S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

March 16, 2009

Introduced by Sen. OPPENHEIMER -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the agriculture and markets law, in relation to item pricing

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The agriculture and markets law is amended by adding a new section 214-i to read as follows:

S 214-I. ITEM PRICING. 1. DECLARATION OF LEGISLATIVE FINDINGS AND INTENT. THE LEGISLATURE HEREBY FINDS AND DECLARES THAT THERE IS TECHNOLOGY UTILIZING A LASER SCANNING DEVICE OFFERING NUMEROUS EFFICIENCIES AND ECONOMIES TO THE OPERATION OF THE RETAIL FOOD INDUSTRY, THE USE OF WHICH MAY MAKE IT ECONOMICALLY ADVANTAGEOUS FOR RETAIL STORES TO REMOVE PRICE MARKINGS ON INDIVIDUAL GROCERY ITEMS. THE LEGISLATURE FURTHER FINDS THAT PRICE MARKING CONSTITUTES AN INDISPENSABLE INGREDIENT TO A CONSUMER'S RIGHT TO ALL REASONABLE INFORMATION IN ORDER TO MAKE AN INFORMED PURCHASE CHOICE.

THEREFORE, THE LEGISLATURE DECLARES THAT REQUIRING ITEM PRICE MARKING IS NECESSARY TO PROTECT THE INTEREST OF THE CONSUMING PUBLIC, AND FURTHER DECLARES THAT IT IS IN THE PUBLIC INTEREST TO PROMOTE USEFUL TECHNOLOGY BY PERMITTING CONTINUED TESTING AND DEVELOPMENT OF THE UNIVERSAL PRODUCT CODE CHECKOUT SYSTEM WITHOUT THE REMOVAL OF ITEM PRICES.

IT IS THE INTENT OF THIS LEGISLATION TO ENSURE THAT CONSUMER GOODS OFFERED FOR SALE IN NEW YORK STATE ARE CLEARLY, ADEQUATELY, AND ACCURATELY PRICE MARKED.

2. DEFINITIONS. THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS FOR THE PURPOSE OF THIS SECTION:

A. "STOCK KEEPING UNIT" OR "UNIT" SHALL MEAN EACH GROUP OF ITEMS OFFERED FOR SALE OF THE SAME BRAND NAME, QUANTITY OF CONTENTS, RETAIL PRICE, AND VARIETY WITHIN THE FOLLOWING CATEGORIES:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(I) FOOD, INCLUDING ALL MATERIAL, SOLID, LIQUID OR MIXED, WHETHER SIMPLE OR COMPOUND, USED OR INTENDED FOR CONSUMPTION BY HUMAN BEINGS OR DOMESTIC ANIMALS NORMALLY KEPT AS HOUSEHOLD PETS AND ALL SUBSTANCES OR INGREDIENTS TO BE ADDED THERETO FOR ANY PURPOSE;

(II) NAPKINS, FACIAL TISSUES, TOILET TISSUES, PAPER TOWELING AND ANY DISPOSABLE WRAPPING OR CONTAINER FOR THE STORAGE, HANDLING, SERVING, OR DISPOSAL OF FOOD;

(III) DETERGENTS, SOAPS AND OTHER CLEANSING AGENTS; AND

(IV) NON-PRESCRIPTION DRUGS, FEMININE HYGIENE PRODUCTS AND HEALTH AND BEAUTY AIDS.

B. "STOCK KEEPING ITEM" OR "ITEM" SHALL MEAN EACH ITEM OF A STOCK KEEPING UNIT OFFERED FOR SALE.

C. "RETAIL STORE" SHALL MEAN A STORE SELLING STOCK KEEPING UNITS AT RETAIL. A STORE WHICH IS NOT OPEN TO THE GENERAL PUBLIC BUT IS RESERVED FOR USE BY ITS MEMBERS SHALL COME WITHIN THE PROVISIONS OF THIS DEFINITION UNLESS THE MEMBERS MUST PAY A DIRECT FEE TO THE STORE TO QUALIFY FOR MEMBERSHIP AND THE STORE IS NOT REQUIRED TO COLLECT SALES TAX ON TRANSACTIONS WITH MEMBERS. PURSUANT TO THIS SECTION, A RETAIL STORE SHALL NOT INCLUDE ANY STORE WHICH:

(I) HAS AS ITS ONLY FULL-TIME EMPLOYEE THE OWNER THEREOF, OR THE PARENT, SPOUSE OR CHILD OF THE OWNER, AND IN ADDITION THERETO NOT MORE THAN TWO FULL-TIME EMPLOYEES; OR

(II) HAD ANNUAL GROSS SALES OF STOCK KEEPING UNITS IN THE PREVIOUS CALENDAR YEAR OF LESS THAN THREE MILLION DOLLARS, UNLESS THE RETAIL STORE IS PART OF A NETWORK OF SUBSIDIARIES, AFFILIATES OR OTHER MEMBER STORES, UNDER DIRECT OR INDIRECT COMMON CONTROL, WHICH AS A GROUP, HAD ANNUAL GROSS SALES OF STOCK KEEPING ITEMS IN THE PREVIOUS CALENDAR YEAR OF THREE MILLION DOLLARS OR MORE; OR

(III) ENGAGES PRIMARILY IN THE SALE OF FOOD FOR CONSUMPTION ON THE PREMISES OR IN A SPECIALTY TRADE WHICH THE COMMISSIONER DETERMINES, BY REGULATION, WOULD BE INAPPROPRIATE FOR ITEM PRICING.

D. "ITEM PRICE" SHALL MEAN THE TAG, STAMP OR MARK AFFIXED TO A STOCK KEEPING ITEM WHICH SETS FORTH, IN ARABIC NUMERALS, THE RETAIL PRICE THEREOF.

E. "ADVERTISED PRICE" SHALL MEAN THE PRICE OF A STOCK KEEPING UNIT WHICH A RETAIL STORE HAS CAUSED TO BE DISSEMINATED BY MEANS OF PROMOTIONAL METHODS SUCH AS AN IN-STORE SIGN, NEWSPAPER, CIRCULAR, TELEVISION OR RADIO ADVERTISING.

F. "SHELF PRICE" SHALL MEAN THE TAG OR SIGN PLACED BY AN AUTHORIZED PERSON AT EACH POINT OF DISPLAY OF A STOCK KEEPING UNIT, WHICH CLEARLY SETS FORTH THE RETAIL PRICE OF THE STOCK KEEPING ITEMS WITHIN THAT STOCK KEEPING UNIT.

G. "SALE PRICE" SHALL MEAN THE PRICE OF STOCK KEEPING ITEMS OFFERED ON SALE IN GOOD FAITH AT A PRICE BELOW THE PRICE FOR WHICH SUCH STOCK KEEPING ITEMS ARE USUALLY SOLD IN THE RETAIL STORE, FOR A STATED PERIOD OF TIME NOT TO EXCEED SEVEN DAYS.

H. "COMPUTER-ASSISTED CHECKOUT SYSTEM" SHALL MEAN ANY ELECTRONIC DEVICE, COMPUTER SYSTEM OR MACHINE WHICH DETERMINES OR INDICATES THE SELLING PRICE OF A STOCK KEEPING ITEM BY INTERPRETING ITS UNIVERSAL PRODUCT CODE, OR AN IN-HOUSE PRODUCT CODE, OR BY USE OF ITS PRICE LOOK-UP FUNCTION.

I. "PRICE LOOK-UP FUNCTION" SHALL MEAN THE CAPABILITY OF ANY CHECKOUT SYSTEM TO DETERMINE THE RETAIL PRICE OF A STOCK KEEPING ITEM BY WAY OF ENTRY INTO THE SYSTEM OF A CODE NUMBER OR OTHER INDICATOR ASSIGNED TO THAT ITEM'S STOCK KEEPING UNIT BY THE RETAIL STORE OR BY WAY OF THE

CHECKOUT OPERATOR'S CONSULTATION OF A FILE MAINTAINED AT THE POINT OF SALE.

J. "INSPECTOR" SHALL MEAN AN AUTHORIZED GOVERNMENT OFFICIAL HAVING THE JURISDICTION TO ENFORCE THE PROVISIONS OF THIS SECTION.

3. ITEM PRICING REQUIRED. A. EVERY PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION WHICH SELLS, OFFERS FOR SALE OR EXPOSES FOR SALE A STOCK KEEPING UNIT IN A RETAIL STORE, SHALL DISCLOSE TO THE CONSUMER THE ITEM PRICE OF EACH STOCK KEEPING ITEM EXCEPT AS PROVIDED IN PARAGRAPH B OF THIS SUBDIVISION BY CAUSING THE ITEM PRICE TO BE CONSPICUOUSLY, CLEARLY AND PLAINLY MARKED, STAMPED, TAGGED OR AFFIXED THERETO.

B. STOCK KEEPING ITEMS OF THE FOLLOWING STOCK KEEPING UNITS NEED NOT BE ITEM PRICED AS PROVIDED IN THIS SUBDIVISION PROVIDED THAT A SHELF PRICE AND A PRICE LOOK-UP FUNCTION ARE MAINTAINED FOR SUCH STOCK KEEPING UNITS:

(I) MILK;

(II) EGGS;

(III) UNPACKAGED FRESH PRODUCE;

(IV) UNPACKAGED FOOD OFFERED FOR SALE IN BULK;

(V) FOOD SOLD FOR CONSUMPTION ON THE PREMISES;

(VI) STOCK KEEPING ITEMS WHICH ARE UNDER THREE CUBIC INCHES IN SIZE, AND WEIGH LESS THAN THREE OUNCES, AND ARE PRICED UNDER ONE DOLLAR;

(VII) SNACK FOODS SUCH AS CAKES, GUM, CANDIES, CHIPS AND NUTS OFFERED FOR SALE IN SINGLE PACKAGES AND WEIGHING FIVE OUNCES OR LESS;

(VIII) CIGARETTES, CIGARS, TOBACCO AND TOBACCO PRODUCTS;

(IX) ITEMS SOLD THROUGH A VENDING MACHINE;

(X) ITEMS OFFERED AT A SALE PRICE, PROVIDED THAT THE SALE PRICE AND BEGINNING AND ENDING DATES OF THE SALES ARE CLEARLY INDICATED TO THE CONSUMER BY CONSPICUOUS SIGNS LOCATED AT OR NEAR THE DISPLAY OF SUCH ITEMS; AND

(XI) FROZEN FOOD PACKAGED IN PLASTIC OR POLYETHYLENE BAGS.

C. THE COMMISSIONER MAY PROMULGATE RULES AND REGULATIONS AS HE OR SHE DEEMS NECESSARY, TO ENSURE THAT UNIT PRICES, AS REQUIRED UNDER SECTION TWO HUNDRED FOURTEEN-H OF THIS ARTICLE, ARE OF ADEQUATE SIZE, COLOR AND LOCATION TO ENHANCE VISIBILITY BY THE CONSUMER FOR THE UNITS INDICATED BY PARAGRAPH B OF THIS SUBDIVISION.

4. PRICE ACCURACY. NO RETAIL STORE SHALL CHARGE A RETAIL PRICE FOR ANY EXEMPT OR NON-EXEMPT STOCK KEEPING ITEM WHICH EXCEEDS THE LOWER OF ANY ITEM, SHELF, SALE OR ADVERTISED PRICE OF SUCH STOCK KEEPING ITEM.

5. ENFORCEMENT, INSPECTION PROCEDURES. A. FOR ANY INSPECTION UNDER THIS SECTION, THE STORE REPRESENTATIVE SHALL AFFORD THE INSPECTOR ACCESS TO THE TEST MODE OF THE CHECKOUT SYSTEM AND TO THE RETAIL PRICE INFORMATION CONTAINED IN A PRICE LOOK-UP FUNCTION.

B. FOR THE PURPOSE OF DETERMINING A STORE'S COMPLIANCE WITH THE REQUIREMENTS OF SUBDIVISION THREE OF THIS SECTION, AN INSPECTION SHALL BE CONDUCTED OF A SAMPLE OF NO LESS THAN FIFTY STOCK KEEPING UNITS. HOWEVER, IN THE EVENT THE COMMISSIONER HAS RECEIVED A SPECIFIC WRITTEN COMPLAINT, NO SUCH MINIMUM SAMPLE SHALL BE REQUIRED IN THE INVESTIGATION OF SAME.

C. IN A STORE WITH A LASER SCANNING OR OTHER COMPUTER ASSISTED CHECKOUT SYSTEM, THE ENFORCING AGENT SHALL BE PERMITTED TO COMPARE THE ITEM, SHELF, SALE OR ADVERTISED PRICE ON ANY ONE OR MORE STOCK KEEPING ITEMS SOLD IN THE STORE, NOT TO EXCEED FIVE HUNDRED STOCK KEEPING ITEMS AT ANY ONE INSPECTION, WITH THE PROGRAMMED COMPUTER PRICE. NO MINIMUM SAMPLE SHALL BE REQUIRED FOR AN INSPECTION FOR PRICE ACCURACY. THE STORE SHALL PROVIDE SUCH ACCESS TO THE COMPUTER AS IS NECESSARY FOR THE ENFORCING AGENT TO MAKE THE DETERMINATION.

6. PENALTIES. A. (I) THE FAILURE TO ITEM PRICE THREE OR MORE STOCK KEEPING ITEMS OF A PARTICULAR STOCK KEEPING UNIT SHALL CONSTITUTE A SINGLE VIOLATION.

(II) ANY RETAIL STORE FOUND IN VIOLATION OF SUBDIVISION THREE OF THIS SECTION SHALL BE SUBJECT TO THE FOLLOWING PENALTIES: FOR VIOLATIONS DISCOVERED UPON THE FIRST INSPECTION IN ANY TWELVE MONTH PERIOD THE STORE SHALL PAY A PENALTY OF FIFTY DOLLARS FOR EACH OF THE FIRST FOUR VIOLATIONS; ONE HUNDRED DOLLARS FOR EACH OF THE NEXT TWELVE VIOLATIONS; AND ONE HUNDRED FIFTY DOLLARS FOR EACH SUBSEQUENT VIOLATION, BUT IN NO EVENT SHALL THE TOTAL PENALTY THEREFOR EXCEED FIVE THOUSAND DOLLARS. FOR VIOLATIONS DISCOVERED UPON A SECOND OR SUBSEQUENT INSPECTION IN ANY TWELVE MONTH PERIOD, THE ABOVE PENALTIES SHALL BE DOUBLED, WITHOUT LIMITATION. EACH DAY A VIOLATION IS CONTINUED SHALL CONSTITUTE A SEPARATE VIOLATION.

B. IN THE EVENT THAT THE PROGRAMMED COMPUTER PRICE EXCEEDS THE ITEM, SHELF, SALE OR ADVERTISED PRICE OF ANY STOCK KEEPING ITEM, THE STORE WILL BE SUBJECT TO THE FOLLOWING PENALTIES: FOR A VIOLATION OF SUBDIVISION FOUR OF THIS SECTION, A PENALTY IN THE AMOUNT OF FIFTY DOLLARS PER VIOLATION SHALL BE IMPOSED ON THE FIRST TWO PERCENT OF THE STOCK KEEPING ITEMS COMPARED ROUNDED TO THE NEAREST WHOLE NUMBER; ONE HUNDRED DOLLARS PER VIOLATION FOR THE NEXT TWO PERCENT; TWO HUNDRED DOLLARS FOR THE NEXT TWO PERCENT; AND THREE HUNDRED DOLLARS FOR EACH ADDITIONAL VIOLATION. FOR VIOLATIONS DISCOVERED UPON A SECOND OR SUBSEQUENT INSPECTION IN A TWELVE MONTH PERIOD THE ABOVE PENALTIES SHALL BE DOUBLED.

C. AN INSPECTOR SHALL HAVE THE AUTHORITY TO ISSUE A STOP-REMOVAL ORDER WITH RESPECT TO ANY STOCK KEEPING ITEM, DEVICE OR SYSTEM BEING USED, HANDLED, SOLD, OFFERED FOR SALE OR EXPOSED FOR SALE IN VIOLATION OF THIS SECTION.

(I) ANY STOP-REMOVAL ORDER ISSUED WITH RESPECT TO ANY STOCK KEEPING ITEM SHALL BE IN WRITING, SHALL LIST THE VIOLATIONS AND SHALL DIRECT THAT ANY STOCK KEEPING ITEM IN VIOLATION SHALL NOT BE SOLD, OFFERED FOR SALE OR EXPOSED FOR SALE UNTIL THE VIOLATIONS ARE CORRECTED.

(II) ANY STOP-REMOVAL ORDER ISSUED WITH RESPECT TO ANY DEVICE OR SYSTEM SHALL BE IN WRITING AND SHALL LIST THE VIOLATIONS. SUCH STOP-REMOVAL ORDER SHALL BE STAYED FOR UP TO TWO HOURS AFTER THE INSPECTOR PROVIDES THE WRITTEN STOP-REMOVAL ORDER TO THE RETAIL STORE PROVIDED THAT, UNTIL THE VIOLATIONS ARE CORRECTED, EITHER: THE STOCK KEEPING ITEMS WHICH ARE AFFECTED BY THE VIOLATIONS ARE NOT SOLD, OFFERED FOR SALE OR EXPOSED FOR SALE, OR SIGNS ARE POSTED CONSPICUOUSLY AT OR NEAR EACH CASH REGISTER WHICH CLEARLY DISCLOSE TO STORE EMPLOYEES AND CONSUMERS WHICH STOCK KEEPING ITEMS ARE AFFECTED BY THE VIOLATIONS AND THEIR CORRECT PRICES, AND THE RETAIL STORE ENSURES THAT CONSUMERS ARE CHARGED THE CORRECT PRICE.

D. VIOLATIONS OF THIS SECTION SHALL NOT BE SUBJECT TO THE PENALTIES SPECIFIED IN SECTION FORTY-ONE OF THIS CHAPTER.

7. JURISDICTION. A. THE PROVISIONS OF THIS SECTION AND THE REGULATIONS PROMULGATED HEREUNDER MAY BE ENFORCED BY THE DEPARTMENT OR BY THE MUNICIPAL DIRECTOR OF A CONSUMER AFFAIRS OFFICE AND/OR A MUNICIPAL DIRECTOR OF WEIGHTS AND MEASURES. NOTWITHSTANDING THE PROVISIONS OF SECTION FORTY-FIVE OF THIS CHAPTER, ALL MONEYS COLLECTED HEREUNDER BY A MUNICIPALITY SHALL BE RETAINED BY THE MUNICIPALITY. IN THE EVENT THAT A MUNICIPALITY ELECTS TO ENFORCE THIS SECTION, IT SHALL GIVE NOTICE OF SUCH INTENTION TO THE COMMISSIONER WHO, UPON RECEIPT THEREOF, WILL DIRECT THAT THE DEPARTMENT'S INSPECTIONS FOR COMPLIANCE WITH THIS SECTION BE DISCONTINUED IN SUCH MUNICIPALITY UNLESS AND UNTIL SUCH MUNICIPALITY GIVES FURTHER NOTICE THAT IT NO LONGER INTENDS TO ENGAGE IN

ENFORCEMENT OF THIS SECTION. THE PROCEDURES SET FORTH IN PARAGRAPHS B AND C OF THIS SUBDIVISION SHALL BE APPLICABLE TO MUNICIPAL ENFORCEMENT OF THIS SECTION.

B. EACH MUNICIPAL DIRECTOR OF A CONSUMER AFFAIRS OFFICE AND/OR A MUNICIPAL DIRECTOR OF WEIGHTS AND MEASURES PERSONALLY, OR THROUGH HIS OR HER AUTHORIZED AGENTS, SHALL, UPON FINDING A VIOLATION OF THE PROVISIONS OF THIS SECTION OR OF THE RULES AND REGULATIONS PROMULGATED PURSUANT TO THIS SECTION, EXPEDITIOUSLY CAUSE THE SAME TO BE CORRECTED OR SHALL REFER THE MATTER TO THE ATTORNEY FOR THE MUNICIPALITY, FOR COMMENCEMENT OF A CIVIL ACTION IN THE NAME OF THE MUNICIPALITY TO RECOVER A CIVIL PENALTY IN THE AMOUNTS PRESCRIBED BY THIS SECTION AND BY SECTIONS THIRTY-NINE AND FORTY OF THIS CHAPTER. A CAUSE OF ACTION FOR RECOVERY OF SUCH PENALTY MAY BE RELEASED, SETTLED OR COMPROMISED BY THE MUNICIPAL DIRECTOR BEFORE THE MATTER IS REFERRED TO THE MUNICIPAL ATTORNEY OR THEREAFTER BY SUCH ATTORNEY.

C. THE MUNICIPAL DIRECTOR MAY HOLD A HEARING TO DETERMINE WHETHER A VIOLATION OF THE PROVISIONS OF THIS SECTION HAS OCCURRED. AT LEAST TWO WEEKS WRITTEN NOTICE OF A HEARING SHALL BE SERVED EITHER PERSONALLY ON THE INDIVIDUAL IN CHARGE OF THE PLACE OF BUSINESS WHERE THE ALLEGED VIOLATION OCCURRED OR BY CERTIFIED OR REGISTERED MAIL ADDRESSED TO SUCH PLACE OF BUSINESS. SUCH NOTICE SHALL CONTAIN A CONCISE STATEMENT OF THE FACTS CONSTITUTING THE ALLEGED VIOLATION AND SHALL SET FORTH THE DATE, TIME AND PLACE THAT THE HEARING WILL BE HELD. UPON A FINDING OF A VIOLATION OF THE PROVISIONS OF THIS SECTION, THE MUNICIPAL DIRECTOR SHALL BE AUTHORIZED TO RECOVER ANY CIVIL PENALTY PROVIDED FOR IN PARAGRAPH B OF THIS SUBDIVISION.

8. LOCAL STANDARDS. NOTHING HEREIN SHALL BE CONSTRUED TO RESTRICT THE POWER OF ANY COUNTY, CITY, TOWN OR VILLAGE TO ADOPT AND ENFORCE ADDITIONAL LOCAL LAWS, ORDINANCES, OR REGULATIONS WHICH EXCEED THE MINIMUM APPLICABLE STANDARDS IN THIS SECTION.

9. RULES AND REGULATIONS. THE COMMISSIONER MAY PROMULGATE SUCH RULES AND REGULATIONS AS HE OR SHE MAY DEEM NECESSARY OR APPROPRIATE TO EFFECTUATE THE PURPOSES OF THIS SECTION.

S 2. This act shall take effect on the thirtieth day after it shall have become a law.