

3316

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:

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

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

12 THEREFORE, THE LEGISLATURE DECLARES THAT REQUIRING ITEM PRICE MARKING
13 IS NECESSARY TO PROTECT THE INTEREST OF THE CONSUMING PUBLIC, AND
14 FURTHER DECLARES THAT IT IS IN THE PUBLIC INTEREST TO PROMOTE USEFUL
15 TECHNOLOGY BY PERMITTING CONTINUED TESTING AND DEVELOPMENT OF THE
16 UNIVERSAL PRODUCT CODE CHECKOUT SYSTEM WITHOUT THE REMOVAL OF ITEM PRIC-
17 ES.

18 IT IS THE INTENT OF THIS LEGISLATION TO ENSURE THAT CONSUMER GOODS
19 OFFERED FOR SALE IN NEW YORK STATE ARE CLEARLY, ADEQUATELY, AND ACCU-
20 Rately PRICE MARKED.

21 2. DEFINITIONS. THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEAN-
22 INGS FOR THE PURPOSE OF THIS SECTION:

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

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

LBD09145-01-9

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 (I) MILK;

16 (II) EGGS;

17 (III) UNPACKAGED FRESH PRODUCE;

18 (IV) UNPACKAGED FOOD OFFERED FOR SALE IN BULK;

19 (V) FOOD SOLD FOR CONSUMPTION ON THE PREMISES;

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

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

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

25 (IX) ITEMS SOLD THROUGH A VENDING MACHINE;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 9. RULES AND REGULATIONS. THE COMMISSIONER MAY PROMULGATE SUCH RULES
32 AND REGULATIONS AS HE OR SHE MAY DEEM NECESSARY OR APPROPRIATE TO EFFEC-
33 TUATE THE PURPOSES OF THIS SECTION.

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