

CHAPTER 53**STORES****Authority**

N.J.S.A. 4:1-11.1, 24 and 25; and 4:12A-1 et seq., specifically 4:12A-7, 20 through 23, 37 and 38.

Source and Effective Date

R.2006 d.97, effective February 7, 2006.
See: 37 N.J.R. 4094(a), 38 N.J.R. 1315(b).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 53, Stores, expires on August 6, 2011. See: 43 N.J.R. 704(a).

Chapter Historical Note

Chapter 53, Stores, was adopted and became effective prior to September 1, 1969.

Pursuant to Executive Order No. 66(1978), Subchapter 4, Notice of Intent to Change Source of Supply, was readopted as R.1985 d.336, effective June 7, 1985. See: 17 N.J.R. 1011(a), 17 N.J.R. 1645(a).

Pursuant to Executive Order No. 66(1978), Subchapter 3, Sales Below Cost; Stores, expired on November 1, 1985. Subchapter 3, Sales Below Cost; Stores, was adopted as emergency new rules by R.1985 d.648, effective November 26, 1985, expired January 25, 1986. See: 17 N.J.R. 3014(a). The provisions of R.1985 d.648 were readopted as R.1986 d.43, effective March 3, 1986. See: 17 N.J.R. 3014(a), 18 N.J.R. 476(a).

Subchapter 3, Sales Below Cost; Stores, and Subchapter 4, Notice of Intent to Change Source of Supply, were repealed and Subchapter 6, Sales Below Cost; Stores, and Subchapter 7, Notice of Intent to Change Source of Supply, were adopted as emergency new rules by R.1990 d.252, effective April 25, 1990, to expire June 24, 1990. See: 22 N.J.R. 1629(a). The provisions of R.1990 d.252 were readopted as R.1990 d.355, effective June 22, 1990. See: 22 N.J.R. 1629(a), 22 N.J.R. 2138(a).

Pursuant to Executive Order No. 66(1978), Chapter 53, Stores, was readopted as R.1991 d.51, effective January 10, 1991. See: 22 N.J.R. 3609(a), 23 N.J.R. 294(a).

Pursuant to Executive Order No. 66(1978), Chapter 53, Stores, was readopted as R.1996 d.45, effective December 21, 1995. See: 27 N.J.R. 4477(a), 28 N.J.R. 259(a).

Pursuant to Executive Order No. 66(1978), Chapter 52, Stores, was readopted as R.2000 d.438, effective October 4, 2000. See: 32 N.J.R. 2635(a), 32 N.J.R. 3973(b).

Administrative change: Pursuant to Reorganization Plan No. 03-2002, the Division of Dairy and Commodity Regulation was renamed Division of Marketing and Development, effective February 27, 2003. See: 35 N.J.R. 3(a), 35 N.J.R. 1539(b).

Chapter 53, Stores, was readopted as R.2006 d.97, effective February 7, 2006. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. (RESERVED)**SUBCHAPTER 2. PRICE POSTING****2:53-2.1 Price posted in store**

(a) Every licensed store shall post at the milk display case a current price list showing all the prices at which it will sell milk and milk products.

(b) The price posting shall be so placed in the store that it may be readily seen and read by all customers purchasing milk or milk products.

(c) Prices legibly marked on the individual containers of each and every package of milk or milk products offered for sale will be deemed as compliance with this provision.

SUBCHAPTERS 3 THROUGH 4. (RESERVED)**SUBCHAPTER 5. STORE RECORDS AND REPORTS****2:53-5.1 Store books of record and account**

(a) Every store selling milk or milk products shall maintain such books and records, including records of any and all transactions relating to the licensee's business as are necessary for a determination by the Division of Marketing and Development that the store has complied with the applicable statutes and rules and regulations of the Division. These records shall include, but not be limited to, the following:

1. A purchase record including a detailed daily record of all purchases of milk and milk products showing the supplier's name and number of units and prices of all products with the value of each product extended and totaled;

2. A record of rebates, discounts or allowances received, directly or indirectly, from suppliers of milk and milk products;

3. A record of equipment, loans or other items of value received or purchased from suppliers of milk and milk products with applicable documentation;

4. A detailed daily record of all payments to suppliers of milk and milk products, directly or indirectly, for loans, purchases or leases of equipment, or any other purchases;

5. A record and documentation for any agreement, arrangement, contract or common understanding with any other division licensee;

6. All books and records shall be retained at the store or other convenient location within the State of New Jersey for a period of three years to begin at the end of the calendar month to which such books and records pertain; provided that, if within such three-year period the Director of the Division of Marketing and Development notifies the store 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 store shall retain such books and records until further written notice from the Director:

i. A store may maintain its books and records outside the State of New Jersey by notifying the director in writing and by agreeing in writing to make such records available for inspection and audit as if the records were physically located within this State.

Amended by R.2000 d.438, effective November 6, 2000. See: 32 N.J.R. 2653(a), 32 N.J.R. 3973(b).

In (a), substituted "and Commodity Regulation" for "Industry" in the introductory paragraph and 6.

2:53-5.2 Reports by stores

(a) All stores selling milk or milk products shall report on forms provided by the Department for such purposes, the following information by April 1, 2007, broken down on a per point basis for the time period between January 1 to December 31, 2006:

1. The following sales information for each store premises:

i. The store location, including street address, city and zip code;

ii. The total annual amount of money received in sales of licensed milk and milk products;

iii. The total annual amount of money received in sales for all products;

iv. The price of all licensed milk and milk products charged to consumers on a monthly basis, for each size container;

v. A list of all rebates, price cuts, credits, give-backs, advertising allowance or any other reduction in the price charged to the consumer;

vi. The total volume of milk sold calculated on a point basis;

vii. The total volume of licensed milk products sold calculated on a point basis; and

viii. Any other similar cost information as may be deemed necessary by the Director of the Division of Marketing and Development;

2. A statement of costs and other expenses, showing the following information for each store premises, reported on a per point basis:

i. The store location including street address, city and zip code;

ii. The cost of all licensed milk and milk products purchased by the store;

iii. Total labor costs attributable to the sale of licensed milk and milk products;

iv. Total labor costs of the store;

v. The total costs of utilities, cooling and storage attributable to the sale of licensed milk and milk products;

vi. The total costs of utilities, cooling and storage attributed of the sale of all refrigerated products;

vii. Fixed expenses or costs of running the store, including, but not limited to, rent, lease payments or mortgage payments, interest, depreciation, license fees, taxes, advertising and insurance attributable to the sale of licensed milk and milk products; and

viii. Any other similar cost information as may be deemed necessary by the Director of the Division of Marketing and Development; and

3. For purposes of reporting pursuant to (a)2 above, points will be calculated as follows:

i. Point value for allocation of plant cost centers shall be as follows:

- (1) Fluid gallon-milk, milk drinks, etc., ice cream, others in fruit drink.....Four points;
- (2) Yogurt, dips, sour cream, cottage cheese
 - (A) 12 to 16 ounces.....One point;
 - (B) Under 12 ounces.....1/2 point;
- (3) Butter, margarine, bread, eggs...One point per pound, loaf, dozen;
- (4) Aerated whips, cream.....One point per can;
- (5) Ice cream novelties.....Two points per dozen; and
- (6) All other items.....Two points per \$1.00 sales;
 - (A) All other items shall include, but not be limited to, non-processed fruit drinks purchased for resale in unchanged form and package.

(b) All stores selling milk or milk products shall file annually, but no later than April 1st of each year, on forms provided by the Department for such purposes, a revised report containing the information in (b) above for the time period between January 1st to December 31st for the preceding year.

(c) All stores selling milk or milk products shall file such other reports as the Director may require in the administration and enforcement of N.J.S.A. 4:12A-1 et seq.

(d) All records and supporting documents for the information required to be reported in this section shall be kept by the store for a period of three years and shall be made available to an employee or agent of the Department upon request for purposes of audit.

(e) Reports which are incomplete or inaccurate may be returned and considered not filed.

Emergency amendment, R.2007 d.70, effective January 29, 2007 (operative February 1, 2007, to expire March 30, 2007).
See: 39 N.J.R. 677(a).

Added (a) and (b); inserted designation (c); in (c), substituted "All stores" for "Every store" and "Director" for "director" and inserted "other"; and added (d) and (e).

2:53-5.3 Confidentiality

The New Jersey Department of Agriculture will hold confidential any information obtained pursuant to this chapter, which constitutes proprietary commercial or financial information, or is otherwise protected from disclosure under 7 CFR Part 205.501 and 205.504 or the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., subject to the limitations set forth therein.

New Rule, R.2006 d.97, effective March 6, 2006.
See: 37 N.J.R. 4094(a), 38 N.J.R. 1315(b).

SUBCHAPTER 6. SALES BELOW COST; STORES

2:53-6.1 Sales below variable cost prohibited

It shall be unlawful and a violation of this subchapter for any licensed store to offer for sale or sell milk or milk products at less than the variable cost thereof as defined in N.J.A.C. 2:53-6.2; but nothing in this section shall prevent a store from meeting the price or offer of a competitor for a product or products of like quality sold 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

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 (App.Div.1987).

2:53-6.2 Variable cost defined

(a) Except as hereinafter provided, the term "variable cost" as used in this subchapter shall include the net invoice cost of the milk and milk products plus all other variable costs related to the sale of milk and milk products. Such costs will be determined in accordance with generally accepted accounting principles and be allocated proportionately to each unit of product sold. These costs shall include labor, receiving, cooling, storing, selling, distributing, maintenance, delivery, gifts, and free service allocated to each unit of product sold. Not included in these costs are salaries of those engaged in administrative functions, office expenses, interest, rent, depreciation, license fees, taxes, insurance and advertising.

(b) In the absence of proof of a smaller amount, a store may add (as a proxy for total variable cost) five percent of the net invoice cost to determine the lawful selling price for milk and milk products. Also, pursuant to N.J.A.C. 2:53-6.1, a store may meet any price or offer of a competitor.

SUBCHAPTER 7. NOTICE OF INTENT TO CHANGE SOURCE OF SUPPLY

2:53-7.1 Notice of intent

(a) As used in this section, "supplier of record" shall mean any supplier of milk or milk products from whom a licensed store has accepted three or more deliveries of milk or milk products.

(b) A licensed store may change its supplier of record or engage an additional supplier of milk and milk products once it has complied with the following requirements:

1. A store shall pay all indebtedness, less any legal rates and discounts earned, for fluid milk and milk products purchased from the supplier of record.

2. A store shall give the supplier of record at least 48 hours actual notice of intent to change suppliers. Actual notice shall be given in writing reasonably calculated to be received 48 hours prior to the date and time of the effective date as stated in the notice. Unless the store gives at least 48 hours prior notice to its supplier of record, the store shall not refuse to accept the next scheduled delivery from the supplier of record.

3. Notice to the supplier of record is not required in the following circumstances:

- i. If the Director of the Division of Marketing and Development of the Department of Agriculture finds after investigation that the supplier of record 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 State and Federal health authorities;

ii. If such change is mutually agreeable to all parties;

iii. If the licensed store account is changing ownership, and the new owner accepts two or less deliveries of milk and milk products from the supplier of record. (If the new owner accepts three or more deliveries of milk and milk products from the supplier of record, 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 section;

iv. If the supplier of record transfers the account to another supplier of milk and milk products; however, if the licensed store is notified in writing of the transfer and accepts three or more deliveries from the new supplier of milk and milk products after the date the written notice is received by the licensed store, notice shall be required; or

v. If yogurt is the only product involved.

(c) The licensed store shall give notice to the Division of Marketing and Development within three business days of an agreement to change its supplier of record or add suppliers of milk and milk products. Such notice shall be filed by the store, or the new supplier of milk and milk products on its behalf, on the forms provided for that purpose by the Director.

(d) A store changing its supplier of record or adding suppliers of milk and milk products without complying with the requirements of (b) above may be cited for a violation of this section. A cited store may request a hearing before an Administrative Law Judge pursuant to the Administrative Procedure Act and the Uniform Administrative Procedure Rules, or at an informal hearing pursuant to N.J.S.A. 4:12A-43 provided that, if the total amount owed is in controversy, the amount not in controversy must be paid and the balance referred to the Director for mediation pursuant to N.J.S.A. 4:12A-24.

Amended by R.2000 d.438, effective November 6, 2000.
See: 32 N.J.R. 2653(a), 32 N.J.R. 3973(b).

In (b), substituted "and Commodity Regulation" for "Industry".
Amended by R.2006 d.97, effective March 6, 2006.
See: 37 N.J.R. 4094(a), 38 N.J.R. 1315(b).

Rewrote the section.