

PROPOSED RULEMEKING

MILK MARKETING BOARD

[7 PA. CODE CHS. 145—147]

Refrigeration Equipment; Records and Reports

The Milk Marketing Board (Board) proposes to delete the provisions in Chapter 145, add the reformatted and amended provisions in new Chapter 146 (relating to transactions between dealers and customers) and amend § 147.12 (relating to contracts for sale or lease of refrigeration equipment) to read as set forth in Annex A.

Purpose

Current Board regulations prohibit milk dealers from giving or lending refrigeration equipment to wholesale customers without charge, but do not prohibit milk dealers from selling or leasing equipment to customers according to specified terms and conditions. During a recent Statewide enforcement audit conducted by Board staff, it was discovered that virtually all dealers in this Commonwealth that were providing refrigeration equipment to wholesale customers were not in compliance with these terms and conditions. It is apparent to the Board that the industry is not being well served by the existing regulations. Based upon reviews of existing practices, as well as feedback from industry participants during private discussions and public meetings, the Board believes that there is a strong preference for a method to incorporate sale and lease charges into the wholesale minimum price of milk, rather than requiring sale and lease payments that are separate and apart from payments for milk.

This proposed rulemaking provides a method whereby licensed milk dealers may sell or lease refrigeration equipment to wholesale customers through an additional charge, or "up-charge" of not less than 1¢ or 1/4¢, respectively, added to the Board-established minimum prices. The secondary purposes of the proposed rulemaking are to: clarify that subdealers as well as dealers are governed by the regulations; specify that a manufacturer or seller of refrigeration equipment may not sell or in any way handle milk without a license; clarify that cream dispensers are considered as refrigeration equipment covered by the regulations; and preclude the possibility of a dealer avoiding the regulations by contracting with a seller or manufacturer of equipment to have the equipment delivered to a wholesale customer on behalf of the dealer.

Summary of the Proposed Rulemaking

Proposed § 146.1 (relating to applicability) prohibits a dealer or subdealer from avoiding the regulations by purchasing equipment that will be delivered by the seller of the equipment directly to a wholesale customer; prohibits a dealer or subdealer from avoiding the regulations by contracting with a third party to provide equipment to a wholesale customer; prohibits a manufacturer of refrigeration equipment from selling or in any way handling milk in this Commonwealth without a license; and exempts grocery wholesalers who are licensed as dealers, and who in the normal course of their business supply their subsidiaries, franchisees, affiliates or nonaffiliated customers with a complete line of groceries, including milk, to the extent that refrigeration equipment is not used as an inducement related to acquiring or retaining the milk business of any customers.

Existing § 145.2 established the written requirements for leases and requires that the leases be for "an amount comparable to the fair rental value of the equipment at the time of the execution of the lease." This proposal eliminates that language. Existing § 145.3 sets out a minimum monthly amount that must be paid, based upon the value of the equipment, and requires monthly payments, in advance, billed separately from any other billing. Proposed § 146.3 (relating to leasing agreements) establishes a minimum upcharge of 1/4¢ per quart equivalent added to the Board-established minimum prices for every unit of controlled products sold to the customer at the site where the leased equipment is used. The proposed section also adds the words "or cream" to the types of equipment covered and removes any possible ambiguity as to whether dispensers are covered and also describes the written agreement that is required.

Proposed § 146.4 (relating to sale of equipment) governs the sale of refrigeration equipment. This section establishes a minimum upcharge of 1¢ per quart equivalent added to the Board-established minimum prices for every unit of controlled products sold to the customer at the site where the purchased equipment is used, until the full value of the equipment has been paid. The proposed rulemaking also adds the words "or cream" for consistency with § 146.3.

Proposed § 146.5 (relating to exceptions for certain schools regarding refrigeration equipment) adds subdealers to the exceptions regarding refrigeration equipment in schools.

Proposed §§ 146.7 and 146.8 (relating to identification of ownership of equipment; and unfair pricing) include subdealers in provisions regarding leased equipment and pricing.

Section 147.12 currently requires a dealer wishing to sell or lease equipment to a customer to submit the sale or lease agreement to the Board for approval. The proposed rulemaking eliminates the need for Board approval of sale or lease agreements by the removal of the words "for approval." For consistency with other sections dealing with sales and leases, the word "contract" (of sale or lease) has been replaced with "agreement" and "or subdealer" has been added. Finally, the phrase "subject to § 146.1 (relating to applicability)" has been added to exempt grocery wholesaler licensees who are exempted from Chapter 145.

Statutory Authority

Section 307 of the Milk Marketing Law (act) (31 P. S. § 700j-307) provides the Board with the authority to adopt and enforce regulations necessary or appropriate to carry out the provisions of the act.

Public Hearing

The Board held a public meeting/workshop on March 8, 2006, to discuss the issue in general and to determine what changes to the regulations, if any, the interested parties would like to see. Among the attendees were representatives of the Pennsylvania Association of Milk Dealers, the Pennsylvania Food Merchants' Association, Dairy Marketing Services, LLC, Dean Foods Company, Meadow Brook Dairy Company, Lehigh Valley Dairies, Schneider's Dairy, Inc., Schneider-Valley Farms, Inc. and Wawa Dairy, Inc. The problem expressed by the attendees at this meeting was that many wholesale customers want dealers to provide refrigeration equip-

ment, but are unwilling to pay a separate sales or lease payment as required by the current regulations. There was a consensus that customers would be willing to pay these charges if they were included as an additional charge, or "upcharge," added to the minimum price of milk. The milk dealers proposed that the specified amounts and terms in the current regulations be replaced by an upcharge of 1/4¢ per unit of controlled product sold to a customer for each piece of leased equipment for as long as the equipment is in use, and 1¢ per unit of controlled product sold to a customer for each piece of equipment sold to a customer until the full value of the equipment has been paid. The first draft of this proposed rulemaking was written as a result of the discussion and comments at that public meeting and circulated among interested parties.

Following circulation of the first draft proposed rulemaking, the Board received correspondence from the Pennsylvania School Boards Association expressing concern that the proposed upcharge, since it was the same regardless of container size, would unfairly affect schools who purchase milk predominantly in 1/2 pint containers.

On April 12, 2006, a meeting of the interested parties was held to discuss the first draft of this proposed rulemaking. At this meeting, it was agreed among the parties present that the upcharge should be added on a per quart equivalent basis rather than per unit. Based upon the discussion and comments at that meeting, a final draft of the proposed rulemaking was circulated among the interested parties.

On May 16, 2006, the Board, after due notice, conducted a public hearing to receive comments on the proposed rulemaking. Representatives of the Pennsylvania Association of Milk Dealers, the Pennsylvania Food Merchants' Association and Rutter's Dairy were in attendance, in addition to Board staff. Both Board staff and the Pennsylvania Association of Milk Dealers spoke in favor of the proposed rulemaking and urged the Board to adopt them. Subsequent to the public hearing, correspondence was received from Giant Eagle, Inc., a grocery wholesaler also licensed as a milk dealer, requesting that the Board exempt grocery wholesalers who supply a complete line of groceries, including milk, to wholly-owned subsidiaries, franchisees, affiliates or nonaffiliated customers to the same extent that grocery wholesalers are exempted from the dealer loan prohibition elsewhere in Chapter 145. The final draft of the proposed rulemaking was changed to accommodate this request.

Fiscal Impact

The Board believes that adoption of this proposed rulemaking will have a positive fiscal impact on milk dealers since it will eliminate the requirement that sales and lease charges be billed separately from milk sales. The proposed rulemaking may have an additional positive impact on dealers to the extent that dealers were providing refrigeration equipment to customers without receiving adequate payment.

The proposed rulemaking will have a negative fiscal impact on retail stores only to the extent that they were being provided with refrigeration equipment without adequate charges in contravention of the existing regulations.

Paperwork Requirements

The proposed rulemaking will not require additional paperwork. If anything, paperwork requirements will be

reduced because the proposed rulemaking eliminates the requirements for separate billings for lease and rental charges.

Effective and Sunset Dates

The proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*. There is no sunset date.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 7, 2006, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees on Agriculture and Rural Affairs. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections concerning the proposed rulemaking to Chief Counsel, Milk Marketing Board, 2301 North Cameron Street, Harrisburg, PA 17110 within 30 days following publication in the *Pennsylvania Bulletin*.

BOYD E. WOLFF,
Chairperson

Fiscal Note: 47-12. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 7. AGRICULTURE

PART VI. MILK MARKETING BOARD

CHAPTER 145. (Reserved)

(Editor's Note: As part of this proposed rulemaking, the Board is proposing to delete the text of Chapter 145, which appears at 7 Pa. Code pages 145-1—145-9, serial pages (313305), (313306), (237857), (237858) and (313307) to (313311).)

§§ 145.1—145.11. (Reserved).

§§ 145.21—145.24. (Reserved).

§ 145.26. (Reserved).

(Editor's Note: The following chapter is new. It has been printed in regular type to enhance readability.)

CHAPTER 146. TRANSACTIONS BETWEEN DEALERS AND CUSTOMERS

REFRIGERATION EQUIPMENT

Sec.	
146.1.	Applicability.
146.2.	Gifts of refrigeration equipment.
146.3.	Leasing agreements.
146.4.	Sale of equipment.
146.5.	Exceptions for certain schools regarding refrigeration equipment.
146.6.	Maintenance of equipment.
146.7.	Identification of ownership of equipment.
146.8.	Unfair pricing.
146.9.	Financing.

DEALER INDUCEMENTS

- 146.21. Giveaways.
- 146.22. Sampling prospective retail customers and established retail customers.
- 146.23. Gifts to established retail customers.
- 146.24. Samples or gifts to wholesale customers.
- 146.25. Extension of credit to wholesale customers.

REFRIGERATION EQUIPMENT**§ 146.1. Applicability.**

(a) Dealers and subdealers purchasing refrigeration equipment directly for use by, or sale to, or lease or rental to their wholesale customers are governed by this chapter.

(b) Dealers and subdealers providing refrigeration equipment to their wholesale customers in conjunction with, or through, or in coordination with, a third party refrigeration equipment manufacturer or supplier are deemed to be supplying the refrigeration equipment directly and are governed by this chapter.

(c) A manufacturer or seller of refrigeration equipment may not sell, deliver, arrange for delivery, or in any way handle, as defined by the act, milk within this Commonwealth without a dealer or subdealer license.

(d) This chapter does not apply to transactions between grocery wholesalers and their subsidiaries, affiliates, franchisees or wholesale customers to the extent the transactions occur in the normal course of the grocery wholesaler's business and are only incidentally related to acquisition or retention of the fluid milk business of the subsidiary, affiliate, franchisee or wholesale customer.

§ 146.2. Gifts of refrigeration equipment.

(a) A dealer or subdealer may not give or lend refrigeration equipment or milk or cream dispensers of any type to customers for storing or dispensing milk or cream.

(b) Nothing in subsection (a) may be construed to prohibit a dealer or subdealer from selling or leasing any of the described equipment to a wholesale customer.

§ 146.3. Leasing agreements.

(a) Whenever a dealer or subdealer leases refrigeration equipment, or milk or cream dispensers or similar facilities to a wholesale customer, the lease agreement must be reduced to writing and provide for a payment of at least the minimum price established by the Board plus an additional charge of at least \$0.0025 per quart equivalent for every unit of controlled products sold to that wholesale customer at the site at which the equipment is used.

(b) The agreement must contain a complete description of the equipment with respect to type, style, model and serial number, manufacturer and year of manufacture.

§ 146.4. Sale of equipment.

(a) Whenever refrigeration equipment, or milk or cream dispensers, or similar facilities are sold to stores or other wholesale customers, the agreement of sale must be reduced to writing and contain the following:

(1) A complete description of the equipment with respect to type, style, model and serial number, manufacturer and year of manufacture.

(2) An itemized record of the actual cost or value of the equipment to the dealer at the time it was placed at the customer's location, handling, installation, freight, tax if applicable and interest.

(3) A provision that title to the refrigeration equipment, or milk or cream dispensers, or similar facilities does not pass until the last payment has been made under the agreement.

(b) Equipment may be purchased outright by payment in full at or before the time of installation or by payment of an additional charge per quart equivalent purchased until the full purchase price has been made. If payment is to be made by means of an additional charge per quart equivalent, each agreement must provide for a payment of at least the minimum price posted by the Board plus an additional charge of at least \$0.01 per quart equivalent for every unit of controlled products sold to that wholesale customer at the site at which the equipment is used. When the cumulative sum of the additional charges is equal to the itemized cost or value established in subsection (a)(2), the dealer may eliminate the additional charge. At that time, ownership of the equipment may be transferred to the customer.

(c) Used equipment may be sold to a wholesale customer at a price determined by adjusting its original cost to the dealer for annual straight line depreciation at a rate of 8-1/3% per annum plus all ancillary costs.

(d) A dealer or subdealer selling equipment pursuant to an agreement providing for payment by means of an additional charge per unit shall maintain the following for review by the Board:

(1) A complete list of all wholesale customers purchasing equipment pursuant to this provision, showing the location of each piece of equipment and the date the equipment was placed at that location;

(2) A record of the number of quart equivalents of price-controlled packaged products sold to each customer in this program along with the cumulative sum of the additional charges since the equipment was placed at the customer's location.

§ 146.5. Exceptions for certain schools regarding refrigeration equipment.

Dealers or subdealers installing refrigeration equipment, including milk vending machines, dispensers and milkshake dispensers in schools which are approved for the school milk program and which are eligible for reimbursement, in whole or in part, for the amortization of the equipment need not execute and submit to the Board a formal lease or contract of sale if the dealer submits to the Board a sworn statement setting forth the type, style, model and serial number, manufacturer, year of manufacture, cost of the equipment to the dealer plus handling, installation, tax and freight charges, and date of installation, together with the method of amortization.

§ 146.6. Maintenance of equipment.

(a) Maintenance of equipment when it is leased to the customer may be the responsibility of the lessor. When maintenance is performed by the lessee, no charge may be made to the lessor dealer for maintenance.

(b) Maintenance of equipment, whenever it is sold either by lump sum payment or on a time payment sales basis, shall be the responsibility of the purchaser.

§ 146.7. Identification of ownership of equipment.

Dealers or subdealers leasing equipment to customers shall identify the equipment as the property of the dealer by painting, decal or metal plate affixed to the equipment. Identification shall be placed on all equipment in place within 30 days after _____ (*Editor's Note: The blank refers to the effective date of adoption of this proposed rulemaking.*). New identifications shall be so

identified not later than 15 days after installation. Dealers or subdealers shall replace mutilated or missing identification within 15 days after either observing the requirement or being notified by the Board of the requirement.

§ 146.8. Unfair pricing.

(a) Sale of equipment by a dealer or subdealer to a wholesale customer at a price less than the brand or retail list price or fair market value of the equipment where there is no list price, is prohibited.

(b) When purchasing any equipment or property from a wholesale customer or prospective wholesale customer, a dealer or subdealer may not pay the customer a price in excess of the fair market value of the equipment or property at the time for the transfer to the milk dealer.

§ 146.9. Financing.

Milk dealers and their affiliates, subsidiaries or representatives thereof may not provide financial accommodations for a wholesale customer by lending money to the customer, or by paying or guaranteeing the payment of any obligation of the customer, or by acting as a cosigner on a promissory note or other obligation of the customer, or by depositing money or collateral with a third party, person or organization which will lend money or extend credit to the customer. This section does not apply to transactions between grocery wholesalers and their subsidiaries, affiliates, franchisees or wholesale customers to the extent the transactions occur in the normal course of the grocery wholesaler's business and are only incidentally related to acquisition or retention of the fluid milk business of the subsidiary, affiliate, franchisee or wholesale customer.

DEALER INDUCEMENTS

§ 146.21. Giveaways.

Milk dealers and their affiliates, subsidiaries or representatives thereof may not give or lend any milk, milk products, money, article, prize, award or any other item to a customer or a prospective customer, as an inducement for the purpose of soliciting or securing business. This section does not apply to transactions between grocery wholesalers and their subsidiaries, affiliates, franchisees or wholesale customers to the extent the transactions occur in the normal course of the grocery wholesaler's business and are only incidentally related to acquisition or retention of the fluid milk business of the subsidiary, affiliate, franchisee or wholesale customer.

§ 146.22. Sampling prospective retail customers and established retail customers.

The practice of providing free samples to prospective retail customers or to established retail customers may not be permitted. This section does not apply to on-the-premises consumption in stores or restaurants.

§ 146.23. Gifts to established retail customers.

(a) Dealers may distribute to any of their established retail customers, but not to prospective retail customers, free of charge, in any one calendar year, any gift including milk, milk products, or other item, if the cost to the dealer of the gift does not exceed the sum of 60¢.

(1) Dealers may provide utilitarian gifts to any of their established retail customers who have purchased milk for at least 60 days prior to the birth of a child.

(2) The cost to the dealer of the gift may not exceed \$2.

(3) The gift must have particular and exclusive relationship to the care of newborn children.

(4) A dealer is limited to one such gift for each child.

(b) The word "gift" may not be construed to prohibit a dealer from lending a porch box to an established retail customer provided the box is imprinted with the name of the dealer and the unit cost to the dealer does not exceed \$5.

§ 146.24. Samples or gifts to wholesale customers.

(a) Samples of a product may not be given to a wholesale customer or prospective wholesale customer by or on behalf of a milk dealer.

(b) Gifts of any value may not be given by a dealer to a wholesale customer or to a purchasing agent, contracting officer or other person or organization whose position, rank or other means of influence, enables him to select or to influence the selection of milk vendors.

§ 146.25. Extension of credit to wholesale customers.

(a) Extension of credit to a wholesale customer, excluding a hospital, school or government agency, beyond 30 days from the date of invoice is prohibited.

(1) The invoice from dealers to customers must be rendered at least monthly.

(2) If a customer fails to pay an invoice within 30 days, the dealer shall place that customer on a cash basis.

(b) For the purpose of this section, cash payment basis may, at the option of the dealer, be interpreted to mean weekly payments for the delivery of the past weeks plus at least 4% of the past due account to be received by the dealer, on a regular and continuing weekly basis until the customer has reduced the past due balance below the maximum 30-day credit limitation. A dealer who has placed a customer on a cash payment basis under this section may, with approval of the Board, require the customer to execute a promissory note in favor of the dealer, or to grant the dealer a lien on assets of the customer, or to otherwise secure payment of the past due balance to the dealer. The dealer shall immediately notify the Board of the full details of an action taken to secure the payment of a past due balance under this section.

(c) This section does not apply to transactions between grocery wholesalers and their subsidiaries, affiliates, franchisees or wholesale customers to the extent the transactions occur in the normal course of the grocery wholesaler's business and are only incidentally related to acquisition or retention of the fluid milk business of the subsidiary, affiliate, franchisee or wholesale customer.

CHAPTER 147. RECORDS AND REPORTS

§ 147.12. Contracts for sale or lease of refrigeration equipment.

Whenever a dealer or subdealer which is subject to § 146.1 (relating to applicability) sells or leases refrigeration equipment, milk or cream dispensers or similar facilities to a customer, the [contract] agreement of sale or lease shall be submitted to the Board [for approval] on or before the date of installation of [such] the equipment.

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