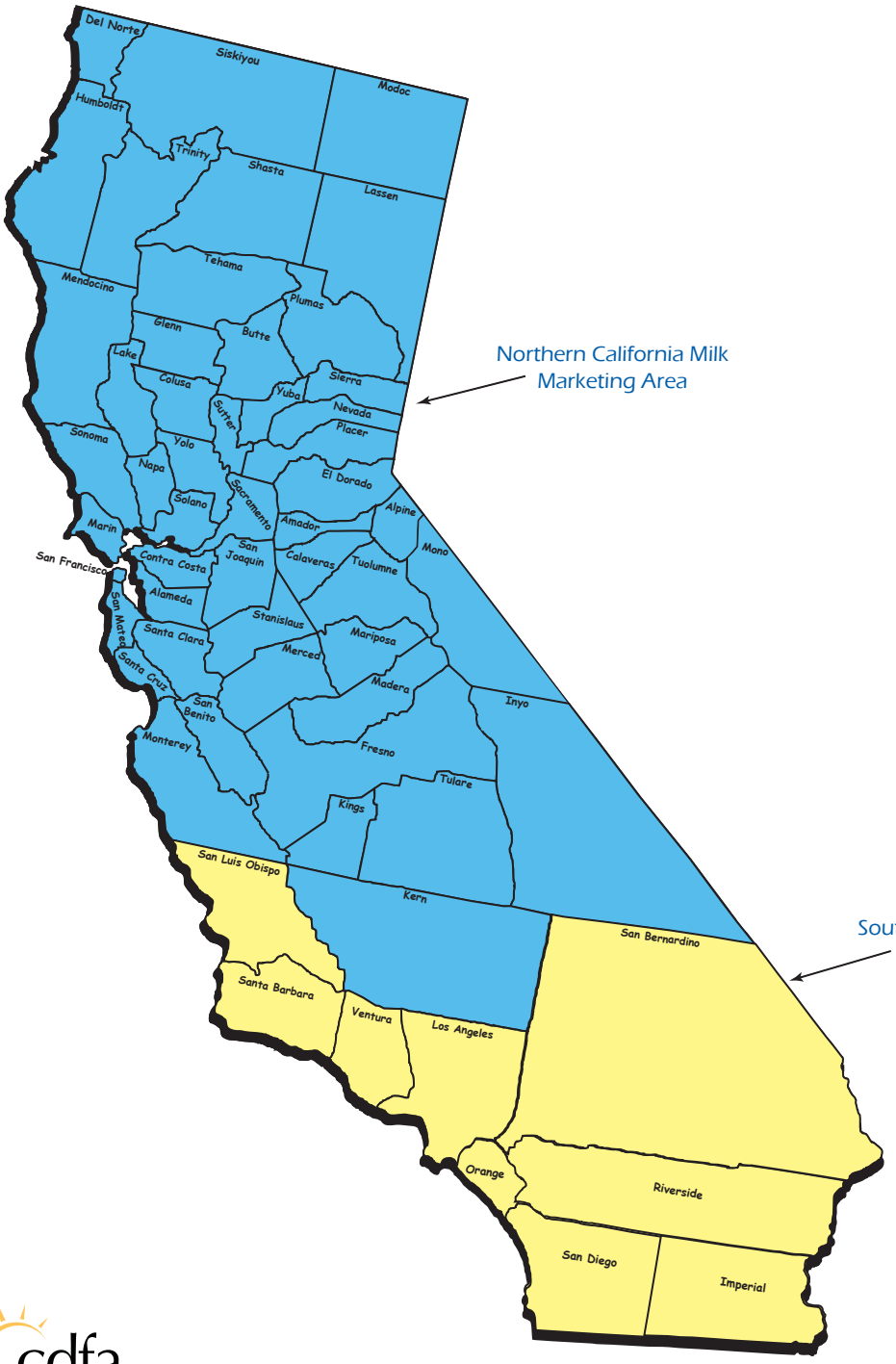
California Milk & Dairy Product Marketing Provisions



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2008 Revised Edition

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MARKETING PROVISIONS
2008 Revised Edition

This guide was prepared by the
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Introduction

The Department of Food and Agriculture (Department) promotes the intelligent production and orderly marketing and distribution of all milk and dairy products. For more than 50 years, California has been the number one ranking agricultural producer and exporter in the United States, growing more than half of the nation's fruits and vegetables. California is also the largest dairy producer and has some of the largest dairies in the country, averaging 958 cows per dairy. In the year 2007, California accounted for 21 percent of the milk produced in the United States and cash farm receipts from the marketing of milk and cream reached $7.3 billion.

The Dairy Marketing Branch

The Dairy Marketing Branch (Branch) is responsible for enforcing the provisions of the California Food and Agricultural Code (FAC) and related regulations concerning the marketing of milk and dairy products. These provisions were adopted to maintain an orderly and stable market for milk and dairy products by discouraging unfair and disruptive marketing tactics. The laws also deter the formation of monopolies in the wholesale and retail sectors of the dairy industry, which if left unmonitored, could lead to discriminatory practices and predatory pricing designed to force competitors out of business. Branch responsibilities include: encouraging sound production and marketing of dairy products by resolving public policy issues and providing key market information; establishing minimum farm milk prices; enforcement of statutes prohibiting unlawful marketing practices relating to milk and dairy products; and formulating a comprehensive plan of regulating the marketing of milk. The goal of these activities is to ensure availability to consumers of an adequate and continuous supply of pure, fresh, wholesome market milk. The FAC, administrative regulations, Pooling Plan, and Stabilization and Marketing Plan provisions apply equally to all manufacturers, distributors, producers, wholesale customers, brokers, or any representative of them.

Branch Enforcement

The Branch is responsible for enforcing laws pertaining to the marketing and trade practices associated with distribution of milk and dairy products. The staff performs investigations to verify compliance with dairy industry laws and may exercise its authority to take enforcement actions.

The basis of the milk and dairy products marketing provisions discussed in this booklet is found in the FAC, Division 21, Part 3, Chapter 1, Sections 61381 through 61391 (website: www.leginfo.ca.gov/calaw.html). A copy of these laws are included at the back of this booklet.

The regulations related to these provisions of the FAC are contained in Title 3, Chapter 3, Subchapter 1 of the California Code of Regulations (CCR) (website: www.calregs.com). A copy of these regulations is included at the back of this booklet.

Licensing Requirements

Any person who regularly operates mobile vehicles on routes used predominately for the sales of dairy products to wholesale customers is required to be a licensed distributor. Distributors whose routes are used predominately for home delivery customers are not required to be licensed; however, if less than 51 percent of their business is to homes, then a license is required, FAC Section 61306, and Sections 62141 and 62142.

Records

Any distributor, manufacturer or person who sells at wholesale is required to maintain and keep certain records. In addition to price schedules and terms and conditions, records must be kept of all milk received, processed and sold, the quantity sold, the price received and all costs of handling, processing, sale and delivery, FAC Section 61441. The Secretary, or his/her representatives, shall have access anywhere records concerning milk and dairy products are kept, which includes any place where dairy products are sold. The records may be inspected and copied at any place in the State, FAC Section 61442.

How to Use This Booklet

This publication provides discussion and examples to clarify provisions in the laws and regulations relating to marketing dairy products. The most common marketing practices are categorized with related subtopics, following in each chapter. For example, violations related to selling dairy products below cost are located in the "Determining Cost" section. The laws and regulations can be found at the websites or back of the booklet as previously mentioned. Please read the related laws and regulations referred to in each chapter for a better understanding of the subject.

Confidentiality

Information obtained pursuant to these provisions is confidential and shall not be divulged, except if necessary for the determination of any court proceeding or hearing before the Secretary or his/her representatives, FAC Section 61443.

Glossary of Terms/Definitions

The definitions listed below are guidelines, for more specific definitions refer to the Food and Agricultural Code or visit our website at www.cdfa.ca.gov/dairy.

Brokers: Persons or firms who represent others in buying and selling milk and dairy products are subject to the same unlawful practices provisions as are distributors, manufacturers and wholesale customers. Examples of broker marketing practices subject to the FAC and regulations include: 1) A broker may not sell dairy products below cost, whether or not the transaction is on behalf of another party; and 2) A broker can be considered a joint participant to an unlawful practice. For example, an unlawful practice may involve a broker purchasing dairy products below cost from a dairy supplier. If a broker is engaged in selling a large lot of butter, the prices at which he sells the lot must be in compliance with the "special price" and "discrimination" provisions. The broker may not offer a special price or service that is not made available to other wholesale customers or consumers purchasing like quantity under like terms and conditions.

Chain Store: A chain store is considered two or more stores owned by the same person or corporation. (An example of chain stores would be Safeway, Ralph's, and Albertsons.

Classes of Milk:

Class 1 – Milk supplied to a consumer as a fluid product
Class 2 – Milk used for heavy cream, cottage cheese, yogurt, and sterilized milk products
Class 3 – Milk used in frozen dairy products
Class 4a – Milk used in the manufacture of butter and dry milk
Class 4b – Milk used in the manufacture of hard cheese

Code: Food and Agricultural Code (FAC)

Cooperative: A nonprofit association of producers which accounts to producer-members on a patronage basis. The cooperative can perform the functions of a distributor, handler, or producer.

Dairy Product: Any product classified as Class 1, Class 2, Class 3, Class 4a, or Class 4b and any filled product or any imitation milk product in which the use of market milk or any component of market milk is required.

Distributor: 1) Any handler, broker, agent, nonprofit cooperative, delivery route operator that sells market milk, market cream, or dairy products to wholesale customers, or 2) wholesale customers who actively process, manufacture, or package milk, cream, or dairy products. A distributor can also be regarded as a "handler" that includes any person who, either directly or indirectly, receives, purchases or otherwise acquires ownership, possession or control of market milk in unprocessed or bulk form from a producer, a producer-handler, or another handler for the purpose of manufacture, processing, sale, or other handling.

Food Service Establishment: An establishment, such as a restaurant, where dairy products are sold to consumers for immediate consumption.

Handler:

- A person (other than a cooperative association) who operates one or more pool plants or operates any other plant from which Class 1 milk is disposed of directly or indirectly during the month in the marketing area.

- A cooperative association that has authority from its individual producer members to market their milk and receive payment and which operates one or more pool plants.
- A cooperative association acting as a marketing agent for producer milk which it markets and receives payment therefore under authority of contracts or agreements with its individual members.
- A person who operates a milk plant located in the marketing area and receives market milk from one or more dairy ranches.

Joint Participant: A party engaged in a willful unlawful practice with another party. The parties are knowledgeable of marketing provisions that regulate the marketing of milk and dairy products.

Manufacturer: Any person or firm that is engaged in the business of manufacturing any dairy product. A manufacturer can also be considered a distributor.

Manufacturing Milk (Grade B): Milk produced and processed with sanitary regulations prescribed, inspected, and approved by public health authorities for milk to be used for manufactured products only.

Market Milk (Grade A): Milk produced under the strictest sanitary regulations prescribed, inspected, and approved by public health authorities. In most markets, milk used in any products intended for consumption in fluid form must meet this inspection standard.

Milk: Bulk whole milk, bulk lowfat milk, bulk skim milk, bulk condensed skim, and bulk cream that have not had nondairy ingredients added. Section 61302 defines bulk milk or bulk cream as milk or cream that has not been pasteurized or packaged and is delivered in tanks, cans, or other bulk containers. Bulk skim milk or bulk cream that has not been preheated or pasteurized more than once is not defined as pasteurized.

Notice Of Violation (NOV): A Notice of Violation (NOV) may be issued when the Department has sufficient evidence to verify that a violation of the Code has occurred. The NOV includes a description of the violation and a date to provide documentation of compliance (if applicable). A permanent NOV record is maintained, and the Branch may institute a civil action against a firm who has repeat NOVs on file.

Private Schools: A private school can be either: 1) a non-public school that offers instruction in or maintains grades kindergarten through high school (k-12) and provides nonprofit food service or lunch programs, or 2) a non-public post-secondary educational institution that offers the same academic degrees as public universities and colleges and provides a non-profit food service program.

Producer/Handler: Any person that is both a producer selling or delivering bulk market milk of his or her own production and is a handler purchasing, acquiring, or receiving market milk, pasteurizing or packaging market milk, or selling or delivering market milk.

Public Agency: Any city, county, district, or other local authority or public body of or within this State (Section 20009). An example of a public agency is a public school, county hospital, or city jail.

Regulation: California Code of Regulations (CCR), Title 3, Chapter 3, Subchapter 3, Milk Marketing.

Secretary: The Secretary of the California Department of Food and Agriculture or any employee duly assigned or delegated to perform the functions required pursuant to the Pooling Plan, Stabilization and Marketing Plan, or FAC.

Stabilization and Marketing Plan: Any plan formulated by the Secretary to establish prices paid to producers for any class of market milk. (See Appendix for an example of price letter derived from information gathered using the Stabilization and Marketing Plans).

Wholesale Customer: Any person or firm who buys packaged milk, cream, or any dairy product for resale to consumers or to other wholesale customers.

Determining Cost

Section 61384 of the FAC states that the sale below cost by any retailer, wholesale customer, manufacturer, or distributor, including any producer-distributor or nonprofit cooperative association acting as a distributor, of milk, cream, or any dairy product at less than cost is an unlawful practice. This section also defines the meaning of *cost* as applied to each of the types of business entities. *Cost* is further defined in the CCR Sections 1811, 1812, and 1850. Section 1811 specifies cost components of dairy processing for manufacturers, distributors, and handlers. Section 1812 specifies cost components of retailers and wholesale customers. Section 1850 specifies cost components for promotions.

Non-Dairy Items

Regulation Section 1941(e) prohibits the sale of nondairy items below cost, if sold in conjunction with a dairy product. Examples of nondairy items include orange juice, bottled water, toppings, paper products, etc. This includes any non-dairy products manufactured in a dairy plant, such as popsicles, juices, beverages, etc. These items are subject to the same laws and regulations as dairy products.

Manufacturers and Distributors

Manufacturers (processors) and distributors (involved in processing, manufacturing, or packaging) are prohibited from selling dairy products below cost, per FAC Section 61384. When determining compliance with sales below cost provisions, the costs associated with manufacturers and distributors differ from those associated with wholesale customers. Manufacturer and distributor costs may include raw product, manufacturing, processing, handling, sale, and delivery. CCR Section 1811 details specific cost components which must be included in cost calculations for manufacturers, distributors, and handlers. Promotional discounts, advertising allowances, redemption devices, rebates, etc., are types of costs that must be factored in if applicable.

Wholesale Customers (includes Retailers and Non-Processing Distributors)

Cost, as applied to wholesale customers, means the invoice or replacement cost, whichever is lower, plus the cost of doing business of the wholesale customer (see illustration below).

The Dairy Marketing Branch calculates the customer's cost of doing business by determining total sales income and all operating expenses. This information is obtained from the retailer's most recent tax filing. Total operating expense is divided by the total sales income, providing the wholesale customer's cost of doing business expressed as a percentage.

For example, HEY Market's profit and loss statement for the period of January 1, 2005 to December 31, 2005, indicates total sales income of $1,000,000 and total operating expenses of $150,000. The total operating expenses of $150,000 divided by the total sales income of $1,000,000 equals the cost of doing business of HEY Market, which is 15 percent.

HEY Market's invoice price for a gallon of homogenized milk is $1.60. To arrive at this market's minimum lawful out-of-store price, the grand mark-up method is used. The grand mark-up method applies the cost of doing business on the invoice price. The following calculation illustrates this method:

$$\frac{\text{INVOICE PRICE}}{\text{100\% MINUS COST OF DOING BUSINESS}} = \text{MINIMUM LAWFUL OUT-OF-STORE PRICE}$$

$$\frac{\$1.60}{(100\% - 15\%)} = \frac{\$1.60}{.85} = \$1.88 \text{ MINIMUM LAWFUL OUT-OF-STORE PRICE}$$

So, HEY Market's $1.60 cost for a gallon of homogenized milk divided by 100 percent, less HEY Market's 15 percent cost of doing business equates to $1.60 divided by .85 which equals $1.88. This is HEY Market's minimum lawful out-of-store price.

Scan-Based Trading and Direct Service Delivery

The cost of doing business percentage can be lowered for retailers who use the Direct Store Delivery (DSD) and/or Scan-Based Trading (SBT) methods in their stores. Use of the DSD method can reduce the cost of doing business by a maximum of 5 percent. Use of the SBT method can reduce the cost of doing business by a maximum of 4 percent. Use of both methods by a retailer can reduce the cost of doing business by a maximum of 9 percent. Retail stores using one or both of these methods may make a 5, 4, or 9 percent deduction after computing their cost of doing business.

For ice cream and frozen snacks only, a minimum total cost of doing business of 6.4 percent is allowed for DSD, and an additional .2 percent is allowed to be subtracted if also using SBT, for a total cost of doing business of 6.2 percent when both methods are used by the retailer.

Corporate General and Administrative In-Store Overhead

In determining compliance with cost provisions of the FAC and CCR, corporate overhead costs must be included. This applies to stores that are part of a corporation such as Longs or Vons. At times, the Department requires these types of stores to provide cost justification for their milk and dairy product prices. In doing so, it is necessary to factor in corporate operating expenses related to its oversight of the operation of the individual store in question. Whenever it is necessary for the Department to consider the cost justification of wholesale customers, the corporate general and administrative operating expenses must be included in the cost calculation.

Fee Accounts

A "fee account," or a "contract hauler" account, is a wholesale customer of a processing dairy served by an independent distributor for a delivery fee. The payment for serving the fee account might be a certain percentage of the total dollar amount of the invoice or a contract haul rate of so many cents per gallon delivered. The fee account must be billed from the appropriate processing dairy price schedule. The dairy should do the billing of the fee customer and carry the account receivables. If the customer is unable to pay their bill, the dairy must assume the loss.

Audits of processing dairies that maintain fee accounts have revealed one common unlawful practice. The dairy, in billing a fee account at a relatively low price and extending a high delivery fee percent or haul rate, may find it is selling at less than cost to service that fee account. It is the responsibility of the dairy to periodically analyze its costs relative to its fee accounts and ensure that no sales at less than cost are occurring.

Cost Records and Cost Justification

FAC Sections 61441 and 61442 require that cost records be kept for three years by each type of dairy entity. They also allow the Department access to these records, and require that all information be kept confidential. If the Department has determined that any dairy product might be sold below cost, cost information is requested under this authority. "Request for Cost Information" forms are normally used for this purpose, as they were developed to ensure that all cost factors are included in the calculations. See Appendix for these documents.

Accounting for Other Costs, Benefits, and Values

CRC Section 1811(c) specifies various costs, benefits, and values resulting from sales of dairy products which must be captured. These include promotions, advertising, coupons, slotting allowances, sweepstakes, loans, discounts, rebates, equipment, gifts, etc.

Unlawful practices occur when a dairy distributor, manufacturer, or retailer gives anything of value to wholesale customers without receiving adequate compensation in return. The giving of any article in any transaction which involves the sale or disposal of milk, cream, or any dairy product to secure or retain the business of any customer or consumer violates FAC Section 61383.

These transactions sometimes take the form of free or price-discounted delivery of product. Such transactions are a violation of FAC Sections 61382, discrimination in price; 61383 and 61384, sale or offer or giving of something for less than cost.

Another example of a benefit or value that must be included in cost calculations involves the distributor giving a wholesale customer one or more pieces of equipment. Examples include ice cream cabinets, refrigerator boxes or milk dispensers.

Equipment gifts have been provided in a number of ways including the following:

1. An outright gift of the equipment;
2. A lease of equipment, but rent free;
3. A lease agreement for the equipment where the rent charged is collected and rebated back to the wholesale customer; and
4. A lease agreement for the equipment where the rent charged and collected is below the fair market value for rental of that equipment.

It is incumbent upon the distributor to establish rental rates for refrigeration equipment.
When there is doubt as to what the rental charge should be, the dairy distributor may contact the manufacturer or manufacturer's representative of the particular piece of equipment and ask what their rental charge would be. This should be a good guide for a fair market value rental.

Money loans made by a distributor to a wholesale customer may be proper if the distributor charges a fair market rate of interest on the amount loaned and the conditions under which the loan was made are appropriate and fulfilled. If money loans are made below market rates, the value of the difference is a cost that must be included. If made without appropriate loan provisions or the terms of the loan are not met, the entire loan or some aspect of it could result in a benefit from the distributor to the wholesale customer, and must be included in cost calculations.

Promotions

Advertising and promotions are an integral part of marketing most products, and are used by both dairy manufacturers and wholesale customers (retailers). All dairy products may be promoted through the use of redemption devices (coupons, store cards, premiums, certificates, etc.), sweepstakes, drawings, sampling, etc. All costs of promotions and use of promotional accounts and advertising allowances must be captured and included in cost calculations. Promotions must comply with all of the requirements of the dairy laws (FAC Sections 61381 – 61391), and related regulations, including Section 1850 of the CCR. Promotional items shall not be sold below cost. In determining whether the use of a coupon or redemption device results in a below cost violation, all associated costs, including but not limited to: the face value of the coupon, advertising, printing, redemption, etc., must be included in the cost calculations.

Departmental Review of Promotions Prior to Implementation

Promotional material should be submitted for review prior to its implementation. Dairy Marketing staff will then determine whether the promotion appears to comply with the law and regulations; and if not, adjustments may be made to ensure that the promotion will not be in violation, and then recalled or terminated. To eliminate delays in a company's implementation of a promotion, all submitted material will be given a prompt review to determine compliance with California marketing laws. Prior to a submitting a promotion request, please review CCR Sections 1811, 1812, and 1850, which detail cost elements which must be included in cost calculations for manufacturing, retailing, and promotions.

Submit the following information to the Branch prior to implementation: name of firm sponsoring the promotion; dairy company involved; product(s) being promoted (if a cross-promotion, state the portion of the cost to be paid by the dairy company); description of the promotion; include a copy of the ad and/or coupon if available; if it is a coupon promotion, indicate distribution method and anticipated redemption rate; dates of the benefit period of the promotion; a statement that you have included all the cost elements in your calculations, per the CCR sections stated above, and that the costs are not anticipated to exceed the sales income of the product(s) being promoted.

Coupons

A coupon is defined as a certificate offering a discount for a single item that must be presented to a cashier at the time of purchase, or mailed to a manufacturer, to get a discount. Coupons may be issued by manufacturers and retailers on fluid milk and all other dairy products, but if its use results in a below cost sale of the dairy product, at either the manufacturer level or the retail level, it is a violation of Section 61384 of the FAC. Cost compliance will be determined based on the total sales revenue of the product as compared to the total cost, including coupon cost, over the benefit period. See CCR Section 1850. It is recommended that manufacturer coupons for dairy products state on the face “May Not Be Doubled,” and that retail stores do not double such coupons, to prevent a sales below cost violation.

Issuers of coupons must keep records which document all cost factors as stated in CCR Section 1850. Such records must include, but are not limited to, the following:

- Redemption rate of the coupon (actual if after, or estimated if prior to promotion)
- Distribution method used
- Total revenue resulting from the promotion
- Total cost of the products sold, plus the cost of doing business for retail stores
- Total cost of the promotion, including coupon cost, redemption, advertising
- Promotional allowances or discounts

Cross Promotions

Frequently, nondairy products and dairy products are promoted together, such as cereal and milk, ice cream and cookies, etc. Compliance with the sales below cost provisions requires that the value of the coupon and all costs associated with the promotion must not result in the dairy product being sold below cost. The nondairy manufacturer and dairy manufacturer should decide how they will divide the costs of the promotion. If the dairy manufacturer paid a portion of the costs, then this portion would be examined to determine whether this promotion complies with the sales below cost requirements.

Sweepstakes

Sweepstakes and drawings are permitted as a promotional tool for marketing dairy products; however, they shall otherwise comply with the requirements of the FAC, including not causing dairy products to be sold below cost (Section 61384). Entities conducting sweepstakes must keep records for purposes of determining compliance with sales below cost provisions of the FAC. These records should include the total cost of prizes awarded in the sweepstakes, and the advertising, promotional and administrative costs involved. Should it be necessary to determine whether the sweepstakes complied with the sales below cost requirement, these costs shall be prorated among all applicable products sold within the state during the term of the sweepstakes or drawing.

Sampling of Milk or Dairy Products

Providing samples of dairy products to consumers is allowed under the law. However, it is recommended that to prevent a sales below cost violation, the samples provided are in single serving or small size containers, the length of the give-away is limited, and are not done in a predatory manner.

The entity providing the samples must keep records containing the following information: identity of samples distributed, number of samples distributed, period of time samples were distributed, physical location where samples were distributed.

Samples must be offered by distributors, wholesale customers, or a designated representative.

Meeting Competition

California's milk marketing laws and regulations allow a dairy retailer, wholesale customer, manufacturer or distributor to meet a lawful competitive price or a lawful competitive condition to retain the dairy products business of an existing customer, FAC Section 61384(d)(1) and CCR Sections 1943-1945.

Retailers or Wholesalers

A retailer or wholesaler may meet a lawful price of a competitor. If there is any uncertainty as to whether a competitive price is lawful or not, the retailer or wholesaler should contact the Branch to determine if the lower price is lawful. A lawful lower price may be met for as long as it is valid.

Distributors (including Manufacturers)

If a distributor is faced with the possibility of losing a customer because of a lower priced offer of a competitor, they may meet that price to retain their customer. If a distributor loses a customer, the distributor can no longer meet the prices of the competitor for that customer. At that point, only the distributor's appropriate written price schedule can be offered.

Records to be Kept by Distributors

If a distributor decides to meet the competitor’s offer, the price variation must be recorded. The distributor must document why sales are being made to that customer at prices that differ from the distributor's regular prices. The same documentation is required for any modification of terms and conditions. This information must be recorded on what the Dairy Marketing Branch refers to as a "price exception letter." (See Appendix for example)

The price exception letter must list the customer's name, address and date the offer was made. It should indicate the prices or terms and conditions the wholesale customer claims were offered and the name of the competitor who made the offer. Also, it should indicate the method by which the distributor is meeting that offer, the name of the person initiating the price exception and the name of the person who approved the price exception.

CCR Section 1945(d) requires the distributor to review his records as to meeting competition not less often than once every six months. The price exception letter should also indicate when it was reviewed and by whom. If the wholesale customer's records are examined, and prices charged by the dairy distributor vary from the distributor's lawful price schedule, the dairy distributor will be requested to provide a price exception letter. It is in the wholesale customer's best interest to carefully examine the entire written price schedule when solicited, to determine if the customer's purchasing pattern will in fact produce an overall lower price.

In addition to carefully examining the written price schedule, the wholesale customer should pay the same attention to the terms and conditions. They may or may not be as favorable. If you are going to ask your supplier to meet a price or term and condition, tell the supplier all the details.

Meeting Competition with Coupons

A coupon is defined as a certificate offering a discount for a single item that must be presented to a cashier at the time of purchase, or mailed to a manufacturer, to get a discount. Store membership cards are **not** considered coupons.

- A coupon price in a store may **not** be met by a competitor store without a coupon. The only way the price may be met is if the competitor store honors the first store's coupon.

- If a store wishes to conduct a coupon promotion similar to a competitor's coupon promotion, this is **not** considered "meeting competition" because it could not be conducted at the same time, due to the time needed to prepare a coupon promotion. The second store's coupon promotion will be evaluated based on its own cost factors.

Allowances and Special Accounts

Allowances and prepaid accounts for advertising and promotions are lawful, as long as they do not cause a dairy product to be sold below cost, at either the manufacturing level or retail level. Any transfer of anything of value in connection with the sale of any dairy product, including accounts or funds used to reduce the invoice cost of a dairy product for promotional purposes, or incentives to obtain new customers, must be included in the cost calculations. See CCR Section 1811(c)(8).

An unlawful practice occurs when something of value is bestowed on a customer without adequate compensation being returned, or any performance requirements, or when allowances or accounts are applied against the cost of a product so as to artificially reduce the actual cost to a level that is below cost. Such use of allowances and accounts violates FAC Section 61384 (sales below cost), as well as FAC Section 61383 (giving something of value) and FAC Section 61382 (discrimination).

An example of a violation occurring when allowances or accounts are used unlawfully is as follows: A retail store applies funds from a promotional account provided by an ice cream manufacturer to reduce the invoice price of ice cream so that it can be discounted to its customers. However, the funds are applied to such a degree that it has the effect of lowering the invoice price below the cost to manufacture the ice cream, thus creating an unlawfully low price at the manufacturing level.

An example of an unlawful practice occurring when something of value is bestowed on a customer without adequate compensation being returned is as follows: A distributor offers discounted prices, cash or new equipment to a potential new customer to obtain his account, but doesn't offer the same gifts to existing customers, and has no contract or performance requirements for the new customer. This action violates FAC Sections 61382, 61383, and 61384.

There are other similar marketing practices that also violate FAC Section 61383:

- An outright gift of cash or something else of value, such as free deliveries, products or equipment, to obtain a new account is predatory and a violation.
- Under normal circumstances, if a manufacturer is required to pay a "presentation fee" to present a product to a prospective buyer, this would be giving something of value and a violation. If a manufacturer participates in a customer's advertising, the manufacturer may only contribute the legitimate cost of its actual participation in the advertising.

Advertising

A manufacturer or distributor may give to wholesale customers an advertising allowance on any dairy product. A key distinction between advertising allowance and promotional allowance is that the advertising allowance may not be used to reduce the sales price of the dairy product. The advertising allowance is strictly to reduce or offset advertising costs.

Advertising allowances are subject to certain provisions as follows:

1. Records must be maintained that identify the manner in which the allowance is offered, the particular period during which the allowance is available, the terms and conditions under which a wholesale customer may qualify for the allowance and the method used to determine the appropriate allowance paid.

2. The advertising allowance shall be offered to all wholesale customers without limitation.

3. The advertising allowance shall not be directly or indirectly conditioned on a wholesale customer's purchase, handling or sales promotion of any other dairy product.

4. To ensure compliance with below cost standards, an advertising allowance shall be considered a direct cost to the dairy product in which the allowance applies.

5. The costs associated with advertising allowances shall be borne by the issuing distributor.

Advertising allowances shall otherwise comply with all other marketing provisions contained in the FAC and CCR.

Price Schedules

The written price schedule is an essential part of the everyday operations of people who sell dairy products. It is equally essential to the buyer. The written price schedule conveys what prices will be charged for different types of delivery and different purchase volumes. It also contains various terms and conditions which qualify the customer for the prices set forth in the price schedule.

By following the information and guidelines contained herein, the possibility of vague, overlapping, misleading or incomplete price schedules may be avoided.

FAC Section 61441 states in pertinent part: "Every distributor, person who sells at wholesale… shall maintain and keep, for a period of three years… "(b) … written price schedules . . . " This provision means that the record keeping requirements of the CCR, and the related regulations discussed below, apply to distributors and wholesale customers selling to a wholesale customer.

CCR Section 1831(a*)* provides in pertinent part: "Every distributor shall maintain… written price schedules which set forth the prices at which each distributor is selling, offering, or agreeing to sell to distributors or wholesale customers, any dairy product … and any product sold in conjunction with any dairy product … " *Subparagraph (b)* of this same regulation requires that written price schedules clearly state the effective date of each schedule and the geographic area to which each written price schedule applies. The importance of designating the geographic area for the price schedule is often overlooked. The geographic area applicable to each written price schedule must be clearly designated to avoid the problems created by overlapping prices, and to enable a reasonable person to determine the validity of "price meeting" situations. Finally, geographic areas must be designated on the written price schedule so proper delivery cost determinations may be made.

Delivery cost factors shall be determined and applied on the basis of a single delivery at a single delivery location. Price variations may reflect delivery costs associated with the methods listed in FAC Section 1942 (a)(1). Those methods of delivery include both on premise (i.e., restaurant) and off premise (i.e., store, distributor) and are:

- At the processor's dock or non-processing depot
- At the customer's dock
- By limited service delivery
- By full service delivery

Weekly or monthly accumulations of delivered product, or combined dock pick up product, do not constitute justification for variable pricing. Thus, further price variations, other than those stated in CCR Section 1942 (a)(3), Classes of Trade are not permissible.

CCR Section 1942 (a)(3) provides authority for a distributor's price schedule to vary for classes of customer or trade. Those classes of customers or trade include: (1) retail stores; (2) food service establishments; (3) public agencies; and (4) private schools.

Price schedules must also reflect any terms and conditions of purchase which accompany a particular price schedule (CCR Section 1940). CCR Section 1942 (a)(2) provides that the terms and conditions of a written price schedule may justify possible price variations. The terms and conditions set forth the rules under which the distributor and customer must perform for the wholesale customer to receive certain prices. Examples of terms and conditions affecting net prices would be: 48-hour preorder, prompt pay, delivery invoice not extended by driver, and delivery at hours specified by the dairy.

At all times, proper documentation must be maintained by the seller to substantiate all prices at which the products are sold, including any price variations.

Except for meeting a lawful competitive price, any variation from a written price schedule is a violation of FAC Section 61382, discrimination.

Variations from a Price Schedule's Terms and Conditions

Unlawful practices have been observed when variations from the terms and conditions of a dairy's price schedules are permitted. To illustrate how some of those practices occur, a set of hypothetical terms and conditions is shown below. While the precise terms and conditions contained in the list below are hypothetical, similar provisions are used in the dairy industry.

EZ Dairy Terms and Conditions Nos. 1, 2, and 3

1. All products must be pre-ordered at least 24 hours in advance.

2. Milk and by-products are to be delivered at the same time.

3. Products are to be delivered to one point only.

The first three items are similar to those contained in the terms and conditions for HIP Dairies and Competitor Dairy (see Appendix) except that products must be pre-ordered at least 24 hours in advance.

EZ Dairy Terms and Conditions Nos. 4 and 5

4. $25 delivery charge for regularly scheduled deliveries.

5. $45 delivery charge for special non-scheduled deliveries.

EZ Dairy has a $25 delivery charge for regularly scheduled deliveries. If they do not bill certain wholesale customers for that delivery charge, an unlawful practice has occurred; that is, a special price has been extended to one or more wholesale customers.

If for some reason EZ Dairy is unable to deliver all of the product which the buyer has ordered, a return delivery need not carry a delivery charge.

If on the other hand, the wholesale customer requests an extra delivery, term 5 requires the customer to pay a $45 delivery charge for such special non-scheduled deliveries. Failure by EZ Dairy to properly bill for delivery charges or to collect the amount owed would result in the extension of a special price to wholesale customers.

EZ Dairy Terms and Condition No. 6

6. Minimum dollar volume for all regular deliveries is $125.

Term 6 requires that all regular deliveries be for a minimum dollar volume of $125. If EZ Dairy's wholesale customer is not purchasing at least this amount, the customer is not meeting all the terms and conditions and is not qualified for the prices contained on this price schedule. If the Dairy extends prices from this price schedule to such a wholesale customer, another unlawful practice has occurred.

EZ Dairy Terms and Condition No. 7

7. Only damaged products and “leakers” may be returned for credit.

Term 7 allows credits for the return of damaged products and leakers. An unlawful variation from this type of provision occurs if a dairy gives credit for other than damaged product or leakers. For example, it would be an unlawful practice if a dairy gives credit for "out-of-code" product because that is not a listed term or condition.

It is not unlawful for the dairy to give credit for the return of "out-of-code" products. This specific term, however, must be listed as part of the dairy's terms and conditions.

EZ Dairy Terms and Condition No. 8

8. For prompt payments within 7 days of the invoice date deduct 1 percent.

Term 8 is commonly referred to as a "prompt payment provision." The wholesale customer who makes payment within 7 days of the invoice date is entitled to deduct 1 percent of the amount charged on the invoice.

If a dairy offers a prompt payment provision to some of its wholesale customers rather than all similar customers, the customers who receive the benefit of the prompt payment provision have received a special price.

The dairy must offer the same prompt payment provision to all similar customers. If a dairy offers a larger percentage in its prompt payment provision to selected wholesale customers even though they purchase under the same terms and conditions, the customers who receive the larger percentage have an economic advantage over other similar customers and an unlawful practice has occurred.

EZ Dairy Terms and Conditions Nos. 9 and 10

9. If payment is made within 21 days of invoice date, no interest will be charged.

10. For late payments, interest charges of 0.5 percent on the late balance per month will be calculated from the invoice date.

Terms 9 and 10 relate to the payment of interest charges. If a wholesale customer of EZ Dairy does not pay for a delivery within 21 days of the invoice, the customer is required to pay interest charges as provided in Term 10.

If these charges are not billed and collected, the dairy distributor will have extended a special price to the wholesale customer and will be in violation of California's milk marketing provisions.

Services

Occasionally, a dairy distributor will accommodate requests to provide services beyond those the distributor routinely offers. For example, the wholesale customer may ask that the distributor agree to rotate stock, or assist in taking inventory at the customer's business. The wholesale customer might further ask that the distributor maintain customer-owned refrigeration equipment or load and unload milk dispensers or service vending machines.

Other requests might be that the distributor provide personnel for free demonstrations to promote product sales or for window signs to advertise sales on certain products. In addition, a request

might be made to forgo special non-scheduled delivery charges, and that the distributor guarantee that the wholesale customer will receive credit for the return of any product.

If the dairy distributor agrees to any of these requests and these services are not made available to all similar wholesale customers, the distributor is in violation of FAC Section 61382, Discrimination. The wholesale customer would be in violation of FAC Section 61391, Joint Participation.

As discussed in connection with EZ Dairy's Terms and Conditions 5 and 7, if these provisions are available to all similar wholesale customers, no violation of law has occurred. However, if they are not available to all similar customers, both the distributor and the wholesale customer are in violation of California's milk marketing provisions. (See Variations from A Price Schedule's Terms and Conditions)

Discount Price Schedule

Another type of price schedule is one which has a single set of prices for each item, together with a discount schedule that is based upon the total dollar volume purchased on a single delivery. This type of price schedule is called a "discount price schedule." A discount price schedule may provide that for total purchases on a single delivery of $0 to $250, the wholesale customer will be billed at the net price. For deliveries where the volume purchased is $251 to $400, the wholesale customer will receive a 2.5 percent discount from the net price total charged on the invoice.

Price Discrimination

FAC Section 61382 provides in pertinent part:

“Discrimination in price between distributors or between wholesale customers, or between consumers that purchase milk, cream, or any dairy product of like grade and quality under like conditions of service if the effect of that discrimination may be substantially to lessen competition or to injure or destroy or prevent competition with the person that either grants or knowingly receives the benefit of the discrimination is an unlawful practice.”

FAC Section 61383 provides in pertinent part:

"The sale or offer to sell or giving of any article in any transaction which involves the sale or disposal of milk, cream, or any dairy product, for less than the cost of the article, as “cost” is defined in FAC Section 61384, to secure or retain the milk, cream, or dairy products business of any wholesale customer or any person that buys as a consumer is an unlawful practice."

It should be recognized that a violation of FAC Section 61383, as with the violation of most of the other unlawful practices provisions discussed in this booklet, will result in the extension of an economic advantage, which is in violation of FAC Section 61382 (discrimination in price).

Volume Purchase Provisions

A bid request sometimes contains a provision that if the wholesale customer's dairy product purchases exceed a certain dollar volume during a specified period, the customer will receive a percentage rebate based upon all products purchased.

To illustrate this practice, assume the wholesale customer who owns 25 stores has included such a proposal in the bid request. Each of the 25 stores purchases approximately $425 of milk and dairy products on individual deliveries. Further assume the bid request asks for a 3 percent rebate on all product purchased in a six month period if the total volume purchased by all 25 stores exceeds $500,000. Assuming at least 2 deliveries a week at each location, the total volume purchased during a six-month period would exceed $500,000, and the wholesale customer would expect a rebate of over $15,000.

This arrangement, which extends a rebate to a wholesale customer based on the total volume of product purchased on more than one delivery at more than one location, would result in price discrimination to the customer and a would be a violation of California's milk marketing provisions.

A variation on this type of request is a suggestion that the dairy distributor agree that if the total dollar volume of the wholesale customer's purchases of milk and dairy products increases by a certain amount during a specified period, the dairy will lower the prices being charged to the customer for future purchases.

Either of these arrangements would result in an unlawful practice by the dairy distributor. The wholesale customer's request for such provisions constitutes a violation of FAC Section 61391, solicitation of an unlawful practice.

Firm Prices or Prior Notification of Changes

Occasionally, a wholesale customer's request for price quotations will specify a dairy distributor to provide firm prices for a certain period of time. Such a request could be lawful if the dairy distributor's appropriate written price schedule did not change during the specified period of time. If the prices from which this customer is being charged change during the specified period, and the dairy distributor continues to bill this customer at the old prices, the distributor and the wholesale customer would be engaged in unlawful practices. The result would be price discrimination by the distributor, FAC Section 61382. The wholesale customer would have jointly participated in an unlawful practice, FAC Section 61391. Further, if due to increased costs some of the old prices resulted in sales of dairy products below cost, a violation of FAC Section 61384 has occurred.

Another similar request is that the dairy distributor agrees to provide a specific amount of notice prior to price changes. For example, the dairy distributor is required to agree that the wholesale customer must be given 90 days notice prior to any price changes. If the distributor's appropriate price schedule changes, and the wholesale customer continues to receive prices not available to other similar wholesale customers for a 90-day period, then both the distributor and the wholesale customer would be participating in unlawful practices, as discussed above.

Price Variations on Individual Items

A practice which results in discrimination occurs when a wholesale customer is designated by the dairy to receive a price on one or more selected dairy products which differs from the appropriate price schedule for similar customers purchasing under basically the same terms and conditions.

To illustrate this practice, assume an audit of Competitor Dairy that reveals that one of the wholesale customers purchases enough dairy products per delivery to qualify for the $350 bracket. One of the products this wholesale customer purchases is half-gallon containers of homogenized milk. The $350 bracket price is $1.11 per half-gallon container. The audit reveals that this customer is not being billed $1.11 per unit for that product, but is being billed $1.07 per half-gallon container. Thus, this wholesale customer is receiving a lower price for this particular item than the price listed in the bracket for which the customer qualifies.

Catering: Price variations are permissible to include classes of customer or trade. A catering business would qualify as a food service establishment, one of the classes of customer or trade. An unlawful practice would occur if a dairy supplier extended to a caterer, different prices than those listed on his food service establishment price schedule.

Combining Delivery Invoices

Another example of a practice which violates California's milk marketing provisions occurs when the volume of product purchased on different deliveries is combined by the dairy to represent a single delivery of product to the wholesale customer.

To illustrate this practice, assume an audit of HIP Dairies. The investigator notices that there is an unusual pattern of purchases on the part of the wholesale customer. During the week of February 5, 2006, the following pattern is seen:

Weekly Statement

Deliveries - Week of February 5, 2006

Date	Amount
2/5	$ 700.00
2/8	$1,500.00

The disparity between the volume of product purchased on February 6 and that purchased on February 8 causes the investigator to look more closely at the records concerning this wholesale customer. Those records reveal that what actually occurred is the following:

Actual Deliveries	
Date	Amount
2/5	$700.00
2/6	$700.00
2/8	$800.00

The audit reveals that the delivery invoices for the February 6 and February 8 deliveries were combined. The result of the combination of the invoices appears to qualify the wholesale customer for $950 bracket prices for those purchases rather than the $600 bracket prices for which the customer is actually qualified. This unlawful practice creates lower net prices for the products purchased on February 6 and 8 deliveries, and would be considered price discrimination to the wholesale customer.

The above materials describe the granting of "discounts" either through the use of bracket price schedules or discount price schedules, with particular emphasis on unlawful practices which result in discrimination by the granting of unearned discounts. The Branch considers a "discount" to be a credit that is reflected on a statement or an invoice.

The Guaranteed or Locked-In Price Bracket

An example of an unlawful practice is the extension of a "guaranteed" or "locked-in" price bracket. In such cases the wholesale customer is guaranteed that regardless of the amount of product ordered for an individual delivery, the customer will be billed as though the customer qualified for a particular predetermined bracket.

An example of this type of violation can be shown using HIP Dairies' limited service price schedule. (See Appendix) For the purpose of this example assume the wholesale customer has been promised by HIP Dairies that regardless of the amount of product purchased the customer will be billed according to $600 bracket prices.

An audit reveals that while this wholesale customer often purchases enough product to qualify for the $600 bracket prices, two or three times a month the customer purchases only enough product on a single delivery to qualify for prices in the $350 bracket.

Our investigator's notes concerning one of HIP Dairies' deliveries to HEY Market shows the following:

HEY MARKET

Product/ Quantity	Extended Base Price	Net Price $600 Bracket	Net Price $350 Bracket
Gal. Homo 120	$247.20	$204.00	$216.00
1/2 Gal. Homo 100	120.00	105.00	110.00
Qt. Homo. 60	42.00	38.40	39.60
1/2 Pt. Yogurt 24	12.00	9.84	10.32
Total	$ 421.20	$357.24	$375.92
	Net at $350 Bracket Prices		$375.92
	Net at $600 Bracket Prices		357.24
		Difference	$ 18.68

On this particular delivery, the wholesale customer's purchases, when extended at HIP Dairies' wholesale base prices, total $421.20. While the customer has qualified for the net prices of the $350 bracket, a Department audit shows that HEY Market was billed at the $600 bracket's net prices. If HIP Dairies has agreed to bill the customer based upon prices in the $600 bracket regardless of the amount of product purchased on a particular delivery, then in those instances where the customer did not purchase enough product to qualify for those prices, the customer has received a special price. Such a practice gives this customer an economic advantage, which is not available to other wholesale customers, and an unlawful practice has occurred.

Rebates

A rebate is the payment by the dairy distributor of a sum of money, or its equivalent, to the wholesale customer. Unlawful practices occur when a rebate is improperly granted to a wholesale customer. Some types of unlawful rebates found during enforcement audits include:

1. The extension of a special price by granting a rebate of a specified percentage of the total amount charged for milk and dairy product purchases over an agreed upon period.

   For example: Assume a dairy distributor offers wholesale customers a rebate of 2 percent of the amount paid for all products purchased during an 8-week period. The investigator finds that one of these customers purchased $5,400 of milk and dairy products during a particular 8-week period, and that this customer then received a check for $108 from the distributor.

2. The dairy distributor promises some wholesale customers to rebate a specified sum for each unit of a particular product purchased by the customer.

   For example: A wholesale customer is promised a rebate of 10 cents for each one-gallon container of milk purchased. This customer purchases 450 one-gallon containers of milk and receives a check from the distributor for $45.

3. Some wholesale customers are promised a refund of all monies paid for delivery charges.

4. Wholesale customers are promised a refund for all payments made for rental of cabinets and other equipment from the distributor.

Chain Pricing or Statewide Single Unit Pricing

Almost all dairy distributors maintain written price schedules in which prices are predicated on serving a specific marketing area. The volume of product purchased must be based on a single delivery at a single delivery location. This applies even if the distributor delivers to stores that are part of a chain.

Sometimes chain stores will request and expect to receive statewide single unit pricing or "chain" pricing on milk and dairy products. Given the differences in serving individual geographic areas, variances in the amount of dairy products delivered, and normal differences in plant costs, it is unlikely that a dairy distributor operating in California could lawfully grant a request for such pricing.

To illustrate the problems a request for chain or statewide unit pricing presents to the dairy distributor, assume that a distributor receives such a request from a wholesale customer who has 100 stores in California. Fifty of the customer's stores are located in the Los Angeles area and fifty stores are located in the San Francisco Bay area.

Further assume that the dairy distributor has a processing plant in Los Angeles and another in San Francisco. Assume the distributor maintains a limited service type price schedule for the Los Angeles area and another similar price schedule for the San Francisco area. Even if both limited service price schedules contain the same terms and conditions and the same price brackets, they probably will have different prices because the costs of operation in the two areas may differ.

If this dairy distributor grants the wholesale customer's request for chain or statewide uniform pricing, unless the distributor extends the same prices to all other similar wholesale customers statewide, the distributor would then be discriminating between customers. The wholesale customer would also be in violation of California's milk marketing provisions for solicitation.

Two-area pricing could raise the same problems and violation for the same reasons.

Public Agency Prices

Specific guidelines are set forth for public agency and private school price schedules in CCR Section 1942(b). A public agency price schedule is a wholesale price schedule and it must be on file at the dairy distributor's office. The prices on this schedule must reflect those being offered to public agency accounts.

Public agency prices may vary from the distributor's regular written wholesale price schedules. However, public agency prices are still subject to the following provisions of the FAC: sales below cost; giving something of value; and discrimination.

A distributor may, at a particular public agency location, meet the offer of a competitor's lawful price schedule. If a competitor's price schedule is met, it must be met in its *entirety*, which includes all prices and terms and conditions.

Private Schools

Private schools also qualify within the scope of public agency pricing, CCR Sections 1942(a)(3) and 1942(b)(4)), and are subject to the same unlawful practices provisions of the FAC. (See definition of private schools in glossary of terms).

If a distributor maintains public agency prices, he may elect to offer such prices to private schools subject to the same quantity and service conditions as are applicable to the distributor's public agency prices. If the distributor offers public agency prices to private schools, these prices shall be applicable to all private schools serviced by the distributor.

It is not mandatory that private schools receive public agency prices. The distributor may charge private schools from his regular wholesale price schedule. If that is the case, the regular wholesale prices shall be applicable to all private schools serviced by the distributor.

Public Agency Bid Request – Need for Adjustor Clause

A bid request for prices and terms and conditions must be adequately defined to enable a distributor to offer a lawful response. The request should completely define the public agency's needs, i.e., duration of contract, number of facilities to be served, which days of the week service is required, type of service required (full or limited service), etc. The public agency may request specific terms and conditions as long as those requests do not conflict with the FAC or CCR. For example a public agency cannot specify that a response contain "fixed" prices during the contract period. If fixed prices have been requested and given, and the raw product cost increases, or some other uncontrollable cost increases, then the result could be a sale at less than cost. If this happened, the dairy supplier would be in violation of FAC Section 61384 (sales below cost) and the public agency who insisted upon fixed prices would be a joint participant in the same violation of the FAC Section 61391.

To prevent this type of situation, an "adjustor clause" should be included in the bidding process and the contract. This would allow for price variations beyond the dairy's control.

To assure itself that public agency prices are being offered, the public agency may request the dairy supplier to submit a copy of the appropriate written public agency price schedule with the bid response.

The length of contract between the public agency and dairy supplier may be for a fixed period of time not to exceed one year. The contract could be considered lawful if it did not conflict with any provisions of prevailing law.

Public Agency Bid Response

A bid response from the dairy supplier to a public agency is a formal quotation of prices with terms and conditions. While the supplier will want to comply with all of the requests of the public agency, it must abide by California's milk and dairy products marketing provisions.

Wholesale Customer Bid Requests-Contracts

Wholesale customer bid requests should not be confused with public agency bid requests. The distinction being a wholesale customer bid request is simply a request for the distributor to quote his regular wholesale prices and terms and conditions.

The dairy product prices must follow the distributor's established wholesale price schedule and terms and conditions. Prices must be based on a single delivery to a single delivery location. Deviations from price or service, as based on the price schedule's terms and conditions, may not be allowed and specific requests of service that are not listed as a term or condition may not be offered or an unlawful practice has occurred.

Solicitation, False Statements

Solicitation, Collusion or Joint Participation

FAC Section 61391 states in pertinent part:
"Solicitation by, or collusion or joint participation between or among, any . . . distributor, wholesale customer, or any representative of any of them, to commit any of the unlawful practices which are prescribed in this article or the use of any misrepresentation, threat. . . . or boycott to effectuate the commission of those unlawful practices, makes any person that participates . . . subject to the penalties of this chapter."

Investigations have found that many of the unlawful practices described above involved active participation by the affected wholesale customers.

For example, if a wholesale customer seeks a service not offered by its distributor to all similar wholesale customers, that customer has solicited a special service in violation of FAC Section 61391. If the distributor agrees to provide the special service this customer seeks without offering it to all similar wholesale customers, the customer and the distributor have jointly participated in a violation of FAC Section 61391. The distributor will have also violated FAC Section 61382.

False Statements and Misrepresentations

The FAC prohibits the wholesale customer, or anyone acting on behalf of the wholesale customer, from making false statements or misrepresentations to any dairy distributor that a competitor of the distributor is selling or offering to sell any dairy product for less than was actually offered, FAC Section 61385.

Here are some examples of violations:

1. When a wholesale customer tells his supplier that a competing distributor has offered lower net prices for dairy products and no such offer has been made, a false statement has occurred.

2. Also, if the customer informs his supplier a competitor offered an ice cream cabinet rent free when no such offer was made, another false statement has occurred.

3. A chain store customer tells a competitor each store purchases $300 per delivery per store when only two of the stores purchase $300 and one store purchases $150. The competitor then offers the $300 price for all of the stores, which includes the $150 store, requiring the present supplier to meet the offer to retain the account. This is an example of misrepresentation.

Legal Actions & Penalties

Violations of California's milk marketing laws are made punishable by three provisions of the FAC.

- The imposition of civil penalties in an amount not less than one hundred dollars ($100) and not exceeding one thousand dollars ($1,000) for each and every violation. FAC Section 61572

- The Secretary may seek the issuance of an injunction to prevent the violation or threatened violation of any of the milk marketing laws. FAC Section 61573

- Misdemeanor punishable by fine or imprisonment. FAC Section 61571

Appendix

Illustrated Hypothetical Price Schedules

These price schedules have been developed to illustrate common written price lists with terms and conditions used in California's milk and dairy industry. The hypothetical price schedules described in this attachment are used in other portions of this booklet to illustrate some of the examples.

The first hypothetical price schedule is for an imaginary company called HIP Dairies. The HIP Dairies limited service price schedule is an example of a bracket type price schedule, the most prevalent type of price schedule used in the industry today.

The second page of HIP Dairies' limited service price schedule contains its terms and conditions entitled, "Conditions For Limited Service." For a wholesale customer to qualify for the prices contained on this price list, the customer must meet all of the terms and conditions for such limited service. HIP Dairies' Conditions For Limited Service are:

1. A minimum of two deliveries per week;
2. All products must be pre-ordered;
3. Milk and by-products are delivered at the same time;
4. All products are to be delivered to one delivery point;
5. Only leakers and damaged products may be returned for credit; and
6. Extended credit may not exceed 21 days.

The HIP Dairies limited service price list shows the net pricing of various products sold in a single delivery to a single delivery location.

The statement at the bottom of the first page of HIP Dairies' price schedule indicates how to determine the net bracket prices for products sold on each delivery. This procedure calls for the total number of units of all products delivered to be extended at the base price for each product. The total of this extension then indicates the appropriate price bracket to be used in determining the net prices on this invoice.

The first bracket of this price schedule, on the left, is the wholesale base price for each of the products. The second column of prices on HIP Dairies, price schedule reflects the net prices for products purchased where the extended price for all products delivered falls between $100.00 and $349.99.

The remaining brackets in this price schedule reflect net prices when the wholesale customer purchases a larger quantity of products at a particular delivery. These brackets are usually referred to by reference to the lowest dollar amount which qualifies the customer for the prices in that bracket, e.g., the "$350 bracket" for the $350 to $599.99 bracket.

The following is an example of how the net prices found on an invoice are established for a HIP Dairies wholesale customer being served from this limited service price schedule:

100 units of one gallon Homo. milk @ base price of $2.06	=	$206.00
125 units of half gallon Homo. milk @ base price of $1.20	=	150.00
36 units of half pint yogurt @ base price of $.50	=	18.00
12 units of one gallon fruit punch @ base price of $.92	=	11.04
Total extended base price for all products	=	$385.04

The total extended base price for purchases on the hypothetical delivery to the wholesale customer amounts to more than $350.00 and less than $599.99, thus qualifying this customer for net prices on the invoice for that delivery based upon the $350 bracket as follows:

100 units of one gallon Homo. milk @ net bracket price of $1.80	=	$180.00
125 units of half gallon Homo. milk @ net bracket price of $1.10	=	137.50
36 units of half pint yogurt @ net bracket price of $.43	=	15.48
12 units of one gallon fruit punch @ net bracket price of $.90	=	10.80
Net invoice price	=	$343.78

The second hypothetical price schedule is for Competitor Dairy. This schedule is also a limited service bracket type price schedule.

The second page of Competitor Dairy's written price schedule contains terms and conditions entitled, "Conditions for Limited Service". Competitor Dairy also has six conditions which must be met in order to qualify for the prices on this price schedule. The first five conditions are the same as those contained in the HIP Dairies price schedule. However, the last condition provides for a shorter period of extended credit, 14 days instead of the 21 days provided by HIP Dairies.

The only significant difference between the two hypothetical price schedules, beside the prices, is noted at the bottom of the first page. Competitor Dairy states, "All products above the double line are to be extended at list (base] price and the total amount establishes the net bracket price." Competitor Dairy does not permit purchases of fruit punch or orange juice to be used in determining the appropriate net bracket prices. The price extension process for determining net prices is the same as that discussed above.

HIP Dairies

Effective Date:
July 1, 2001

Limited Service

	(LS-010) Wholesale Base Price	(LS-01)	(LS-012)	(LS-013)	(LS-014)
Product	$ 0.00 $99.99	$100.00 $349.99	$350.00 $500.00	$600.00 $949.00	$950.00 & More
6 Gal. Disp. Homo.	$12.00	$11.70	$11.40	$11.10	$10.80
1 Gal. Homo.	$2.06	$1.90	$1.80	$1.70	$1.60
1/2 Gal. Homo.	$1.20	$1.15	$1.10	$1.05	$1.00
Qt. Homo.	$.74	$.70	$.68	$.66	$.64
1/2 Pt. Homo	$ .28	$ .23	$ .20	$ .18	$ .15
1/2 Pt. Cottage Cheese	$.70	$.64	$.61	$.58	$.56
1/2 Pt. Yogurt	$.50	$.46	$.43	$.41	$.38
1 Gal. Fruit Punch	$.92	$.90	$.90	$.90	$.90
Qt. Orange Juice	$.90	$.85	$.82	$.82	$.82

All products on this page are to be extended at base price and the total amount establishes the net bracket price.

HIP Dairies

Effective Date:
July 1, 2001

Limited Service

<u>Conditions For Limited Service</u>

1. Minimum of Two Deliveries Per Week
2. All Products Must Be Pre-Ordered
3. Milk and By-Products Delivered At Same Time
4. Products Delivered To One Delivery Point
5. Only Leakers and Damaged Products May Be Returned For Credit
6. Extended Credit May Not Exceed 21 Days

Competitor Dairy

Effective Date:
July 1, 2001

Schedule No. L-1

Limited Service

	L-1)	(L-2)	(L-3)	(L-4)	(L-5)
	List Price				
Product	$ 0.00 $99.00	$100.00 $349.99	$350.00 $500.00	$600.00 $949.00	$950.00 & More
6 Gal. Disp. Homo.	$11.75	$11.45	$11.15	$11.05	$10.95
Gal. Homo.	$ 2.00	$1.89	$1.79	$1.65	$1.59
1/2 Gal. Homo.	$ 1.18	$1.14	$1.11	$1.07	$1.02
Qt. Homo.	$.72	$.71	$.70	$.68	$.66
1/2 Pt. Homo.	$.26	$.21	$.18	$.16	$.14
1/2 Pt. Cottage Cheese	$.68	$.65	$.62	$.60	$.58
1/2 Pt. Yogurt	$.50	$.47	$.44	$.42	$.40
Gal. Fruit Punch	$.91	$.89	$.87	$.85	$.85
Qt. Orange Juice	$.88	$.84	$.81	$.81	$.81

All products above the double line are to be extended at list price and the total amount establishes the net bracket price.

Competitor Dairy

Effective Date:
July 1, 2001

Schedule No. L-1

Limited Service

Conditions For Limited Service

1. At Least Two Deliveries Per Week
2. All Products Must Be Pre-Ordered
3. Milk and By-Products Delivered At Same Time
4. Products Delivered to One Point Only
5. Only Damaged Products and Leakers May Be Returned For Credit
6. Extended Credit May Not Exceed 14 Days

Price Exception Letter

CUSTOMER INFORMATION	COMPANY INFORMATION
ACCT. NAME:_____ ACCT. ADDRESS:_____ _____ ACCT. NO.:_____ DATE FIRST SERVED:_____	SALES RES NAME:_____ COMPETITIVE INFORMATION 1. COMPANY NAME:_____ 2. NAME OF REP_____ 3. DATE OF OFFER:_____

COMPETITIVE PRICE AND CONDITIONS OFFERED

1. Products Involved: _____

_____

2. Prices Or Price Schedule Offered: _____

_____

3. Conditions: _____

_____

Supporting Documents: 1. Competitor's Price Schedule_____

2. Competitor's Letter Of Offer : 3. Customer's Statement ; 4. Other

Company Action Taken:_____ Effective Date:_____

_____

_____

Exception Originated By: _____; Title:_____

Date: _____

Exception Approved By: _____; Title:_____

Date: _____

Subsequent Review Dates: _____;_____;_____;_____;_____;_____;_____;

By (Initials): _____;_____;_____;_____;_____;_____;_____;

STATE OF CALIFORNIA

DEPARTMENT OF FOOD AND AGRICULTURE
Dairy Marketing/Milk Pooling Branches
1220 N Street
Sacramento, CA 95814
Email: *dairy@cdfa.ca.gov*

Telephone (916) 341-5988
FAX (916) 341-6697

REQUEST FOR COST INFORMATION

MANUFACTURER

Sent to: **Date: / /** ___ _____ _____	**Return to:** **Return by: / /** Dairy Marketing Branch Attention: Mary Riley _____
Fax Number: _____ _____	**Fax Number: (916) 341-6697**

Subject: Investigation of alleged sales below cost violation for milk or other dairy products. California Food and Agriculture Code (FAC), Section **§** 61384, California Code of Regulations Section 1811.

The California Department of Food and Agriculture, Dairy Marketing Branch has received a complaint or inquiry that you may be selling dairy products below cost. Information is needed from you to determine whether there is a violation. Please return the information within seven business days. If more time is needed, please contact us. **All information provided will be kept confidential.**

Description of Alleged violation(s):

.

Provide the following information for your most recent representative operating period: Submit in your regular format as an attachment to this cover sheet.
Information requested is authorized by the FAC, Section 61441 et seq.

Raw Product Cost
- Cost of dairy products (inc. those used for fortification)
- Cost of non-dairy ingredients: e.g. vitamins

Container Costs
- A breakdown of packaging material expenses for each type of product and for each size.
- If applicable, include all blow mold costs to make plastic containers.

Delivery Expenses
- Drivers and supervisors' payroll, including wages, payroll taxes, and benefits
- Truck expenses, including depreciation, gas, repairs, and maintenance, etc.
- Other delivery expenses, e.g., laundry, utilities, storage, etc.
- Depot expenses, if applicable

Labor Expenses
- All applicable labor (including salaried).
- Include all wages, payroll taxes and benefits.

Non-Labor Expenses
- Depreciation – buildings and equipment
- Supplies – operating, cleaning, lab, etc.
- Repairs and Maintenance – building & equipment
- Rental/Leases – building & equipment
- Utilities – natural gas & electricity
- Sewage, Water & Garbage
- Property Taxes
- Property Insurance
- Other expenses: e.g., laundry, outside testing, professional services, etc.

General and Administrative Expenses

- Office and executive payroll, including wages, payroll taxes & benefits
- Interest expenses
- Income taxes
- Headquarter or corporate expenses charged to individual plants or stores
- Other general and administrative expenses, e.g., professional services, office supplies, computer expenses, etc.

Selling Expenses

- Sales payroll, including wages, payroll taxes and benefits.
- Advertising expenses
- Promotions (see section below)
- Other selling expenses: e.g., auto, entertainment, etc.

Promotions

Coupons

- Distribution method used: e.g., in-store, newspaper insert, attached to the dairy product, etc.
- Discount amount
- Cost of redemption
- Redemption Rate
- Rebates
- Gifts, prizes, sales awards
- Benefit period
- Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product
- Anticipated or actual (if available) income from product promoted

Sale prices, store membership cards, sweepstakes, slotting allowances, etc.

- Discount amount
- Benefit period
- Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Include the value of gifts and prizes, if applicable. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product.
- Anticipated or actual (if available) income from product promoted
- Value of gifts, i.e., free equipment, free products, cash, etc.

Other costs

- Expenses foregone
- Special or prepaid accounts
- Promotional Allowance
- Scan Allowance
- Earnings Accrual
- Off Invoice Allowance

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REQUEST FOR COST INFORMATION

WHOLESALER/RETAILER

Sent to: **Date:** _____ _____	**Return to:** **Return by: / /** Dairy Marketing Branch Attention: Mary Riley _____
Fax Number: _____ _____	**Fax Number: (916) 341-6697**

Subject: Justification for retail prices charged for fluid milk gallons. California Food and Agriculture Code (FAC), Section **§** 61384, Regulations, **§** 1811, 1850.

The California Department of Food and Agriculture, Dairy Marketing Branch, is updating our records on your cost information. Please return the information below within seven days. If more time is needed, please contact us. Information requested is authorized by the FAC, Section 61441 et seq.

All information provided will be kept confidential.

Provide the following information for your most recent representative operating period: Submit in your regular format as an attachment to this cover sheet.

1. **Invoice Price, or replacement cost of the dairy product, whichever is less. Please attach copies of invoices from all suppliers.**

2. **Total Operating Expense, based on the categories listed below:**

Labor Expense
- All applicable labor (including salaried).
- Include all wages, payroll taxes and benefits.

Non-Labor Expense
- Depreciation – buildings and equipment
- Supplies – operating, cleaning, lab, etc.
- Repairs and Maintenance – building & equipment
- Rental/Leases – building & equipment
- Utilities – natural gas & electricity
- Sewage, Water & Garbage
- Property Taxes
- Property Insurance
- Other expenses: e.g., laundry, outside testing, professional services, etc.

General and Administrative Expense
- Office and executive payroll, including wages, payroll taxes & benefits
- Interest expenses
- Income taxes
- Headquarter or corporate expenses charged to individual plants or stores
- Other general and administrative expenses, e.g., professional services, office supplies, computer expenses, etc.

Selling Expense

- o Sales payroll, including wages, payroll taxes and benefits
- o Advertising expenses
- o Promotions (see section below)
- o Other selling expenses: e.g., auto, entertainment, etc.

Promotions

Coupon

- o Distribution method used: e.g., in-store, newspaper insert, attached to the dairy product, etc.
- o Discount amount
- o Cost of redemption
- o Redemption Rate
- o Rebates
- o Gifts, prizes, sales awards
- o Benefit period
- o Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product
- o Anticipated or actual (if available) income from product promoted

Sale prices, store membership cards, sweepstakes, slotting allowances, etc.

- o Discount amount
- o Benefit period
- o Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Include the value of gifts and prizes, if applicable. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product.
- o Anticipated or actual (if available) income from product promoted
- o Value of gifts, i.e., free equipment, free products, cash, etc.

Other Costs

- o Expenses foregone
- o Special or prepaid accounts
- o Promotional Allowance
- o Scan Allowance
- o Earnings Accrual
- o Off Invoice Allowance

3. Total Sales Income, as shown on your latest Federal Income Tax filing.

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Telephone (916) 341-5988
FAX (916) 341-6697

SALES PROMOTION COST SHEET

MANUFACTURER

Sent to: **Date:** _____ _____ _____	**Return to:** **Return by: / /** Dairy Marketing Branch Attention: _____ _____
Fax Number: _____ _____	**Fax Number: (916) 341-6697**

Subject: Sales Promotion Cost, California Food and Agriculture Code § 61384, Regulations § 1850

Submit this cost sheet prior to promotion, allow adequate time for your sales promotion to be reviewed and approved by Dairy Marketing Branch. All information provided will be kept confidential, records must be maintained for three years and offer must be made to all customers.

Product _____

Dates of promotion: / / through / /

Description of sales promotion and location of store(s):

(For coupon promotions state type of coupon, e.g., in-store, newspaper insert, attached to dairy item.)

Provide the following information for your most recent representative operating period: Submit in your regular format as an attachment to this cover sheet.

Information requested is authorized by The California Food and Agriculture Code, Section 61441 et seq.

Raw Product Cost

- Cost of dairy products (inc. those used for fortification)
- Cost of non-dairy ingredients: e.g. vitamins

Container Costs

- A breakdown of packaging material expenses for each type of product and for each size.
- If applicable, include all blow mold costs to make plastic containers

Delivery Expenses

- Drivers and supervisors' payroll, including wages, payroll taxes, and benefits.
- Truck expenses, including depreciation, gas, repairs, and maintenance, etc.
- Other delivery expenses, e.g., laundry, utilities, etc.
- Depot expenses, if applicable

Labor Expenses

- All plant labor (including salaried) from receiving area to dock loadout.
- Include all wages, payroll taxes and benefits.

Non-Labor Expenses

- Depreciation – buildings and equipment
- Supplies – operating, cleaning, lab, etc.
- Repairs and Maintenance – building & equipment
- Rental/Leases – building & equipment
- Utilities – natural gas & electricity
- Sewage, Water & Garbage
- Property Taxes
- Property Insurance
- Other expenses: e.g., laundry, outside testing, professional services, etc.

General and Administrative Expenses

- Office and executive payroll, including wages, payroll taxes & benefits
- Interest expenses
- Income taxes
- Headquarter or corporate expenses charged to individual plants or stores
- Other general and administrative expenses, e.g., professional services, office supplies, computer expenses, etc.

Selling Expenses

- Sales payroll, including wages, payroll taxes and benefits.
- Advertising expenses
- Promotions (see section below)
- Other selling expenses: e.g., auto, entertainment, etc.

Promotions

Coupon: Distribution method used: e.g., in-store, newspaper insert, attached to the dairy product, etc.

- Discount amount
- Expected redemption rate
- Benefit period
- Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product
- Anticipated or actual (if available) income from product promoted

Non-Coupon: e.g., store membership cards, sale prices, sweepstakes, etc.

- Discount amount
- Benefit period
- Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Include the value of gifts and prizes, if applicable. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product.
- Anticipated or actual (if available) income from product promoted

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SALES PROMOTION COST SHEET

WHOLESALER/RETAILER

Sent to: **Date:**	**Return to:** **Return by: / /**
_____ _____ _____	Dairy Marketing Branch Attention: _____ _____
Fax Number: _____ _____	**Fax Number: (916) 341-6697**

Subject: Sales Promotion Cost, California Food and Agriculture Code § 61384, Regulations § 1850

Submit this cost sheet prior to promotion, allow adequate time for your sales promotion to be reviewed and approved by Dairy Marketing Branch. All information provided will be kept confidential, records must be maintained for three years and offer must be made to all customers.

Product _____

Dates of promotion: / / through / /

Description of sales promotion and location of store(s):

(For coupon promotions state type of coupon, e.g., in-store, newspaper insert, attached to dairy item.)

Provide the following information for your most recent representative operating period: Submit in your regular format as an attachment to this cover sheet.

Information requested is authorized by The California Food and Agriculture Code, Section 61441 et seq.

Invoice Price, or replacement cost of the dairy product, whichever is less.

Labor Expenses

- All plant labor (including salaried) from receiving area to dock loadout.
- Include all wages, payroll taxes and benefits.

Non-Labor Expenses

- Depreciation – buildings and equipment
- Supplies – operating, cleaning, lab, etc.
- Repairs and Maintenance – building & equipment
- Rental/Leases – building & equipment
- Utilities – natural gas & electricity
- Sewage, Water & Garbage
- Property Taxes
- Property Insurance
- Other expenses: e.g., laundry, outside testing, professional services, etc.

General and Administrative Expenses

- Office and executive payroll, including wages, payroll taxes & benefits
- Interest expenses
- Income taxes
- Headquarter or corporate expenses charged to individual plants or stores
- Other general and administrative expenses, e.g., professional services, office supplies, computer expenses, etc.

Selling Expenses

- Sales payroll, including wages, payroll taxes and benefits.
- Advertising expenses
- Promotions (see section below)
- Other selling expenses: e.g., auto, entertainment, etc.

Sales Promotion Cost Sheet
Wholesaler/Retailer
Page 2

Promotions

Coupon: Distribution method used: e.g., in-store, newspaper insert, attached to the dairy product, etc.

- Discount amount
- Expected redemption rate
- Benefit period
- Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product
- Anticipated or actual (if available) income from product promoted

Non-Coupon: e.g., store membership cards, sale prices, sweepstakes, etc.

- Discount amount
- Benefit period
- Estimated or actual (if available) total costs to dairy manufacturer or retail store, including promotion costs and all advertising costs and allowances or discounts. Include the value of gifts and prizes, if applicable. Also include special or prepaid accounts or funds used to reduce the invoice cost of a dairy product.
- Anticipated or actual (if available) income from product promoted

CALIFORNIA CODES
FOOD AND AGRICULTURAL CODE

61381. Any false or misleading advertising, as defined in Sections 32914 and 36062 of this code, and Sections 17500, 17501, and 17502 of the Business and Professions Code, of milk, cream, or any dairy product is an unlawful practice.

61382. Discrimination in price between distributors or between wholesale customers, or between consumers, that purchase milk, cream, or any dairy product of like grade and quality under like conditions of service if the effect of that discrimination may be substantially to lessen competition or to injure or destroy or prevent competition with the person that either grants or knowingly receives the benefit of the discrimination is an unlawful practice. This section does not, however, prevent differentials which make only due allowance for differences in the cost of the raw product which is used in the milk, cream, or dairy product, or the cost of manufacture, processing, sale, or delivery which results from the different methods or quantities in which the commodities are manufactured, processed, sold, or delivered.

61383. The sale or offer to sell or giving of any article in any transaction which involves the sale or disposal of milk, cream, or any dairy product, for less than the cost of the article, as "cost" is defined in Section 61384, to secure or retain the milk, cream, or dairy products business of any wholesale customer or any person that buys as a consumer is an unlawful practice.

61384. (a) The sale by any retailer, wholesale customer, manufacturer, or distributor, including any producer-distributor or nonprofit cooperative association acting as a distributor, of milk, cream, or any dairy product at less than cost is an unlawful practice. This subdivision applies to finished products, and does not apply to sales of bulk milk between handlers.

(b) For the purposes of this section, the following terms have the following meanings:

(1) "Cost," as applied to manufacturers and distributors, means the total consideration paid or exchanged for raw product, plus the total expense incurred for manufacturing, processing, handling, sale, and delivery.

(2) "Cost," as applied to wholesale customers, means the invoice price charged to the wholesale customer, or the expense of replacement, whichever is lower, plus the wholesale customer's cost of doing business.

(3) "Cost of doing business," as applied to wholesale customers, means a wholesale customer's total operating expense divided by the customer's total sales income.

(4) (A) Except as provided in subparagraph (B), "total consideration paid or exchanged for raw product," in the case of market milk or market cream used in the manufacture of class 1, 2, and 3 products, means the department's current announced regulated

minimum price of the market milk or market cream, payable by handlers to producers, except as provided in Section 62708.5.

(B) Notwithstanding subparagraph (A), in situations involving sales on a bid basis to public agencies or institutions, the definition in subparagraph (A) shall only apply to market milk or market cream that is utilized for class 1 purposes, as those purposes are defined in Chapter 2 (commencing with Section 61801).

(c) Proof of cost, based on audits or surveys conducted in accordance with generally accepted accounting principles as defined by the American Institute of Certified Public Accountants and the Financial Accounting Standards Board, and modified, if necessary, to satisfy the requirements of this section, shall establish a rebuttable presumption of that cost at the time of the transaction of any sale. This presumption is a presumption affecting the burden of proof, but it does not apply in a criminal action.

(d) Nothing in this section shall be deemed to prohibit any of the following activities:

(1) The meeting, in good faith, of a lawful competitive price or a lawful competitive condition.

(2) A distributor's action in making conditional sales of equipment or other property, extending credit for merchandise purchased, or paying a customer's obligations not otherwise prohibited by this chapter to another distributor in connection with the transfer of the customer's business from the latter to the former.

(e) The secretary shall establish, by regulation pursuant to Section 61341, the procedures which shall be used to make the determinations required by this section, including the following:

(1) Any modifications to the generally accepted accounting principles described in subdivision (c) necessary to satisfy the requirements of this section.

(2) Procedures for evaluating efforts to meet lawful competitive prices or conditions.

(3) Other procedures necessary or appropriate to facilitate the application or enforcement of this section.

61385. Any false statement or representation which is knowingly made, by any wholesale customer or consumer, or anyone that is acting on the behalf of either, to any distributor or manufacturer, or any representative of a distributor or manufacturer, that a competitor of the distributor or manufacturer has offered or is offering to sell, or is selling milk, cream, or any dairy product to the wholesale customer or consumer at a lower price than the manufacturer or distributor has offered or is offering to sell, or is selling it is an unlawful practice.

61391. Solicitation by, or collusion or joint participation between or among, any manufacturer, distributor, producer, wholesale customer, consumer, or any representative of any of them, to commit any of the unlawful practices which are prescribed in this article, or the use of any misrepresentation, threat, intimidation, or boycott to effectuate the commission of those unlawful practices, makes any person that participates in those unlawful practices subject to the penalties of this chapter.

61441. Every distributor, person who sells at wholesale, or manufacturer of milk, cream, or any dairy product shall maintain and keep, for a period of three years from their initial recordation, or for a period of three years from their expiration date, whichever period is longer, all of the following records:

(a) A record of all milk, cream, or dairy products received, detailed as to location, names and addresses of suppliers, prices paid, and deductions or charges made, and the use to which the milk or cream was put.

(b) A record of all milk, cream, or dairy products sold, classified as to kind and grade of milk, cream, or dairy product, showing where the milk, cream, and dairy products were sold, the quantities sold, the amounts received for the sales, and the written price schedules maintained by the distributor, person who sells at wholesale, or manufacturer for all milk, cream, and dairy products sold.

(c) A record of the wastage or loss of milk or any dairy product.

(d) A record of all costs of manufacturing, processing, handling, sale, and delivery, including overhead costs.

(e) A record of all property or financial transactions, other than those for which records are maintained under subdivision (b), between the distributor, person who sells at wholesale, or manufacturer and wholesale customers.

(f) Other records that the director may deem necessary for the proper enforcement of this chapter.

61442. The director shall have access to, and may enter at all reasonable hours, any place where any dairy product is being processed, bottled, stored, kept, or sold, or where the books, papers, records, or documents pertaining to any transaction which relates to any dairy product is kept. He may inspect and copy such books, papers, records, or documents in any place within the state.

61442.1. Within 60 days of the effective date of this section, each manufacturing milk handler shall provide the director with a list of the name, address, and date of every current contract between the handler and manufacturing milk producers. Monthly thereafter, the handler shall report to the director the same information on all terminated, new, and amended contracts which has not been previously reported. The director may assess a one hundred dollar ($100) penalty against any manufacturing milk handler who fails to file the required report for each report not filed.

61443. Any record or report which is made to the director pursuant to this article, or any contract required to be filed pursuant to this chapter, is confidential and shall not be divulged, except if necessary for the proper determination of any court proceeding or hearing before the director.

61571. The violation of any provisions of this chapter is a misdemeanor which is punishable by a fine not less than one hundred dollars ($100) and not exceeding one thousand dollars ($1,000) or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment. The amount of penalty which is assessed pursuant to this section on each count of violation shall be based upon the nature of the violation and the seriousness of the effect of such violation upon effectuation of the purposes and provisions of this chapter.

61572. Any person who violates this chapter, or any regulations adopted under this chapter, is liable civilly in an amount not less than one hundred dollars ($100) and not exceeding one thousand dollars ($1,000) for each and every violation, that sum to be recovered by the director in any court of competent jurisdiction. The amount of penalty which is assessed pursuant to this section on each count of violation shall be based upon the nature of the violation and the seriousness of the effect of the violation upon effectuation of the purposes and provisions of this chapter. The court may, in addition to the civil penalty, award reasonably incurred investigative and enforcement costs, and attorney's fees, to the director. The court may also award attorney's fees to any person successfully defending a civil action under this section. In any civil action initiated by the director under this section, the director shall join in the action, and assert civil penalties against, all parties participating in the commission of the unlawful practice. Any sum which is recovered under this section shall be deposited in the State Treasury to the credit of the Department of Food and Agriculture Fund.

61573. The director may bring an action to enjoin the violation or the threatened violation of any provision of this chapter or of any order which is made pursuant to this chapter in the superior court in the county in which such violation occurs or is about to occur. There may be enjoined in one proceeding any number of defendants alleged to be violating the same provisions or orders, although their properties, interests, residences, or places of business may be in several counties and the violations separate and distinct. Any proceeding which is brought pursuant to this section shall be governed in all other respects by the provisions of Chapter 3 (commencing with Section 525), Title 7, Part 2 of the Code of Civil Procedure.

Barclays Official

CALIFORNIA CODE OF REGULATIONS

Title 3. Food and Agriculture

Complete Title

Vol. 4

THOMSON WEST

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
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800–888–3600

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

REVISED EDITION

This edition of *Barclays Official California Code of Regulations*, revised on April 1, 1990, has been published under the direction of the California Office of Administrative Law which is solely responsible for its contents. Comments or questions regarding regulations published in this edition should be addressed to the State of California, Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814, (916) 323–6225. Errors reported will be promptly corrected in subsequent supplements.

OFFICIAL PUBLICATION

Courts are required to take judicial notice of contents of regulations published in the *Official California Code of Regulations* (Gov. Code, § 11344.6). *Barclays Official California Code of Regulations*, as revised April 1, 1990, has been certified by the Office of Administrative Law as the official publication of the State of California for this purpose pursuant to title 1, *California Code of Regulations*, section 190.

CODE SUPPLEMENTS

Amendments to the official Code are certified weekly by the Office of Administrative Law for publication by Barclays. These amendments, when certified and published, become part of the *Official California Code of Regulations*, beginning with Register 90, No. 14, dated April 7, 1990, and include all regulations filed with the Secretary of State on or after April 1, 1990. Amendment subscriptions to the entire revised Code, or to parts of it, are available from the publisher. For a descriptive brochure and order form, write Barclays Official California Code of Regulations, P.O. Box 2006, San Francisco, CA 94126 or telephone 800–888–3600.

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SUMMARIES OF NEW REGULATIONS

For subscribers to the amendment service for:
Title 3. Food and Agriculture
Complete Title

Includes all amendments to regulations approved by the Office of Administrative Law and filed with the Secretary of State for the period 8/8/2005 through 8/12/2005.

Title 3

Food and Agriculture, Department of

Amendment of regulations pertaining to unlawful practices in marketing milk and dairy products

Summary: The Department of Food and Agriculture has revised regulations relating to unlawful practices in the marketing of milk and dairy products.

The regulations provide cost–accounting procedures for manufacturers, distributors, handlers and wholesale customers to discourage predatory marketing practices, such as selling milk and other dairy products below cost. Regulations that reference defunct statutes have been repealed.

Regulatory Action: Changes affect title 3, sections 1804, 1806, 1808, 1809, 1810, 1811, 1812, 1831, 1850, 1851, 1851.1, 1870.1, 1870.2, 1871, 1872, 1873, 1930, 1931, 1932, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1950, 1951, 1960 and 1961.

Filed: 8/8/2005. **Effective:** 9/7/2005. **OAL File No.:** 05–0627–01

Agency Contact: Mary Riley (916) 341–5988

Chapter 3. Milk Stabilization and Marketing of Milk and Dairy Products

Subchapter 1. Unlawful Practices in Marketing Milk and Dairy Products

Article 1. General Provisions

§ 1800. Authority to Promulgate.

NOTE: Authority cited: Sections 16, 4143, 4361.5, Food and Agricultural Code.

1. Subchapter 3 originally printed 7–25–45 (Title 3).
2. Revised subchapter 3 filed 4–9–56; effective thirtieth day thereafter (Register 56, No. 7). For prior amendments in subchapter 3 refer to Registers 14, No. 5, and 54, No. 3.
3. Repealer filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).
4. Editorial correction of printing error in HISTORY 2. (Register 91, No. 24).

§ 1801. Definition.

"Code," as used in these regulations means the Food and Agricultural Code.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61341, Food and Agricultural Code.

HISTORY

1. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Amendment filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).

§ 1802. Violations of Regulations.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61341, Food and Agricultural Code.

HISTORY

1. New section filed 10–7–74; designated effective 12–1–74 (Register 74, No. 41). For prior history, see Register 64, No. 15.
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Repealer filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).

§ 1803. Invalidity of Provision or Application.

HISTORY

1. Repealer filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).

§ 1804. Violations by Agent, Employee, Representative, Subsidiaries, Affiliates.

No handler, manufacturer, distributor, producer, wholesale customer including any producer–distributor or non–profit cooperative association acting as a handler, manufacturer, or distributor, consumer shall violate any of the provisions of this subchapter, directly or indirectly, or through an employee, representative or other agent, or through a subsidiary or affiliated company or corporation. For the purposes of this subchapter, "subsidiary or affiliated company or corporation" includes, but is not limited to, companies or corporations controlled by a handler, manufacturer, distributor, producer, wholesale customer or consumer, directly or indirectly, through ownership of issued capital stock, partnership interests, membership interests, or otherwise.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61391, Food and Agricultural Code.

HISTORY

1. Amendment filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Amendment of NOTE filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
4. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
5. Amendment filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1805. Application to Corporations and Subsidiaries.

NOTE: Authority cited: Sections 16 and 4143, Food and Agricultural Code. Reference: Chap. 16, Div. 6, Food and Agricultural Code.

HISTORY

1. Repealer filed 9–8–67; effective thirtieth day thereafter (Register 67, No. 36).

§ 1806. Confidentiality of Records and Reports.

Proprietary financial information reported by any person subject to the provisions of this Chapter and any information obtained in the course of an investigation or audit is subject to the confidentiality provisions of Section 61443 of the Code.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61443, Food and Agricultural Code.

HISTORY

1. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Editorial correction of note filed 5–15–80 (Register 80, No. 20).
3. Amendment filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
4. Amendment filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1807. Meeting Competition.

HISTORY

1. Repealer filed 4–9–62; effective thirtieth day thereafter (Register 62, No. 7).

§ 1808. Applicability of Unlawful Practices.

The provisions of this subchapter shall apply to any handler, manufacturer, distributor, producer, wholesale customer including any producer–distributor or non–profit cooperative association acting as a handler, manufacturer, distributor, or consumer or any representative of them, that solicits, or colludes with, or jointly participates with, any other person to commit any of the unlawful practices provided for in this subchapter, or that uses any misrepresentation, threat, intimidation or boycott to effectuate the commission of such unlawful practices. Any provision of this subchapter that applies to a distributor shall apply equally to a wholesale customer that buys packaged milk, cream, or any dairy product for resale to other wholesale customers.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61391, Food and Agricultural Code.

HISTORY

1. New section filed 2–26–70; effective thirtieth day thereafter (Register 70, No. 9).
2. Amendment of NOTE filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
3. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
4. Amendment filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1809. Meaning of Distributor.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61306 and 61308, Food and Agricultural Code.

HISTORY

1. New section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20).
2. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1810. Purpose of Regulations.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61341, Food and Agricultural Code.

HISTORY

1. New section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20).
2. Amendment filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
3. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1811. Cost Components of Dairy Processing — Manufacturers, Distributors and Handlers.

In determining whether a manufacturer, distributor, or handler sold milk, cream, or any other dairy product(s) below cost, the Department shall evaluate the total consideration paid or exchanged for the raw product and the total expenses incurred and allocated for manufacturing, processing, handling, sale, and delivery.

(a) Milk processing and distributing costs shall be calculated using cost element categories which include, but which are not limited to, those specified below. All costs and expenses incurred, and any non–cash or other value received or given must be included in cost calculations.

(1) Ingredient Cost. Procurement of raw milk and other ingredients including, but not limited to additives and flavorings, premiums, service charges, federal, state, or local assessments.

(2) Labor Costs. All salaries, wages, benefits, and other compensation for workers and staff.

(3) Packaging Costs. All costs for purchasing packaging materials and for packaging products for sale.

(4) Shipping and Freight/Transportation/Storage Expense. All costs related to storing and transporting products.

(5) Waste, Shrinkage, Spoilage. All costs or values related to ingredient and finished product waste, shrinkage, spoilage.

(6) Manufacturing and Administrative Costs. All fixed and variable costs directly related to processing, manufacturing, sales and distribution of products, and associated administrative activities. For handlers, manufacturers, and distributors with more than one product line, costs should be allocated to each line using an allocation method that is both consistently applied and which is consistent with Generally Accepted Accounting Principles.

(A) Fixed Costs. Land and property expenses, property taxes, financing, leases, insurance, and other costs that are commonly considered fixed.

(B) Variable Costs. Plant expenses incurred to manufacture or produce product lines, including maintenance and testing of plant and equipment, non–capitalized furniture and fixtures, supplies, utilities, taxes, and other costs that are commonly considered variable.

(7) Asset Charges. Costs related to capital equipment and assets including depreciation, amortization, and capital repairs.

(b) Allocation methods selected for distributing costs must be fair, consistent with Generally Accepted Accounting Principles, and consistently applied.

(c) Other Costs. Handlers, manufacturers and distributors must capture all other costs, benefits or value resulting from activities which are directly related to sales of dairy products. These costs include, but are not limited to, promotions, advertising, coupons, slotting allowances, sweepstakes, or any other sales promotions or incentives, as well as the following:

(1) Low interest loans. For any low interest loan provided to or guaranteed on behalf of a customer, the handler, manufacturer or distributor must recognize as a cost the value of the portion of the interest rate that is below market, the value of any terms that are more favorable than commercially available, or the value of the guarantee afforded.

(2) Discounts or rebates on non–dairy items. For any product other than regulated dairy products that are sold at a discount greater than that afforded to other customers or when non–dairy products are given free of charge to a customer as a direct or indirect part of the sale of a dairy product, the value of the discount or of the free product must be captured and included in the cost calculations.

(3) Payments made on behalf of the customer. Any payments or debts forgiven on behalf of a customer as a direct or indirect consequence of a dairy product must be captured and included in the cost calculations.

(4) Equipment. For any equipment given or loaned to a customer without a related rental fee, the manufacturer or distributor must capture and include in its costs the value of the gifted equipment or the value of the rental payments foregone.

(5) Advertising and Promotions. For any advertising campaign, promotion, giveaway, coupons, or other incentives, the costs related to that campaign must be recognized as a cost following the provisions established in Article 3 of this subchapter.

(6) Gifts, Prizes, Sales Awards. The value of any gifts, prizes, sales awards, vacations, trips, gift certificates, cash or items of property given to any customer as a direct or indirect consequence of a sale of a dairy product must be included in the cost calculations.

(7) Expenses Foregone. The value of any expenses foregone in connection with the sale of any dairy product must be included in the cost calculations.

(8) Special or Prepaid Account. Any transfer of anything of value in connection with the sale of any dairy product, including special accounts or funds used to reduce the invoice cost of a dairy product must be included in the cost calculations.

(d) Retention of Data. Handlers, manufacturers, and distributors are responsible for retaining sufficient records to demonstrate compliance with Article 4, Chapter 1, Part 3, Division 21 of the Food and Agricultural Code and this subchapter.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383, 61384, 61441, 61442 and 61443, Food and Agricultural Code.

HISTORY

1. New section filed 8-8-2005; operative 9-7-2005 (Register 2005, No. 32).

§ 1812. Cost Components of Dairy Processing — Wholesale Customers.

In determining whether any wholesale customer sold milk, cream, or any other dairy product below cost, the Department shall evaluate the total consideration paid or exchanged for the processed dairy product as reflected on such wholesale customer's invoice, or the expense of replacement, whichever is lower, plus that wholesale customer's Cost of Doing Business. For the purposes of this subchapter, "Cost of Doing Business" shall include all costs and expenses related to the wholesale customer's total operation including, but not limited to the following:

(a) Discounts or rebates on non-dairy items. For any products other than regulated dairy products that are sold at a discount greater than that afforded to other customers, or when such products are given free of charge to a customer as a direct or indirect part of the sale of dairy product(s), the value of the discount or of the free product must be captured and included in the cost calculations.

(b) Gifts, Prizes, Sales Awards. The value of any gift, prize, sales award, vacation, trip, gift certificate, cash, or any other item of property given to any customer as a direct or indirect consequence of a sale of a dairy product must be included in the cost calculations.

(c) Advertising and Promotions. For any advertising campaign, promotion, giveaway, coupon, or other incentives, the costs related to that campaign must be recognized as a cost following the provisions of Article 3 of this subchapter.

Costs that directly or indirectly result from activities within a specific region or activity shall be allocated to the dairy product sold or distributed in that region or throughout that activity.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383, 61384, 61441, 61442 and 61443, Food and Agricultural Code.

HISTORY

1. New section filed 8-8-2005; operative 9-7-2005 (Register 2005, No. 32).

Article 2. Record Keeping Requirements

§ 1831. Record Keeping Requirements.

(a) Every distributor shall maintain for the Secretary's inspection and copying, written price schedules which set forth the prices at which each distributor is selling, offering, or agreeing to sell to distributors or wholesale customers, any dairy product and any product sold in conjunction with any dairy product. Such written price schedules shall be maintained and kept for a period of three years from their initial recordation or for a period of three years from their expiration date, whichever period is longer.

(b) Every distributor in maintaining written price schedules shall do all of the following:

(1) Clearly state the effective date of each price schedule.

(2) Define the geographic area in which each price schedule is effective.

(c) Every distributor shall maintain such other records as are required by section 61441 of the Code.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61441, 61442 and 61443, Food and Agricultural Code.

HISTORY

1. Repealer of article 2 (sections 1830–1834) and new article 2 (sections 1831–1833) filed 5-15-80; effective thirtieth day thereafter (Register 80, No. 20). For prior history see 79, No. 24; 77, No. 52; 77, No. 41; 73, No. 6; 70, No. 9; and 64, No. 15.
2. Repealer of subsection (d) filed 10-25-82; effective thirtieth day thereafter (Register 82, No. 44).
3. Amendment of subsections (a) and (c) filed 9-1-83; effective thirtieth day thereafter (Register 83, No. 36).
4. Amendment of subsection (b) filed 9-12-84; designated effective 11-1-84 (Register 84, No. 37).
5. Change without regulatory effect amending section filed 8-16-90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
6. Amendment of subsection (a) and NOTE filed 8-8-2005; operative 9-7-2005 (Register 2005, No. 32).

§ 1832. Terms and Conditions.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61377 and 61441, Food and Agricultural Code.

HISTORY

1. Amendment of NOTE filed 10-25-82; effective thirtieth day thereafter (Register 82, No. 44).
2. Amendment filed 9-1-83; effective thirtieth day thereafter (Register 83, No. 36).
3. Renumbering and amendment of former Section 1832 to Section 1940 filed 9-12-84; designated effective 11-1-84 (Register 84, No. 37).

§ 1833. Wholesale Price Variations to Public Agencies.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61377 and 61382-61384, Food and Agricultural Code.

HISTORY

1. Amendment of NOTE filed 10-25-82; effective thirtieth day thereafter (Register 82, No. 44).
2. Amendment of subsection (c) filed 9-1-83; effective thirtieth day thereafter (Register 83, No. 36).
3. Renumbering of Section 1833 to Section 1942(b) filed 9-12-84; designated effective 11-1-84 (Register 84, No. 37).

Article 3. Advertising and Sales Promotion

§ 1850. Determining and Allocating Costs for Promotions.

Handers, manufacturers, distributors, including any producer-distributor or non-profit cooperative association acting as a handler, manufacturer, or distributor, and wholesale customers must capture costs related to or resulting from all incentives, advertisements, marketing, sweepstakes, coupons, or any other activity intended to promote sales of dairy products. Such costs include expenses incurred and any and all value derived, gained, or realized.

(a) Advertising, Incentives and Sales Promotions. Any person engaging in any activity regulated by this section must define the benefit period of each sales or advertising campaign that is directly a cost of selling the involved dairy product (the "Defined Benefit Period"). For the purposes of calculating the cost of the involved dairy product, all advertising and sales costs must be allocated to each of the affected products over the applicable Defined Benefit Period. Actual or imputed costs for slotting allowances, exclusive agreements or other related agreements and activities shall be determined and allocated over the appropriate Defined Benefit Period.

(b) Sweepstakes, Drawings, Instant Prizes, and Other Such Sales Campaigns. Any person conducting any such activity shall estimate the approximate costs of the awards actually distributed to winners and allocate them over the Defined Benefit Period. The costs of actual redemption shall be determined, and estimated costs shall be adjusted to reflect actual costs incurred over the Defined Benefit Period.

(c) Coupons. Any person issuing a coupon shall estimate the value of the expected redemption of the coupon and allocate that value over a Defined Benefit Period. Estimated costs shall be adjusted to reflect actual coupon redemption during that Defined Benefit Period.

(d) Compliance with Section. If, upon determination of the actual costs of any activity regulated by this Section 1850, a handler, manufacturer, distributor, or wholesale customer experiences an actual redemption rate for that activity which results in an otherwise prohibited sale below cost, but that handler, manufacturer, distributor or wholesale customer can demonstrate that its estimates of the approximate cost of the redemption made according to the preceding provisions of this Section were made in good faith, and according to Generally Accepted Accounting Principles, and projected sales above its cost, that handler, manufacturer, distributor or wholesale customer shall be deemed to have complied with the Code and this Subchapter.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383, 61384, 61441, 61442 and 61443, Food and Agricultural Code.

HISTORY

1. Repealer and new section filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32). For prior history, see Register 79, No. 24.

§ 1851. Wholesale Customer Advertising.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61378, Food and Agricultural Code.

HISTORY

1. Amendment filed 10–6–77; effective thirtieth day thereafter (Register 77, No. 41).
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Amendment of NOTE filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
4. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1851.1. Permissible Advertising Allowance.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61377, 61378, and 61441, Food and Agricultural Code.

HISTORY

1. Repealer and new section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20). For prior history see 79, No. 24 and 77, No. 41.
2. Amendment filed 4–3–81; effective thirtieth day thereafter (Register 81, No. 14).
3. Amendment of NOTE filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
4. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
5. Change without regulatory effect amending section 1851.1 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
6. Editorial correction of printing error inadvertently omitting subsection (e) (Register 91, No. 19).
7. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1852. Demonstration to Consumer.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61307 and 61375–61378, Food and Agricultural Code.

HISTORY

1. Repealer and new section filed 7–17–59; effective thirtieth day thereafter (Register 59, No. 11).
2. Repealer filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).

§ 1853. Demonstration to Wholesale Customer.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61307 and 61375–61378, Food and Agricultural Code.

HISTORY

1. Repealer and new section filed 7–17–59; effective thirtieth day thereafter (Register 59, No. 11).
2. Repealer filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).

§ 1870. Prohibition Against Gifts and Free Services As Defined.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61375, Food and Agricultural Code.

HISTORY

1. Repealer and new section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20). For prior history, see 79, No. 24; 74, No. 8; 64, No. 15 and 59, No. 11.
2. Amendment of subsection (h) filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
3. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
4. Repealer filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).

Article 4. Gifts and Free Services

§ 1870.1. Redemption Devices for Retail Sales of Dairy Products.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61375, 61383, and 61384, Food and Agricultural Code.

HISTORY

1. New section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20).
2. Amendment filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
3. Change without regulatory effect amending section 1870.1 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
4. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1870.2. Redemption Devices for Replacement Dairy Products.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61375, 61383, 61384 and 61441, Food and Agricultural Code.

HISTORY

1. New section filed 7–15–91; operative 8–14–91 (Register 91, No. 43).
2. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1871. Bona Fide Charities.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61375, Food and Agricultural Code.

HISTORY

1. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1872. Frozen Dairy Products.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61371.5, Food and Agricultural Code.

HISTORY

1. New Section filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
2. Amendment filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).
3. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1873. Sampling of Milk or Dairy Products.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61375, Food and Agricultural Code.

HISTORY

1. New section filed 7–15–91; operative 8–14–91 (Register 91, No. 43).
2. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1880. Payment for Manufacturing Milk.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61441, Food and Agricultural Code.

HISTORY

1. Repealer of article 5, (sections 1883–1886) and new article 5 (section 1880) filed 10–5–82; effective thirtieth day thereafter (Register 82, No. 44). For prior history (sections 1800–1891) see, Registers 79, No. 24; 74, No. 41; 73, No. 6; and 64, No. 15.
2. Change without regulatory effect renumbering former section 1880 to section 2039 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
3. Editorial correction of printing error (Register 91, No. 18).

§ 1910. Sale of Equipment.

NOTE: Authority cited: Sections 407 and 61341, Food and Agriculture Code. Reference: Sections 61307, 61372, 61375, 61386 and 61441, Food and Agriculture Code.

HISTORY

1. Repealer of Subarticle 6 (Sections 1910–1919) filed 6–11–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Change without regulatory effect repealing Article 6 heading and renumbering former Article 9 to Article 6 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No. 18).
3. Editorial correction adding HISTORY 2. (Register 91, No. 18).

§ 1929. Procedure for Authorization to Install.

NOTE: Section 4138, Agricultural Code.

HISTORY

1. Renumbering of former section 1930 to new section 1929 filed 8–29–96; operative 9–28–96 (Register 96, No. 35).

§ 1930. Definitions.

Unless the context otherwise requires, the following definitions shall govern the construction of this Chapter 3.

(a) "Meeting Competition" means meeting a lawful competitive price.

(b) "Geographic Marketing Area" means one of the following two regions of counties: the Northern California geographic marketing area shall be composed of the counties of Monterey, Kings, Kern, Inyo and all counties north to the Oregon border. The Southern California geographic marketing area shall be composed of the counties of San Luis Obispo, Ventura, Los Angeles, and San Bernardino and all counties south to the Mexican Border.

(c) "Multi–Unit Price" is defined as the total price paid for two or more units or packages of any dairy product.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61384, Food and Agricultural Code.

HISTORY

1. Repealer of Article 7 (Sections 1930 and 1931) filed 11–24–61; effective thirtieth day thereafter (Register 61, No. 23).
2. Change without regulatory effect repealing Article 7 heading and renumbering former Article 10 to Article 7 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No. 18).
3. Editorial correction adding HISTORY 2 (Register 91, No. 18).
4. Renumbering of former section 1930 to new section 1929 and new section filed 8–29–96; operative 9–28–96 (Register 96, No. 35).
5. Amendment of subsection (c) and NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1931. Meeting Competition—Retail Sales by Wholesale Customers.

Wholesale customers may meet a lawful competitive price of dairy products of similar defined composition or standard only within the same geographic marketing area. It shall be lawful to meet a competitive price subject to the following provisions:

(a) A price offered by the wholesale customer to meet a competitor's lawful price may be offered only while competitor's price is effective and may not be lower than such competitor's price; and

(b) A lawful competitive price may be met whether or not that price results in a below cost sale by the wholesale customer.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383 and 61384, Food and Agricultural Code.

HISTORY

1. New section filed 8–29–96; operative 9–28–96 (Register 96, No. 35).
2. Amendment of subsection (a) and NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1932. Meeting Competition—"Multi–Unit Price".

(a) A lawful multi–unit price may be met by a wholesale customer by dividing the number of units sold together to arrive at an individual unit price.

EXAMPLE: A wholesale customer's lawful multi–unit price for two one–gallon milk containers is priced at $4.20. Another wholesale customer may meet competition by dividing the multi–unit price by two and lawfully sell a one–gallon unit for $2.10 ($4.20 divided by 2 = $2.10). When the number to be divided is an odd number, the result shall be rounded up.

(b) It is unlawful to divide the weight or volume of a dairy product in a single container to arrive at a per–unit price for the purpose of meeting competition.

EXAMPLE: The price of a five–gallon tub of butter may not be divided by five to arrive at a one pound unit price.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383 and 61384, Food and Agricultural Code.

HISTORY

1. New section filed 8–29–96; operative 9–28–96 (Register 96, No. 35).
2. Amendment of section heading, section and NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

Article 5. Terms and Conditions, Price Differences and Meeting Competition

§ 1940. Terms and Conditions.

(a) Schedules setting forth the price of each product sold by a distributor shall include any terms and conditions which are applicable in determining the ultimate net price available to the customer for each product purchased. As used herein, "terms and conditions" include the factors stated in section 1942.

(b) Within the boundaries of each geographic area defined in a distributor's written price schedule, terms and conditions shall be uniformly applicable and available to all customers receiving products by the same methods of delivery, and under the same conditions of sale, as such methods of delivery and conditions of sale are defined in section 1942.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383, 61384 and 61441, Food and Agricultural Code.

HISTORY

1. Renumbering and amendment of former section 1832 to section 1940 filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37). For history of former section 1940, see Register 65, No. 2 and 61, No. 8.
2. Change without regulatory effect of renumbering former article 8 to article 5 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
3. Editorial correction of printing error (Register 91, No. 18).
4. Amendment of NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1941. Price Discrimination.

(a) Discrimination in price by a distributor between customers that purchase milk, cream or any dairy product of like grade and quality, under like conditions of service, is prohibited if the effect of such discrimination may be substantially to lessen competition or to injure or destroy or prevent competition with the person that either grants or knowingly receives the benefit of such price discrimination.

(b) The establishment of price schedules by a distributor which offer to any customer special prices or services which are not offered to all customers purchasing any milk, cream, or dairy product of like quantity, under like terms and conditions, within the same area is prohibited.

(c) Discrimination in price by a wholesale customer between consumers that purchase milk, cream or any dairy product of like grade and quality, under like conditions of service, is prohibited if the effect of such discrimination may be substantially to lessen, injure, destroy or prevent competition with the wholesale customer that grants such price discrimination, or substantially to produce competitive detriment to consumers who are not afforded the benefit of such price discrimination.

(d) A distributor who is not a processor, purchasing processed milk from a distributor that is a processor, whether such milk is packaged under the label of the selling distributor or the label of the purchasing distributor, shall not, except for the purpose of meeting a lawful competitive price or lawful competitive condition, offer or establish lower wholesale prices for such milk than those offered or established by the selling distributor, if the effect of the price differences may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of them.

(e) Proof of any sale of, or offer or agreement to sell, milk, cream, or any dairy product, by a distributor at less than the prices offered to other like customers subject to the provisions of Chapter 1, Part 3, Division 21 of the Code and these regulations, or offer by such distributor to sell any other product in combination with any dairy product at less than cost, establishes a rebuttable presumption of a violation of said Chapter 1 and these regulations. This presumption is a presumption affecting the burden of producing evidence. Offers or agreements to sell, as used in this section, include offers, or agreements to sell which are conditional, or for which price schedules will be established at a future date.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383 and 61384, Food and Agricultural Code.

HISTORY

1. New section filed 1–29–65; effective thirtieth day thereafter (Register 65, No. 2).
2. Amendment filed 10—77; effective thirtieth day thereafter (Register 77, No. 41).
3. New subsections (e) and (f) filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
4. Repealer and new subsections (e) and (f) filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20).
5. Amendment of subsection (b) filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
6. Amendment of subsections (a)–(c) and (f) filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
7. Amendment filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).
8. Amendment of NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1942. Permissible Price Variations in Distributor's Price Schedules.

(a) A distributor may vary prices to customers for milk, cream or any dairy product if such price variations, as contained in the distributor's established written price schedules, are based upon the following factors:

(1) *Methods of Delivery* – Price schedules may vary to reflect the following applicable methods of delivery only: at processor dock or nonprocessing depot; at customer's dock; delivery by limited service; and delivery by full service.

(2) *Conditions of Sale* – Price schedules may vary to reflect applicable conditions of sale.

(3) *Classes of Trade* – Price schedules may vary among the following classes of trade: retail stores, food service establishments, public agencies and private schools.

(A) "Food service establishments" as used in this section is defined as follows: establishments where dairy products are sold for consumption on the premises by the consumer.

(b) Wholesale Price Variations to Public Agencies and Private Schools:

(1) Wholesale prices for milk, cream or dairy products offered or established by a distributor for public agencies only, for a fixed term contract not to exceed one year, may vary from the distributor's regular wholesale price schedule.

(2) Such wholesale prices offered or established for public agencies shall be subject to the discriminatory pricing provisions as set forth in Section 61382, the below cost standards contained in sections 61383 and 61384, and to all other provisions of Chapter 1, Part 3, Division 21 of the Code.

(3) A distributor may, at a particular public agency location, meet a current lawful competitive price schedule, including conditions for the sale of milk or any dairy product, without alteration or amendment of the distributor's established wholesale price schedules for such milk or dairy products. When meeting a lawful competitive public agency fixed term price schedule, or a lawful bid or offer for a public agency fixed term contract, such schedule, bid or offer shall be met in its entirety, including all prices, terms and conditions.

(4) If a distributor offers or establishes wholesale prices for public agencies, the distributor may elect to offer such prices to private schools (as "private schools" is defined in subsection (5) of this section), subject to the same quantity and service conditions as are applicable to the distributor's public agency prices, and if so offered, public agency prices shall be applicable to all private schools serviced by the distributor. Public agency prices offered to private schools under this subsection shall be subject to all provisions of this section.

(5) "Private Schools" as used in this section is defined as follows:

(A) Non–public schools that offer instruction in or maintain grades kindergarten through high school (K–12) and provide non–profit food service or lunch programs; or

(B) Non–public post secondary educational institutions that offer the same academic degrees as public universities and colleges and provide a non–profit food service program.

(c) All price variations, within a distributor's price schedules, shall be based upon identifiable costs and shall otherwise conform to the requirements of Chapter 1, Part 3, Division 21 of the Code. Delivery cost factors shall be determined and applied on the basis of a single delivery at a single delivery location.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61382, 61383 and 61384, Food and Agricultural Code.

HISTORY

1. New section filed 10–6–77; effective thirtieth day thereafter (Register 77, No. 41).
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Repealer and new section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20).
4. Amendment of note filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
5. Amendment of subsection (a) filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
6. Amendment filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).
7. Amendment of subsections (a) and (b) filed 7–15–91; operative 8–14–91 (Register 91, No. 43).
8. Amendment of subsections (b)(2) and (c) and amendment of NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1943. Prices Offered to Meet Competition Generally.

This article does not prohibit establishment of price schedules, or particular location price variations as provided for in Sections 1944 and 1945, which meet in good faith lawful competitive prices or lawful competitive conditions in the sale of milk or dairy products. "Meeting competition" is a question of fact to be determined under all the facts and circumstances of a particular instance. As a general rule, a distributor shall be deemed to have met in good faith a lawful competitive price or a lawful competitive condition if facts exist which would lead a reasonable and prudent person in the position of such a distributor to believe in good faith that his granting of a particular price (whether or not such price is less than the cost of such distributor as the term "cost" is defined in the Code and these regulations) would in fact meet, but not be lower than a lawful competitive price.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61384, Food and Agricultural Code.

HISTORY

1. Renumbering and amendment of former Section 1943 to Section 1944 and new Section 1943 filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).
2. Amendment of NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1944. Prices Offered to Meet Competition at a Particular Location.

A distributor may, at a particular location, other than that authorized for a public agency by Section 1942(b), meet a current lawful competitive price, including conditions, for the sale of milk or any dairy product, without alteration or amendment of the distributor's regular, established price schedule for such milk or dairy product, if done to retain the milk or dairy products business of an existing customer of the distributor.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61384, Food and Agricultural Code.

HISTORY

1. New section filed 10–6–77; effective thirtieth day thereafter (Register 77, No. 41).
2. Amendment of NOTE filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Repealer and new section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20).
4. Amendment of NOTE filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
5. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
6. Renumbering and amendment of former Section 1944 to Section 1945 and renumbering and amendment of former Section 1943 to Section 1944 filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).

7. Amendment of NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1945. Records to Be Kept As to Price Variation to Meet Competition at a Particular Location.

(a) A distributor who in good faith meets, or has met, pursuant to the provisions of section 1944, a lawful competitive price, including conditions relating to milk and dairy products, shall retain in his files for the period during which the distributor meets such lawful competitive price, including conditions, and for a period of three years thereafter, information detailing the circumstances applicable to the distributor's meeting of the lawful competitive price, including conditions. Such record information shall include the lawful competitive price and conditions met, the effective date of such price and conditions, and such other information as may be required by the director to determine that the competitive price, including conditions met, represents current marketing practices.

(b) The meeting of competitive prices pursuant to section 1944 and this section shall be subject to the record keeping requirements of section 61441 and 61442 of the Code.

(c) All meeting of competitive prices by a distributor pursuant to section 1944 shall be subject to review by the Secretary at any time in order that the Secretary may verify that such exceptions are current lawful competitive prices and conditions.

(d) Not less often than once every six (6) months, the distributor shall review his records as to meeting competition under the provisions of section 1944, in order to verify that such records, and the prices and conditions therein, are current lawful competitive prices and conditions. If such review discloses that the competitive prices and conditions no longer exist, the distributor shall bring such prices into conformity with his current lawful price.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61384, 61441 and 61442, Food and Agricultural Code.

HISTORY

1. New section filed 10–6–77; effective thirtieth day thereafter (Register 77, No. 41).
2. Amendment of NOTE filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Repealer and new section filed 5–15–80; effective thirtieth day thereafter (Register 80, No. 20).
4. Amendment of subsections (b) and (d) filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
5. Renumbering and amendment of former section 1944 to section 1945 filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).
6. Change without regulatory effect amending subsection (a) filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
7. Amendment of subsection (c) and NOTE filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1946. Burden of Proof.

Upon proof being made, in any enforcement proceedings brought by the Secretary under the provisions of Chapter 1, Part 3, Division 21 of the Code, that there has been price discrimination by a distributor, the burden of establishing cost justification for any variations by the distributor in prices between customers, or of otherwise rebutting the prima facie case of price discrimination made by the Secretary, shall be upon such distributor.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Cod. Reference: Sections 61382 and 61384, Food and Agricultural Code.

HISTORY

1. New section filed 10–6–77; effective thirtieth day thereafter (Register 77, No. 41).
2. Amendment of NOTE filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
4. Amendment filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

Article 6. Generally Acceptable Cost Accounting Procedures—Sales by Distributors

§ 1950. Records to Be Kept.

Each distributor, manufacturer, handler, and wholesale customer shall maintain a record of prices at which such distributor, manufacturer, handler, and wholesale customer is selling, offering or agreeing to sell fluid milk and dairy products, and current cost records to reflect costs under the accounting procedures required by Section 61384 of the Code and this subchapter.

For purposes of uniform and impartial enforcement of the "sales below cost" standards contained in Article 4, Chapter 1, Part 3, commencing with Section 61381 of the Code, any distributor, manufacturer, and wholesale customer, upon written demand by the Secretary and within seven calendar days after receipt of such demand, shall submit in writing to the Secretary cost data developed in compliance with the requirements of Article 4, Chapter 1, Part 3, commencing with Section 61381 of the Code and this subchapter in respect to a particular price on one or more dairy products. In cases where a distributor, manufacturer, handler, and wholesale customer have a history of repeated violations, or of not providing cost data timely, the Secretary may require cost data to be submitted within 48 hours of a written demand.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61384, 61441 and 61442, Food and Agricultural Code.

HISTORY:

1. New article 9 (sections 1950 and 1951) filed 4–9–62; effective thirtieth day thereafter (Register 62, No. 7).
2. Amendment filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).
3. Amendment filed 10–6–77; effective thirtieth day thereafter (Register 77, No. 41).
4. Amendment of article heading filed 8–17–78; designated effective 9–22–78 (Register 78, No. 33).
5. Editorial correction of subsection (b)(6) (Register 80, No. 24).
6. Amendment of note filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
7. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
8. Change without regulatory effect renumbering article 9 to article 6 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
9. Editorial correction of printing error (Register 91, No. 18).
10. Amendment of section heading and section filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1950.1. Acceptable Cost Accounting Procedures—Retail Stores.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61341, 61343, 61371, 61372, 61383, 61384 and 61443, Food and Agricultural Code.

HISTORY

1. New section filed 5–25–78 as an emergency; effective upon filing (Register 78, No. 21).
2. Repealed by operation of Section 11422.1(c), Government Code (Register 79, No. 18).

§ 1951. Unacceptable Cost Accounting Procedures.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61384, Food and Agricultural Code.

HISTORY

1. Amendment filed 10–6–77; effective thirtieth day thereafter (Register 77, No. 41).
2. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
3. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

Article 7. Generally Acceptable Cost Accounting Procedures—Retail Sales by Wholesale Customers

§ 1960. Acceptable Cost Accounting Procedures—Retail Sales by Wholesale Customers.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61384, Food and Agricultural Code.

HISTORY

1. New article 10 (sections 1960–1962) filed 8–17–78; designated effective 9–22–78 (Register 78, No. 33). For history of former article 10, see Register 70, No. 9.
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Amendment of NOTE filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
4. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
5. Change without regulatory effect renumbering article 10 to article 7 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
6. Editorial correction of printing error (Register 91, No. 18).
7. Repealer of article 7 (sections 1960–1962) and repealer of section filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1961. Availability of Cost Data—Wholesale Customers Selling at Retail.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61442, Food and Agricultural Code.

HISTORY

1. Editorial correction of NOTE filed 5–15–80 (Register 80, No. 20).
2. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
3. Repealer filed 8–8–2005; operative 9–7–2005 (Register 2005, No. 32).

§ 1962. Meeting Competition—Retail Stores.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Sections 61371 and 61372, Food and Agricultural Code.

HISTORY

1. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Repealer filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).

Article 11. Sales of Packaged Market Milk Below Minimum Prices Established by the Director, When and If Such Prices Are Established

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61582, Food and Agricultural Code.

HISTORY

1. New Article 11 (Sections 1970 through 1973) filed 5–3–67; effective thirtieth day thereafter (Register 67, No. 18).
2. Repealer of Article 11 (Sections 1970–1973) and new Article 11 (Sections 1970–1973) filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Editorial correction (Register 80, No. 24).
4. Amendment of NOTE filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
5. Repealer of Article 11 (Sections 1970–1973) filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).

Subchapter 2. Sale of Manufacturing Milk, Market Milk and Dairy Products

Article 1. General Provisions

§ 2000. Authority to Promulgate.

NOTE: Authority cited for Group 2: Sections 16, 4143 and 4240, Agricultural Code.

HISTORY

1. Repealer and new Article 1 (Sections 2000 through 2005) filed 11–24–61; effective thirtieth day thereafter (Register 61, No. 23).
2. Repealer filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).

§ 2001. Definition.

"Code," as used in these regulations, means the Food and Agricultural Code.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Section 61891, Food and Agricultural Code.

HISTORY

1. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Amendment filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).

§ 2002. "Section" and "Subdivision" Defined.

HISTORY

1. Repealer filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).

§ 2003. Invalidity of Provision or Application.

HISTORY

1. Repealer filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).

§ 2004. Violations by Agent, Employee, Representative, Subsidiaries, and Affiliates.

Violations by Agent, Employee, Representative, Subsidiaries, and Affiliates. No handler, producer, wholesale customer, manufacturer, distributor, or consumer shall violate any of the provisions of this group, directly or indirectly, or through an employee, representative or other agent, or through a subsidiary or affiliated company or corporation. "Subsidiary or affiliated company or corporation," as used herein includes, but is not limited to, companies or corporations controlled by the handler, directly or indirectly, through ownership of issued capital stock or otherwise.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61371 and 62091, Food and Agricultural Code.

HISTORY

1. Amendment filed 7–9–64; effective thirtieth day thereafter (Register 64, No. 15).
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Amendment of NOTE filed 10–30–82; effective thirtieth day thereafter (Register 82, No. 44).
4. Amendment filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
5. Amendment to section and Reference NOTE filed 11–26–90, operative 12–26–90 (Register 91, No. 2).
6. Amendment filed 11–26–90; operative 12–26–90 (Register 91, No. 2).

§ 2005. Application to Corporations and Subsidiaries.

NOTE: Authority cited: Sections 16 and 4240, Agricultural Code. Reference: Chap. 17, Div. 6, Agricultural Code.

HISTORY

1. Repealer filed 9–8–67; effective thirtieth day thereafter (Register 67, No. 36).

Article 2. Milk Handler's License

§ 2030. Prohibited Practices.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 62143–62145, Food and Agricultural Code.

HISTORY

1. New article 3 (section 2030) filed 4–9–62; effective thirtieth day thereafter (Register 62, No. 7).

2. Repealer of article 2 (sections 2020–2023) filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24). For prior history, see Registers 61, No. 8, 61, No. 23, 62, No. 7 and 65, No. 2.
3. Renumbering of article 3 (sections 2030 and 2031) to article 2 (sections 2030 and 2031) filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
4. Editorial correction of NOTE (Register 80, No. 24).
5. Repealer filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
6. Editorial correction of Article title (Register 91, No. 19).

§ 2031. Cancellation of Inactive Licenses.

Cancellation of Inactive Licenses. Every licensed handler who (a) within 60 days after issuance of the license fails to actively engage in the business activities permitted by the license; or (b) ceases for 60 consecutive days to engage in the business activities permitted by the license, shall surrender the license to the director for cancellation. Such cancellation shall be without prejudice to an application for another license at such time as the applicant is ready to actively engage in the business activities permitted by the license. A license reissued to the same person for the same premises during the year in which it was cancelled shall not require an additional license fee for the remainder of said year.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61490–61494 and 62141–62145, Food and Agricultural Code.

HISTORY

1. New section filed 4–26–66; effective thirtieth day thereafter (Register 66, No. 11).
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Change without regulatory effect of article 2 heading filed 8–16–90 pursuant ot section 100, title 1, California Code of Regulations, (Register 90, No. 44).
4. Amendment of Reference NOTE filed 11–26–90; operative 12–26–90 (Register 91, No. 2).
5. Editorial correction of HISTORY 4. (Register 91, No. 19).

§ 2039. Payment for Manufacturing Milk.

Manufacturing milk handlers and/or market milk handlers purchasing manufacturing milk from producers of manufacturing milk shall pay for such milk in accordance with the date and method of payment provided in section 61411 of the Code and the conforming contract between the producer and handler. If said contract requires an earlier or larger payment than required by section 61411, then payment shall be made in accordance with such contract. Each payment shall be made by cash, or valid check which is immediately negotiable. Payments shall not be made by promissory note, post–dated check, or other evidence of indebtedness.

NOTE: Authority cited: Sections 407 and 61341, Food and Agricultural Code. Reference: Section 61411, Food and Agricultural Code.

HISTORY

1. Repealer of article 5 (sections 1883–1886) and new article 5 (section 1880) filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44). For prior history, see Registers 79, No. 24; 74, No. 41; 73, No. 6; and 64, No. 15).
2. Change without regulatory effect renumbering former section 1880 to section 2039 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).

Article 3. Payment by Handlers to Producers for Manufacturing Milk and Market Milk

§ 2040. Payment for Market Milk.

Handlers purchasing market milk from producers shall pay for such milk in accordance with provisions of section 62191 of the Code and the conforming contract between the producer and handler; provided, however, if said contract requires an earlier or higher percentage of payment, or both, than that required by section 62191, then payment shall be made in accordance with the contract. Each payment shall be made on or before the date due, shall be in the full amount required and shall be made by cash or valid bank check which is immediately negotiable. Payment shall not be made by promissory note, post–dated check or other evidence of indebtedness.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Section 62191, Food and Agricultural Code.

HISTORY

1. New article 4 (section 2040) filed 4–9–62; effective thirtieth day thereafter (Register 62, No. 7).
2. Amendment filed 9–10–63; effective thirtieth day thereafter (Register 63, No. 15).
3. Amendment filed 6–12–79, effective thirtieth day thereafter (Register 79, No. 24).
4. Renumbering of article 4 (sections 2040 and 2041) to article 3 (sections 2040 and 2041) filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
5. Change without regulatory effect amending section 2040 filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).

§ 2041. Bond Indemnification Agreement Prohibited.

Bond Indemnification Agreement Prohibited. No bond filed with the director pursuant to sections 61404–61407.3 or 62181–62190, inclusive, of the Code shall contain or at any time be subject to any indemnification agreement, waiver or cosignature by any producer from whom the handler purchases manufacturing milk or market milk during the period the bond is in force.

The undertaking of such an obligation by such a producer and the acceptance of the benefits thereof by such a handler are declared to be unlawful trade practices proscribed by sections 61400, 61415, 62078, 62095, and 62095.1 of the Code.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61400, 61415, 62078, 62095, and 62095.1, Food and Agricultural Code.

HISTORY

1. New section filed 4–26–66; effective thirtieth day thereafter (Register 66, No. 11).
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Editorial correction (Register 80, No. 24).
4. Amendment filed 10–25–82; effective thirtieth day thereafter (Register 82, No. 44).
5. Amendment to section and Reference NOTE filed 11–26–90; operative 12–26–90 (Register 91, No. 2).
6. Amendment filed 11–26–90; operative 12–26–90 (Register 91, No. 2).

§ 2042. Allocation of Handler Payments to Producers for Bulk Milk for Surety Bond and Milk Producers Security Trust Fund Coverage.

(a) For the purpose of determining whether or not a handler has properly paid producers for milk purchased, all payments shall be applied first to bulk milk sales for all amounts due and payable on the date the payment is made, except in the following situations:

(1) If the handler and producer have historically engaged in a pattern of allocating payments in a manner different from that described above, and that pattern is documented in writing, then payments may be allocated in accordance with that pattern, as long as the execution of the documentation by both parties is simultaneous with the beginning of the pattern of allocating payments; or,

(2) If, simultaneously with payment, the handler delivers to the producer a written notice or remittance device which notifies the producer that the payment is for a specific invoice, delivery, commodity, expense, allowance or other charge.

(b) Payments by a handler to a producer for the purposes of any action by the Secretary associated with a surety bond or the Fund shall be credited first to interest and then to the remaining unpaid principal. Upon the payment of all outstanding interest, principal payments shall be applied first to the amount due for the oldest unpaid delivery, and then successively, in sequence, to the amounts due for the next oldest unpaid delivery.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 62185, 62190, 62501 and 62623, Food and Agricultural Code.

HISTORY

1. New section filed 10–6–2004; operative 11–5–2004 (Register 2004, No. 41).

Article 4. Contracts for Purchase of Manufacturing Milk or Market Milk

§ 2050. Prohibition Against Procurement Options in Contracts.

Prohibition Against Procurement Options in Contracts. No contract entered into between a handler and a producer in accordance with the provisions of section 61411 or 62191 of the Code shall provide for an option of the handler to purchase any milk of the producer in excess of the amount which the handler has obligated itself to purchase under the contract, nor shall said contract contain any right of first refusal by the handler to purchase such excess milk no matter whether the right of first refusal is on like terms and conditions as competing purchasers or not. No handler shall require as a condition, whether oral or written, of execution or renewal of a contract, that the producer grant to the handler an option to purchase or any right of first refusal with regard to milk of the producer in excess of the amount the handler has obligated itself to purchase under the contract.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61411 and 62191, Food and Agricultural Code.

HISTORY

1. New Article 5 (Section 2050) filed 3–25–66; effective thirtieth day thereafter (Register 65, No. 8).
2. Amendment filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
3. Amendment to section and Reference NOTE filed 11–26–90; operative 12–26–90 (Register 91, No. 2).
4. Amendment filed 11–26–90; operative 12–26–90 (Register 91, No. 2).

§ 2051. Charges to a Producer for Transportation of Manufacturing Milk or Market Milk Hauled by the Handler.

Charges to a Producer for Transportation of Manufacturing Milk or Market Milk Hauled by the Handler. In compliance with section 61411(d)(2) or 62191(b)(5) of the Code, any establishment of charges or any amendment thereto for transportation of manufacturing milk or market milk hauled by a handler shall be filed by the handler with the director within five (5) days of the effective date of any such charges or amendment.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61411(d)(2) and 62191(b)(5), Food and Agricultural Code.

HISTORY

1. New section filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Amendment filed 11–26–90; operative 12–26–90 (Register 91, No. 2).

Article 6. Exclusion from Subdistributor Prices of Certain Fluid Milk and Fluid Cream

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61581–61584, Food and Agricultural Code.

HISTORY

1. New Article 6 (Sections 2060, 2061 and 2062) filed 2–22–74; effective thirtieth day thereafter (Register 74, No. 8).
2. Repealer of Article 6 (Sections 2060–2062) filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).

Subchapter 3. Petitions and Hearings

Article 1. Procedures for Filing of Petitions and Conduct of Hearings

§ 2080. Purpose.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61808.5, 61903, 61991–62032, 62705 and 62717, Food and Agricultural Code.

HISTORY

1. New Group 3 (Sections 2080–2080.3) filed 3–3–78; effective thirtieth day thereafter (Register 78, No. 9).
2. Repealer filed 12–15–82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

§ 2080.1. Petition for Adoption, Amendment or Repeal of Regulations.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61808.5, 61903, 61991–62032, 62705 and 62717, Food and Agricultural Code.

HISTORY

1. NOTE filed 6–12–79 (Register 79, No. 24).
2. Editorial correction of subsection (b) filed 5–15–80 (Register 80, No. 20).
3. Repealer filed 12–15–82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

§ 2080.2. Petition for Adoption, Amendment or Termination of Stabilization and Marketing Plans or Milk Pooling Plan.

(a) Procedures for the adoption, amendment or termination of stabilization and marketing plans are stated in Sections 61991–62032 of the Food and Agricultural Code. Procedures for the adoption, amendment or termination of the milk pooling plan are stated in Sections 62705 and 62717 of the Food and Agricultural Code. In addition to the secretary's authority to adopt, amend or terminate stabilization and marketing plans or the milk pooling plan, any interested person may petition the secretary requesting the adoption, amendment or termination of a stabilization or marketing plan or the milk pooling plan. The petition shall be submitted using the format available from the Department. The format shall be laid out so that the petition shall clearly and concisely give:

(1) a brief written description of the requested changes including a copy of the suggested language to amend the plan;

(2) specifications as to why the petitioner recommends the proposed changes including relevant analysis, comments and data supporting the request; and

(3) The authority of the secretary to take the action requested.

(b) Upon receipt of such petition at the designated Departmental office, the secretary shall notify the petitioner in writing of its receipt. The secretary shall also notify all interested parties of record in writing of the receipt of the petition. Within 15 days of the petition's receipt at the designated office, the secretary shall either schedule the matter for public hearing or deny the petition in writing indicating why the secretary has reached such a decision on the merits of the petition.

(c) The secretary may grant or deny such a petition in whole or in part, and may grant such other relief or take such other action as the secretary may determine to be warranted and shall notify the petitioner in writing of such action.

(d) Any interested person may request reconsideration of any part or all of a decision of the secretary on any petition submitted. Any such request shall be submitted in accordance with subsection (a) of this Section and shall include the reason(s) why the secretary should reconsider the previous decision no later than 60 days after the date of the decision involved. The secretary's reconsideration of any matter relating to a petition shall be subject to the provisions of subsection (b) of this Section.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61903, 61991–61998, 62031, 62032, 62705 and 62717, Food and Agricultural Code.

HISTORY

1. NOTE filed 6–12–79 (Register 79, No. 24).
2. Amendment of NOTE filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
3. Amendment of NOTE filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).
4. Amendment of subsection (a), repealer and new subsections (a)(1) and (a)(2), amendment of subsection (a)(3), repealer and new subsection (b), and amendment of subsections (c) and (d) filed 7–2–96; operative 8–1–96 (Register 96, No. 27).

§ 2080.3. Mandatory Hearing to Amend or Terminate a Stabilization and Marketing Plan(s) or to Terminate the Milk Pooling Plan.

(a) Procedures for a mandated hearing to amend or terminate a stabilization and marketing plan are stated in Section 62032 of the Food and Agricultural Code. Procedures for a mandated hearing to terminate the milk pooling plan are stated in Section 62717 of the Food and Agricultural Code. In addition to the procedures laid out in Section 2080.2 to adopt, amend or terminate stabilization and marketing plans or the milk pooling plan, interested procedures may petition the secretary requesting a mandated hearing to amend or terminate a stabilization and marketing plan or to terminate the milk pooling plan. The petition shall be submitted using the format available from the Department, as specified herein. The format shall be laid out so the petition shall clearly and concisely give:

(1) a brief description of the requested changes including a copy of the suggested language to amend the plan;

(2) specifications as to why the petitioner recommends the proposed changes including relevant analysis, comments and data supporting the request; and

(3) the authority of the secretary to take the action requested.

(b) Upon receipt of such petition at the designated Departmental office, the secretary shall notify the petitioner in writing of its receipt. The secretary shall also notify all interested parties of record in writing of the receipt of the petition. Within 60 days of the receipt of the petition, the secretary shall notice the mandated hearing provided that:

(1) the petition meets all the requirements of subsection (a) of this Section;

and

(2) the petition clearly shows the number of market milk producers who have signed the petition and/or are being represented by a petitioning cooperative, including their names and producer numbers issued by the Milk Pooling Branch (or their address if they have no such number), as well as the volume of milk produced individually by such producers for the latest available month; the number of producers and volume of milk shall be tabulated by the marketing areas the producers' milk is shipped into;

and

(3) both the number of producers and volume of milk equals or exceeds 55 percent (25 percent for a pooling hearing) of the number of producers shipping into and volume of milk being shipped into each of the marketing areas affected by the petition;

and

(4) in addition, for any nonprofit agricultural cooperative marketing association petitioning, the petition shall be signed by the board of directors or, with proof of authority, by a person so delegated by that board and the petition shall attach proof that the board has been granted specific or general authority by its members to petition the secretary.

(c) If the petition does not meet all the requirements of subsection (b) of this Section, then it shall be subject to the provisions of Section 2080.2, except that the secretary shall have 60 days rather than 15 days from the petition's receipt at the designated office to either schedule the matter for public hearing or deny that petition in writing indicating why the secretary has reached such a decision on the merits of the petition.

NOTE: Authority cited: Sections 407, 61891, 62032 and 62717, Food and Agricultural Code. Reference: Sections 61903, 61991–61998, 62031 and 62705, Food and Agricultural Code.

HISTORY

1. Amendment of subsection (f) filed 6–12–79; effective thirtieth day thereafter (Register 79, No. 24).
2. Repealer of reproduction of Food and Agriculture Code section 61903 filed 12–15–82 by OAL pursuant to Government Code section 11349.7(j) (Register 82, No. 51).
3. Amendment of NOTE filed 9–1–83; effective thirtieth day thereafter (Register 83, No. 36).
4. Amendment of subsection (i) filed 9–12–84; designated effective 11–1–84 (Register 84, No. 37).
5. Change without regulatory effect amending subsections (g) and (i) filed 8–16–90 pursuant to section 100, title 1, California Code of Regulations (Register 90, No. 44).
6. Repealer and new section filed 7–2–96; operative 8–1–96 (Register 96, No. 27).

§ 2080.4. Conduct of Hearings for Adoption, Amendment or Termination of Stabilization and Marketing Plans or Milk Pooling Plan.

(a) Hearing Officer and Panel. The secretary or secretary's designee may conduct the hearing, or may select a panel to receive evidence and question witnesses. A hearing officer will preside at the hearing. No member of the panel will be a witness.

(b) Department Exhibits. Department exhibits and Departmental proposals, if any, will be presented by a person who is not a member of the panel. Exhibits which the Department anticipates introducing at the hearing will be available for public inspection at the Department's Sacramento office not less than seven calendar days prior to the hearing. All exhibits will also be available for review during the hearing.

(c) Hearing Roster. Any person desiring to testify shall sign, at the hearing, a roster prepared for such purpose. At the hearing, the hearing officer will announce the manner in which the roster will be used to determine the order of witnesses.

(d) Testimony by Petitioners. If the hearing results from a petition, the petitioners will normally testify immediately after Department officials have introduced explanatory and statistical material, if any. Petitioners will then explain the proposal and submit supporting documents. In such cases, the petitioners, as a group, normally will be allowed up to one hour for testimony. If the hearing results from more than one petition, the multiple groups of petitioners normally will collectively be allowed up to 90 minutes for testimony. The group can (1) divide up the 90 minutes as they wish, (2) have the 90 minutes allocated to each group on a prorata basis, or (3) each have 20 minutes for testimony. In any case, if there does not

appear to be large number of witnesses, the hearing officer may grant each group of petitioners up to an additional 20 minutes of time.

(e) Testimony by Persons Submitting Alternative Proposals. Any person who has submitted an alternative proposal in response to a petition for a public hearing shall be allowed up to 30 minutes for testimony. However, if there does not appear to be a large number of witnesses, the hearing officer may grant up to an additional 20 minutes of time for such testimony.

(f) Other Testimony. Oral testimony shall not exceed the time limit specified by the hearing officer. However, a witness may supplement oral testimony by submitting a written statement at the time the testimony is given. Normally, each witness, or group of witnesses appearing together, will be allowed 20 minutes for direct testimony. However, if there does not appear to be a large number of witnesses, the hearing officer may grant each witness up to an additional 20 minutes of time. After all persons wishing to testify have had an opportunity to do so, not more than an additional 20 minutes of time will be provided to each witness or petitioner who desires to present further testimony.

(g) Questioning of Witnesses. At the conclusion of their testimony, witnesses will be subject to questioning by members of the hearing panel. With respect to Department witnesses, the hearing officer shall permit additional questioning by members of the audience. Any member of the audience may submit questions to the hearing officer for possible use by the hearing panel. Questions of witnesses shall be related to their testimony and pertinent to the call of the hearing.

(h) Written Statements. Any interested person may file a written statement concerning the matter at the hearing. Written statements may be of any length, but limited to relevant matters. They must be signed. Preferably, written statements should be typewritten or printed. Written statements may be delivered personally or by mail any time after the notice of hearing, and shall be received by the Department prior to the close of the hearing. Such statements should be addressed to the hearing officer at the designated Departmental office. Written statements will be available for review during the hearing.

(i) Posthearing Briefs. With respect to posthearing briefs, the provision of Section 61903 of the Code shall be applicable.

(j) Hearing Transcripts. The hearing shall be recorded by a reporter or recorder. Copies of the transcript may be obtained directly from the hearing reporter, or from the Department at the current rate for copies of public records. The Department will maintain and make available for public inspection a hearing transcript at its Sacramento office and, upon reasonable request, at the regional office of the Department nearest the location at which the public hearing was held.

NOTE: Authority cited: Sections 407 and 61891, Food and Agricultural Code. Reference: Sections 61903, 61991–61998, 62031, 62032, 62705 and 62717, Food and Agricultural Code.

HISTORY

1. New section filed 7–2–96; operative 8–1–96 (Register 96, No. 27).

Subchapter 4. Milk Producers Security Trust Fund

Article 1. Eligibility for Coverage

§ 2100. Definition of Beneficial Ownership Interest.

(a) For purposes of Milk Producer Security Trust Fund (hereinafter "Fund") coverage criteria for milk shipped by a producer to a handler, as set forth in Food and Agricultural Code Section 62580, the term "beneficial ownership interest" shall be defined as set forth in (b) of this Section.

(b) Except as otherwise provided by law, any person or any other legally constituted business entity, including but not limited to, a corporation, limited partnership, limited liability company, joint venture, association, or any other form of cooperative ownership, shall be deemed to have a beneficial ownership interest through owning an interest in a handler, as defined in Food and Agricultural Code Section 62521(d), in any form, such that they have any interest in the profits, losses, or equity of that handler, with the authority to influence or create policy which affects the handler's policies and business decisions.

(c) Authority to influence or create policy includes service in any discretionary capacity associated with a handler's policies and business decisions, and shall not be limited to service in an official capacity, such as a member of a Board of Directors, or employment as an officer or any administrative position.

(d) An individual possesses a beneficial ownership interest only if he/she owns a 10 percent or greater interest in the equity and/or profits and/or losses of a handler, with the exception that an individual who owns a 10 percent interest or greater interest as community property with his/her spouse shall be deemed to possess a beneficial ownership interest.

(e) A producer who has extended credit to a handler does not possess a beneficial ownership interest unless the terms of the agreement under which such credit was extended permit the producer to acquire a 10 percent or greater ownership interest in the handler in any form.

(f) For the purpose of determining beneficial ownership interests, cooperatives shall be treated as producers for all transactions involving the handling of their members' milk in bulk form, and shall be treated as handlers for all transactions involving non–member bulk milk.

(1) A cooperative will be deemed to have a beneficial ownership interest in a handler if any member of that cooperative owns a 10 percent or greater interest in the handler's gross revenues and /or profits and/or losses and/or equity capital or stock.

(2) A cooperative shall also be treated as having a beneficial ownership interest in any handler in which the cooperative has a 10 percent or greater interest in such handler's profits and/or losses, equity capital or stock.

(g) Producers and cooperative members specifically possess beneficial ownership interests, beyond the general provisions of (b) and (c) in this Section, in the following circumstances:

(1) A producer who is a member of a cooperative has a beneficial ownership interest in that cooperative.

(2) All members of a cooperative, including producers, additionally have beneficial ownership interest in any other cooperatives in which their cooperative has such an interest.

(3) All members of a cooperative, including producers, have a beneficial ownership interest in any handler in which their cooperative has a beneficial ownership interest.

(h) For the purpose of determining beneficial ownership interests, cooperatives shall be treated as producers for all transactions involving the handling of their members' milk in bulk form, and shall be treated as handlers for all transactions involving non–member bulk milk.

(1) In addition to the general provisions of (b) and (c) in this Section, a cooperative will be deemed to have a beneficial ownership interest in a handler if any member of that cooperative owns a 10 percent or greater interest in the handler's gross revenues and/or profits and/or losses and/or equity capital or stock.

(2) In addition to the general provisions of (b) and (c) in this Section, a cooperative shall also be treated as having a beneficial ownership interest in any handler in which the cooperative has a 10 percent or greater interest in such handler's profits and/or losses and/or equity capital or stock.

(i) For purposes of determining whether a corporation possesses a beneficial ownership interest, there are "S" corporations as defined and regulated by the Internal Revenue Service, and "C" corporations, which are all corporations other than "S" corporations.

(1) In determining whether an "S" corporation has a beneficial ownership interest in a handler, all beneficial ownership interests in a handler held by any person/entity who owns or controls any of the "S" corporation's stock shall be deemed to be owned by the "S" corporation.

(2) In determining whether a "C" corporation has a beneficial ownership interest in a handler, all beneficial ownership interests in a handler

held by any person/entity who owns five percent or more of the "C" corporation's stock, regardless of class, shall be deemed to be owned by the "C" corporation.

(3) In addition to the general provisions of (b) and (c) in this Section, any beneficial ownership interest of a "C" corporation shall be attributed to any stockholder who owns a 5 percent or greater interest in any class of stock of the corporation.

(j) A "Controlled Group of Corporations" (hereinafter "CGC") is defined as any group of corporations, partnerships, joint ventures or any other business entities, where a common parent entity owns or controls the largest number of outstanding shares, or any other ownership interest, in each member of the group.

(1) In addition to the general provisions of (b) and (c) of this Section, if a CGC cumulatively owns, as the parent entity of any group of corporations, partnerships, joint ventures or other business entities, as defined in (j) of this Section, a 10 percent or greater interest in any handler derived from these entities, the CGC shall be deemed to have a beneficial ownership interest in that handler.

(2) In addition to the general provisions of (b) and (c) of this Section, if a producer or cooperative owns a 10 percent or greater interest in a handler, and that handler is also a member of a CGC, the producer or cooperative shall be deemed to have a beneficial ownership interest in all corporations, partnerships, joint ventures or other business entities of the CGC.

(3) In addition to the general provisions of (b) and (c) of this Section, any beneficial ownership interest of an "S" corporation shall be attributed to each stockholder of the corporation.

(4) Any beneficial ownership interest held by any common owner or subsidiary company of a CGC shall be considered as being held by each member of the group.

(k) A partnership, limited partnership, joint venture, estate or trust will be deemed to own any beneficial ownership interest attributed to any of its partners or beneficiaries.

(1) A beneficial ownership interest owned by a partnership shall be attributed to each partner of the partnership.

(2) Joint ventures and/or similar arrangements involving the participation of corporate participants shall be treated as partnerships.

(3) All participants in joint ventures and/or similar arrangements shall be treated as partners.

(4) In situations involving trusts and estates, where the beneficiaries have no rights to direct or influence the entity's decisions, these beneficiaries shall be treated like "C" corporation shareholders.

(*l*) In addition to the general provisions of (b) and (c) of this Section, any beneficial ownership interest owned by a Limited Liability Company (hereinafter "LLC") shall be attributed to each member of the company. Conversely, any beneficial ownership interest owned by a member of a LLC shall be attributed to the LLC.

NOTE: Authority cited: Section 407, Food and Agricultural Code. Reference: Sections 62580 and 62587, Food and Agricultural Code.

HISTORY

1. New subchapter 4 (articles 1–2), article 1 (sections 2100–2101) and section filed 10–6–2004; operative 11–5–2004 (Register 2004, No. 41).

§ 2101. Definition of Milk Eligible for Trust Fund Coverage.

"Milk" means bulk milk of any composition of milk solids–not–fat, fat, and fluid carrier that has not been altered in any way that further restricts its usage from the milk in its original or natural form. Milk that has been altered by adding processed products, whether dairy or non–dairy, other than for fortifying bulk milk, bulk low fat milk, bulk reduced–fat milk, or bulk skim milk, changes the bulk product such that it can no longer be considered as farm or producer milk, and is therefore ineligible for Trust Fund coverage.

NOTE: Authority cited: Section 407, Food and Agricultural Code. Reference: Section 62521(e), Food and Agricultural Code.

HISTORY

1. New section filed 10–6–2004; operative 11–5–2004 (Register 2004, No. 41).

Article 2. Payment of Claims

§ 2102. Calculation of Trust Fund Obligation to a Producer.

The amount paid to each eligible producer shall be determined as follows:

(a) The total amount owed by the handler to all producers shall be called the "gross default". From the gross default, any surety bond recovery shall be deducted. The resulting amount is called the "adjusted default".

(b) From the adjusted default, any amounts ineligible for coverage per FAC Section 62580 shall be deducted. The resulting amount is called the "net default".

(c) The $200,000 deductible required by FAC Section 62624 shall be deducted from the net default. The resulting amount is the total maximum exposure of the Fund.

(d) An eligible producer who claims reimbursement from the Fund will be paid his/her pro rata shares from the total maximum exposure amount.

NOTE: Authority cited: Section 407, Food and Agricultural Code. Reference: Sections 62580, 62623 and 62624, Food and Agricultural Code.

HISTORY

1. New article 2 (section 2102) and section filed 10–6–2004; operative 11–5–2004 (Register 2004, No. 41).