



Rules of
Department of Agriculture
Division 90—Weights and Measures
Chapter 38—Unfair Milk Sales Practices Act

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**Title 2—DEPARTMENT OF
AGRICULTURE**
Division 90—Weights and Measures
**Chapter 38—Unfair Milk Sales
Practices Act**

2 CSR 90-38.010 Definitions

PURPOSE: This regulation provides definitions of words or terms (except in those instances where the context clearly indicates otherwise) used in the regulations of this chapter as required by section 416.460, RSMo.

(1) The Act means the Unfair Milk Sales Practices Act, sections 416.410–416.560, RSMo (1986).

(2) The director is the director of the Department of Agriculture. Under Missouri state government reorganization, the Office of Commissioner of Agriculture has been replaced with the Office of the Director of the Department of Agriculture.

(3) Person means any individual, partnership, corporation, cooperative, public body, political subdivision or any legal entity of any kind.

(4) Processor means any person engaged in the business of processing or packing bulk milk or other materials into milk products, and includes persons who sell, at retail, milk processed by themselves.

(5) Distributor means any person other than a bulk milk handler engaged in the business of transferring title within the state to milk products for a consideration where the milk is to be sold for resale or further processing. The following criteria will be among those considered in determining if a distributor is operating as an independent business entity, and is required to obtain a distributor's license under this Act:

(A) Takes legal title to and possession of milk products and conveys title to customers or accounts;

(B) Exercises own judgment and discretion as to all aspects of business including products price and pricing policies; and

(C) Obtains customers and accounts, collects for merchandise sold and absorbs any loss for returned merchandise, faulty merchandise excluded. Persons who are commissioned salesmen, truck drivers or independent haulers for a processor and who are not free and independent business entities shall not be considered distributors under this Act and will not be licensed as such regardless of their designation by processor. Accordingly,

all persons who are commissioned salesmen, drivers or independent haulers for a processor will be considered agents of that processor and that person's conduct will be imputed to and be the responsibility of the processor.

(6) Nonprocessing retailer means any person engaged in the business of transferring title to consumers of milk products not processed by him/her directly. A retailer who sells both products processed by him/herself and products processed by others shall be deemed a processor with regard to those products processed by him/herself, and a nonprocessing retailer with regard to those products by others.

(7) Milk product purchaser means any person who purchases milk products, including processors, distributors, retailers, nonprofit organizations and consumers, except persons who purchase milk for charitable purposes or for unemployment relief agencies. Public school districts, agencies and institutions of Missouri and its political subdivisions are included within the definition of milk product purchaser. The word customer, as used in these rules, refers to any milk product purchaser.

(8) Cost to the bulk milk handler means the price paid dairy farmers for the milk, plus receiving plant charge or a reasonable charge to cover all cost of operating his/her own receiving plant, plus transportation costs to the point of delivery to the purchaser.

(9) Dock cost for fluid milk means the cost of the raw milk plus the processor's cost for processing fluid milk placed on the dock at his/her processing plant, ready for sale or delivery. In the absence of specific evidence, dock cost shall be presumed to be the cost of the raw milk plus four cents (4¢) per quart, eight cents (8¢) per half-gallon and sixteen cents (16¢) per gallon

(10) Transportation cost shall include the cost of loading a truck or other delivery vehicle and driving the truck or other vehicle from the distribution point to the several points of purchase, appropriately prorated among the various purchasers of the milk products on the truck.

(11) Delivery cost includes all costs of unloading the truck and stacking the milk products in the dairy case or storage case of the purchaser.

(12) Milk products include market milk, pasteurized milk, including low-fat milk, vitamin

D milk, homogenized milk, flavored milk or flavored milk drinks, sweet cream, whipped cream, homogenized cream, including half-and-half, skim milk, buttermilk and cultured buttermilk.

(13) Discount means an amount, whether computed as a percentage of the value of milk products purchased or otherwise, which is deducted from an invoice price permitting the purchaser to discharge his/her liability to the seller for a sum smaller than the invoice price of the milk products.

(14) Rebate means an amount whether computed as a percentage of the value of milk products purchased or otherwise, which is paid or credited by a seller to a purchaser of milk products after the purchaser has bought and paid for those milk products.

(15) Central billing means the billing to one (1) location or the payment from one (1) location for the sale of milk products delivered to more than one (1) location. Central billing includes, but is not limited to, the billing to the central office of a business which owns or operates more than one (1) store or restaurant, the billing to the central office of an association made up of separately-owned grocery stores and grocery chains and the billing to a jobber who purchases milk to be delivered to more than one (1) grocery store or restaurant.

(16) Equipment includes dairy display cases, dairy storage coolers, ice cream display cases, ice cream storage cases, display cases and storage cases for meats, frozen foods, produce, and other food and food products, dairy serving equipment, milk vending equipment and other types of equipment used for the storage, display for sale or serving of any dairy product, including ice cream, or any food product; refrigeration equipment, whether used in conjunction with the previously listed equipment or otherwise; and any other item used in the furnishing or operation of the business of any milk product purchaser.

(17) Invoice price is the price of a milk product quoted or billed to a customer prior to or contemporaneously with sale or delivery of the milk product, that is, the monetary amount charged for a particular milk product in a specific sized and type of container, stated as an amount of money per unit.

(18) Business day means any day except Saturday, Sunday or legal holiday.

(19) Cost to the retailer means the actual price paid by the retailer plus the retailer's cost of doing business. The retailer's cost of doing business shall include all direct and indirect cost allocable to the storage display and sale of milk products. In the absence of specific evidence the cost of doing business shall be presumed to be eight percent (8%) of the invoice price and this cost shall be calculated to the nearest half cent (1/2¢) per sales unit.

AUTHORITY: section 416.460, RSMo Supp. 1993. This rule was previously filed as 2 CSR 40-3.010. Original rule filed Nov. 26, 1975, effective Dec. 10, 1975. Amended: Filed Sept. 14, 1977 effective Jan. 1, 1978. Amended: Filed July 10, 1984, effective Oct. 11, 1984.*

**Original authority 1959, amended 1993.*

2 CSR 90-38.020 Unfair Milk Sales Practices

PURPOSE: This regulation places prohibitions or requirements on practices done with the intent of or with the effect of unfairly diverting trade from a competitor or otherwise injuring a competitor or destroying competition or of creating a monopoly.

(1) No processor, distributor or nonprocessing retailer shall sell any milk product for less than cost, except in conformance with section (6) of this rule.

(2) No processor or distributor shall sell milk products from different price schedules, including any applicable volume price differentials, in different communities in this state from the same plant, except that price differentials which reflect actual transportation cost differences or which are allowed by section (12) of this rule may be made.

(3) No person may advertise, offer to sell or sell any milk product with any other commodity or service (except services permitted by section (9) of this rule) at a combined price which is less than the aggregate of the prices for which the milk product and the other commodity or service are offered for sale. This prohibition includes the giving of bonus trading stamps, cash discounts or other things of value specifically tied to the purchase of milk, but does not prohibit a retailer from giving trading stamps, cash discounts and other similar things of value for the purchase of milk products on the same basis as those things of value are given for the pur-

chase of all other products sold by such retailer.

(4) No processor or distributor shall differentiate between the price charged for private label products and the price charged for the regular brand products if both contain like grade and quality of the same milk products and are contained in the same size and type of container unless the processor or distributor can establish a cost justification for any price differential. The sale of any private label product for a price less than the regular brand product the difference not being cost justified, will be considered an illegal discount except as that price may be authorized by section (12) of this rule.

(5) Delivery tickets or invoices from processors or distributors to retail stores must show the actual unit price of milk products delivered to the retail store. In the absence of delivery tickets or invoices a current report showing the actual unit price of milk products delivered must be furnished to each retail store.

(6) No processor or distributor shall give, allow or grant to any customer any rebate or discount from the invoice price of milk products except as follows:

(A) Cost-justified volume price differentials based on differences in delivery costs or other provable cost differences may be granted by appropriate discount from list price or by lower net invoice prices, provided that they are made available to any purchaser who buys the required volume; and

(B) A processor or distributor, at its option, may allow a discount of no more than two percent (2%) for prompt payment. This discount may be allowed either where a customer requests central billing or when s/he pays on an individual and independent basis. In no event, however, shall a customer who is centrally billed be allowed any greater discount for prompt payment than customers who pay equally promptly for products received on an individual and independent basis. In the event that a processor or distributor chooses to offer this discount, it may do so only after defining the terms of eligibility for this discount through the publication of objective written criteria and the distribution of criteria to all customers. The criteria shall clearly state the amount of discount any customer is entitled to for payment on each of the following items: payment in advance, cash on delivery, payment within ten (10) days of delivery, payment within twenty (20) days of delivery, payment within thirty (30) days of delivery and payment within ten (10) days of monthly billing. A processor or dis-

tributor may offer the same rate of discount to more than one (1) of these categories but each category shall have a rate of discount equal to or greater than that given to all categories below it. No discount in any way shall be conditioned on the amount of milk products purchased from the processor or distributor or on the use of central billing. All customers who pay in a timely fashion so as to satisfy the written criteria for prompt payment shall be credited with that discount without further request.

(7) No processor or distributor shall extend or offer to extend and no milk product purchaser shall request or accept deferred payments or extend credit for milk products delivered except as expressly provided in this rule:

(A) No processor or distributor shall fail to bill each customer at least once each month for all milk products delivered since the last previous billing and not yet paid for;

(B) Within twenty-five (25) days from the date of first billing which first billing shall demand payment for all milk products delivered to a milk product purchaser by a processor or distributor, but not paid for since the immediately antecedent first billing, each milk product purchaser billed must make payments in full in each of his/her outstanding milk product accounts;

(C) No processor or distributor shall deliver milk products to any customer, which customer has become in arrears on his/her account by reason of failure to pay in full the amount noted on a first billing within twenty-five (25) days of that billing, unless that processor or distributor is paid cash on delivery by the customer in arrears;

(D) No processor or distributor shall sell milk products to a customer which customer is in arrears on an open account, as provided in this rule, with any other processor or distributor unless that sale is for cash on delivery;

(E) No milk product purchaser shall accept credit terms, as expressly provided for in this rule, from any processor or distributor unless that milk product purchaser is not in arrears on any open account with another processor or distributor; and

(F) In each instance where a customer fails to pay in full, within twenty-five (25) days of the first billing for milk products delivered to the customer by any processor or distributor, that processor or distributor shall so advise the director. When a customer making payment, in full, to a processor or distributor, on an account previously in arrears, that processor or distributor receiving the payment shall so advise the director.



(8) No processor or distributor shall grant discount or rebate for central billing unless the discount or rebate can be cost-justified by the processor or distributor.

(9) No processor or distributor shall make any payment or transfer any merchandise or other thing of value to any customer or credit the account of any customer other than for money received or products returned.

(10) No processor or distributor shall provide any free service or labor to any customer, including, but not limited to:

(A) Stamping prices;

(B) Stacking or carrying out groceries;

(C) Setting up cases or displays for products not provided by the processor or distributor; or

(D) Otherwise lending assistance to a customer not limited exclusively to preparation of the processor's or distributor's products for sale on a customer's premises; provided, however, that this prohibition shall not apply to—

1. Delivery of milk products to a customer's place of business;

2. Stocking shelves with the processor's or distributor's products;

3. Pulling up and rotating stocks of the processor's or distributor's products; or

4. Cleaning up of dairy display cases when made necessary by presence of the processor's or distributor's products.

(11) No processor or distributor shall provide equipment to any milk product purchaser whether the equipment is provided free, by lease or otherwise.

(12) No processor or distributor shall provide warehouse or storage space for the use of any customer or for the use of any association whose members are customers of the processor or distributor.

(13) No processor or distributor shall meet any lower price or other competition offered by a competitor by means other than lower invoice prices or the introduction of new products or services extended in conformance with the provisions of the Missouri Unfair Milk Sales Practices Act and the rules promulgated by the director of agriculture.

(14) No processor or distributor shall purchase any equipment for, on behalf of or for use by any customer.

(15) No processor or distributor shall loan money to, or guarantee or facilitate any loan to any customer. As used in the rule, loan does not include the extension of credit for

goods delivered but not yet paid for; extensions of credit are governed by section (7) of this rule.

(16) No processor or distributor shall provide, or pay in whole or in part for any sign, a sign painting or other advertisement to a customer except for point-of-sale advertising material for the promotion of the sale of the processor's or distributor's products.

(17) No milk product purchaser shall accept from any processor or distributor any rebate, discount, free service(s), advertising allowance, pay for advertising space used jointly, donation, free merchandise, rent on space used by the retailer for storing or displaying the milk processor's or distributor's merchandise, financial aid or any other thing of value, including, without limitation, those things of value which are enumerated in sections (4)–(17) of this rule, except to the extent that the giving of that thing of value by processor or distributor is not prohibited by the Act or these rules.

(18) The activities, contracts or arrangements or any stockholder, owner, officer, manager or employee of any processor, distributor, nonprocessing retailer or milk product purchaser shall be deemed to be the activities, contracts or arrangements of the processor, distributor, nonprocessing retailer or milk products purchaser, so that, for example, the payment of money to the owner of a store shall be considered the payment of money to the store within these rules.

(19) Nothing in these rules shall prohibit a processor or distributor from furnishing to any consumer of milk products a porch box or similar item used for the temporary storage of milk delivered to homes.

(20) Taste sampling of milk products for immediate consumption on the premise in quantities not to exceed three (3) ounces is not a violation of the Act.

(21) All retailers must have the actual retail price stamped on the container or attached to the display case on all milk products displayed for sale.

AUTHORITY: section 416.460, RSMo Supp. 1993. This rule was previously filed as 2 CSR 40-3.020. Original rule filed Nov. 26, 1975, effective Dec. 10, 1975. Amended: Filed Dec. 18, 1975, effective Dec. 28, 1975. Amended: Filed Sept. 14, 1977, effective Jan. 1, 1978. Amended: Filed July 10, 1984, effective Oct. 11, 1984.*

**Original authority 1959, amended 1993.*

Foremost Dairies v. Thomason, 384 SW2d 651 (Mo. 1964). Court held that the following rule, promulgated by commissioner of agriculture, was void because the commissioner of agriculture had no power under the act to so promulgate: "Rule 11. Volume pricing is a discount in price and results in a discrimination in price between localities and is therefore prohibited under the Act." It therefore follows that the commissioner would not have the authority to make a rule the effect of which would be to prohibit cost-justified volume pricing, as Rule 10: "Rule 10. In determining cost to the processor or distributor for retail sales, all retail stops and rates in a given area should be combined and averaged to obtain a uniform cost for such areas. In determining cost to the processor or distributor for wholesale sales, all wholesale stops and routes in a given area should be combined and averaged to obtain a uniform cost for such areas." Further, court held that Rule 12 is not authorized by the Act and is beyond the authority of the commissioner to so promulgate: "Rule 12. Public schools districts, agencies and institutions of the state of Missouri and its political subdivisions are not within the purview of sections 416.410 to 416.560, RSMo (1959) and sales of milk products to them are not regulated by the Unfair Milk Sales Practices Act."

Foremost-McKesson, Inc. v. Davis, 488 SW2d 193 (Mo. banc 1972). Four (4) milk processors and distributors brought this action for declaratory judgement and injunctive relief from Unfair Milk Sales Practices rule. Appellants have the burden to plead facts to show the invalidity of the rule. In view of the broad statutory authority granted the commissioner of agriculture, the rule must be regarded as prima facie reasonable. Only in a clear case will the courts interfere on the ground of unreasonableness. The burden is upon those challenging the rules to show that they bear no reasonable relationship to the legislative objective. Administrative rules should be reviewed in light of the evil they seek to cure and are not unreasonable merely because they are burdensome. They must be so at odds with fundamental principles as to be mere whim or caprice.

2 CSR 90-38.030 Procedures

PURPOSE: In order to implement the remedies afforded the director by the Act and enable the director to obtain information necessary for enforcement of the Act, it is necessary to give the director the means necessary

to gain price and cost information from processors, distributors and retailers of milk products. This rule is designed to enable the director to acquire that information.

(1) Each processor, within thirty (30) days (January 9, 1976) of the effective date of these rules (December 10, 1975), shall provide the director with a list indicating the name and business address of each distributor of the milk products of the processor. Each person desiring to be licensed as a processor shall provide a list of distributors at the time application for a processor's license is made. Each processor shall notify the director, in writing, within forty-eight (48) hours of any addition to or deletion from the distributors handling the processor's milk products.

(2) Every processor, distributor and nonprocessing retailer of milk products shall make and retain for twenty-four (24) months records showing all prices charged or offered by him/her for milk products in this state. If different prices are charged or offered in different communities or to different customers, separate records shall be kept which indicate all such price differentials. Records of any discount schedules shall be maintained, the records to include the effective dates of those schedules, the amounts of any discounts allowed and the terms of eligibility for the documents.

(3) Each processor, distributor and nonprocessing retailer shall make and retain for twenty-four (24) months product cost information which enables the processor, distributor or nonprocessing retailer to determine the cost of any milk product by a reasonable rule, fairly allocating the price paid for raw materials and the cost of doing business among all products sold by the processor, distributor or nonprocessing retailer. Marginal cost analysis, that is, cost computation which allocates all overhead cost to some units of production and assigns only the actual cost of raw products, packaging and other marginal costs to subsequent units of production, is not acceptable under this rule.

(4) Each processor and distributor shall make and retain for twenty-four (24) months records of transportation and delivery costs to all customers. These costs, at the option of the processor or distributor, may either be averaged among all purchasers of milk products or they may be fairly prorated among different purchasers so as to reflect additional cost or cost savings attributable to distance of delivery or volume of delivery. Marginal cost analysis, that is, cost computation which allocates all transportation or delivery cost to

existing customers and only marginal cost to additional customers, is not acceptable under this rule.

(5) The director of agriculture and agents shall be furnished, upon request in writing or in person, any record required to be kept in sections (2)–(4) of this rule.

(A) Every processor, distributor and retailer shall furnish, by the end of the next business day after receipt of a request, records of any requested prices and discounts schedules in effect at the time of the request. All retailers shall furnish, within one (1) business day after receipt of a request, records showing the price they pay for any milk product at the time of the request.

(B) Every processor, distributor and retailer shall furnish current cost information (other than the price paid by a retailer for milk products as provided in subsection (5)(A) of this rule) upon demand within seven (7) days of the date of request.

(C) All processors, distributors and retailers shall furnish, within seven (7) days of the date of request, price or cost information concerning any period less than thirty (30) days prior to the date of request.

(D) Any processor, distributor or retailer shall furnish, within fourteen (14) days after the date of the request, any price or cost information concerning a period more than thirty (30) days prior to the date the request was made.

(6) Any processor, distributor or nonprocessing retailer who sells milk below cost in order to meet the equally lower price of competition shall furnish the director, in writing, the identity of the person whose offer s/he is meeting, the identity of the person(s) to whom the offer was made, the date at which the offer was made or at which it came to the attention of the processor, distributor or nonprocessing retailer seeking to match the offer and the terms of the offer as understood by the processor, distributor or nonprocessing retailer. Failure to deposit this report in the United States mail by the end of the next business day after the time the first sale below cost is made by a processor, distributor or nonprocessing retailer shall be considered *prima facie* evidence that no competitive offer was made and that the sale is an illegal sale below cost.

(7) All information gathered by the director or his/her agents pursuant to sections (5) and (6) of this rule will be kept confidential and will not be made available to the public because that information generally will deal

with pending investigations of possible violations of the Act.

(8) On the first Monday in May of each year, the director shall conduct a hearing at the offices of the Department of Agriculture in Jefferson City, Missouri for the purposes of setting the amount of the license fee for manufacturing and processing plants and the amount of the licensing fee, if any, for distributors.

(A) At least fourteen (14) days prior to the date of the hearing, all persons who are currently licensed to operate processing or manufacturing plants and all persons who anticipate applying for a license to operate a plant for the subsequent year, whether the plant is located inside or outside Missouri, shall file with the director the following information for the calendar year ending on December 31 of the preceding year for each plant:

1. Name;
2. Corporate headquarters;
3. Locations of plant;
4. Gross poundage of raw milk purchased;
5. Total pounds used to manufacture ice cream, cheese, dry milk and other products not included in the definition of milk products in 2 CSR 90-38.010(12). This figure does not have to be itemized as to products;
6. Pounds used to manufacture cottage cheese;
7. Pounds spoiled or wasted;
8. Pounds of milk products (as defined in 2 CSR 90-38.010(12)) sold in Missouri;
9. Pounds of milk products (as defined in 2 CSR 90-38.010(12)) sold outside Missouri, specified as to state of sale; and
10. The place of sale, as used in paragraphs (8)(A)8. and 9. of this rule shall be the place of ultimate retail sale and not necessarily the place where the licensee transfers title to the milk.

(B) At least fourteen (14) days prior to the date of the hearing, all persons who are currently licensed as distributors and all persons who anticipate applying for licenses as distributors of milk products in the state shall file with the director the following information:

1. Name;
2. Name of company(ies) to be distributed for in the coming year;
3. Name of company(ies) distributed for in previous calendar year; and
4. Volume of poundage of milk products distributed in Missouri in previous year, itemized as to company.

(C) On the date of the hearing the director of the Division of Weights and Measures of



the Department of Agriculture shall present to the director—

1. Information as to the financial needs and resources of the department applicable to enforcement of the Act; and

2. A summary of the information filed with the director pursuant to subsections (8)(A) and (B) of this rule. Any person may file additional information or make any statement at the hearing as to the truth, falseness or incompleteness of the information given the director by the director of the Division of Weights and Measures or by any other person pursuant to this rule.

(D) On the date of the hearing, any person may bring any other matter concerning the enforcement of the Act to the attention of the director or may comment on any enforcement policy of the department.

(E) At the conclusion of the hearing or within fourteen (14) days after the hearings, the director shall fix the amounts of the fees provided for in the act at levels as will produce not more than an amount necessary for proper enforcement of the Act.

(9) On or before the tenth day of June of each year, every person who intends to operate a milk processing or manufacturing plant in this state or who intends to operate a milk processing or manufacturing plant outside this state, the products of which are sold in this state, shall file an application for a license with the director which shall include all information specified in subsection (8)(A) of this rule, and which shall include a check payable to the Department of Agriculture, state of Missouri, in an amount equal to the license fee for processors set by the director times the hundred-weight of milk products (as defined in 2 CSR 90-38.010(12)) sold in Missouri. The place of sale, for purposes of computing license fees, shall be the place of ultimate retail sale.

(10) On or before the tenth day of June of each year, every person who intends to act as a distributor of milk products within this state or who intends to distribute milk products within this state shall file an application for a license which shall include all information specified in subsection (8)(B) of this rule, and which shall include a check payable to the Department of Agriculture, state of Missouri, in an amount equal to the license fee for distributors set by the director.

(11) The director shall issue licenses to all persons filing satisfactory applications who are not eligible for licensing on July first of each year. Any person who has filed an application pursuant to section (9) or (10) of

this rule who has not received a license on July first may continue to operate as if s/he had a license unless and until receiving notice that his/her application for a license had been denied following a hearing held in pursuant to section 416.490 of the Act.

(12) The issuance of a license shall not waive the right of the director to subsequently suspend or revoke the license or to take appropriate actions to recover additional license fees owed the state.

(13) The director may request information from any licensee or license applicant as is believed by the director to be necessary to determine the accuracy of any license application or the eligibility of any applicant to be licensed.

(14) Any person at any time may request that one (1) or more of these sections be amended or revoked or that additional sections be promulgated. The director, at his/her discretion, may order hearings to be held with regard to any such requests.

(15) Nothing in this rule should be construed to waive or alter any statutory provision or procedure provided in the Act, and the director retains the right to take such actions and conduct such investigations as are allowed by the Act.

AUTHORITY: section 416.460, RSMo Supp. 1993. This rule was previously filed as 2 CSR 40-3.030 Original rule filed Nov. 26, 1975, effective Dec. 10, 1975. Amended: Filed July 10, 1984, effective Oct. 11, 1984.*

**Original authority 1959, amended 1993.*

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2 CSR 90-38.040 Separability and Effective Period

PURPOSE: This rule states the separability of the rules and their provisions within Chapter 38 and the effective period of these rules.

(1) If any provision of the rules within Chapter 38 is declared invalid, the validity of the remainder of these rules shall not be affected.

AUTHORITY: section 416.460, RSMo Supp. 1997. This rule was previously filed as 2 CSR 40-3.040. Original rule filed Nov. 26, 1975, effective Dec. 10, 1975. Amended: Filed Sept. 14, 1977, effective Jan. 1, 1978. Amended: Filed July 10, 1984, effective Oct. 11, 1984. Amended: Filed Nov. 14, 1988, effective Feb. 11, 1989. Amended: Filed March 14, 1994, effective Aug. 28, 1994. Amended: Filed Feb. 20, 1998, effective Aug. 30, 1998.*

**Original authority 1959, amended 1993, 1995.*

2 CSR 90-38.050 Enforcement of 2 CSR 90-38.030 Stayed or Enjoined

PURPOSE: This rule provides alternate provisions concerning price filings, volume price differentials and cost records which were filed in 1970 and upheld in 1972 by the Missouri Supreme Court, if enforcement of all or part of 2 CSR 90-38.030 is stayed or enjoined by any court in this state.

(1) Within fifteen (15) days (July 17, 1970) after the effective date of these rules (July 2, 1970), every processor and distributor shall file with the director of agriculture, on forms furnished by the director, the price of every milk product proposed to offer for sale in Missouri. Any processor or distributor whose prices differ in localities served for the reasons enumerated in section 416.420, RSMo or for any other lawful reason will file a separate price list for each such locality. The prices filed as provided in this rule will be current at all times and any change in prices after the initial filing (up or down) will be filed with the director within forty-eight (48) hours after the effective date thereof. In compliance with this rule, processors will file their dock price and their wholesale price. Distributors shall file their wholesale price.

(2) No sale will be made by any processor or distributor below the prices filed with the director as provided by this rule, except as provided otherwise in this rule. Provided further, nothing contained in this rule will prohibit a processor or distributor from making

a sale at a price below the prices on file with the director of agriculture if such a sale is made in good faith to meet the equally lower price of a competitor. Any sale made under this provision must be reported to the director of agriculture in writing, by registered mail or telegram, postmarked or dated within twenty-four (24) hours after the sale has been made and the notification of the sale for such purpose to the director of agriculture shall name the competitor offering the lower price, the name and address of the person receiving the lower price, the date or dates, the amount of the lower price and any and all other conditions of the sale relevant to indicate the good faith of the person making the reduction to meet competition. Upon receipt of the report, the director will immediately cause an investigation to be conducted to determine whether good cause exists to justify a lower price to meet competition as alleged in the report. The director will notify the person filing the report that his/her lower price is either approved or disapproved within ten (10) days after receipt of the report.

(3) Any sale by any processor or distributor to a customer for an amount less than the prices filed under section (1), except as provided in this rule, or a reduction in good faith still validly in force under the meeting competition provisions of section (2), will be *prima facie* evidence of an illegal discount and a violation of section 416.420, RSMo and may result in the institution of proceedings as provided in section 416.450, RSMo.

(4) The director recognizes that, under certain conditions and circumstances, a processor or distributor may be justified in making a price reduction to a given purchaser which results from a saving to a processor or distributor because of the quantity and type of delivery in which the milk products to that purchaser are sold or delivered. The difference between the price as filed and the price as so reduced as a result of the saving, stated in cents or as a percentage of the filed price shall be known as the volume price differential. In the event any processor or distributor wishes to grant a price reduction and establish a volume price differential to one (1) or more customers, s/he will file the volume price differential with the director (on forms furnished by the director) five (5) days before the effective date of the proposed volume price differential on each price reduction to be granted, including the name and address of the recipient, the date or dates on which it will be granted and all relevant factors indicating the cost-justification. The proposed volume price differential will be examined by

the director and approved or disapproved before the effective date and the proponent will be notified accordingly. If the proposed volume price differential is disapproved by the director, the aggrieved processor or distributor may request a hearing at which s/he may submit evidence to the director showing justification for the proposed volume price differential. The hearing shall be conducted in accordance with procedures for contested cases as established by Chapter 536, RSMo.

(5) Each processor and each distributor shall keep current records to show the cost of doing business. On the written request of the director, the product cost shall be computed for any designated period in accordance with accepted cost accounting methods.

AUTHORITY: section 416.460, RSMo Supp. 1993. This rule was previously filed as 2 CSR 40-3.050. Original rule filed June 22, 1970, effective July 2, 1970. Amended: Filed July 10, 1984, effective Oct. 11, 1984.*

**Original authority 1959, amended 1993.*