

PART 40

NEW YORK DAIRY PROMOTION ORDER

(Statutory authority: Agriculture and Markets Law, §§ 16, 18, 258-t, 258-aa)

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DEFINITIONS

§ 40.1 Act.

Act means chapter 1008 of the Laws of the State of New York for 1969, as amended, also known as the Dairy Promotion Act, article 21-A of the Agriculture and Markets Law.

§ 40.2 Commissioner.

Commissioner means the Commissioner of Agriculture and Markets of the State of New York.

§ 40.3 Division.

Division means the Division of Dairy Industry Services of the Department of Agriculture and Markets of the State of New York.

§ 40.4 Dairy products.

Dairy products mean milk and products derived therefrom and products of which milk or a portion thereof is a significant part.

§ 40.5 Person.

Person means any individual, partnership, corporation, cooperative association, unincorporated cooperative association or other business unit.

§ 40.6 Producer.

Producer means any person in the State of New York who is engaged in the production of milk in a quantity which exceeds family and on-farm use or who causes milk to be produced for any market in this or any other state.

§ 40.7 Dairy promotion order.

Dairy promotion order means the provisions of this Part issued by the commissioner pursuant to the act.

§ 40.8 Advisory board.

Advisory board means those producers who are appointed by the commissioner pursuant to section 40.15 of this Part to advise and assist him in administering this Part.

§ 40.9 Milk dealer.

Milk dealer means any person who purchases or handles or receives or sells milk.

§ 40.10 Cooperative.

Cooperative means an association or federation or cooperative of milk producers organized under the laws of New York State, or any other state, having agreements with their producer members to market, bargain for or sell the milk of such producers, and is actually performing one or more of these services in the marketing of milk produced by their members, through the cooperative or through a federation of milk cooperatives in which the cooperative has membership.

AREA AND PERSONS AFFECTED

§ 40.11 Area.

The area to which this Part shall apply is the State of New York.

§ 40.12 Persons.

Persons subject to or affected by this Part shall be:

- (a) all producers as defined in this Part; and
- (b) all milk dealers as defined in this Part who receive milk from producers.

ADVISORY BOARD

§ 40.13 Advisory board.

An advisory board consisting of 10 members shall be appointed by the commissioner to advise and assist in the administration of this Part. Each member of the advisory board shall be an individual producer, including any individual who is active in a partnership, corporation, association or other business unit which is a producer as defined in this Part.

§ 40.14 Nominations.

The commissioner shall accept nominations of individual producers for the advisory board which have been submitted in accordance with the following procedure:

- (a) The commissioner shall notify in writing each farm organization whose membership is known to include producers as defined in this Part and shall provide such other reasonable notification as he deems appropriate with respect to the date or dates on which he will accept nominations for the advisory board and the final date for submitting any such nomination. The notification by the commissioner shall include a statement setting forth the procedure for submitting a nomination.
- (b) Any individual producer marketing milk in the State of New York may submit to the commissioner in writing within the time limitation fixed by him one or more nominations of individual producers for membership on the advisory board.

(c) Any organization listed in section 40.15 of this Part (or any successor thereto) may submit to the commissioner a resolution of its board of directors or other governing body endorsing the nomination of not less than two of its members received pursuant to subdivision (b) of this section and thereby designate to the commissioner any such producer thus endorsed as a recommended representative of its organization on the advisory board.

§ 40.15 Appointments.

The commissioner shall appoint the members of the advisory board and determine their acceptance in accordance with the following procedure:

(a) For each of the organizations or joint organizations listed in this subdivision (or any successor thereto), one of the nominees endorsed by such organization or joint organization pursuant to section 40.14(c) of this Part shall be appointed to the advisory board. In the event less than two nominees are endorsed by an organization, the commissioner at his discretion shall appoint to the advisory board an individual producer who has been nominated pursuant to section 40.14(b) of this Part with or without endorsement by such organization.

- (1) Dairylea Cooperative, Inc.
- (2) Eastern Milk Producers Cooperative Association, Inc.
- (3) Northeast Dairy Cooperative Federation, Inc.
- (4) Allied Federated Cooperatives, Inc.
- (5) Niagara Frontier Cooperative Milk Producers Bargaining Agency, Inc.
- (6) Rochester Cooperative Milk Producers Bargaining Agency, Inc.
- (7) New York Farm Bureau, Inc.
- (8) New York State Grange, Inc.
- (9) Agri-Mark, Inc.

(b) One other individual producer shall be appointed to the advisory board from among nominations which have been submitted in accordance with section 40.14(b) of this Part. In the event the commissioner does not receive a nomination other than those endorsed by organizations pursuant to section 40.14(c) of this Part, he shall appoint from among such nominees at his discretion an individual producer who has not otherwise been appointed to the advisory board pursuant to subdivision (a) of this section.

(c) Each individual producer appointed as a member of the advisory board shall file a written acceptance with the commissioner within 15 days after being notified of his appointment by the commissioner.

(d) After the members of the advisory board have been appointed and each member has indicated his acceptance, the commissioner shall make known to the producers generally the names of the members of the advisory board.

§ 40.16 Term of office.

The term of office for each member of the advisory board shall be three years and successor members shall be appointed by the commissioner in accordance with the provisions of sections 40.14 and 40.15 of this Part to coincide with the three-year term.

§ 40.17 Disqualification.

A member of the advisory board shall be disqualified for any of the following reasons:

- (a) ceases to be a producer as defined in this Part; and
- (b) By executive disqualification by the commissioner on recommendation of a majority vote of the advisory board when the member's conduct is deemed prejudicial to the public interest and the dairy promotion order: provided, that a disqualified member shall have the right to appeal and to have a hearing before the full advisory board and the commissioner by filing a written request with the commissioner of his intent to appeal within 10 days after receiving notice of disqualification.

§ 40.18 Vacancies.

In the event of a vacancy on the advisory board created by an appointee's failure to qualify for or accept membership, or which is caused by the death, resignation or disqualification of a member, the commissioner shall appoint an individual producer to serve for the duration of the unexpired term. In making such appointment, the commissioner shall maintain representation on the advisory board in accordance with that prescribed in section 40.15 of this Part.

§40.19 Duties and responsibilities of the advisory board.

It shall be the duty and responsibility of the advisory board to advise and assist the commissioner in all matters pertaining to the administration of this Part, subject only to such limitation as may be prescribed in section 258-t of the Agriculture and Markets Law. The advisory board shall:

- (a) recommend to the commissioner administrative rules and regulations relating to this Part;
- (b) recommend to the commissioner such amendments to this Part as seem advisable;
- (c) prepare and submit to the commissioner at least 30 days in advance of each fiscal year an estimated budget required for the proper operation of this Part during such year;
- (d) recommend to the commissioner methods of assessing producers and methods of collecting the necessary funds;
- (e) assist the commissioner in the collection and assembly of information and data necessary for the proper administration of this Part; and
- (f) perform such other duties in connection with this Part as the commissioner shall designate.

§ 40.20 Quorum and vote majority.

A simple majority of the advisory board members shall be necessary to constitute a quorum. A simple voting majority present shall be required to pass any motion or approve any advisory board action. At assembled meetings all votes shall be cast in person.

§ 40.21 Compensation and expenses.

The members of the advisory board shall not receive salaries, but each member shall be reimbursed for his actual and reasonable expenses while attending a meeting or committee meeting of the advisory board or in performing a duty necessary to the functions and activities of the advisory board as determined by the commissioner. The monies required for payment to members of the advisory board as authorized pursuant to this section shall be paid by the commissioner, as trustee, from the funds obtained through assessments against producers pursuant to the terms of this Part.

BUDGET AND ASSESSMENTS

§ 40.22 Preparation of budget.

At least 15 days in advance of each fiscal year, the commissioner shall announce a budget necessary for its administration and enforcement and for carrying on duly authorized programs and activities including advertising, promotion, education and publicity, marketing and product research, and informational services for encouraging the consumption of dairy products and protecting the health and welfare of consumers, as provided by the act; provided, that the commissioner may modify or revise the budget for any portion of the fiscal year if the maximum rate of assessment authorized under section 40.23 of this Part is amended, in which case he shall announce such revision in budget at least 15 days in advance of the date on which it is to become effective. The total amount of budgeted administrative costs for each fiscal year shall not exceed five percent of the total budget.

§ 40.23 Assessment.

The commissioner shall announce a rate of assessment for each fiscal year to provide adequate funds to defray expenditures in the budget, and there shall be credited against any such assessment the amount per hundredweight otherwise paid by any producer subject to this Part, by voluntary contribution or otherwise, pursuant to the Niagara Frontier and Rochester milk marketing orders and any other State or Federal milk marketing order for any similar research, promotion or advertising program. The rate of assessment shall apply to all milk delivered by producers to milk dealers for sale (including the milk of a milk dealer's own production handled for sale) and shall not exceed a rate per hundredweight which corresponds with the simple average uniform price for the New York - New Jersey Milk Marketing Order (I NYCRR, Part 20) at the 201-210 milk zone for 3.5 percent butterfat milk for the preceding calendar year, rounded to the nearest whole cent, as set forth in the following schedule:

Simple Average Uniform Maximum Rate

Price for Preceding of Calendar Year (Range)	Assessment Dollars Per Hundredweight
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10.01-10.75

.065

10.76-11.50	.070
11.51-12.25	.075
12.26-13.00	.080
13.01-13.75	.085
13.76-14.50	.090
14.51-15.25	.095
15.26-16.00	.100

In the event the average uniform price for the New York - New Jersey order for the preceding calendar year does not fall within the ranges listed in the foregoing schedule, such schedule shall be extended by the same incremental amounts.

§ 40.24 Collection of assessment.

The rate of assessment fixed by the commissioner pursuant to section 40.23 of this Part upon milk delivered by producers shall be collected as follows:

- (a) Each milk dealer shall deduct from the price otherwise to be paid to producers or collecting cooperatives (other than producers who are credited with the full assessment pursuant to section 40.23 of this Part) the rate of assessment announced by the commissioner for the fiscal year on all milk received from producers.
- (b) Each milk dealer shall on or before the 25th day of the month pay to the commissioner as trustee, the amount deducted from producers or collecting cooperatives pursuant to subdivision (a) of this section on milk received during the preceding month. Each milk dealer with respect to his own production shall also pay to the commissioner as trustee, on or before the 25th day of the month for milk handled for sale during the preceding month, an amount computed at the rate of assessment announced by the commissioner.
- (c) The amounts paid to the commissioner as trustee pursuant to subdivision (b) of this section shall be deposited with a bank or other depository in the State designated by him and the State Comptroller and subject to withdrawal or disbursement by the commissioner in accordance with the act and the terms and provisions of this Part. Such fund shall be known as the dairy promotion fund.

§ 40.25 Prior assessments.

Any assessments paid to the commissioner by cooperative associations prior to the effective date of this Part to defray the expense of promulgating, administering and enforcing the order until such time as the assessment as provided pursuant to section 40.23 of this Part is adequate for that purpose shall be reimbursed to such cooperative associations from the funds received and deposited by the commissioner in the dairy promotion fund pursuant to section 40.24 of this Part.

REPORTS AND RECORDS OF MILK DEALERS

§ 40.26 Monthly report to the division.

Not later than the 28th day of each month, except as the commissioner may otherwise provide, each milk dealer, including a milk dealer handling only milk of his own production, shall file with the division at Albany, on forms provided for that purpose, an accurate report covering the preceding month, for each plant or other facility operated by him, showing the quantities of milk received from producers and the monies deducted from the prices otherwise paid producers or collecting cooperatives as assessments required under this Part. Such reports shall be sworn to by the milk dealer or by a responsible officer or employee authorized to act in his behalf.

§ 40.27 Records to be maintained.

Each milk dealer shall maintain accurate records, books of accounts and other data readily available at his or its office or other principal places of business which shall verify the quantity of milk received from producers. Such records shall establish for each plant or other receiving point each month:

- (a) the full name and post office address of each producer from whom the milk dealer has received milk;
- (b) the quantity of milk received from each such producer each day; and
- (c) such other records as the commissioner deems necessary for the administration of this Part.

§ 40.28 Accurate record of quantities.

When the quantity of milk delivered to a milk dealer by or for the account of a producer is determined by weighing, or otherwise, an accurate record of each such determination showing the quantity of milk received for the account of each such producer shall be made at once. Each such original record containing information with respect to the quantity of milk received for the account of one or more producers, whether the records be for one day or more than one day, shall be dated and signed by the person making the determination, and shall be preserved by the milk dealer purchasing or receiving such milk regardless of the fact that such milk dealer may copy such records for the purpose of making a more permanent record for the milk dealer's own use.

§ 40.29 Availability of records and facilities.

Each milk dealer shall make available at his office at all reasonable hours to any employee designated by the commissioner all books, papers, records or documents relating to the purchase of milk from producers.

§ 40.30 Retention of records.

All records required pursuant to this Part to be made available to the commissioner shall be retained by the milk dealer for a period of three years to begin at the end of the month to which such records pertain. If, within the three-year period the commissioner notifies the milk dealer in writing that further retention of such records is necessary, the milk dealer shall retain the specified records until further written notification is received from the commissioner.

PROMOTION PROGRAMS AND DISBURSEMENT OF FUNDS

§ 40.31 Advertising, promotion, education and publicity of dairy products.

The commissioner, with the advice and assistance of the advisory board, is hereby authorized to contract with any person or persons to carry on or cause to be carried on such advertising, promotion, education and publicity programs as he may believe will create new markets for the milk of producers as defined in this Part or maintain present markets therefor. For such purposes, he may expend such monies or any part thereof as may be available pursuant to this Part. No advertising, promotion or publicity programs shall be conducted pursuant to this Part which make reference to any particular brand or trade name.

§ 40.32 Marketing and product research.

The commissioner, with the advice and assistance of the advisory board, is hereby authorized to contract with any person or persons to carry on or cause to be carried on milk marketing and/or dairy product research and to expend such monies as may be available pursuant to this Part for such purpose.

§ 40.33 Information services.

The commissioner, with the advice and assistance of the advisory board, is hereby authorized to contract with any person or persons to provide for informational services designed to keep producers and others informed on milk marketing and dairy product research, promotion, advertising, education and publicity programs and any other dairy industry information deemed important, and to expend such monies as may be available and required pursuant to this Part to obtain and disseminate such information.

§ 40.34 Disbursement of funds.

The monies deposited in the dairy promotion fund shall be disbursed by the commissioner with the advice and assistance of the advisory board for the necessary expenses incurred with respect to this Part. All such disbursements shall be made in the manner prescribed by the act and the provisions of this Part and shall be in accordance with any rules and regulations promulgated by the commissioner to effectuate the provisions and intent thereof. The expenses incurred with respect to this Part shall be audited by the State Comptroller at least annually and a copy of the audit report shall be made available to any producer for inspection.

§ 40.35 Report of the commissioner.

The commissioner, with the advice and assistance of the advisory board, shall prepare and publish a report each year for the benefit of producers which shall contain information on the promotion programs carried on during the preceding year, the expenditure of funds for each such program and such other information with respect to this Part as may be of benefit to producers.

MISCELLANEOUS AND GENERAL PROVISIONS

§ 40.36 Effective date.

The provisions of this Part or any amendments thereto shall become effective at such time as the commissioner may declare and shall continue in force until suspended or terminated by him in accordance with the act. This Part shall continue in effect on and after May 1, 1984 if not amended or otherwise voted upon within a period of three years therefrom.

§ 40.37 Amendment, suspension or termination.

The commissioner may amend, suspend or terminate any or all provisions of this Part in accordance with the provisions of the act and any rules and regulations promulgated by him to effectuate the provisions and intent thereof.

§ 40.38 Continuing power and duty.

If, upon amendment, suspension or termination of any or all provisions of this Part, there are any obligations arising hereunder the final accrual or ascertainment of which requires further acts by any milk dealer, or by the commissioner, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such amendment, suspension or termination.

§ 40.39 Continuing obligation of milk dealers.

Unless otherwise provided by the commissioner in any notice of amendment, suspension or termination of any or all of the provisions hereof, such amendment, termination or suspension shall not:

- (a) affect, waive or terminate any right, duty, obligation or liability which shall have arisen or may thereafter arise in connection with any provision of this Part;
- (b) release or waive any violation of this Part occurring prior to the effective date of such amendment, termination or suspension; or
- (c) affect or impair any right or remedies of the commissioner or of any other person with respect to any such violations.

§ 40.40 Liquidation.

Upon the termination of this Part, the commissioner shall dispose of all funds received hereunder in an equitable manner, together with claims to any such funds which are unpaid and owing at the time of termination and which are in accordance with the intent of the act and the provisions of this Part.

§ 40.41 Rate of assessment.

The rate of assessment to be paid pursuant to this Part is hereby established as follows: 7 1/2 cents per hundredweight for the period May 1, 1988, through April 30, 1989, on all milk received from producers, including each milk dealer's own production of milk handled for sale.