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I N   S E N A T E

May 6, 2010

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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:

1     Section 1. Section 258-m of the agriculture and markets law, as added  
2     by chapter 383 of the laws of 1937, subdivisions 1, 4 and the opening  
3     paragraph of subdivision 6 as amended by chapter 679 of the laws of  
4     2002, subdivision 2 as amended by chapter 935 of the laws of 1971,  
5     subdivisions 6 and 11 as amended by chapter 309 of the laws of 1999,  
6     subdivision 9 as amended and subdivision 12 as renumbered by chapter 696  
7     of the laws of 1940 and subdivision 10 as amended by chapter 169 of the  
8     laws of 1994, is amended to read as follows:  
9     S 258-m. Orders fixing prices for milk and marketing agreements. 1.  
10    [Upon] THE COMMISSIONER SHALL, AFTER MAKING A DETERMINATION, OR UPON the  
11    petition of [a producers' bargaining agency of the production area  
12    supplying a marketing area, such agency representing] at least thirty-  
13    five per centum of the producers of milk [therein, alleging the exist-  
14    ence of] THAT conditions so affecting the orderly marketing of milk in  
15    such area that public interest requires regulation of prices of milk in  
16    such area and equalization of the burden of surplus milk and expense of  
17    handling it, and sharing the benefits of the fluid market in order that  
18    the public policy declared in section two hundred fifty-eight-k of this  
19    [chapter] ARTICLE shall be effective, [and upon the written request of  
20    the petitioner, the commissioner shall] AND SHALL HAVE THE AUTHORITY TO  
21    set, without a hearing, an interim price for class I fluid milk, and may  
22    set an interim price for class II and/or III milk. In determining such  
23    interim price, the commissioner shall take into consideration, among  
24    other factors: (a) the prices being paid to producers; (b) the costs of  
25    production to producers; (c) any changes in the ratio of index of prices  
26    received for milk to index of prices paid by dairy farmers; (d) the  
27    level of prices paid to producers in adjoining markets; and (e) the  
28    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.

LBD16787-01-0

1 RESPONSE TO A PETITION BY PRODUCERS OF MILK, SUCH interim price shall be  
2 set within five days of such [written request] PETITION and to the  
3 extent practicable apply to any milk purchased on or after the first day  
4 of the month following [such] THE COMMISSIONER'S determination. Such  
5 [interim price shall be in effect until the final determination regard-  
6 ing the petition is made pursuant to the provisions of this article and  
7 is enforceable and effectuated, provided however, such] interim price  
8 shall be in effect for [no longer] NOT MORE than [one hundred eighty]  
9 NINETY consecutive calendar days. During such time when the interim  
10 price is in effect, the commissioner shall provide for and enforce a  
11 mechanism for compensatory payments and have the authority to establish  
12 and administer an equalization pool throughout the entire state or any  
13 part thereof. Such interim price shall be reviewable by a person  
14 aggrieved in a proceeding pursuant to article seventy-eight of the civil  
15 practice law and rules. The effectiveness or enforcement of such interim  
16 price regulation shall not be restrained, stayed, or enjoined pendente  
17 lite. [In addition, it shall be the duty of] WITHIN FIFTEEN DAYS OF  
18 SETTING THE INTERIM PRICE the commissioner [to] SHALL call a public  
19 hearing for the consideration of said [petition] PRICE and [to] give  
20 notice [thereof] OF by advertising [such call] in [such] A newspaper or  
21 newspapers of general circulation in such marketing area as the commis-  
22 sioner deems advisable. Such notice shall specify a time and a place  
23 within the marketing area at which the hearing will be held and at which  
24 the [applicants] PETITIONERS and other persons, including producers,  
25 distributors and consumers and associations thereof, may be heard. In  
26 not more than fifteen days upon receiving the petition the commissioner  
27 shall set the hearing date in accordance with the above provisions. Such  
28 hearing shall commence in not less than fifteen days but not more than  
29 twenty days of the notice specifying the date and time of the hearing.  
30 Such hearing shall conclude within fifteen days of commencement,  
31 provided however, if the commissioner determines in writing that the  
32 hearing has been conducted with due diligence but an extension is neces-  
33 sary to accord due process, he or she may extend the hearing for a peri-  
34 od not to exceed ten days. If after such hearing the commissioner shall  
35 find, upon the record of the proceeding that conditions referred to in  
36 section two hundred fifty-eight-k of this [chapter] ARTICLE exist so  
37 affecting the orderly marketing of milk in such area, that public inter-  
38 est requires that the public policy declared in section two hundred  
39 fifty-eight-k of this [chapter] ARTICLE shall be effective and that it  
40 is necessary that prices for milk to producers and associations of  
41 producers be fixed by the commissioner, as expressed by section two  
42 hundred fifty-eight-k of this [chapter] ARTICLE, and that it is favored  
43 by at least [sixty-six and two-thirds] FIFTY-ONE per centum of the  
44 producers of milk produced in the production area for said marketing  
45 area voting, [individually or through cooperatives,] in the referendum,  
46 the commissioner may by order fix and determine for such marketing area  
47 fair and equitable minimum prices to be paid to producers. The determi-  
48 nation of the commissioner as to whether or not by order to fix and  
49 determine minimum prices shall be made within forty days after such  
50 hearing, effective on the first day of the month following the determi-  
51 nation. If the commissioner determines not to fix and determine minimum  
52 prices, he shall state his reasons in writing and transmit same to the  
53 petitioner, the governor, the temporary president of the senate and the  
54 speaker of the assembly. Such price fixing order or orders shall be  
55 rescinded effective at the end of the current month after a public hear-  
56 ing whenever the commissioner shall find either that such conditions

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

5 2. [The commissioner may, from time to time upon like petition, during  
6 the existence of such conditions revise the prices so fixed, after hold-  
7 ing a hearing thereon. Whenever as herein provided a producers' bargain-  
8 ing agency of a production area supplying a marketing area shall file a  
9 petition and/or amended petition praying for any relief provided in this  
10 article, it shall be lawful for a distributors' agency of such marketing  
11 area to file a petition and/or amended petition providing for the  
12 consideration of issues therein raised relative to the petition and/or  
13 amended petition of the producers' bargaining agency, or to an existing  
14 milk marketing order. Upon receipt of any such petition of a producers'  
15 bargaining agency for any such marketing area, the commissioner shall  
16 mail a copy thereof to the secretary of the distributors' bargaining  
17 agency for such marketing area, if any, which meets the qualifications  
18 set forth in the last sentence of this paragraph. If such distributors'  
19 bargaining agency files either a petition or an amended petition with  
20 the commissioner or notifies the commissioner that no such petition will  
21 be filed, the commissioner may proceed to give notice of hearing as  
22 provided in subdivision one of this section; otherwise the commissioner  
23 shall defer the giving of such notice of hearing for a period of ten  
24 days after such distributors' bargaining agency has received from the  
25 commissioner a copy of the petition and/or amended petition of the  
26 producers' bargaining agency. The commissioner shall mail a copy of the  
27 distributors' bargaining agency petition to the secretary of the produc-  
28 ers' bargaining agency and shall give such notice of such petition by  
29 publication or otherwise as the commissioner deems advisable. Evidence  
30 upon the proposals set forth in both the producers' and distributors'  
31 bargaining agency petitions shall be received at the same hearing. The  
32 commissioner shall not be required to furnish a copy of any petition of  
33 a producers' bargaining agency to a distributors' bargaining agency nor  
34 shall such distributors' bargaining agency be entitled to file a peti-  
35 tion and to be heard as herein provided unless within the calendar year  
36 preceding the filing with the commissioner of the producers' bargaining  
37 agency petition such distributors' bargaining agency shall have filed  
38 with the commissioner a list of its distributor members and the names  
39 and addresses of its officers and unless such distributors' bargaining  
40 agency represents not less than sixty per centum of the quantity of milk  
41 distributed in such marketing area, exclusive of that distributed by  
42 cooperative corporations, as determined by the reports submitted to the  
43 commissioner during the preceding license year.

44 The provisions of this subdivision relative to distributors' bargain-  
45 ing agency petitions shall not apply to any milk marketing area or  
46 order, jointly administered by the commissioner and any officer or agen-  
47 cy of the United States or of any other state.

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

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

7 [4. In determining the approval or request for an order as herein  
8 provided or the termination thereof on the part of producers the commis-  
9 sioner shall consider the approval, request or favor in respect thereto  
10 by any bona fide cooperative association of producers engaged in market-  
11 ing milk within such marketing area as the approval, request or favor  
12 either of making an order or of termination thereof of the producers who  
13 are under contract with such cooperative association of producers.]

14 3. The commissioner shall appoint a referendum advisory committee to  
15 assist and advise him in the conduct of the referendum. Such committee  
16 shall review referendum procedures and the tabulation of results, and  
17 shall advise the commissioner of its findings. A record of the commit-  
18 tee's advice, recommendations and findings shall be kept and made avail-  
19 able to any person upon request. The final certification of the referen-  
20 dum results shall be made by the commissioner. The committee shall  
21 consist of three members. One member shall be appointed from at least  
22 three nominations of producers submitted by the producers bargaining  
23 agency, one shall be an independent producer, and one shall be appointed  
24 from at least three nominations of producers submitted by any general  
25 farm organization. The members of the committee shall not receive a  
26 salary but shall be entitled to actual and reasonable expenses in the  
27 performance of their duties.

28 [5.] 4. Marketing agreements. It shall be lawful for a producers'  
29 bargaining agency of the production area supplying a marketing area and  
30 a distributors' bargaining agency for such marketing area to enter into  
31 marketing agreements as to the prices to be paid by distributors to  
32 producers for milk sold or otherwise utilized in said marketing area, as  
33 to rules and regulations covering the method of determining the propor-  
34 tion of the product of the entire dairy herd of a producer which shall  
35 be accepted and paid for pursuant to such price or prices, as to reason-  
36 able trade practices affecting the relations between producers and  
37 distributors in such market. Such agreement may also contain provisions  
38 for a committee to administer the provisions of said marketing agree-  
39 ment. No agreement, however, shall be effective until a copy thereof  
40 signed by all persons parties thereto shall have been filed with the  
41 commissioner.

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

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

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

32 [6.] 5. If approved by [sixty-six and two-thirds] FIFTY-ONE per centum  
33 of the producers affected voting [individually or through their cooper-  
34 ative] in the referendum, any order or marketing agreement fixing the  
35 price to producers under either subdivision one or subdivision [five]  
36 FOUR of this section for market or markets, may provide for an equaliza-  
37 tion of prices to all producers of the production area of the market  
38 affected so that each producer or co-operative association shall receive  
39 the same base price for all milk delivered subject to reasonable differ-  
40 entials for quality and location and for services. Any such order may  
41 contain provisions requiring from persons who bring milk or cream into  
42 the marketing area regulated by such order payments on all such milk or  
43 cream whenever such persons are not otherwise regulated by the order.

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

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

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

14 [7.] 6. After the commissioner shall have fixed prices in any area or  
15 approved prices in a marketing agreement to be charged or paid for milk  
16 in any form included in the definition of milk as used in this article  
17 whether by class, grade or use, it shall be unlawful for a milk dealer  
18 to buy or offer to buy milk at any price less than such price or prices  
19 as shall be applicable to the particular transaction, and no method or  
20 device shall be lawful whereby milk is bought or sold or offered to be  
21 bought or sold at a price less than such price, or prices, as shall be  
22 applicable to the particular transaction, whether by a discount or  
23 rebate, or free service, or advertising allowance, or a combined price  
24 for such milk together with another commodity or commodities, or service  
25 or services, which is less than the aggregate of the prices for the milk  
26 and the price or prices for such other commodity or commodities, or  
27 service or services, when sold or offered for sale separately or other-  
28 wise.

29 [8.] 7. It is the intent of the legislature that the instant, whenever  
30 that may be, that the handling within the state by a milk dealer of milk  
31 produced outside of the state becomes a subject of regulation by the  
32 state, in the exercise of its police powers, the restrictions set forth  
33 in this article respecting such milk so produced shall apply and the  
34 powers conferred by this article shall attach.

35 [9.] 8. No marketing agreement or order shall prevent a cooperative  
36 association from blending as heretofore the proceeds of all sales and  
37 distributing to its producers the resultant blended price subject to  
38 deductions and differentials as provided by its contracts with its  
39 producers, but no such cooperative association shall sell milk at prices  
40 lower than the prices fixed by the commissioner in an order for the  
41 markets affected.

42 [10.] 9. Any marketing agreement or order of the commissioner may  
43 provide for necessary deductions from payments to producers to cover the  
44 cost of administering such marketing agreement or order, including the  
45 cost of auditing milk dealers' classifications, and the cost of other  
46 services to producers. The funds so derived from such deductions shall  
47 be deposited in an account within the miscellaneous special revenue fund  
48 and shall not be deemed to be state funds. The commissioner may, in his  
49 or her discretion, appoint an administrator and such assistant adminis-  
50 trators as in his or her opinion may be necessary to administer the  
51 terms of any agreement or order, and the persons so appointed shall be  
52 deemed to occupy positions confidential to the commissioner and may be  
53 appointed without competitive examination. All other persons employed by  
54 the commissioner in the administration of such a marketing agreement or  
55 order shall be selected in accordance with the civil service law and  
56 rules.

1 [11.] 10. Any marketing agreement or order of the commissioner may  
2 provide (a) for payments to cooperative associations of producers in  
3 cases where the commissioner finds that such associations are actually  
4 rendering marketing services to producers under contract with them,  
5 which services enure to the benefit of all producers in the market or to  
6 the benefit of the market as a whole and may include the conduct and  
7 maintenance, jointly with other cooperative associations, of plans or  
8 campaigns, by advertisement or otherwise, including participation in  
9 similar regional or national plans or campaigns, to promote the  
10 increased consumption of milk and milk products, to acquaint the public  
11 with the dietary advantages of milk and milk products and with the econ-  
12 omy in the diet, and to command, for milk and dairy products, consumer  
13 attention consistent with their importance and value, or that such asso-  
14 ciations are rendering services in the control and disposition of  
15 surplus for the benefit of the market; (b) for payment to milk dealers  
16 or to cooperative associations of producers which operate milk receiving  
17 stations or manufacturing plants for services rendered by them, in the  
18 stabilizing of the supply of fluid milk and cream within the market at  
19 times either of surplus or of shortage of milk; and (c) for adjustments  
20 in payments to producers to effect a more favorable seasonal balance as  
21 between the production and consumption of milk. Such adjustments may be  
22 made in the form of deductions and additions to the fund to equalize  
23 prices of milk to producers, or by apportioning among producers the  
24 total value of all milk subject to equalization on the basis of their  
25 marketings of milk during a representative period of time. Any such  
26 deductions from the fund to equalize prices shall not be deemed to be  
27 state funds. Such moneys shall be held in reserve and used solely for  
28 additions to the fund to equalize prices, in such manner as the order  
29 may provide. The commissioner shall make no provision for adjustment in  
30 payments under this section with respect to a state milk marketing  
31 order, except on the petition of a producers' bargaining agency of a  
32 production area supplying a marketing area and after a public hearing  
33 and subsequent producer approval as required by this section.

34 [12.] 11. "Distributor" as used in this and the preceding section  
35 means a milk dealer as defined in this article who delivers milk to  
36 stores and/or consumers within the marketing area, from a milk depot or  
37 milk plant owned and/or operated by such dealer.

38 S 2. This act shall take effect immediately.