



NEW YORK STATE
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF FOOD SAFETY AND INSPECTION
10B AIRLINE DRIVE ALBANY, NY 12235

CIRCULAR 936

**Rules and Regulations Relating to
ADVERTISING AND MARKETING OF FOOD FOR SALE AT RETAIL,
SALE OF SMALL QUANTITIES OF PREPACKAGED FRESH FRUITS
AND VEGETABLES,
SALE OF SEAFOOD, FISH, MEAT AND POULTRY IN FROZEN
STATE**

**Pursuant to Article 17 of the Agriculture and Markets
Law and Parts 271-2-4 of Title 1 of the Official
Compilation of Codes, Rules and Regulations of the
State of New York**

Revised as of December 21, 2016

SUBPART 272-2

ADVERTISING AND MARKETING OF FOOD FOR SALE AT RETAIL

Section

- 272-2.1 Definitions
- 272-2.2 Availability of advertised items
- 272-2.3 Mispricing of advertised items
- 272-2.4 Disclaimers

Section 272-2.1 Definitions.

As used in relation to food and food products sold or offered for sale at retail and as used in this Part:

(a) *Sale at retail* means a transaction wherein a person sells or offers for sale food or food products to the consumer, whether at the place of business of such person or whether such sale is consummated by mail, by telephone or in writing at a place other than at the place of business. Places of business carrying on the aforesaid transaction include supermarkets, grocery stores, butcher shops, food freezer dealers, food plan companies and other retail foodstores.

(b) *Food* and *food product* mean all articles of food, drink confectionery or condiment, whether simple, mixed or compound, used or intended for use by men or animals, and shall also include all substances or ingredients to be added to food for any purpose.

(c) *Advertisement* or *advertising* means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of a food or food product.

(d) *Commissioner* means the Commissioner of Agriculture and Markets.

Section 272-2.2 Availability of advertised items.

No person shall offer for sale at retail any food or food product at a stated price by means of any advertisement disseminated in a area served by any of his stores or places of business which are covered by the advertisement which do not have such products in stock, and readily available for sale to customers during the effective period of the advertisement, unless there is a clear and conspicuous disclosure in all such advertisements as to all exceptions and/or limitations or restrictions with respect to stores or places of business, products or prices otherwise included within the advertisements.

(a) If an advertised item is not readily available, clear and adequate notice shall be provided that the item is in stock and may be obtained upon request.

(b) It shall constitute a defense to a charge under this section if the retailer maintains records sufficient to show that the advertised products were ordered in adequate time for delivery and delivered to the stores or places of business in quantities sufficient to meet reasonably anticipated demands.

(c) It shall also constitute a defense to a charge under this section if the retailer establishes that advertised products were actually ordered in good faith, in quantities sufficient to meet reasonably anticipated demands, but were not delivered due to circumstances beyond the retailer's control and not reasonably foreseeable by him. In determining whether the retailer acted in good faith and with reasonable foresight, the commissioner shall consider all circumstances surrounding the placement of the advertisement and the nondelivery of the product. The availability of "rain checks" shall be considered by the commissioner as a relevant factor, but the existence of a "rain check" policy, in and of itself, shall not constitute compliance with this section.

Section 272-2.3 Mispricing of advertised items.

(a) No person shall offer for sale at retail any food or food product at a stated price by means of any advertisement disseminated in an area served by any of his stores or places of business which are covered by the advertisement which do not have such products conspicuously and readily available for sale to customers at or below the advertised prices, unless there is a clear and conspicuous disclosure in all such advertisements as to all exceptions and/or limitations or restrictions with respect to stores or places of business, products or prices otherwise included within the advertisements.

(b) In determining whether this section will be applied, the commissioner shall consider all circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices but were not made available at those prices due to circumstances beyond the advertiser's control.

Section 272-2.4 Disclaimers.

(a) General disclaimers in advertising relating to product availability will not be considered to be in compliance with the disclosure provisions of sections 272-2.2 and/or 272-2.3 of this Subpart. Examples of such general disclaimers would be:

(1) "Not all items available at all stores."

(2) A statement that a particular item or group of items is "Available at most stores."

(b) Specific, clear and conspicuous disclaimers in advertising relating to product availability only in those stores possessing particular facilities will be considered to be in compliance with the disclosure provisions of section 272-2.2 of this Subpart. An example of such a disclaimer would be: "Available only at stores featuring delicatessen departments."

SUBPART 272-3
SALE OF SMALL QUANTITIE OF PREPACKAGED FRESH FRUITS AND
VEGETABLES

Section

272-3.1 Definitions

272-3.2 Availability of small quantities of fresh fruits and vegetables

272-3.3 Means of disclosure of availability

Section 272-3.1 Definitions.

As used in relation to fresh fruits and vegetables being offered for sale at retail and as used in this Part:

(a) *Sale at retail* means a transaction wherein a person sells or offers for sale fresh fruits or vegetables to consumers at the place of business of such person. Places of business carrying on the aforesaid transaction include supermarkets, grocery stores and other retail foodstores.

(b) *Small quantities of fresh fruits and vegetables* means amounts by count, weight or volume of whole fruits or vegetables smaller than the amounts of such fruits or vegetables being offered for sale at retail in prepackaged form.

Section 272-3.2 Availability of small quantities of fresh fruits and vegetables.

When varieties or grades of fresh fruits or vegetables are not available in unpackaged form and the same are being offered for sale at retail in packaged form, upon customer request a package of fresh fruit or vegetables of the same variety and grade being offered shall be opened to provide any small quantity of fresh fruits or vegetables which the customer desires.

Section 272-3.3 Means of disclosure of availability.

A prominent and conspicuous sign reading “Small Quantities of Prepackaged Fresh Fruits and Vegetables are Available upon Request” shall be located in the prepackaged fresh fruit and vegetable area and such sign shall be posted in clear view not more than 30 feet from any point within such area. The lettering on the aforesaid sign or signs shall not be less than one-inch type.

SUBPART 272-4
SALE OF SEAFOOD, FISH, MEAT AND POULTRY IN FROZEN STATE

Section

- 272-4.1 Definitions**
- 272-4.2 Sale in a package or container**
- 272-4.3 Sale from bulk**

Section 272-4.1 Definitions.

The definitions and interpretation contained in sections 96-g and 96-z-21 of the New York State Agriculture and Markets Law are applicable to such terms when used in this Subpart. The following definitions shall also apply:

(a) *Seafood* means any food fish or shellfish, as such terms are defined in this section, as well as all products derived therefrom which are used as human food, or are offered for sale at retail as human food.

(b) *Food Fish* means amounts any cold-blooded, strictly aquatic, craniate vertebrate, the flesh or any part of which is used as human food, or is offered for sale at retail as human food.

(c) *Shellfish* means any aquatic animal whose external covering consists of a shell, either testaceous or crustaceous, including but not limited to oysters, clams, mussels, mollusks, lobsters, crabs, shrimp, crawfish and snails.

(d) *Sale at retail* means a transaction wherein a person, firm, corporation, partnership, association or any other business association sells or offers for sale human food or food products to consumers. Places of business carrying on the aforesaid transaction include supermarkets, grocery stores, butcher shops, food freezer dealers, food plan companies, and other retail food dealers.

Section 272-4.2 Sale in a package or container.

No seafood, food fish or shellfish, meat, meat by-product or meat food product, poultry or poultry product which has been frozen subsequent to being offered for sale or distribution at retail shall be offered for sale at retail or displayed for sale at retail unless the package or container bearing said products is labeled clearly and conspicuously with the words, "This product was previously offered for sale in an unfrozen state."

Section 272-4.3 Sale from bulk.

No seafood, food fish or shellfish, meat, meat by-products or meat food product, poultry or poultry product which has been frozen subsequent to being offered for sale or distribution at retail shall be offered for sale at retail or displayed for sale at retail from bulk unless a sign is clearly displayed at the point where such products are offered for sale which prominently and conspicuously contains the words, "These products were previously offered for sale in an unfrozen state."