

Amended by R.1990 d.271, effective May 21, 1990.
See: 22 N.J.R. 888(a), 22 N.J.R. 1553(a).
Minor internal recodification.

2:52-1.5 Retention of records

(a) All books and records shall be retained by the licensee for a period of three years to begin at the end of the calendar month to which such books and records pertain, subject to the following.

1. If within such three year period the Director of the Division of Dairy Industry notifies the licensee in writing that the retention of such books and records or of specified books and records is necessary in connection with a proceeding under the act or a court action specified in such notice, the licensee shall retain such books and records until further written notification from the director;

2. Daily delivery records which have been consolidated into weekly; biweekly or monthly records may be retained for only two years.

2:52-1.6 Reports required

(a) All processors, dealers and subdealers shall file reports on forms supplied by the Division of Dairy Industry as follows:

1. On or before the 20th day of each month for the preceding month a report of all milk and milk products purchased and sold during the month, which report shall include information as to the source of milk supplies and the destination and quantities of products sold.

i. In lieu of the monthly report of milk and milk products purchased and sold, the director may accept a copy of the report filed with the market administrator of the joint Federal-State order covering New Jersey;

ii. If milk and milk products are purchased and/or sold both within and outside the State of New Jersey, such information shall be reported separately;

iii. The director may exempt subdealers from filing the report of purchases and sales if such information is included in the report of the processor or dealer supplying the subdealer.

2. Annually and at such other times as the director may request, a list of all stores and wholesale accounts served (including dealers, subdealers, schools and institutions) showing name, trade name, address, current milk license number (if applicable) and the aged amount receivable for all products and any other amounts due shown separately;

3. Annually, by January 15 of the following year, a report of milk sold within the State of New Jersey during the month of November by size and type of container and by type of customer;

4. Such other reports as may be required by the director in the administration and enforcement of N.J.S.A. 4:12A-1 et seq.;

5. All reports filed with and received by the Division of Dairy Industry pursuant to this section contain confidential, competitive information and shall not at any time be made available to any person except authorized personnel.

As amended, R.1977 d.310, effective August 22, 1977.
See: 9 N.J.R. 250(a), 9 N.J.R. 404(a).

Amended by R.1989 d.127, effective March 6, 1989.
See: 20 N.J.R. 2955(a), 21 N.J.R. 634(a).

Deleted old text in (a)2iii(2) and substituted new.
Amended by R.1990 d.271, effective May 21, 1990.
See: 22 N.J.R. 888(a), 22 N.J.R. 1553(a).

Reporting extended to 20th day of month; old (a)2 deleted, remaining paragraphs recodified.

SUBCHAPTER 2. DEALER NOTICE OF INTENT TO SERVE UNLICENSED STORE

2:52-2.1 Notice of intent

(a) A dealer licensee may begin selling milk and milk products to an unlicensed store (other than a government agency) upon approval by the Director as follows:

1. With a two-week notice to the present supplier and to the Division of Dairy Industry. Such notice shall be filed by the proposed new supplier on forms provided for that purpose.

2. Without notice, if the Director finds after investigation, that the supplier(s) is failing to provide adequate service or to supply products desired by the store or is supplying milk and milk products which do not meet minimum standards of the appropriate health authority.

3. Without notice, if such change is mutually agreeable to all parties.

4. Without notice, if the unlicensed store account is changing ownership, and the new owner accepts two or less deliveries of milk and milk products from the supplier. (If the new owner accepts three or more deliveries of milk and milk products from the supplier, notice shall be required.) As used herein "changing ownership" must be a bona fide transfer of title to the new owner(s). Transfers of title to another member of the owner's immediate family or partial change of ownership shall not be considered a change of ownership for purposes of this regulation.

5. Without notice, if the authorized supplier transfers the account to another supplier; however, if the unlicensed store is notified in writing of the transfer and accepts three deliveries from the new supplier after the date the written notice is received by the unlicensed store, notice shall be required.

6. Without notice if yogurt is the only product involved.

(b) Approval to serve the unlicensed store may be denied if the Director determines that the offer violates the Milk Control Act or rules and regulations issued pursuant thereto. Also until the store pays all indebtedness, less any legal rebates and discounts earned for milk and fluid milk products purchased from the previous supplier(s) approval to change supplier(s) shall be withheld.

As amended, R.1984 d.488, effective November 5, 1984.

See: 16 N.J.R. 2028(a), 16 N.J.R. 3004(b).

Deleted old (a)1; renumbered (a)2.-3. as (a)1.-2.; added new (a)3. Amended by R.1985 d.75, effective March 4, 1985.

See: 16 N.J.R. 3071(a), 17 N.J.R. 576(a).

(a)4 added.

Amended by R.1985 d.335, effective July 1, 1985.

See: 17 N.J.R. 1012(a), 17 N.J.R. 1645(b).

(a)6 added.

2:52-2.2 Commencement of the two-week period and approval

The two-week period referred to in N.J.A.C. 2:52-2.1(a)1 shall commence upon receipt of the form in the office of the Division of Dairy Industry. All parties to the change shall be notified of any approval or denial within the two-week period except that if the Director determines that there is probable cause that the offer to serve a new customer is below cost and in violation of the Milk Control Act, action on the notice may be delayed pending investigation and/or cost analysis.

As amended, R.1984 d.488, eff. November 5, 1984.

See: 16 N.J.R. 2028(a), 16 N.J.R. 3004(b).

Changed reference from (a)2 to (a)1.

Amended by R.1990 d.271, effective May 21, 1990.

See: 22 N.J.R. 888(a), 22 N.J.R. 1553(a).

Exception to two-week period if there is probable cause to believe that there has been a violation of the Milk Control Act.

SUBCHAPTER 3. DEALER NOTICE OF INTENT TO CHANGE SOURCE OF SUPPLY

2:52-3.1 Change in source of supply

(a) A dealer may change his source of supply or engage an additional source of supply of milk and milk products upon approval by the Director as follows:

1. With a two week notice to the present supplier(s) and to the Division of Dairy Industry. Such notice shall be filed by the dealer making the change on forms provided for that purpose.

2. Without notice if the Director finds after investigation that the supplier(s) is failing to provide adequate service or to supply products desired by the dealer requesting the change or is supplying milk and milk products which do not meet minimum standards of the appropriate health authority.

3. Without notice, if such change is mutually agreeable to all parties.

4. Without notice, if the business is changing ownership, and the new owner accepts two or less deliveries of milk or milk products from the supplier. (If the new owner accepts three or more deliveries of milk and milk products from the supplier, notice shall be required.) As used herein "changing ownership" must be a bona fide transfer of title to the new owner(s). Transfers of title to another member of the owner's immediate family or partial change of ownership shall not be considered a change in ownership for purposes of this regulation.

5. Without notice, if the authorized supplier transfers the account to another supplier; however, if the licensed dealer is notified in writing of the transfer and accepts three deliveries from the new supplier after the date the written notice is received by the dealer, notice shall be required.

6. Without notice if yogurt is the only product involved.

(b) Approval to change supplier(s) may be denied if the Director determines that the offer violates the Milk Control Act or rules and regulations issued pursuant thereto. Also, until the dealer pays all indebtedness, less any legal rebates and discounts earned, for milk and fluid milk products purchased from the previous supplier(s) approval to change supplier(s) shall be withheld.

As amended, R.1984 d.488, effective November 5, 1984.

See: 16 N.J.R. 2028(a), 16 N.J.R. 3004(b).

Deleted old (a)1; renumbered (a)2-3 as (a)1-2; added new (a)3. Amended by R.1985 d.75, effective March 4, 1985.

See: 16 N.J.R. 3071(a), 17 N.J.R. 576(a).

(a)4 and 5 added.

Amended by R.1985 d.335, effective July 1, 1985.

See: 17 N.J.R. 1012(a), 17 N.J.R. 1645(b).

(a)6 added.

2:52-3.2 Commencement of the two-week period and approval

The two-week period referred to in N.J.A.C. 2:52-2.1(a)1 shall commence upon receipt of the form in the office of the Division of Dairy Industry. All parties to the change shall be notified of any approval or denial within the two-week period except that if the Director determines that there is probable cause that the offer to serve a new customer is below cost and in violation of the Milk Control Act, action on the notice may be delayed pending investigation and/or cost analysis.

As amended, R.1984 d.488, eff. November 5, 1984.

See: 16 N.J.R. 2028(a), 16 N.J.R. 3004(b).

Changed reference from 3.1(a)2 to 3.1(a)1.

Amended by R.1990 d.271, effective May 21, 1990.

See: 22 N.J.R. 888(a), 22 N.J.R. 1553(a).

Exception made for probable cause regarding violation of Milk Control Act.

Source and Effective Date

R.1990 d.355, effective June 22, 1990.
See: 22 N.J.R. 1629(a), 22 N.J.R. 2138(a).

SUBCHAPTER 4. PROCESSOR, DEALER OR SUBDEALER NOTICE TO STOP SERVING

2:52-4.1 Notice to wholesale customers of discontinuance of service

(a) Before a processor, dealer or subdealer licensee may discontinue selling any milk, cream or milk products to a dealer, subdealer, licensed store or unlicensed store (other than a governmental agency), the licensee shall notify the customer and the director, in writing, of his intent to discontinue service at least two weeks prior to the proposed date of discontinuance.

(b) Such two week notice shall not be required if the customer releases the supplier in writing and a copy of such release is sent to the Division of Dairy Industry.

As amended, R.1980 d.284, eff. July 1, 1980.
See: 12 N.J.R. 299(a), 12 N.J.R. 450(c).

SUBCHAPTER 5. (RESERVED)

Subchapter Historical Note

This subchapter was filed and became effective January 13, 1973 as R.1973 d.39. See: 5 N.J.R. 4(a), 5 N.J.R. 75(a). The amendments repealing this subchapter were filed June 27, 1980 to become effective July 1, 1980 as R.1980 d.284. See: 12 N.J.R. 299(a), 12 N.J.R. 450(c).

SUBCHAPTER 6. SALES BELOW COST; DEALER (RESERVED)

Subchapter Historical Note

Subchapter 6, Sales Below Cost; Dealer, was originally adopted as R.1984 d.488, effective November 5, 1984. See: 16 N.J.R. 2030(a), 16 N.J.R. 3306(b). Emergency Repeal: R.1990 d.252, effective April 25, 1990 (expires June 24, 1990). See: 22 N.J.R. 1629(a). Adopted concurrent repeal, R.1990 d.355, effective June 22, 1990. See: 22 N.J.R. 1629(a), 22 N.J.R. 2138(a). See new rules at Subchapter 7.

SUBCHAPTER 7. SALES BELOW COST; DEALER

Authority

N.J.S.A. 4:12A-1 et seq., specifically 4:12A-7.

Subchapter Historical Note

Emergency New Rule was adopted as R.1990 d.252, effective April 25, 1990. See: 22 N.J.R. 1629(a). Court ordered less restrictive rules. A concurrent new rule was adopted as R.1990 d.355. See: Source and Effective Date.

2:52-7.1 Sales below variable cost prohibited

It shall be unlawful and a violation of these rules for any dealer licensee to directly or indirectly be a party to, or assist in, any transaction to sell or offer to sell milk and milk products within the State of New Jersey, or for sale in the State of New Jersey, at less than the variable cost thereof as defined in N.J.A.C. 2:52-7.2; but nothing in this section shall prevent a dealer from meeting the price or offer of a competitor for a product or products of like quality and nature in similar quantities; provided, however, that the burden of proving and properly documenting the meeting of a competitive price shall rest with the licensee asserting the claim.

Case Notes

Challenge to New Jersey's milk pricing scheme would not be certified for interlocutory appeal. *Beyer Farms, Inc. v. Brown*, D.N.J.1989, 721 F.Supp. 644.

New Jersey milk pricing scheme, which prohibited sale of milk in New Jersey below cost, did not directly regulate interstate commerce or amount to intentional discrimination against interstate commerce; genuine issues of material fact existed, bearing on question of whether New Jersey's milk pricing scheme had a discriminatory effect on interstate commerce and whether local benefits of scheme outweighed any incidental effects on interstate commerce, precluding summary judgement. *State of N.Y. v. Abrams v. Brown*, 721 F.Supp. 629 (D.N.J.1989).

Milk processor's targeting of distributor's customers by solicitation with lower prices was not malicious for purposes of distributor's claim of tortious interference with prospective business relation. *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 282 N.J.Super. 140, 659 A.2d 904 (A.D.1995), certification denied 141 N.J. 99, 660 A.2d 1197.

Rules prohibiting sale of milk below cost did not violate substantive due process; presumptive cost guidelines for pricing milk were not administrative rules subject to notice and hearing requirements of Administrative Procedure Act. *Cumberland Farms, Inc. v. Moffett*, 218 N.J.Super. 331, 527 A.2d 913 (App.Div.1987).

2:52-7.2 Variable cost defined

The term "variable cost" as used in this subchapter shall include, but not be limited to, the basic cost of raw or reconstituted milk or derivatives thereof as determined in accordance with the joint State-Federal orders administered by the Division of Dairy Industry and the United States Department of Agriculture in the State of New Jersey; the cost of any added ingredients; and all other variable costs associated with the business of the dealer including the cost of material, labor, receiving, cooling, processing, manufacturing, storing and distributing the products sold; selling expense, maintenance charges, delivery expense, gifts, and free service allocated proportionately to each unit of product sold in accordance with generally accepted accounting

principles. The proportioned allocation may be adjusted to reflect efficiencies in packaging different sized containers. Not included in these costs are office expense, salaries of executives and officers, interest, rent, depreciation, license fees, taxes, insurance, advertising, and advertising allowances.

Case Notes

Challenge to New Jersey's milk pricing scheme would not be certified for interlocutory appeal. *Beyer Farms, Inc. v. Brown*, D.N.J.1989, 721 F.Supp. 644.

2:52-7.3 Certain costs to be averaged

(a) In computing cost as used in this subchapter, all variable costs of doing business with the exception of raw products and ingredient costs shall be based on average costs for the dealer in question during the previous 12 months, adjusted to appropriately reflect any significant changes in costs of operation in the averaging period or such shorter time as the licensee may have been in business.

(b) In determining cost for a specific account, the value of any gifts and free services must be included in cost to be averaged for the 12-month period, except where a written contract for a specified term exists between the dealer and the recipient customer, the value of such gifts and free services may be amortized over the remaining term of the contract.

(c) All costs of delivery shall be based on average variable costs for the dealer in question during the previous 12 months and allocated proportionately to each unit of product delivered except where specific delivery cost records are maintained for each method and size of delivery, the actual direct cost of the delivery shall be the basis of the allocation and shall be prorated to each unit of product included in the delivery.

2:52-7.4 Raw milk costs defined

As used in this subchapter, the cost for raw and the reconstituted milk shall be the total cost of acquiring the milk or butterfat, or milk solids-not-fat, but shall not be less than the applicable class price under the joint State-Federal orders in the respective New Jersey order areas or in the case of butterfat and milk solids-not-fat, not less than the current market price for such products as announced by the United States Department of Agriculture for the New York City market.

2:52-7.5 Enforcement

The Director shall enforce the provisions of this subchapter by proceeding pursuant to N.J.S.A. 4:12A-39 (monetary penalties) or 4:12A-44 (actions to restrain violations). Proceedings to revoke or suspend, or to refuse to renew, the license of any milk dealer who violates the provisions of this subchapter may be commenced by the Director where the licensee has continued in a course of dealing of such nature to satisfy the Director of that dealer's inability or unwillingness properly to conduct the business of receiving or selling milk in accordance with the provisions of the Milk Control Act, N.J.S.A. 4:12A-1 et seq. Such proceedings shall be conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.