

RULES AND REGULATIONS

Title 7—AGRICULTURE

MILK MARKETING BOARD

[7 PA. CODE CHS. 145—147]

Transactions Between Dealers and Customers— Refrigeration Equipment; Records and Reports

The Pennsylvania Milk Marketing Board (Board) is deleting the provisions in Chapter 145, adding the reformatted and amended provisions in new Chapter 146 (relating to transactions between dealers and customers) and amending § 147.12 (relating to contracts for sale or lease of refrigeration equipment) to read as set forth in Annex A under authority of section 307 of the Milk Marketing Law (31 P. S. § 700j-307).

Notice of proposed rulemaking was published at 36 Pa.B. 5875 (September 23, 2006) with an invitation to submit written comments within 30 days. The Board received no comments during the public comment period. The Senate Committee on Agriculture and Rural Affairs and the House Agriculture and Rural Affairs Committee offered no comments, suggestions or objections to the amendment. The Independent Regulatory Review Commission (IRRC) offered two comments, which are discussed as follows.

In final-form rulemaking, the Board considered the comments and suggestions of IRRC and amended the regulations accordingly.

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.

The amendments provide 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 \$0.01 (1¢) or \$0.0025 (1/4¢), respectively, added to the Board-established minimum prices. Secondary purposes of the amendments are to clarify that subdealers as well as dealers are governed by the regulations; to specify that a manufacturer or seller of refrigeration equipment may not sell or in any way handle milk without a license; to clarify that cream dispensers are considered as refrigeration equipment covered by the regulations; and to 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.

Comments

The Board received no comments during the public comment period. The Senate Committee on Agriculture and Rural Affairs and the House Agriculture and Rural Affairs Committee offered no comments, suggestions or objections to the amendment.

IRRC had two concerns with regard to clarity of § 146.4. First, subsection (a)(2) contained the phrase “value of the equipment to the dealer at the time it was placed at the customer’s location . . .” without specifying how that value would be determined. The final-form rulemaking amends § 146.4(a)(2) to clarify that new equipment is valued at the actual cost to the dealer, while used equipment is valued according to the depreciation formula in § 146.4(c).

Second, subsection (d) required dealers and subdealers to maintain certain records without specifying how long these records must be kept. The final-form rulemaking amends § 146.4(d) by cross-referencing § 147.9, which specifies a 5 year time period for all records relating to any type of equipment sold or leased to customers.

Paperwork Estimates

The amendments will not require any paperwork in addition to that already required under the existing regulations. If anything, paperwork requirements will be reduced because the amendments eliminate the requirements for separate billings for lease and rental charges.

Fiscal Impact

The Board believes that adoption of these amendments 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 amendments may have an additional positive impact on dealers to the extent that dealers were providing refrigeration equipment to customers without receiving adequate payment. The amendments will only have a negative impact on retail stores if they were being provided with refrigeration equipment without adequate charges in contravention of the existing regulations. The amendment may have a positive fiscal impact on retail stores by eliminating the need to pay for sales and lease charges separately from milk purchases.

Effective Date

The amendments will become effective September 5, 2008.

Sunset Date

There is no sunset date.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of the notice of proposed rulemaking published at 36 Pa.B. 5875 to IRRC and to the Senate Committee on Agriculture and Rural Affairs and the House Agriculture and Rural Affairs Committee (Committees) for review and comment.

In addition to submitting the final-form rulemaking, the Board has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form. A copy of this material is available to the public upon request. This material is also available on the Board’s web site at www.mmb.state.pa.us.

Contact Person

The official responsible for information on this final-form rulemaking is Keith Bierly, Secretary, Milk Marketing Board, 2301 North Cameron Street, Harrisburg, PA 17110-9408, (717) 787-4194.

Findings

The Board finds that:

(1) Public notice of the intention to adopt the final-form rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law.

(3) The final-form rulemaking is necessary and appropriate for the administration of the act.

Order

The Board, acting under authorizing statute, orders that:

(a) The regulations of the Board, 7 Pa. Code Chapter 7, are amended by deleting §§ 145.1—145.11, 145.21—145.24 and 145.26 to read as set forth in Annex A.

(b) The provisions formerly in Chapter 145 are amended and reformatted by adding §§ 146.1—146.9 and 146.21—146.25 to read as set forth in Annex A.

(c) Section 147.12 is amended to read as set forth in Annex A.

(d) The Board will submit this order and Annex A to the Office of Attorney General for review and approval as to legality and form as required by law.

(e) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(f) The order takes effect September 5, 2008.

BOYD E. WOLFF,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 37 Pa.B. 5951 (November 3, 2007).)

Fiscal Note: Fiscal Note 47-12 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART VI. MILK MARKETING BOARD

CHAPTER 145. (Reserved)

§§ 145.1—145.11. (Reserved).

§§ 145.21—145.24. (Reserved).

§ 145.26. (Reserved).

CHAPTER 146. TRANSACTIONS BETWEEN DEALERS AND CUSTOMERS

REFRIGERATION EQUIPMENT

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146.3.	Leasing agreements.
146.4.	Sale of equipment.
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146.6.	Maintenance of equipment.
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DEALER INDUCEMENTS

146.21.	Giveaways.
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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) prohibits 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 of new equipment to the dealer, or the value of used equipment as determined in accordance with subsection (c), at the time it was placed at the customer's location, including 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 under an agreement providing for payment by means of an additional charge per unit shall maintain the following records for review by the Board for the time period specified in § 147.9 (relating to equipment records):

(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 by October 6, 2008. 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 when 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-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 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 agreement of sale or lease shall be submitted to the Board on or before the date of installation of the equipment.

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