

CHAPTER 52

PROCESSORS, DEALERS AND SUBDEALERS

Authority

N.J.S.A. 4:12A-1 et seq., specifically 4:12A-7 and 20.

Source and Effective Date

R.2005 d.327, effective September 22, 2005.
See: 37 N.J.R. 1913(a), 37 N.J.R. 3968(a).

Chapter Expiration Date

Chapter 52, Processors, Dealers, and Subdealers, expires on September 22, 2010.

Chapter Historical Note

Chapter 52, Processors, Dealers and Subdealers, was filed and became effective prior to September 1, 1969.

Subchapter 5, Information Required from Applicants, was adopted as R.1973 d.39, effective January 13, 1973. See: 5 N.J.R. 4(a), 5 N.J.R. 75(a).

Chapter 52, Processors, Dealers and Subdealers, was adopted as R.1976 d.359, effective January 1, 1977. See: 8 N.J.R. 450(b), 8 N.J.R. 542(c).

Subchapter 7, Application of Minimum Price Regulations to the Sale of Milk to Consumers by Producers-Dealers, was adopted as R.1977 d.303, effective August 25, 1977. See: 9 N.J.R. 250(b), 9 N.J.R. 403(c).

Chapter 52, Processors, Dealers and Subdealers, was adopted as R.1980 d.284, effective July 1, 1980. See: 12 N.J.R. 299(a), 12 N.J.R. 450(c).

Subchapter 6, Sales Below Cost; Dealer, was adopted as R.1984 d.488, effective November 5, 1984. See: 16 N.J.R. 2030(a), 16 N.J.R. 3306(b).

Pursuant to Executive Order No. 66(1978), Chapter 52, Processors, Dealers and Subdealers, was readopted as R.1985 d.335, effective June 7, 1985. See: 17 N.J.R. 1012(a), 17 N.J.R. 1645(b).

Pursuant to Executive Order No. 66(1978), Chapter 52, Processors, Dealers and Subdealers, was readopted as R.1990 d.271, effective May 1, 1990. See: 22 N.J.R. 888(a), 22 N.J.R. 1553(a).

Subchapter 6, Sales Below Cost; Dealer, was repealed and Subchapter 7, Sales Below Cost; Dealer, was adopted as new rules by R.1990 d.355, effective June 22, 1990.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 52, Processors, Dealers and Subdealers, was adopted as new rules by R.1995 d.325, effective June 19, 1995. See: 27 N.J.R. 1343(a), 27 N.J.R. 2383(b).

Pursuant to Executive Order No. 66(1978), Chapter 52, Processors, Dealers and Subdealers, was readopted as R.2000 d.227, effective May 5, 2000. See: 32 N.J.R. 735(a), 32 N.J.R. 2046(b).

Administrative change: Pursuant to Reorganization Plan No. 003-2002, the Division of Dairy Industry 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 52, Processors, Dealers, and Subdealers, was readopted by R.2005 d.327, effective September 22, 2005. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. PROCESSORS, DEALERS AND SUBDEALERS RECORDS AND REPORTS

2:52-1.1 Books and records of account

Every processor, dealer and subdealer shall maintain books and records, including all pertinent books, ledgers, journals, records, papers, schedules, analyses, memoranda, correspondence, vouchers, receipts, cancelled checks, accounts, exhibits, photographs, bills and other documents, including corporate minutes, Federal, State and local tax returns, and any other records required to verify financial statement as needed to ascertain the functioning, operations or activities of the licensee's business and as are necessary for a determination by the Division of Marketing and Development or its staff as to whether the licensee has complied with the applicable New Jersey statutes and rules and regulations of the division.

2:52-1.2 All transactions to be recorded

Any and all transactions relating to the licensed business (including but not limited to operations, customers and suppliers) are to be paid from and/or received into the accounts of the licensed business or be clearly reflected as accruals and be clearly and accurately recorded in the books and records of the business.

2:52-1.3 Separate records for each licensed business

Each licensed business shall maintain separate financial and other records. When requested, licensed dealers operating branches and/or subsidiaries must submit separate records pertaining to such entity for a determination by the Division of Marketing and Development as to whether the licensee's branch or subsidiary has complied with the applicable New Jersey statutes and rules.

Amended by R.2005 d.327, effective October 17, 2005.
See: 37 N.J.R. 1913(a), 37 N.J.R. 3968(a).
Added the last sentence.

2:52-1.4 Books and records required

(a) The books and records shall include but not be limited to the following.

1. Daily route loadout and settlement records, including:

- i. Route number, driver's name and date;
- ii. Beginning inventory of saleable units and milk and milk products;
- iii. Number of units of milk and milk products loaded on truck;
- iv. Number of saleable units of milk and milk products;
- v. Number of spoiled units of milk and milk products;
- vi. Number of units of milk and milk products sold;
- vii. Volume of products totalled by units or pounds;
- viii. Amounts of cash and charge sales stated separately;
- ix. Route collections or charge accounts listed showing customers and amounts;
- x. Amount of route money short or over;
- xi. Details of any expenditures made from subparagraphs viii and ix of this paragraph.

2. Appropriate records on each truck showing the names and addresses of all retail and wholesale customers served on the route. These records shall reflect all sales and/or deliveries to each customer and shall be available for inspection at all times when the trucks are being used to

service customers. On wholesale routes, a copy of the delivery slips to all customers may be maintained in the truck and the addresses maintained in the office of the dealer or subdealer;

3. Detailed daily cash and charge sales records of deliveries and sales, including the number of units and prices of all products sold or delivered to customers with the value of each product extended and totalled. The foregoing extensions and totals may be consolidated into weekly, biweekly or monthly records so long as daily records are maintained as per section 5 of this subchapter;

4. Accounts receivable records, including but not limited to:

i. A detailed accounts receivable record showing customer name, address and identifiable charges and credits. This shall be so maintained and detailed as to permit ready determination of the composition and age of the balances outstanding;

ii. Charges are to be posted in such a manner as to be readily proved to invoices or other posting documentation or record;

iii. A record of loans or notes receivable so maintained and detailed as to permit ready determination of the composition and age of the balances outstanding;

5. Cash receipts and disbursements records, including but not limited to:

i. All cash received, from whatever source, pertaining to the licensed business, shall be entered into a detailed daily record of cash receipts which shall be traceable to a specific deposit made or other disposition of the cash received. This shall include but not be limited to collections for deliveries to accounts and other miscellaneous cash sales or income. It shall also show individual customer or other accounts affected and be supported by original documentation showing the nature of the cash receipt transaction;

ii. All moneys expended, relating to the licensed business, including but not limited to payments for purchases, expenses, rebates, and so forth, shall be entered into a detailed record of cash disbursements. These entries shall be supported by original documentation, including invoices, receipts and bills of sale or other documentation. Records of rebates, if any, are to be maintained and are to indicate details of the basis for such rebates as applied to each customer;

iii. Records required shall also include daily detailed deposit slips, voided and cancelled checks and monthly bank statements or passbooks for all bank accounts affecting the licensed business, including bank debit and credit memoranda, check stubs or duplicates, and bank reconciliations;

6. Purchase and expense records, including but not limited to:

- i. A detailed daily record of all purchases relating to the licensed business, including purchases of milk and milk products and all other items of cost and expense. These entries shall be supported by original documentation from vendors or others with whom the transactions originate;
- ii. A detailed record of all assets purchased, including refrigeration and storage units;
- iii. Detailed payroll and personnel records showing all employees and their individual earnings, as well as any other reimbursed expenses of officers and employees;

7. A general ledger, posted monthly, showing the summary of all transactions reflected in the cash receipt and disbursement records, the sales records, the purchase record, and the adjustments or other financial records;

8. Copies of any and all agreements pertaining to the licensed business, including but not limited to sales or leases or property and/or equipment, rentals of property and/or equipment, loans received or granted, routes leased, sold or purchased, and contracts relating to the sale or purchase of milk or milk products.

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 Marketing and Development 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 Marketing and Development 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; and

3. 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.

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.

Amended by R.2005 d.327, effective October 17, 2005.

See: 37 N.J.R. 1913(a), 37 N.J.R. 3968(a).

In (a), added "and" at the end of 2, deleted former 3, recodified former 4 as 3, and deleted 5.

2:52-1.7 Confidentiality

The New Jersey Department of Agriculture will hold confidential any information obtained while implementing the rules set forth in this chapter, which constitutes proprietary commercial or financial information, or is otherwise protected from disclosure under 7 C.F.R. 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 by R.2005 d.327, effective October 17, 2005.

See: 37 N.J.R. 1913(a), 37 N.J.R. 3968(a).

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 Marketing and Development. 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 through investigation 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.

(c) To provide an orderly flow of milk and milk products, all requests for assistance related to, but not limited to, this section must be filed with the Director of Marketing and Development within 30 days from date of last business transaction between the store and the previous supplier; and shall include the location of the store, amount in dispute, any attempted resolution and any other information necessary for a determination of compliance and/or the administration and enforcement of the applicable New Jersey statutes and rules.

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.

Amended by R.2005 d.327, effective October 17, 2005.

See: 37 N.J.R. 1913(a), 37 N.J.R. 3968(a).

In (b), added "through investigation" following "Director determines"; added (c).

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 Marketing and Development. 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 Marketing and Development. 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 through investigation 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.

(c) To provide an orderly flow of milk and milk products, all requests for assistance related to, but not limited to, this section must be filed with the Director of Marketing and Development within 30 days from date of last business transaction between the dealer and the previous supplier; and shall include the location of the store, amount in dispute, any attempted resolution and any other information necessary for a determination of compliance and/or the administration and enforcement of the applicable New Jersey statutes and rules.

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.
Amended by R.2005 d.327, effective October 17, 2005.
See: 37 N.J.R. 1913(a), 37 N.J.R. 3968(a).

In (b), added "through investigation" following "Director determines"; added (c).

Case Notes

Rule requiring that milk dealers give milk suppliers two weeks notice before changing their source of supply combined with defendant's control of several local dairies deterred plaintiff from taking its business elsewhere. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737 (3rd Cir. N.J. 1996).

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 Marketing and Development. 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.

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 Marketing and Development.

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 6. (RESERVED)

SUBCHAPTER 7. SALES BELOW COST; DEALER

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. By 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 Marketing and Development 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 I price as determined by the Federal Milk Market Administrator's office Federal Order Number 1 (Northeast Marketing area). The order differential zone used in the calculation will be the New York, NY selected location as determined by the United States Department of Agriculture.

Amended by R.2005 d.327, effective October 17, 2005.
See: 37 N.J.R. 1913(a), 37 N.J.R. 3968(a).
Rewrote the section.

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.