

CIRCULAR 1012

Rules and Regulations Implementing the Milk Producers Security Law Pursuant to Section 258-b (3) AND (16) of the Agriculture and Markets Law I NYCRR PART 43

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43.1 General application.

Except as otherwise provided herein, the terms and provisions of this part shall apply to all milk produced on farms in the State of New York and which is sold or delivered to a milk dealer or cooperative. For purposes of this part a joint or common marketing agency operated by one or more cooperative corporations or associations of producers shall be considered a cooperative if qualified under the provisions of Section 258-b of the Agriculture and Markets Law.

43.2. Definitions. For the purpose of this Part:

(a) "Commissioner" means the Commissioner of Agriculture and Markets of the State of New York.

(b) "Law" means Article 21 of the Agriculture and Markets Law, as amended by Chapter 540, Laws of 1987.

(c) "Person" means any person, firm, corporation, partnership, association, cooperative corporation or unincorporated cooperative association.

(d) "Milk dealer" means any person licensed to receive, purchase, handle or sell milk pursuant to Article 21 of the Agriculture and Markets Law and the applicable rules and regulations promulgated thereunder by the Commissioner; provided, that for purposes of this Part a cooperative corporation or association of producers shall be deemed to be a producer and not a milk dealer with respect to milk marketed for its producer members and the milk of producer members of any other cooperative which is marketed under contract with such cooperative.

(e) "Milk" means all milk and milk products as defined pursuant to Section 253(7) of the Law.

(f) "Payment" means cash payment in full received on or before the due date established pursuant to Section 258-b(2)(a) of the Law. Payment by check shall be treated as conditional payment but shall be defeated upon dishonor of the check.

(g) "Producers Security Fund" means the Milk Producers Security Fund established pursuant to Section 258-b(4) of the Law.

43.3 Prevailing Class II price.

The prevailing Class II price for the second preceding month for purposes of making partial payment for milk pursuant to Section 258-b(2)(a) of the Law shall be the Class II or equivalent milk price announced for the applicable federal or state milk marketing order. A milk dealer not subject to a federal or state milk marketing order shall make partial payment at not less than the Class II price announced for the New York-New Jersey milk marketing order (1 NYCRR Parts 19 and 20).

43.4 Notice of nonpayment for milk.

Any milk producer, including a cooperative corporation or association of producers, who does not receive payment for milk from a milk dealer within the time prescribed in Section 258-b(2)(a) of the Law shall notify the Commissioner of such fact verbally or in writing within five days of the date on which payment was due from the milk dealer.

43.5 Application of producer security provisions.

(a) A cooperative corporation or association of producers shall with respect to milk purchased or received from non-member producers for sale, processing or manufacture (except producer members of another cooperative under contract to such cooperative or other sales or transfers of milk from another cooperative) make required payments to the Producers Security Fund and/or file a bond or other security in the amount required pursuant to Section 258-b of the Law. For the purpose of this subdivision a cooperative shall be considered a milk dealer.

(b)A milk dealer who purchases milk of New York producers from a cooperative corporation or association of producers which is commingled with milk produced out-of-state shall make payments to the Producers Security Fund and/or file a bond or other security covering the proportionate amount of New York produced milk received by the dealer. A cooperative shall maintain a record of the quantity of New York produced milk included in each delivery to a milk dealer and shall provide the dealer with a monthly accounting of such quantity.

(c)A milk dealer who purchases milk in packaged form from a cooperative corporation or association of producers shall make payments to the Producers Security Fund and/or file a bond or other security in the amount required pursuant to Section 258-b of the Law.

(d)A milk dealer shall be exempt from making payments to the Producers Security Fund or filing a bond or other security with respect to milk received from a cooperative corporation or association of producers for processing and packaging on account for such cooperative pursuant to a written contract or agreement whereby the cooperative holds title to the milk at all times, pays the milk dealer for services rendered and takes physical possession of the milk when processed and packaged. In such case the cooperative shall be responsible for accounting for such milk under the producer security provisions of Section 258-b of the Law if received from non-member producers, in accordance with subdivision (a) of this section.

43.6 Operation of Producers Security Fund.

(a)Annually, and at such other times as he deems appropriate, the Commissioner shall determine the amount of money to be accumulated in the Producers Security Fund sufficient to protect the interests of producers in accordance with Section 258-b(4)(b) of the Law. The Commissioner's determination shall be promptly announced to milk dealers participating in the Producers Security Fund.

(b)Each milk dealer who participates in the Producers Security Fund shall on or before the 25th day of each month make payment to the Commissioner, at the rate per hundredweight announced for the fiscal year pursuant to 258-b(3)(a) of the Law or at such lesser rate as may be established pursuant to Section 258-b(3)(b) of the Law, on all milk purchased, received or handled from producers during the preceding month. Such payment shall be reduced by the amount of any credit the Commissioner issues to the milk dealer pursuant to subdivision (f) of this section applying to such monthly payment and the balance payable shall be considered the dealer's net monthly payment to the Fund. The amount of a milk dealer's required net monthly payment to the Producers Security Fund may be increased by one percent for each month or portion thereof that such payment is received after the due date. Notwithstanding the payment of late charges, the Commissioner may take such action against the milk dealer for late payment as he deems appropriate pursuant to the Law.

(c)The balance in the Producers Security Fund shall be determined monthly by the Commissioner, including any interest credited to the Fund and allowing for payments from the Fund for the expense of administration, withdrawals by milk dealers who terminate their participation therein, any credits issued or paid from the Fund, claims paid from the Fund not reimbursed by the defaulting milk dealer and any amounts the Commissioner has reason to believe will be paid from the Fund as a result of pending claims.

(d)An account shall be maintained by the Commissioner for each milk dealer who participates in the Producers Security Fund showing his initial and net monthly payments to the Fund and any cash credits or rebates received from the Fund.

(e)Each milk dealer's percentage (pro-rata) share of the balance in the Producers Security Fund to be computed by the Commissioner at the close of each calendar quarter shall be his total net payments to date less any rebates or other cash credits he has received from the Fund divided by the total of such payments less rebates and cash credits of all dealers participating in the Fund at the close of such calendar quarter; provided that:

(1)Any milk dealer who has defaulted in paying producers or a producer settlement or equalization fund for an order promulgated under Section 258-m or 258-n of the Law for which a claim or claims have been paid or there is reason to believe will be paid from the Producers Security Fund and has not promptly reimbursed the Fund in full for such claim or claims shall have his percentage share of the balance in the Fund reduced to the extent of all such claims; and

(2)Any milk dealer who fails to make payment to the Producers Security Fund in accordance with subdivision (b) of this section shall have his percentage share of the balance in the Fund reduced to the extent of such delinquent payments.

(f)Whenever the balance in the Producers Security Fund at the close of a calendar quarter exceeds by more than 2 percent the amount the Commissioner determines should be accumulated in the Fund pursuant to subdivision (a) of this section, he shall compute a credit for each participating milk dealer by multiplying the dealer's percentage share as calculated pursuant to subdivision (e) of this section times the amount by which the balance in the Fund exceeds the amount the Commissioner has determined should be so-accumulated. Notice of any such credits shall be issued to each participating milk dealer for application to such dealer's monthly payments to the Fund during the next calendar quarter. If a credit or credits issued to a milk dealer exceed the amount of his required payments to the Fund during such calendar quarter, such excess credits shall be paid by the Commissioner to the dealer at the close of the calendar quarter.

(g)At least twice each year, the Commissioner shall report to participating milk dealers and producers on receipts and disbursements from the Producers Security Fund, the balance therein and such other information about the Fund as he deems of importance to such interested persons.

43.7 Exemption from mandatory minimum surety bond.

(a)A milk dealer may apply in writing to the Commissioner to be exempted from filing a mandatory minimum surety bond pursuant to Section 258-b(3)(c) of the Law when such dealer elects to participate in the Producers Security Fund or upon renewal of his milk dealer's license. Any such application must be filed not later than three months prior to the date the dealer intends to begin participating in the Producers Security Fund or the date of license renewal and should include or reference current financial information of the dealer.

(b)Notwithstanding the time established for milk dealers to apply for exemption from the mandatory minimum surety bond pursuant to subdivision (a) of this section, a milk dealer may apply not later than to be exempted from filing the initial such bond required pursuant to Chapter 540 of the Laws of 1987.

(c)The criteria to be used in reviewing an applicant's financial condition, the viability of the Producers Security Fund and the effect of the proposed exemption on security afforded producers are as follows:

(1)The milk dealer's financial liquidity, indebtedness, equity in the business, profitability, value of unencumbered real and other tangible assets located within New York State, value of milk purchases from New York State producers and in total, and milk payment practices.

(2)The balance in the Producers Security Fund relative to the total value of milk secured by the Fund, the value of milk on which exemption from the mandatory minimum surety bond is requested or has been granted, and the value of milk of dealers purchasing less than \$250,000 worth of milk in a forty-three day period on which such exemption is requested or has been granted.

(3)The amount of any producer claims pending against the Producers Security Fund or which the Commissioner has reason to believe will be filed against the Fund.

(4)The estimated amounts of payments and interest to be deposited or credited to the Producers Security Fund and expenses or payments to be made from the Fund during the next twelve months.

43.8 Withdrawal from Producers Security Fund.

(a)In the case of a milk dealer who terminates his participation in the Producers Security Fund pursuant to Section 258-b(4)(c) of the Law or ceases to do business as a milk dealer in a manner requiring the filing of producer security, such milk dealer's pro-rata share of the Fund shall be as determined pursuant to Section 43.6 of this Part at the close of the license year when the dealer's participation in the Fund is terminated. The Commissioner shall pay such a milk dealer his pro-rata share of the Producers Security Fund after he is satisfied through audit or other information that the dealer has paid in full for all milk purchased, received or handled from producers or cooperatives during the period in which he participated in the Fund, including any payments to a producer settlement or equalization fund for an order promulgated under Sections 258-m or 258-n of the Law.

(b)A milk dealer who sells or transfers his milk business in its entirety to another milk dealer or to a person who has applied for a milk dealer's license may assign his interest in the Producers Security Fund, as determined pursuant to subdivision (a) of this section, to such milk dealer or person if the latter is already participating or has filed notice of his intent to participate in the Fund. Any interest in the Producers Security Fund assigned to a milk dealer or other person shall be applied to his required initial payment to the Fund and the balance of such interest shall remain with the Fund for the account of such dealer or person. The assignment of any interest in the Producers Security Fund by a milk dealer shall be subject to approval by the Commissioner and shall be conditioned on the assignee assuming full responsibility for any claims arising from the failure of such assigning dealer to pay for milk purchased, received or handled during the period in which he participated in the Fund.

43.9 Claims against mandatory minimum surety bonds and Producers Security Fund.

(a) A deficiency in payment for milk by a milk dealer resulting from an error in butterfat test or other calculation or from a disagreement over quantity, test, price or other terms of trade shall not be cause for a producer or a market administrator to file a claim, pursuant to Section 258-b(5) of the Law, against a mandatory minimum surety bond and the Producers Security Fund.

(b) Claims against a mandatory minimum surety bond and the Producers Security Fund shall be filed within 30 days of notice by the Commissioner to producers and a market administrator unless the Commissioner determines that there is reasonable cause to accept claims filed after such deadline.

(c) The appropriate uniform price of milk for which a claim is filed shall be the uniform price for the milk marketing order under which such milk is priced, adjusted for butterfat content and zone location, or such other pay price as the Commissioner determines is appropriate for a milk dealer not subject to a milk marketing order. For purposes of this Part, any amount owed to or received or credited from a producer settlement or equalization fund of an order promulgated under Section 258-m or 258-n of the Law by a cooperative on milk included in a claim filed against a defaulting milk dealer shall be considered as owing to or credited from such fund on account of the milk dealer and shall be added to or deducted, as the case may be, from the cooperative's claim against a mandatory minimum surety bond and the Producers Security Fund.

(d) For the purpose of determining the amount payable on a claim pursuant to Section 258-b(5)(c) of the Law, the earliest debt owed a claimant by a milk dealer shall mean the amount owed for milk sold or delivered to such milk dealer during the first 43 consecutive day period for which payment was not received.

(e) In the event the Commissioner authorizes the Comptroller to make estimated payments from the Producers Security Fund to individual producer claimants, pursuant to Section 258-b(5)(a) of the Law, by reason of unusual need or hardship, each such claimant shall be required as a condition to receiving an estimated payment to execute a written agreement to repay to the Producers Security Fund any amount thereafter determined by the Commissioner is not due upon the producer's claim.

43.10 Amount of surety bond or alternative security.

(a) Each milk dealer who is required to file a mandatory minimum surety bond pursuant to Section 258-b(3)(c) of the Law or elects to file a surety bond or alternative security in accordance with Section 258-b(6) and (7) of the Law shall, in determining the highest aggregate value of milk purchased or received from producers in two consecutive months during the preceding twelve months, take into account both the quantity and minimum price of such milk. The value so-determined shall include any amount paid to a producer settlement or equalization fund for an order promulgated under Section 258-m or 258-n of the Law.

(b) In determining, pursuant to Section 258-b(3)(d) of the Law, whether a milk dealer should be required to file a further surety bond or other security in addition to making payments to the Producers Security Fund and filing a mandatory minimum surety bond, and the amount of additional security to be required, the Commissioner shall take into account the value of real and other tangible property of the dealer located within the state, any assignments, liens or other

attachments on such property, the liquidity, indebtedness, tangible net worth and profitability of the dealer, and the maximum value of his purchases of milk from producers during a forty-three day period.

43.11 Filing additional security.

(a) Whenever the Commissioner determines pursuant to Section 258-b(3)(d) or (8) of the Law that additional security is required of a milk dealer, such dealer shall within ten days of receiving written notice from the Commissioner indicate in writing how he intends to satisfy the requirement for additional security and within thirty days of the Commissioner's notice shall file a surety bond or alternative security in satisfaction thereof.

(b) A milk dealer who is notified by the Commissioner that additional security must be filed may request a review of the amount of additional security, provided such request is made within 10 days of receiving notice from the Commissioner. Such request shall not waive the requirement that the additional security be filed within 30 days of notice by the Commissioner.

43.12 Claims against surety bonds or alternative security.

(a) The limitations and conditions governing claims against mandatory minimum surety bonds and the Producers Security Fund as set forth in Section 43.10(a) through (d) of this Part shall be applicable to claims filed by producers or a market administrator against a surety bond or alternative security pursuant to Section 258-b(9) of the Law.

(b) Monies available in the Producers Security Fund to pay producer claimants for whom recovery on a surety bond has not been made within sixty days of the Commissioner's certification of the amounts due such producers shall be the balance in the Fund less the amount of any producer claims pending against the Fund or which the Commissioner has reason to believe will be filed against the Fund.

43.13 Applicability of prohibitions and violations.

(a) The provisions for prompt payment for milk prescribed under Section 258-b(2) of the Law shall apply to both bulk and packaged milk purchased or received by a milk dealer from a cooperative corporation or association of producers.

(b) The prohibitions and violations relating to the sale of milk by a milk dealer to another milk dealer pursuant to Section 258-b(15) of the Law shall apply to the sale of milk by a cooperative corporation or association of producers to a milk dealer.

43.14 Records and availability.

Each milk dealer and cooperative shall maintain complete and accurate records and accounts of all milk and milk products purchased, received or handled, billings and payments and such other records as may be required for the administration and enforcement of Section 258-b of

the Law and the terms and provisions of this Part. All such records and accounts shall be made available to the Commissioner or any employee designated by him for such purpose.

43.15 Reporting.

In addition to any monthly reports otherwise required of milk dealers and cooperatives pursuant to Article 21 of the Law, each milk dealer and cooperative subject to the provisions of Section 258-b of the Law shall, as required by the Commissioner, file such other reports and information as may be necessary for administration and enforcement of that section.