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

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I N S E N A T E

May 6, 2010

Introduced by Sen. AUBERTINE -- read twice and ordered printed, and when printed to be committed to the Committee on Agriculture

AN ACT to amend the agriculture and markets law, in relation to orders fixing milk and marketing agreements

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

Section 1. Section 258-m of the agriculture and markets law, as added by chapter 383 of the laws of 1937, subdivisions 1, 4 and the opening paragraph of subdivision 6 as amended by chapter 679 of the laws of 2002, subdivision 2 as amended by chapter 935 of the laws of 1971, subdivisions 6 and 11 as amended by chapter 309 of the laws of 1999, subdivision 9 as amended and subdivision 12 as renumbered by chapter 696 of the laws of 1940 and subdivision 10 as amended by chapter 169 of the laws of 1994, is amended to read as follows:

S 258-m. Orders fixing prices for milk and marketing agreements. 1. [Upon] THE COMMISSIONER SHALL, AFTER MAKING A DETERMINATION, OR UPON the petition of [a producers' bargaining agency of the production area supplying a marketing area, such agency representing] at least thirty-five per centum of the producers of milk [therein, alleging the existence of] THAT conditions so affecting the orderly marketing of milk in such area that public interest requires regulation of prices of milk in such area and equalization of the burden of surplus milk and expense of handling it, and sharing the benefits of the fluid market in order that the public policy declared in section two hundred fifty-eight-k of this [chapter] ARTICLE shall be effective, [and upon the written request of the petitioner, the commissioner shall] AND SHALL HAVE THE AUTHORITY TO set, without a hearing, an interim price for class I fluid milk, and may set an interim price for class II and/or III milk. In determining such interim price, the commissioner shall take into consideration, among other factors: (a) the prices being paid to producers; (b) the costs of production to producers; (c) any changes in the ratio of index of prices received for milk to index of prices paid by dairy farmers; (d) the level of prices paid to producers in adjoining markets; and (e) the interests of the general public. [Such] WHEN THE INTERIM PRICE IS SET IN

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

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RESPONSE TO A PETITION BY PRODUCERS OF MILK, SUCH interim price shall be set within five days of such [written request] PETITION and to the extent practicable apply to any milk purchased on or after the first day of the month following [such] THE COMMISSIONER'S determination. Such [interim price shall be in effect until the final determination regarding the petition is made pursuant to the provisions of this article and is enforceable and effectuated, provided however, such] interim price shall be in effect for [no longer] NOT MORE than [one hundred eighty] NINETY consecutive calendar days. During such time when the interim price is in effect, the commissioner shall provide for and enforce a mechanism for compensatory payments and have the authority to establish and administer an equalization pool throughout the entire state or any part thereof. Such interim price shall be reviewable by a person aggrieved in a proceeding pursuant to article seventy-eight of the civil practice law and rules. The effectiveness or enforcement of such interim price regulation shall not be restrained, stayed, or enjoined pendente lite. [In addition, it shall be the duty of] WITHIN FIFTEEN DAYS OF SETTING THE INTERIM PRICE the commissioner [to] SHALL call a public hearing for the consideration of said [petition] PRICE and [to] give notice [thereof] OF by advertising [such call] in [such] A newspaper or newspapers of general circulation in such marketing area as the commissioner deems advisable. Such notice shall specify a time and a place within the marketing area at which the hearing will be held and at which the [applicants] PETITIONERS and other persons, including producers, distributors and consumers and associations thereof, may be heard. In not more than fifteen days upon receiving the petition the commissioner shall set the hearing date in accordance with the above provisions. Such hearing shall commence in not less than fifteen days but not more than twenty days of the notice specifying the date and time of the hearing. Such hearing shall conclude within fifteen days of commencement, provided however, if the commissioner determines in writing that the hearing has been conducted with due diligence but an extension is necessary to accord due process, he or she may extend the hearing for a period not to exceed ten days. If after such hearing the commissioner shall find, upon the record of the proceeding that conditions referred to in section two hundred fifty-eight-k of this [chapter] ARTICLE exist so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section two hundred fifty-eight-k of this [chapter] ARTICLE shall be effective and that it is necessary that prices for milk to producers and associations of producers be fixed by the commissioner, as expressed by section two hundred fifty-eight-k of this [chapter] ARTICLE, and that it is favored by at least [sixty-six and two-thirds] FIFTY-ONE per centum of the producers of milk produced in the production area for said marketing area voting, [individually or through cooperatives,] in the referendum, the commissioner may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers. The determination of the commissioner as to whether or not by order to fix and determine minimum prices shall be made within forty days after such hearing, effective on the first day of the month following the determination. If the commissioner determines not to fix and determine minimum prices, he shall state his reasons in writing and transmit same to the petitioner, the governor, the temporary president of the senate and the speaker of the assembly. Such price fixing order or orders shall be rescinded effective at the end of the current month after a public hearing whenever the commissioner shall find either that such conditions

have ceased to exist or that such termination is favored by at least [thirty-five] FIFTY-ONE per centum of the producers of milk handled within such market. For purposes of this subdivision, unless otherwise specified, days shall mean business days.

2. [The commissioner may, from time to time upon like petition, during the existence of such conditions revise the prices so fixed, after holding a hearing thereon. Whenever as herein provided a producers' bargaining agency of a production area supplying a marketing area shall file a petition and/or amended petition praying for any relief provided in this article, it shall be lawful for a distributors' agency of such marketing area to file a petition and/or amended petition providing for the consideration of issues therein raised relative to the petition and/or amended petition of the producers' bargaining agency, or to an existing milk marketing order. Upon receipt of any such petition of a producers' bargaining agency for any such marketing area, the commissioner shall mail a copy thereof to the secretary of the distributors' bargaining agency for such marketing area, if any, which meets the qualifications set forth in the last sentence of this paragraph. If such distributors' bargaining agency files either a petition or an amended petition with the commissioner or notifies the commissioner that no such petition will be filed, the commissioner may proceed to give notice of hearing as provided in subdivision one of this section; otherwise the commissioner shall defer the giving of such notice of hearing for a period of ten days after such distributors' bargaining agency has received from the commissioner a copy of the petition and/or amended petition of the producers' bargaining agency. The commissioner shall mail a copy of the distributors' bargaining agency petition to the secretary of the producers' bargaining agency and shall give such notice of such petition by publication or otherwise as the commissioner deems advisable. Evidence upon the proposals set forth in both the producers' and distributors' bargaining agency petitions shall be received at the same hearing. The commissioner shall not be required to furnish a copy of any petition of a producers' bargaining agency to a distributors' bargaining agency nor shall such distributors' bargaining agency be entitled to file a petition and to be heard as herein provided unless within the calendar year preceding the filing with the commissioner of the producers' bargaining agency petition such distributors' bargaining agency shall have filed with the commissioner a list of its distributor members and the names and addresses of its officers and unless such distributors' bargaining agency represents not less than sixty per centum of the quantity of milk distributed in such marketing area, exclusive of that distributed by cooperative corporations, as determined by the reports submitted to the commissioner during the preceding license year.

The provisions of this subdivision relative to distributors' bargaining agency petitions shall not apply to any milk marketing area or order, jointly administered by the commissioner and any officer or agency of the United States or of any other state.

3.] Before fixing any prices [pursuant to the provisions of the two preceding paragraphs,] the commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect of milk and what prices for milk in the market or markets affected by such prices and under varying conditions will be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the cost of production and distribution, including compliance with all sanitary regulations in force in the market or

markets affected, the cost of feeding stuffs used in the production of milk, the supply of milk in such market and the purchasing power and welfare of the public. The commissioner shall fix prices to producers on the basis of the use thereof in the various classes, grades and forms. Any prices fixed or approved by the commissioner shall be deemed to be prima facie reasonable.

[4. In determining the approval or request for an order as herein provided or the termination thereof on the part of producers the commissioner shall consider the approval, request or favor in respect thereto by any bona fide cooperative association of producers engaged in marketing milk within such marketing area as the approval, request or favor either of making an order or of termination thereof of the producers who are under contract with such cooperative association of producers.]

3. The commissioner shall appoint a referendum advisory committee to assist and advise him in the conduct of the referendum. Such committee shall review referendum procedures and the tabulation of results, and shall advise the commissioner of its findings. A record of the committee's advice, recommendations and findings shall be kept and made available to any person upon request. The final certification of the referendum results shall be made by the commissioner. The committee shall consist of three members. One member shall be appointed from at least three nominations of producers submitted by the producers bargaining agency, one shall be an independent producer, and one shall be appointed from at least three nominations of producers submitted by any general farm organization. The members of the committee shall not receive a salary but shall be entitled to actual and reasonable expenses in the performance of their duties.

[5.] 4. Marketing agreements. It shall be lawful for a producers' bargaining agency of the production area supplying a marketing area and a distributors' bargaining agency for such marketing area to enter into marketing agreements as to the prices to be paid by distributors to producers for milk sold or otherwise utilized in said marketing area, as to rules and regulations covering the method of determining the proportion of the product of the entire dairy herd of a producer which shall be accepted and paid for pursuant to such price or prices, as to reasonable trade practices affecting the relations between producers and distributors in such market. Such agreement may also contain provisions for a committee to administer the provisions of said marketing agreement. No agreement, however, shall be effective until a copy thereof signed by all persons parties thereto shall have been filed with the commissioner.

If the commissioner shall have reason to believe that any such marketing agreement results in a monopoly or restraint of trade to such an extent that the price of milk is unduly enhanced by reason thereof, he shall serve upon the parties to such agreement a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing specifying a date and place, not less than thirty days after the service thereof, requiring the parties to such marketing agreement to show cause why an order should not be made directing them to cease and desist from such monopolization or restraint of trade. The parties so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given at such a hearing shall be taken under such rules and regulations as the commissioner shall prescribe, reduced to writing and made a part of the record therein. If upon such hearing the commissioner shall be of the opinion that such marketing agreement results in monopo-

ly or restraint of trade to such an extent that the price of milk in the marketing area affected by such agreement is unduly enhanced, he shall issue and cause to be served upon the parties to said agreement an order reciting the facts found by him and directing them to cease and desist from such undue enhancement of prices. If such order is not obeyed by the parties to such agreement, the commissioner shall file with the attorney-general a certified copy of the order, evidence of such disobedience and all of the records in the proceeding, and the attorney-general may apply to the supreme court for an order or decree affirming, modifying or setting aside such order or for making such other order or decree as the court may deem equitable in the premises.

Upon application of the parties to said marketing agreement and after a hearing, as provided in subdivision one of this section, the commissioner may by order make the provisions of said marketing agreement, relative to prices to producers and other provisions thereof, effective as to all producers, distributors and handlers in said market notwithstanding that they may not have approved of said agreement if he shall find that the terms and conditions of said agreement are fair, equitable and in public interest, that the agreement has been fairly entered into without fraud, that public interest so requires, in order to effectuate the declaration of policy contained in section two hundred fifty-eight-k of this [chapter] ARTICLE, that the proportion of the producers and distributors who have executed such agreement or shall have approved same upon the hearing is equal to that required for an order under subdivision one of this section, and further provided that the commissioner shall determine that the prices set forth in said marketing agreement are reasonable and proper prices, as required by this section for prices fixed by an order of the commissioner. Any order so issued shall terminate effective on the last day of the current month, and in the same manner and upon the same request after a hearing, as provided for the termination of an order in subdivision one of this section.

[6.] 5. If approved by [sixty-six and two-thirds] FIFTY-ONE per centum of the producers affected voting [individually or through their cooperative] in the referendum, any order or marketing agreement fixing the price to producers under either subdivision one or subdivision [five] FOUR of this section for market or markets, may provide for an equalization of prices to all producers of the production area of the market affected so that each producer or co-operative association shall receive the same base price for all milk delivered subject to reasonable differentials for quality and location and for services. Any such order may contain provisions requiring from persons who bring milk or cream into the marketing area regulated by such order payments on all such milk or cream whenever such persons are not otherwise regulated by the order.

In order to effect such equalization of prices to producers the commissioner shall require a monthly report from each dealer receiving milk from producers for such market showing the disposition of all milk handled by the reporting dealer in such market and shall thereafter require payment by each dealer, to a trust company designated as a fiscal agent by the commissioner, of any amount by which the sum otherwise due by such dealer to its producers in accordance with the prices fixed by such order exceeds the equalized base price as determined by the commissioner from such reports, which amounts so paid to said fiscal agent, the commissioner shall direct it to pay to those dealers whose reports show that the base prices they will pay their producers in accordance with such order are less than the equalized base price as so determined by the commissioner, for repayment in turn by such dealers to

their producers so as to bring all lower rates of payment up to the equalized base price. Such payments to said fiscal agents shall not be deemed to be state funds. Such equalization shall include milk of all grades and produced by all breeds of cows, and may include milk, approved by a board or boards of health having jurisdiction in a marketing area designated in an order under this section, which was produced by a dealer.

The provisions of this subdivision shall not become operative as to the New York state metropolitan market production area, however, until pursuant to federal or state statutes, or by action of authorities duly constituted and authorized thereunder, prices to producers are so equalized and made effective throughout all the production area of the New York state metropolitan market area.

[7.] 6. After the commissioner shall have fixed prices in any area or approved prices in a marketing agreement to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to buy or offer to buy milk at any price less than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less than such price, or prices, as shall be applicable to the particular transaction, whether by a discount or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

[8.] 7. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach.

[9.] 8. No marketing agreement or order shall prevent a cooperative association from blending as heretofore the proceeds of all sales and distributing to its producers the resultant blended price subject to deductions and differentials as provided by its contracts with its producers, but no such cooperative association shall sell milk at prices lower than the prices fixed by the commissioner in an order for the markets affected.

[10.] 9. Any marketing agreement or order of the commissioner may provide for necessary deductions from payments to producers to cover the cost of administering such marketing agreement or order, including the cost of auditing milk dealers' classifications, and the cost of other services to producers. The funds so derived from such deductions shall be deposited in an account within the miscellaneous special revenue fund and shall not be deemed to be state funds. The commissioner may, in his or her discretion, appoint an administrator and such assistant administrators as in his or her opinion may be necessary to administer the terms of any agreement or order, and the persons so appointed shall be deemed to occupy positions confidential to the commissioner and may be appointed without competitive examination. All other persons employed by the commissioner in the administration of such a marketing agreement or order shall be selected in accordance with the civil service law and rules.

[11.] 10. Any marketing agreement or order of the commissioner may provide (a) for payments to cooperative associations of producers in cases where the commissioner finds that such associations are actually rendering marketing services to producers under contract with them, which services enure to the benefit of all producers in the market or to the benefit of the market as a whole and may include the conduct and maintenance, jointly with other cooperative associations, of plans or campaigns, by advertisement or otherwise, including participation in similar regional or national plans or campaigns, to promote the increased consumption of milk and milk products, to acquaint the public with the dietary advantages of milk and milk products and with the economy in the diet, and to command, for milk and dairy products, consumer attention consistent with their importance and value, or that such associations are rendering services in the control and disposition of surplus for the benefit of the market; (b) for payment to milk dealers or to cooperative associations of producers which operate milk receiving stations or manufacturing plants for services rendered by them, in the stabilizing of the supply of fluid milk and cream within the market at times either of surplus or of shortage of milk; and (c) for adjustments in payments to producers to effect a more favorable seasonal balance as between the production and consumption of milk. Such adjustments may be made in the form of deductions and additions to the fund to equalize prices of milk to producers, or by apportioning among producers the total value of all milk subject to equalization on the basis of their marketings of milk during a representative period of time. Any such deductions from the fund to equalize prices shall not be deemed to be state funds. Such moneys shall be held in reserve and used solely for additions to the fund to equalize prices, in such manner as the order may provide. The commissioner shall make no provision for adjustment in payments under this section with respect to a state milk marketing order, except on the petition of a producers' bargaining agency of a production area supplying a marketing area and after a public hearing and subsequent producer approval as required by this section.

[12.] 11. "Distributor" as used in this and the preceding section means a milk dealer as defined in this article who delivers milk to stores and/or consumers within the marketing area, from a milk depot or milk plant owned and/or operated by such dealer.

S 2. This act shall take effect immediately.