there has been or is a disruption of orderly marketing of milk in any marketing area by reason of surpluses or by reason of unfair, unjust or destructive trade practices that in order to make such pricefixing effective it is necessary that the benefits of the fluid market and the burden of, and the expense of, handling of surpluses, be shared equally by all producers of milk for the marketing area and to this end that dealers not handling their proportionate share of the surplus shall as part of the price of their milk make payments to a fund to equalize the prices of milk to producers and to share the cost of handling surplus so as to remove one of the principal causes of price demoralization. (Amended Chap. 540, Laws of 1987.)

**258-1. Producers' bargaining agencies and distributors' bargaining agencies**

(a) Incorporated producers' associations operated under and subject to the cooperative corporations law of this state, or similar laws of another state and organized and controlled by milk producers, may establish producers' bargaining agencies for the various production areas of the state designated by the commissioner. Cooperative corporations similarly incorporated hereafter and owned and controlled by producers shall be entitled to use and participate in such a bargaining agency and be represented by it in order that producers not now represented by a cooperative association may be entitled to the benefits of this act.

Upon presentation of a written certification by a cooperative corporation qualified to receive cooperative payments under a state or a joint federal and state milk marketing order, or orders, or by a cooperative corporation affiliated with a federation of cooperative corporations similarly qualified, to a licensed milk dealer, setting forth a list of its members for the payment of whose milk said dealer is responsible, such dealer shall make payments to such cooperative corporation from moneys

due such listed members for milk purchased by the dealer in such amounts as such cooperative shall certify is payable to it; provided that (a) at least the names of 10 members are on the list, or (b) in the case of dealers receiving milk from 17 or less producers at a plant, the names of at least 51% of such producers are on the list. Such amounts shall be payable monthly to the treasurer of the cooperative corporation, together with a compilation of milk poundage to which such payment is related. At intervals, not more frequent than monthly, each such cooperative shall certify to the dealer involved any additions or withdrawals from its listed membership. As to such changes in membership so certified, the dealer shall make payments on the additional producers, but shall not be required to make payments to the cooperative corporation on the withdrawn producers. In no event shall a dealer be required to make payments on a producer who is not listed as a member by the certifying cooperative corporation.

The voting power of each association participating in such an agency shall be on the basis of one vote for each one hundred producers under contract with such association for the marketing of their milk within such marketing area, and in case of an association with less than one hundred producers under contract with it, a fractional vote in proportion to the number of such producers. Only active contracts shall be considered.

The purpose of a producers' bargaining agency is to negotiate agreements on the basis of orders in the respective marketing areas for presentation to the commissioner for his consideration and approval, as provided in section two hundred and fifty-eight-m herein. A producers' bargaining agency shall be authorized to negotiate with a distributors' bargaining agency in such marketing area in regard to arrangements or agreements to be presented to the commissioner as a basis of marketing agreements or orders pursuant to said section two hundred and fifty-eight-m.

Each association upon joining or employing the producers' bargaining agency shall file with it a certified copy of its certificate of incorporation, its by-laws, copies of form of contracts with its producers and a certified statement of the number of such contracts which are in force.

A producers' bargaining agency may appear before and negotiate with the commissioner in regard to marketing agreements or orders, as provided in section two hundred and fifty-eight-m herein.

It shall be lawful for such producers' bargaining agency to act as a common marketing agency for the various cooperative associations of producers which it represents and such cooperative associations may make contracts with each other and with such producers' agency for such purpose and for the collective processing, preparing for market, handling and marketing of the products of such associations and for effectuating the purposes of this act. In order to carry out and effectuate such purposes, contracts and agreements may be made pursuant to section twenty-five of the cooperative corporations laws and as to interstate commerce pursuant to act of congress of February eighteenth, nineteen hundred twenty-two, entitled "An act to authorize association of producers of agricultural products."

(b) A distributors' bargaining agency may be organized by the distributors in a marketing area. The voting power of each distributor in such bargaining agency shall be in proportion to the quantity of milk distributed by him in such area. Such quantity shall be determined by that distributed during the preceding year as reported to the commissioner. In the New York metropolitan milk marketing area the voting power of each distributor shall be on the basis of one vote for each ten million pounds of milk distributed in such market during the preceding year and in case of a distributor handling a less quantity of milk, a proportionate fractional vote. In other marketing areas the voting basis shall be one vote for each one hundred thousand pounds distributed during the preceding year in such market with a proportionate fractional vote in case of distributors handling a less quantity of milk. The purpose of distributors' bargaining agencies is to negotiate with producers' bargaining agencies as to the agreements or the basis of orders in the respective marketing areas for presentation to the commissioner for his consideration and approval, as provided in section two hundred fifty-eight-m herein.

A distributors' bargaining agency may appear before and negotiate with the commissioner in regard to marketing agreements or orders, as provided in section two hundred fifty-eight-m herein.

Producers' bargaining agencies and distributors' bargaining agencies may also meet and negotiate in order to carry out the purposes of this act and subject to the approval of the commissioner, as provided in section two hundred fifty-eight-m, may make marketing agreements with each other and with cooperative associations in relation to the marketing of milk which may be handled or distributed in more than one marketing area. Such agencies may also meet and negotiate and take such reasonable measures as are necessary and advisable to cooperate with the commissioner and legally constituted authorities of other states and of the United States with respect to the handling and control of milk handled in interstate commerce and carry out and effectuate the provisions of section two hundred fifty-eight-e.

Except as specifically provided in section two hundred fiftyeight-m, the activities and operations of producers' bargaining agencies and distributors' bargaining agencies and of the constituent members thereof, and contracts, agreements or arrangements made by them, pursuant to the provisions of this subdivision, and of section two hundred fifty-eight-m hereof, shall not be deemed or construed to be conspiracies, combinations, contracts or agreements in restraint of trade or commerce or an illegal monopoly.

"Milk production area" as used in this article means those dairy farms maintained primarily as a source of fluid milk for a marketing area. Such primary source of supply shall include farms from which all shipments of milk have been subject to the minimum uniform price provisions of a marketing order or agreement for such market during at least a portion of the preceding two years, together with such other farms as may hereafter be designated by the commissioner as a source of supply for the marketing area in

the manner prescribed by section two hundred fifty-eight-j. (As amended by Chap. 515, Laws of 1962; Chap 982, Laws of 1962; Chap 935, Laws of 1971).

**258-m. Orders fixing prices for milk and marketing agreements**

1. Upon the petition of a producers' bargaining agency of the production area supplying a marketing area, such agency representing at least thirty-five per centum of the producers of milk therein, alleging the existence of conditions so affecting the orderly marketing of milk in such area that public interest requires regulation of prices of milk in such area and equalization of the burden of surplus milk and expense of handling it, and sharing the benefits of the fluid market in order that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective, and upon the written request of the petitioner, the commissioner shall set, without a hearing, a interim price for class I fluid milk, and may set an interim price for class II and/or III milk. In determining such interim price, the commissioner shall take into consideration, among other factors: (a) the prices being paid to producers; (b) the costs of production to producers; (c) any changes in the ratio of index of prices received for milk to index of prices paid by dairy farmers; (d) the level of prices paid to producers in adjoining markets; and (e) the interests of the general public. Such interim price shall be set within five days of such written request and to the extent practicable apply to any milk purchased on or after the first day of the month following such determination. Such interim price shall be in effect until the final determination regarding the petition is made pursuant to the provisions of this article and is enforceable and effectuated, provided however, such interim price shall be in effect for no longer than one hundred eighty consecutive calendar days. During such time when the interim price is in effect, the commissioner shall provide for and enforce a mechanism for compensatory payments and have the authority to establish and administer an equalization pool throughout the entire state or any part thereof. Such interim price shall be reviewable by a person aggrieved in a proceeding pursuant to article seventy-eight of the civil practice law and rules. The effectiveness or enforcement of such interim price regulation shall not be restrained, stayed, or enjoined pendente lite. In addition, it shall be the duty of the commissioner to call a public hearing for the consideration of said petition and to give notice thereof by advertising such call in such newspaper or newspapers of general circulation in such marketing area as the commissioner deems advisable. Such notice shall specify a time and a place within the marketing area at which the hearing will be held and at which the applicants and other persons, including producers, distributors and consumers and associations thereof, may be heard. In not more than fifteen days upon receiving the petition the commissioner shall set the hearing date in accordance with the above provisions. Such hearing shall commence in not less than fifteen days but not more than twenty days of the notice

specifying the date and time of the hearing. Such hearing shall conclude within fifteen days of commencement, provided however, if the commissioner determines in writing that the hearing has been conducted with due-diligence but an extension is necessary to accord due process, he or she may extend the hearing for a period not to exceed ten days. If after such hearing the commissioner shall find, upon the record of the proceeding that conditions referred to in section two hundred fifty-eight-k exist so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section two hundred fifty-eight-k of this chapter shall be effective and that it is necessary that prices for milk to producers and associations of producers be fixed by the commissioner, as expressed by section two hundred fifty-eight-k, and that it is favored by a least sixty-six and two-thirds per centum of the producers of milk produced in the production area for said marketing area, the commissioner may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers. The determination of the commissioner as to whether or not by order to fix and determine minimum prices shall be made within forty days after such hearing, effective on the first day of the month following the determination. If the commissioner determines not to fix and determine minimum prices, he shall state his reasons in writing and transmit same to the petitioner, the governor, the temporary president of the senate and the speaker of the assembly. Such price fixing order or orders shall be rescinded effective at the end of the current month after a public hearing whenever the commissioner shall find either that such conditions have ceased to exist or that such termination is favored by a least thirty-five per centum of the producers of milk handled within such market. For purposes of this subdivision, unless otherwise specified, days shall mean business days. (As amended by Chap. 84, Sec. 2, Laws of 1991)

2. The commissioner may, from time to time upon like petition, during the existence of such conditions revise the prices so fixed, after holding a hearing thereon. Whenever as herein provided a producers' bargaining agency of a production area supplying a marketing area shall file a petition and/or amended petition praying for any relief provided in this article, it shall be lawful for a distributors' agency of such marketing area to file a petition and/or amended petition providing for the consideration of issues therein raised relative to the petition and/or amended petition of the producers' bargaining agency, or to an existing milk marketing order. Upon receipt of any such petition of a producers' bargaining agency for any such marketing area, the commissioner shall mail a copy thereof to the secretary of the distributors' bargaining agency for such marketing area, if any, which meets the qualifications set forth in the last sentence of this paragraph. If such distributors' bargaining agency files either a petition or an amended petition with the commissioner or notifies the commissioner that no such petition will be filed, the commissioner may proceed to give notice of hearing as provided in subdivision one of this section; otherwise the commissioner shall



defer the giving of such notice of hearing for a period of ten days after such distributors' bargaining agency has received from the commissioner a copy of the petition and/or amended petition of the producers' bargaining agency. The commissioner shall mail a copy of the distributors' bargaining agency petition to the secretary of the producers' bargaining agency and shall give such notice of such petition by publication or otherwise as the commissioner deems advisable. Evidence upon the proposals set forth in both the producers' and distributors' bargaining agency petitions shall be received at the same hearing. The commissioner shall not be required to furnish a copy of any petition of a producers' bargaining agency to a distributors' bargaining agency nor shall such distributors' bargaining agency be entitled to file a petition and to be heard as herein provided unless within the calendar year preceding the filing with the commissioner of the producers' bargaining agency petition such distributors' bargaining agency shall have filed with the commissioner a list of its distributor members and the names and addresses of its officers and unless such distributors' bargaining agency represents not less than sixty per centum of the quantity of milk distributed in such marketing area, exclusive of that distributed by cooperative corporations, as determined by the reports submitted to the commissioner during the preceding license year.

The provisions of this subdivision relative to distributors' bargaining agency petitions shall not apply to any milk marketing area or order, jointly administered by the commissioner and any officer or agency of the United States or of any other state. (Subd. 2 amended by Chap. 802, Laws of 1959 and Chap. 935, Laws of 1971.)

3. Before fixing any prices pursuant to the provisions of the two preceding paragraphs, the commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect of milk and what prices for milk in the market or markets affected by such prices and under varying conditions will be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the cost of production and distribution, including compliance with all sanitary regulations in force in the market or markets affected, the cost of feeding stuffs used in the production of milk, the supply of milk in such market and the purchasing power and welfare of the public. The commissioner shall fix prices to producers on the basis of the use thereof in the various classes, grades and forms. Any prices fixed or approved by the commissioner shall be deemed to be prima facie reasonable.

4. In determining the approval or request for an order as herein provided or the termination thereof on the part of producers the commissioner shall consider the approval, request or favor in respect thereto by any bona fide cooperative association of producers engaged in marketing milk within such marketing area as the approval, request or favor either of making an order or of

termination thereof of the producers who are under contract with such cooperative association of producers.

5. Marketing agreements. It shall be lawful for a producers' bargaining agency of the production area supplying a marketing area and a distributors' bargaining agency for such marketing area to enter into marketing agreements as to the prices to be paid by distributors to producers for milk sold or otherwise utilized in said marketing area, as to rules and regulations covering the method of determining the proportion of the product of the entire dairy herd of a producer which shall be accepted and paid for pursuant to such price or prices, as to reasonable trade practices affecting the relations between producers and distributors in such market. Such agreement may also contain provisions for a committee to administer the provisions of said marketing agreement. No agreement, however, shall be effective until a copy thereof signed by all persons parties thereto shall have been filed with the commissioner.

If the commissioner shall have reason to believe that any such marketing agreement results in a monopoly or restraint of trade to such an extent that the price of milk is unduly enhanced by reason thereof, he shall serve upon the parties to such agreement a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing specifying a date and place, not less than thirty days after the service thereof, requiring the parties to such marketing agreement to show cause why an order should not be made directing them to cease and desist from such monopolization or restraint of trade. The parties so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given at such a hearing shall be taken under such rules and regulations as the commissioner shall prescribe, reduced to writing and made a part of the record therein. If upon such hearing the commissioner shall be of the opinion that such marketing agreement results in monopoly or restraint of trade to such an extent that the price of milk in the marketing area affected by such agreement is unduly enhanced, he shall issue and cause to be served upon the parties to said agreement an order reciting the facts found by him and directing them to cease and desist from such undue enhancement of prices. If such order is not obeyed by the parties to such agreement, the commissioner shall file with the attorney-general a certified copy of the order, evidence of such disobedience and all of the records in the proceeding, and the attorney-general may apply to the supreme court for an order or decree affirming, modifying or setting aside such order or for making such other order or decree as the court may deem equitable in the premises.

Upon application of the parties to said marketing agreement and after a hearing, as provided in subdivision one of this section, the commissioner may by order make the provisions of said marketing agreement, relative to prices to producers and other provisions thereof, effective as to all producers, distributors

and handlers in said market notwithstanding that they may not have approved of said agreement if he shall find that the terms and conditions of said agreement are fair, equitable and in public interest, that the agreement has been fairly entered into without fraud, that public interest so requires, in order to effectuate the declaration of policy contained in section two hundred fifty-eight-k of this chapter, that the proportion of the producers and distributors who have executed such agreement or shall have approved same upon the hearing is equal to that required for an order under subdivision one of this section, and further provided that the commissioner shall determine that the prices set forth in said marketing agreement are reasonable and proper prices, as required by this section for prices fixed by an order of the commissioner. Any order so issued shall terminate effective on the last day of the current month, and in the same manner and upon the same request after a hearing, as provided for the termination of an order in subdivision one of this section.

6. If approved by sixty-six and two-thirds per centum of the producers affected, any order or marketing agreement fixing the price to producers under either subdivision one or subdivision five of this section for market or markets, may provide for an equalization of prices to all producers of the production area of the market affected so that each producer or cooperative association shall receive the same base price for all milk delivered subject to reasonable differentials for quality and location and for services. Any such order may contain provisions requiring from persons who bring milk or cream into the marketing area regulated by such order payments on all such milk or cream whenever such persons are not otherwise regulated by the order.

In order to effect such equalization of prices to producers the commissioner shall require a monthly report from each dealer receiving milk from producers for such market showing the disposition of all milk handled by the reporting dealer in such market and shall thereafter require payment by each dealer, to a trust company designated as a fiscal agent by the commissioner, of any amount by which the sum otherwise due by such dealer to its producers in accordance with the prices fixed by such order exceeds the equalized base price as determined by the commissioner from such reports, which amounts so paid to said fiscal agent, the commissioner shall direct it to pay to those dealers whose reports show that the base prices they will pay their producers in accordance with such order are less than the equalized base price as so determined by the commissioner, for repayment in turn by such dealers to their producers so as to bring all lower rates of payment up to the equalized base price. Such payments to said fiscal agents shall not be deemed to be included within the provisions of section two hundred fiftyeight-i of this chapter and shall not be deemed to be state funds. Such equalization shall include milk of all grades and produced by all breeds of cows, and may include milk, approved by a board or boards of health having jurisdiction in a marketing area designated in an order under this section, which was produced by a dealer.

The provisions of this subdivision shall not become operative as to the New York state metropolitan market production area, however, until pursuant to federal or state statutes, or by action of authorities duly constituted and authorized thereunder. prices to producers are so equalized and made effective throughout all the production area of the New York state metropolitan market area. (As amended by Chap. 982, Laws of 1962.)

7. After the commissioner shall have fixed prices in any area or approved prices in a marketing agreement to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to buy or offer to buy milk at any price less than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less than such price, or prices, as shall be applicable to the particular transaction, whether by a discount or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

8. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach.

9. No marketing agreement or order shall prevent a cooperative association from blending as heretofore the proceeds of all sales and distributing to its producers the resultant blended price subject to deductions and differentials as provided by its contracts with its producers, but no such cooperative association shall sell milk at prices lower than the prices fixed by the commissioner in an order for the markets affected.

10. Any marketing agreement or order of the commissioner may provide for necessary deductions from payments to producers to cover the cost of administering such marketing agreement or order, including the cost of auditing milk dealers' classifications, and the cost of other services to producers. The fund so derived from such deductions shall not be deemed to be state funds. The commissioner may, in his discretion, appoint an administrator and such assistant administrators as in his opinion may be necessary to administer the terms of any agreement or order, and the persons so appointed shall be deemed to occupy positions confidential to the commissioner and may be appointed without competitive examination. All other persons employed by the commissioner in the

administration of such a marketing agreement or order shall be selected in accordance with the civil service law and rules.

11. Any marketing agreement or order of the commissioner may provide (a) for payments to cooperative associations of producers in cases where the commissioner finds that such associations are actually rendering marketing services to producers under contract with them, which services enure to the benefit of all producers in the market or to the benefit of the market as a whole and may include the conduct and maintenance, jointly with other cooperative associations, of plans or campaigns, by advertisement or otherwise, including participation in similar regional or national plans or campaigns, to promote the increased consumption of milk and milk products, to acquaint the public with the dietary advantages of milk and milk products and with the economy in the diet, and to command, for milk and dairy products, consumer attention consistent with their importance and value, or that such associations are rendering services in the control and disposition of surplus for the benefit of the market; (b) for payment to milk dealers or to cooperative associations of producers which operate milk receiving stations or manufacturing plants for services rendered by them, in the stabilizing of the supply of fluid milk and cream within the market at times either of surplus or of shortage of milk; and (c) for adjustments in payments to producers to effect a more favorable seasonal balance as between the production and consumption of milk. Such adjustments may be made in the form of deductions and additions to the fund to equalize prices of milk to producers, or by apportioning among producers the total value of all milk subject to equalization on the basis of their marketings of milk during a representative period of time. Any such deductions from the fund to equalize prices shall not be deemed to be included within the provisions of section two hundred fifty-eight-i of this chapter and shall not be deemed to be state funds. Such moneys shall be held in reserve and used solely for additions to the fund to equalize prices, in such manner as the order may provide. The commissioner shall make no provision for adjustment in payments under this section with respect to a state milk marketing order, except on the petition of a producers' bargaining agency of a production area supplying a marketing area and after a public hearing and subsequent producer approval as required by this section. (As amended L. 1987, c.390, Sec.1.)

12. "Distributor" as used in this and the preceding section means a milk dealer as defined in this article who delivers milk to stores and/or consumers within the marketing area, from a milk depot or milk plant owned and/or operated by such dealer.

#### **258-n. Interstate and federal compacts**

The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to uniform milk control, including sanitary requirements with states and/or as between states, and with the

federal government in its control of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders.

In order to carry out the policies set forth in sections two hundred fifty-eight-k and two hundred fifty-eight-p, the commissioner is hereby vested with the authority to enter into a compact or compacts or other types of agreements, with the legally constituted authorities of other states and/or the United States to provide for uniform milk control and, in order to effectuate such uniform milk control, he may join with an agent or agencies to exercise under such compact or compacts or other types of agreements the powers conferred upon him by this article with respect to the administration of uniform milk control. In the case of market orders including those covering prices, any such compact or compacts or other types of agreements may provide for necessary assessments upon the handlers regulated thereunder, in order to cover the cost of administering such uniform milk control, including, without limitation, the cost of auditing milk dealers' classifications.

The commissioner may effectuate this section by any type of agreement other than a formal compact if a formal compact is not constitutionally required. (As amended by Chap. 692, Laws of 1974; amended by Chap. 540, Laws of 1987.)

#### **258-0. Sanitation Study.]<sup>1</sup>**

The commissioner is hereby authorized and directed to make a study of the sanitary regulations, codes and rules applicable to milk and milk products produced in the state of New York, and to study and report to the governor the possible economic impact of a national sanitation act upon New York milk production and New York dairy farmers. (As added by Chap. 621, Laws of 1962).

#### **258-p. Declaration of policy**

It is hereby declared: that the milk industry is a paramount agricultural activity of this state and of the northeast in a region comprising the New England states and the Middle Atlantic states and is a business affecting the public health and welfare of the inhabitants of this state and of the northeast; that the production and marketing of milk of the dairy farms of this state and of states in the northeast region is of vast economic

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<sup>1</sup> Section enacted without catchline which has been supplied by editor

importance to the state and to the region; that compliance with reasonable requirements for the production and marketing of a safe and high quality milk supply is a matter of great importance both to the welfare of the dairy farmers of this state and the northeast, and the health and welfare of the consumers of milk and dairy products; that the production conditions in the northeast including the climate, topography and soils are about the same but marketing conditions are unique as compared to the remainder of the United States in that practically all of the milk in the northeast is produced for fluid markets because of the concentration of population. The natural marketing area, under present conditions of production and marketing, lies within the boundaries of the eleven different states with widely different laws and regulations which govern the economic climate and sanitary conditions under which milk and dairy products are marketed. Artificial barriers have contributed significantly to the loss of competitive position by New York and other Northeastern states. The market share held by milk producers in the region has declined. The marketing system for milk and dairy products in the northeast has been and still is badly fragmented. Assembly, administration, operating and sales costs are excessively high. Cooperative membership is below that in most areas of the country. Competition from other regions of the country will increase. A common marketing area in the northeast is necessary for a prosperous and growing dairy industry and it is in the best interest of consumers. It is therefore essential that there be uniformity of laws and regulations governing the production, processing and marketing of milk and dairy products in the northeast. The lack of uniformity of laws and regulations involving inspection of farms and plants, labeling of dairy products and their imitations, standards for dairy products, licensing of milk dealers and the terms of milk market orders have been a serious deterrent to expanding markets for northeast dairy products and costly to consumers. (Sec. 258-p added by Chap. 937, Laws of 1963; amended Chap. 876, Laws of 1966; amended Chap. 871, Laws of 1968; amended Chap. 540, Laws of 1987.)

#### **258-q. Action for a uniform northeast market**

The commissioner is hereby authorized and directed to act independently or through the Northeastern Association of State Departments of Agriculture, the National Conference on Interstate Milk Shipments and any other group or agency, to achieve uniformity of laws and regulations involving inspection of farms and plants, sanitary codes, labeling of dairy products and their imitations, standards for dairy products, licensing of milk dealers and the terms of both federal and state milk marketing orders in effect in the area. He is further directed to work toward the elimination of the unnecessary and costly barriers to the free flow of milk created by laws and regulations originally enacted to help the income of dairy farmers but whose present effect is to interfere with the free flow of milk and to reduce the efficiency of distribution. The commissioner will continuously endeavor to effectuate the purpose of this section by seeking

uniform laws and regulations, joint investigations, joint hearings, and joint and concurrent orders and regulations. He further will endeavor to create a joint agency or joint agencies to carry out and enforce joint and concurrent orders and any other joint activities. Annually, before the end of the fiscal year he will prepare and send to the governor and the legislature a detailed report on his activities. (As added by Chap. 937, Laws of 1963; amended Chap 540, Laws of 1987.)

#### **258-r. Actions to eliminate trade barriers**

1. Any dairy farmer or cooperative producing milk within this state, any licensed milk dealer or general farm organization may file a complaint with the commissioner alleging that unconstitutional or otherwise illegal barriers to or burdens upon interstate commerce in milk or other dairy products exist in the laws, regulations or practices of any other state, or in the municipalities, agencies or instrumentalities thereof or in the regulations or practices of any federal agency. The complaint shall specify the nature of such barriers or burdens and the manner in which the complainant, or its individual members, is aggrieved thereby.

2. The commissioner shall determine whether such barriers or burdens have or may ultimately have an adverse impact upon New York producers or dealers generally and determine whether the public interest would be served by their elimination. If the commissioner concludes that action upon such complaint is in the general public interest of this state, he shall refer the complaint to the attorney general. The commissioner shall, within ninety days of the receipt of such complaint, inform in writing, the complainant and the attorney general as to the status thereof. Upon making a determination with respect to such complaint, the commissioner shall provide to the complainant and the attorney general a written statement of such determination setting forth the reasons therefor.

3. The commissioner shall maintain a continuing review of the laws, regulations and policies of the eleven Northeast states, their municipalities and federal agencies for the purpose of identifying unconstitutional or illegal barriers to the marketing of New York milk and dairy products. The commissioner may initiate and refer to the attorney general his own complaints with respect to any such barriers.

4. Upon referral of any complaint by the commissioner, the attorney general may bring an action in any state or federal court within or outside the state, for the purpose of invalidating such barriers or burdens upon interstate commerce and for such other relief as may be appropriate. The attorney general may bring such action in a *parens patriae* capacity.

5. The attorney general shall, within ninety days of receipt of such referral, inform the commissioner in writing as to the



status of such referral. Upon deciding whether to commence an action with respect to the complaint, the attorney general shall provide to the commissioner a written statement of such decision and the reasons therefor.

6. The commissioner shall make a report to the governor and the legislature setting forth his findings, conclusions and recommendations resulting from the review of trade barriers pursuant to this section. Such report shall also set forth the number and nature of complaints received and their disposition and the number and nature of complaints referred to the attorney general. The attorney general shall likewise make a report to the governor and the legislature setting forth the number and nature of complaints referred to him, their disposition and the reasons therefor, and the status of all pending cases. The annual report of the commissioner and the attorney general shall be made no later than the first day of July, nineteen hundred eighty-eight and no later than the first day of February for every year thereafter. (added Chap. 540, Laws of 1987; amended Chap. 326, Laws of 1988).

**ARTICLE 21-AA-DAIRY PROMOTION ACT****258-aa.Declaration of policy**

**(a) It is hereby declared** that the dairy industry is a paramount agricultural industry of this state, and is an industry affecting the health and welfare of the inhabitants of the state; that the continued existence of the dairy industry and the continued production of milk on the farms of this state is of vast economic importance to the state and to the health and welfare of the inhabitants thereof; that it is essential, in order to assure such continued production of milk and its handling and distribution, that prices to producers be such as to return reasonable cost of production, and at the same time assure an adequate supply of milk and dairy products to consumers at reasonable prices; and to these ends it is essential that consumers and others be adequately informed as to the dietary needs and advantages of milk and dairy products and as to the economies resulting from the use of milk and dairy products, and to command for milk and dairy products, consumer attention and demand consistent with their importance and value. It is further declared that continued decline in the consumption of fluid milk and some other dairy products will jeopardize the production of adequate supplies of milk and dairy products because of increasing surpluses necessarily returning less to producers; and that continued adequate supplies of milk and dairy products is a matter of vital concern as affecting the health and general welfare of the people of this state. It is therefore declared to be the legislative intent and policy of the state:

1. To enable milk producers and others in the dairy industry, with the aid of the state, to more effectively promote the consumption of milk and dairy products,
2. To provide methods and means for the development of new and improved dairy products, and to promote their use, and
3. To this end, eliminate the possible impairment of the purchasing power of the milk producers of this state and to assure an adequate supply of milk for consumers at reasonable prices.

**(b) Definitions.** As used in this act, the following terms have the following meanings:

1. "Commissioner" means the commissioner of agriculture and markets of the state of New York.
2. "Dairy products" means milk and products derived therefrom, and products of which milk or a portion thereof is a significant part.
3. "Producer" means any person in this state who is engaged in the production of milk or who causes milk to be produced for any market in this or any other state.
4. "Advisory board" means the persons appointed by the commissioner from nominations from producers as herein defined to assist the commissioner in administering a dairy promotion order.
5. "Milk dealer" means any person who purchases or handles or receives or sells milk, including individuals, partnerships,

corporations, cooperative associations, and unincorporated cooperative associations.

6. "Dairy promotion order" means an order issued by the commissioner, pursuant to the provisions of this act.

7. "Cooperative" means an association or federation or cooperative of milk producers organized under the laws of New York state, or any other state, having agreements with their producer members to market, bargain for or sell the milk of such producers, and is actually performing one or more of these services in the marketing of the milk produced by their members, through the cooperative or through a federation of milk cooperatives in which the cooperative has membership.

**(c) Powers and Duties of the Commissioner.**

1. The commissioner shall administer and enforce the provisions of this act, and shall have and may exercise any or all the administrative powers conferred upon the head of a department. In order to effectuate the declared policy of this act the commissioner may, after due notice and hearing, make and issue a dairy promotion order, or orders.

2. Such order or orders shall be issued and amended or terminated in accordance with the following procedures:

(a) Before any such order may become effective it must be approved by fifty-one per centum of the producers of milk voting in the referendum for the area to be regulated by such order. Such referendum shall not constitute valid approval unless fifty-one percent centum of all milk producers for the area to be regulated vote in the referendum. Producers may vote by individual ballot or through their cooperatives in accordance with the following procedures:

(i) Cooperatives may submit written approval of such order within a period of one hundred twenty days after the commissioner has announced a referendum on a proposed order, for such producers who are listed and certified to the commissioner as members of such cooperative, provided, however, that any cooperative before submitting such written approval shall give at least sixty days prior written notice to each producer who is its member, of the intention of the cooperative to approve such proposed order and further provide that if such cooperative does not intend to approve such proposed order, it shall likewise give written notice to each such producer who is its member, of its intention not to approve of such proposed order.

(ii) Any producer may obtain a ballot from the commissioner so that he may register his own approval or disapproval of the proposed order.

(iii) A producer who is a member of a cooperative which has notified him of its intent to approve or not to approve of a proposed order, and who obtains a ballot and with such ballot expresses his approval or disapproval of the proposed order, shall notify the commissioner as to the name of the cooperative of which he is a member, and the commissioner shall remove such producer's name from the list certified by such cooperative.

(iv) In order to insure that all milk producers are informed regarding a proposed order, the commissioner shall notify

all milk producers that an order is being considered and that each producer may register his approval or disapproval with the commissioner either directly or through his cooperative.

(v) The commissioner may appoint a referendum advisory committee to assist and advise him in the conduct of the referendum. Such committee shall review referendum procedures and the tabulation of results, and shall advise the commissioner of its findings. The final certification of the referendum results shall be made by the commissioner. The committee shall consist of not less than three members, none of whom shall be persons directly affected by the promotion order being voted upon. Two members shall be representatives of general farm organizations which are not directly affected by the order being voted upon. The members of the committee shall not receive a salary but shall be entitled to actual and reasonable expenses incurred in the performance of their duties.

(b) The commissioner may, and upon written petition of not less than ten per centum of the producers in the area, either as individuals or through cooperative representation, shall, call a hearing to amend or terminate such order, and any such amendment or termination shall be effective only upon approval of fifty-one per centum of the producers of milk for the area regulated participating in a referendum vote as provided pursuant to paragraph two of subdivision (c) of this section. (Amended Chap. 247. Laws of 1986).

3. The commissioner shall administer and enforce any such dairy promotion order while it is in effect, for the purpose of:

(a) Encouraging the consumption of milk and dairy products by acquainting consumers and others with advantages and economy of using more of such products,

(b) Protecting the health and welfare of consumers by assuring an adequate supply of milk and dairy products,

(c) Providing for research programs designed to develop new and improved dairy products,

(d) Providing for research programs designed to acquaint consumers and the public generally with the effects of the use of milk and dairy products on the health of such consumers,

(e) Carrying out, in other ways, the declared policy and intent of this act.

**(d) Provisions of dairy promotion orders.** Any dairy promotion order or orders may contain, among others, any or all of the following:

1. Provision for levying an assessment against all producers subject to the regulation for the purpose of carrying out the provisions of such order and to pay the cost of administering and enforcing such order. In order to collect any such assessments, provision shall be made for each milk dealer who receives milk from producers to deduct the amount of assessments from moneys otherwise due to producers for the milk so delivered. The rate of such assessment shall not exceed two percent per hundredweight of the gross value of the producers milk, and there may be credited against any such assessment the amounts per hundredweight otherwise paid by any producer covered by the order

by voluntary contribution or otherwise pursuant to any other federal or state milk market order for any similar research promotion or advertising program. Notwithstanding the provisions of paragraph two of subdivision (c) of this section, the commissioner, upon written petition of no less than twentyfive percent of producers in the area, either as individuals or through cooperative representation, may call a hearing for the sole purpose of establishing a new rate of assessment hereunder and may submit a proposed change in the rate of assessment to the producers for acceptance or rejection without otherwise affecting the order. The producers in the area may vote on the proposed rate either as individuals or through cooperative representation. Notwithstanding the foregoing provisions of this paragraph and of paragraph two of subdivision (c) of this section, or the provisions of any order promulgated pursuant to this section, the rate of assessment, for any period during which a dairy products promotion and research order established pursuant to the federal dairy and tobacco adjustment act of 1983 is in effect, shall not be less than an amount of equal to the maximum credit which producers participating in this state's dairy products promotion or nutrition education programs may receive pursuant to subdivision (g) of Sec. 113 of said federal act. (Amended Chap. 101, Laws of 1984).

2. Provision for payments to organizations engaged in campaigns by advertisements or otherwise, including participation in similar regional or national plans or campaigns to promote the increased consumption of milk and dairy products, to acquaint the public with the dietary advantages of milk and dairy products and with the economy of their inclusion in the diet and to command, for milk and dairy products, consumer attention consistent with their importance and value.

3. Provision for payments to institutions or organizations engaged in research leading to the development of new or improved dairy products or research with respect to the value of milk and dairy products in the human diet.

4. Provision for requiring records to be kept and reports to be filed by milk dealers with respect to milk received from producers and with respect to assessments on the milk of such producers.

5. Provision for the auditing of the records of such milk dealers for the purpose of verifying payment of producer assessments.

6. Provision for an advisory board as hereinafter.

7. Such other provisions as may be necessary to effectuate the declared policies of the act.

**(e) Matters to be considered.** In carrying out the provisions of this act and particularly in determining whether or not a dairy promotion order shall be issued, the commissioner shall take into consideration, among others, facts available to him with respect to the following:

1. The total production of milk in the area and the proportion of such milk being utilized in fluid form and in other products,

2. The prices being received for milk by producers in the area,
3. The level of consumption per capita for fluid milk and of other dairy products,
4. The purchasing power of consumers,
5. Other products which compete with milk and dairy products and prices of such products.

**(f) Interstate orders for compacts.** The commissioner is authorized to confer and cooperate with the legally constituted authorities of other states and of the United States with respect to the issuance and operation of joint and concurrent dairy promotion orders or other activities tending to carry out the declared intent of the act. He may join with such other authorities in conducting joint investigations, holding joint hearings and issuing joint or concurrent order or orders complementary to those of the federal government and shall have the authority to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders.

**(g) Prior assessments.** Prior to the effective date of any dairy promotion order as provided in this act, the commissioner may require that cooperative associations which have petitioned for such an order and who have approved of the issuance of such and order, to deposit with the commissioner such amounts as he may deem necessary to defray the expense of administering and enforcing such order until such time as the assessments as herein before provided are adequate for that purpose. Such funds shall be received, deposited and disbursed by the commissioner in the same manner as other funds received by him pursuant to this article and the commissioner shall reimburse those who paid these prior assessments from other funds received by him pursuant to this article.

**(h) Status of funds.** Any moneys collected under any market order issued pursuant to this article shall not be deemed to be state funds and shall be deposited in a bank or other depository in this state, approved by the commissioner and the state comptroller, allocated to each dairy promotion order under which they were collected, and shall be disbursed by the commissioner only for the necessary expenses incurred by the commissioner with respect to each separate order, all in accordance with the rules and regulations of the commissioner. All such expenses shall be audited by the state comptroller at least annually and within thirty days after the completion thereof the state comptroller shall give a copy thereof to the commissioner. Any moneys remaining in such fund allocable to a particular order, after the termination of such order and not required by the commissioner to defray the expenses of operating such order, may in the discretion of the commissioner be refunded on a pro-rata basis to all persons from who assessments therefore were collected; provided, however, that if the commissioner finds that the amounts so refundable are so small as to make impracticable the computation and refunding of

such moneys, the commissioner may use such moneys to defray the expenses incurred by him in the promulgation, issuance, administration or enforcement of any other similar dairy promotion order or in the absence of any other such dairy promotion order, the commissioner may pay such moneys to any organization or institution as provided in paragraphs 2. or 3. of subdivision (d) of this section.

**(i) Budget.** The commissioner shall prepare a budget for the administration and operating costs and expenses including advertising and sales promotion when required in any dairy promotion order executed hereunder and to provide for the collection of such necessary fees or assessments to defray costs and expenses, in no case to exceed two percent per hundredweight of the gross value of milk marketed by producers in the area covered by the order.

**(j) Advisory board.**

1. Any dairy promotion order issued pursuant to this article shall provide for the establishment of an advisory board to advise and assist the commissioner in the administration of such order. This board shall consist of not less than five members and shall be appointed by the commissioner from nominations submitted by producers marketing milk in the area to which the order applies. Nominating procedure, qualification, representation, and size of the advisory board shall be prescribed in the order for which such board was appointed.

2. No member of an advisory board shall receive a salary but shall be entitled to his actual and reasonable expenses incurred while performing his duties as authorized herein.

3. The duties and responsibilities of the advisory board shall be prescribed by the commissioner and he may specifically delegate to the advisory board, by inclusion in the dairy promotion order, all or any of the following duties and responsibilities:

(a) The recommendation to the commissioner of administration rules and regulations relating to the order.

(b) Recommending to the commissioner such amendments to the order as seem advisable.

(c) The preparation and submission to the commissioner of an estimated budget required for the proper operation of the order.

(d) Recommending to the commissioner methods for assessing producers and methods for collecting the necessary funds.

(e) Assisting the commissioner in the collection and assembly of information and data necessary for the proper administration of the order.

(f) The performance of such other duties in connection with the order as the commissioner shall designate.

**(k) Rules and regulations enforcement.**

1. Rules and regulations. The commissioner may, with the advice and assistance of the advisory board, make and issue such rules and regulations as may be necessary to effectuate the provisions and intent of this article and to enforce the

provisions of any dairy promotion order, all of which shall have the force and effect of law.

2. Enforcement. The commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this article, or any rule or regulation, or dairy promotion order committed to his administration, and in addition to any other remedy under article three of this chapter or otherwise, may apply for relief by injunction if necessary to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist. Such application shall be made to the supreme court in any district or county provided in the civil practice law or rules, or to the supreme court in the third judicial district. (Formerly Sec. 258-t, added L.1969, C.1008; amended L.1971, c.941, Secs. 1, 2; renumbered L.1973, c.831, Sec. 1; amended L.1977, c.628, Sec. 1; L.1978, c.613, Sec. 1; L.1984, c.101, Sec. 1; L.1986; c.247, Secs. 1, 2.)