

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 47-18

SUBJECT: Transactions between dealers and producers; termination of dealer-producer contract

AGENCY: Pennsylvania Milk Marketing Board

TYPE OF REGULATION

- Proposed Regulation**
- Final Regulation**
- Final Regulation with Notice of Proposed Rulemaking Omitted**
- 120-day Emergency Certification of the Attorney General**
- 120-day Emergency Certification of the Governor**
- Delivery of Tolled Regulation**
 - With Revisions**
 - Without Revisions**

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		<u>HOUSE COMMITTEE - Agriculture and Rural Affairs</u>
_____	_____	MAJORITY CHAIR _____
_____	_____	MINORITY CHAIR _____
		<u>SENATE COMMITTEE - Agriculture and Rural Affairs</u>
_____	_____	MAJORITY CHAIR _____
_____	_____	MINORITY CHAIR _____
		<u>INDEPENDENT REGULATORY REVIEW COMMISSION</u>
_____	_____	<u>ATTORNEY GENERAL</u> (for Final Omitted only)
_____	_____	<u>LEGISLATIVE REFERENCE BUREAU</u> (for Proposed only)

CDL-1

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)**

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>BY: _____ (DEPUTY ATTORNEY GENERAL)</p> <p>_____ DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is here by certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>Pennsylvania Milk Marketing Board</u> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>47-18</u></p> <p>DATE OF ADOPTION: <u>May 11, 2021</u></p> <p><i>Carol A. Hardberger</i></p> <p>BY: _____ TITLE <u>Secretary</u> (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u>/s/ Douglas L. Eberly</u></p> <p><u>May 11, 2021</u> DATE OF APPROVAL</p> <p>(Chief Counsel, Independent Agency)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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Pennsylvania Milk Marketing Board Regulation 47-18

No commentator expressly asked for information regarding the Final Form submission. Regardless, the Board emailed the Final Form submission packet to

Pennsylvania Department of Agriculture johoward@pa.gov
Pennsylvania Center for Dairy Excellence jsebright@centerfordairyexcellence.org
Progressive Dairymen's Cooperative ccampbell@frontiernet.net
United Ag Services unitedag@verizon.net
Rutter's Dairy toddr@rutters.com
Harrisburg Dairies ajdewey@harrisburgdairies.com
Pennsylvania Association of Dairy Cooperatives mbeshore@johnsonduffie.com
Progressive Agriculture Organization progressiveagricultureorg@gmail.com
Pennsylvania Farm Bureau Jdmontenegro@pfb.com
Pennsylvania Association of Milk Dealers wyoviene@bakerdonelson.com
Pennsylvania Food Merchants Association allen.warshaw@gmail.com
Nelson Troutman jt3@evenlink.com
Melissa Bravo bravomelissa@yahoo.com

The Board also posted the Final Form submission packet at <https://www.mmb.pa.gov/Consumer/PublishingImages/Pages/default/Final%20Form%20Packet%2047-18.pdf>.

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p>(All Comments submitted on this regulation will appear on IRRC's website)</p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p>
<p>(1) Agency Pennsylvania Milk Marketing Board</p>		
<p>(2) Agency Number: 47 Identification Number: 18</p>		<p>IRRC Number:</p>
<p>(3) PA Code Cite: 7 Pa. Code § 143.31</p>		
<p>(4) Short Title: Transactions between dealers and producers; Termination of dealer-producer contract</p>		
<p>(5) Agency Contacts (List Telephone Number and Email Address): Primary Contact: Doug Eberly; 717-836-3115; deberly@pa.gov Secondary Contact: Carol Hardbarger; 717-487-4184; chardbarge@pa.gov</p>		
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input type="checkbox"/> Proposed Regulation <input checked="" type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General</p>
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>This is an amendment extending the current 28-day notice requirement to terminate a dealer-producer relationship to 90 days for dealers; the proposed regulation maintains the 28-day notice requirement for producers to terminate the relationship. It also provides for waivers to address situations where a 90-day notice would financially imperil a milk dealer.</p>		
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>Section 301 of the Pennsylvania Milk Marketing Law (“Law”) (31 P.S. § 700j-301) gives the Board the authority to “supervise, investigate, and regulate the entire milk industry of the Commonwealth . . ., including the purchase and sale of milk . . . in this Commonwealth, and including the establishment of reasonable trade practices” Section 307 of the Law (31 P.S. § 700j-307) gives the Board the authority to adopt and enforce regulations necessary or appropriate to carry out the provisions of the Law.</p>		
<p>(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action. No</p>		

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

At the beginning of March 2018 approximately 27 independent Pennsylvania dairy farmers received termination notices from the milk dealer purchasing their milk. These producers received 90-day notices that their agreements would be terminated, yet many had difficulty finding new markets.

The Board regulations currently require a minimum of 28 days notice to terminate a dealer-producer agreement, so the March 2018 producers received more notice than required. However, it took longer than 28 days for the producers to find new markets. If these producers had received 28-day notices, there is a possibility that their inability to find a new market within 28 days would have led to those producers leaving the dairy business. The Pennsylvania Department of Agriculture petitioned the Board to extend the required notice period to address this situation and help to provide adequate time for producers to find new markets when their current market is lost, thereby providing an opportunity for them to continue in the dairy business.

Milk dealers generally do not terminate producer agreements without good cause – there is a cost associated with dropping and adding producers and when an independent producer and a dealer have a relationship that benefits both they do not want to end that relationship without a good reason. In the case of the 27 producers that received notices in March 2018, their dealer could not, from a financial and economic standpoint, continue to purchase their milk. The exceptions to the 90-day notice requirement in the amendment are intended to provide a shorter notice period in the case of a dealer’s financial hardship.

The approximately 1,100 independent dairy farmers in Pennsylvania will benefit by having a longer notice period before their purchasing agreements with dealers are terminated, allowing them more time to find alternate markets and stay in farming.

Approximately 20-25 Class I Pennsylvania milk dealers purchase milk from independent Pennsylvania producers at any time. These dealers will be subject to a longer mandated termination notice requirement, but the exceptions in the amendment are intended to benefit those dealers to the extent that the notice requirement would be shorter in cases of financial hardship. The regulation maintains the existing 28-day notice requirement for dealers in cases of financial hardship, as requested by the dealers.

Approximately 5,000 producers are members of dairy cooperatives. Termination of these relationships are governed by contracts between the producers and their cooperatives. This amendment would not affect those relationships. Cooperatives supply the Class I market and the vast majority of the non-Class I market. Cooperative-dealer supply arrangements are generally done under contract containing termination notice terms – these contracts would also not be affected.

It is not possible to accurately place a dollar figure on the benefits of providing Pennsylvania dairy farmers an opportunity to find another market, rather than leave farming, when they lose a Class I market. Nor is it possible to accurately place a dollar figure on the benefit a dealer would receive by being exempted from the 90-day notice requirement. However, according to the Pennsylvania Center for Dairy Excellence, the Pennsylvania dairy industry has an economic value

of \$12.7 billion and creates almost 53,000 jobs (<http://centerfordairyexcellence.org/calculate-dairys-value/>). Pennsylvania dairy farmers are the backbone of this economic engine and the amendment is intended to provide them increased opportunity to remain in dairy farming in the face of marketing, financial, and economic pressure.

The proposed regulation required that producers also provide 90-day notice to dealers before terminating a relationship. This provision has been removed from the final form regulation. Many dealers have waiting lists of independent producers who want to ship to the dealer. In any event, it is not difficult for dealers to find milk, nor did dealers ask for an additional notice from producers beyond the current 28 days. Therefore, the 90-day notice requirement from producers to dealers to terminate a relationship is not part of this final form submission.

The existing language, carried over into the final form, requiring dealers to specify the reason for terminating producers provides terminated producers an opportunity to correct issues that may make it difficult for them to find a new market for their milk. As noted above, it can be difficult for producers to find a new market and providing producers a reason for their termination provides an opportunity to make the search less difficult, providing that reason is under a producer's control. Given the ready availability of producer milk, an analogous provision is not necessary if a producer terminates a relationship with a dealer.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

There are no applicable federal standards.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

No state has a similar combination of notice requirement and exceptions. The exceptions to the longer notice requirement are intended to minimize the impact on dealers. The Board anticipates that the amendment will have no impact on Pennsylvania's ability to compete with other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations **No**

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The regulation was prompted by a petition from the Pennsylvania Department of Agriculture to extend the required notice period to terminate a dealer-producer relationship. The Board held a public hearing on July 2, 2018. Notice of the hearing was published in the Pennsylvania Bulletin on May 19, 2018. The Board also provided notice on May 7, 2018, via Board Bulletin to parties who have requested notice of Board hearings via email.

The following parties testified at the hearing and/or provided written comments as part of the hearing: Pennsylvania Department of Agriculture, Pennsylvania Center for Dairy Excellence, Pennsylvania Milk Marketing Board Staff, Progressive Dairymen’s Cooperative, United Ag Services, Rutter’s Dairy, Harrisburg Dairies, Pennsylvania Association of Dairy Cooperatives, Progressive Agriculture Organization, National Family Farm Coalition, Dairy Farmer Nelson Troutman, Melissa Bravo, Pennsylvania Farm Bureau, and Pennsylvania Association of Milk Dealers.

The Pennsylvania Association of Milk Dealers represents milk dealer interests before the Board. All Pennsylvania milk dealers (including Rutter’s Dairy and Harrisburg Dairies), with the exception of two milk dealers with multi-state operations/locations, are small businesses.

The cooperatives that are members of the Pennsylvania Association of Dairy Cooperatives are not small businesses. However, the individual member farms of each of the cooperatives, for the most part, are small businesses. There is no overall tracking of receipts by individual farms. However, the average Pennsylvania dairy herd size is approximately 80 cows; at prevailing milk prices and average Pennsylvania production since 2016 at least, a farm would have to milk at least 170 cows to not be a small business. The same analysis applies to other organizations with dairy farmer members – Progressive Dairymen’s, Progressive Agriculture, National Family Farm Coalition, and Pennsylvania Farm Bureau.

Essentially, most of the input the Board solicited and received ultimately can be attributed to small businesses.

The exceptions to the amended notice requirement were developed at the request of, and with considerable input from, the Pennsylvania Association of Milk Dealers. The Pennsylvania Association of Milk Dealers also tested the Ohlson O-score and Dun and Bradstreet quick ratios.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

The regulation amends a current regulation that addresses termination of dealer-producer relationships, so milk dealers and milk producers will be affected. The regulation does not apply when dealers and producers explicitly contract for a different termination period, so the Board anticipates that it will not apply to most sales from a cooperative to a milk dealer. Nor does the regulation apply when a cooperative contract with members provides for a different termination period, so the Board anticipates that it will not apply to the approximately 23 cooperatives marketing the milk of approximately 5,000 Pennsylvania dairy farmers.

The Board anticipates the regulation will affect the approximately 20-25 dealers that purchase milk from approximately 1,100 independent dairy farmers in any given month. These are the businesses currently affected by the regulation and the Board does not anticipate amending the

termination period and providing the waivers/exceptions to the termination period found in the amendment will change those affected. As noted in question 14, most of these businesses are small businesses.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

See response 15.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

As noted in prior answers, most of the impact will be on small businesses in the form of independent Pennsylvania dairy producers and Class I milk dealers. Response 10 describes some of the benefits and economic impact of the dairy industry and the amendment.

Additionally, agriculture is the top industry in Pennsylvania and dairy is the number one sector of agriculture in terms of economic impact. The Pennsylvania dairy farmer is the base of that impact. The number of dairy farms is more important to the health of rural economies than the amount of milk produced. Providing additional time for dairy farmers to find an alternate market when their agreement with a dealer is terminated benefits Pennsylvania's entire economy. However, providing exceptions to the increased notice requirement also benefits the milk dealers who must remain in business to buy the Pennsylvania producer milk that provides the opportunity for Pennsylvania producers to remain in business.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The benefits outweigh the costs as explained in Responses 10 and 17. A longer notice period will benefit dairy farmers by providing them additional time to find an alternate market, thereby providing them additional opportunities to remain in business and contributing to Pennsylvania's number one agricultural industry.

The exceptions to the notice requirement are intended to minimize the costs to dealers of the extended notice requirement. If dealers must continue to purchase milk for which they have no customers, the financial hardship could cause them to go out of business. The exceptions to the extended notice requirement will minimize that impact and allow milk dealers to continue in operation and purchasing Pennsylvania producer milk.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The Board expects that there would be no additional legal, accounting, or consulting procedures required from the regulated community of milk dealers to comply with the amendment.

If a milk dealer qualifies for an exception to the longer notice requirement (and takes advantage of

the exception), qualification is designed to be based on reports already submitted to the Board (Milk Dealer's Financial Statement PMMB-60), records already kept by the dealers (such as sales records), or, in the case of the Statement of Cash Flows, a document already prepared as part of annual milk dealer financial statements (though not required to be filed with the Board) or already prepared because it would be required by banks and significant vendors if a plant were in financial distress.

With the amendment extending the notice period from 28 days to 90 days, the Board has provided for exceptions in the event of general dealer financial hardship, lost business, or a catastrophic event. Each of the exceptions provides the Board up to 10 business days to review the documentation submitted with the request before approving or disapproving it. The 28-day notice period would then begin on the date the Board approves the exception to the 90-day requirement. Therefore, there is the possibility that a dealer may be required to purchase producer milk for up to 10 business days longer under the amendment than dealers are currently required. The cost associated with purchasing milk is different for each dealer and is based on many factors, including, but not limited to, utilization, location, monthly milk price, and volume purchased. The Board has to consider the impact on both producers and dealers. On balance, given the costs and benefits to dealers and producers, it is the Board's judgment that the 28-day notice period should begin on the date of Board approval of an exception request.

The most current audited data the Board has regarding milk values paid by Pennsylvania dealers is that for the 15 Class I processing dealers that are part of the over-price premium calculation cross section. For January 2021, the simple average minimum value due to producers from those dealers was \$18.08 per hundredweight. The Board will use \$18.08 per hundredweight because it is, as the most current audited data we have, the most current accurate value.

The "lost sales" exception found in section 143.31(e) is based on 40,000 pounds or 3% of raw milk receipts per week, whichever is less. The cost to purchase 40,000 pounds of producer milk for one week using the January 2021 simple average of minimum value due would be \$7,232.00 as shown below:

40,000 pounds = 400 hundredweights (cwt)

Minimum value due = \$18.08/cwt

400 cwt x \$18.08/cwt = \$7,232.00 per week (or \$14,464.00 for two weeks or 10 business days)

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There should be no costs or savings to local governments.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

There should be no costs or savings to state government.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

As noted in Response 19 the Board, in consultation with the Pennsylvania Association of Milk Dealers, wrote the exceptions to the longer notice requirement to allow analysis and qualification for the exception to be based on reports already filed with the Board and/or documents and records already prepared or maintained by dealers. The exceptions are written to minimize, if not eliminate, the need for additional reporting, recordkeeping, or other paperwork.

(22a) Are forms required for implementation of the regulation?

Yes – but the forms are already completed independently of their use to implement this regulation. See Response 22.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here.** If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

The forms that milk dealers are currently required to file and which the exceptions are based on are on the Board’s website at <https://www.mmb.pa.gov/Licensing/Dealer/Pages/default.aspx> under the section titled “Financial Report Form(s).”

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	0	0	0	0	0	0
COSTS:	\$	\$	\$	\$	\$	\$
Regulated Community	14,728.00	14,728.00	14,728.00	14,728.00	14,728.00	14,728.00
Local Government	0	0	0	0	0	0

State Government	0	0	0	0	0	0
Total Costs	14,728.00	14,728.00	14,728.00	14,728.00	14,728.00	14,728.00
REVENUE LOSSES:	\$	\$	\$	\$	\$	\$
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	0	0	0	0	0	0

The costs to the regulated community are based on the assumptions and limitations noted in response 19.

(23a) Provide the past three year expenditure history for programs affected by the regulation.

Not applicable

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

(a)

Independent Pennsylvania dairy farmers – 1,100

Processing milk dealers purchasing from independent Pennsylvania dairy farmers – 20-25

(b)

None – see response 19.

(c)

The probable effect on independent Pennsylvania dairy farmers is to provide additional time, when their market is terminated, to find an additional market.

The probable effect on processing milk dealers purchasing milk from independent Pennsylvania dairy farmers is up to 10 business days of additional producer purchases than is currently required.

(d)

As described in prior responses, the Board is balancing the need for dairy farmers to have more time to find an alternative market when they lose their current one, with the need for milk dealers

subject to financial hardship to discontinue producer purchases without being driven out of business by being required to continue producer purchases they cannot afford.

The Board believes the balance it has struck with this amendment is the least intrusive and least costly to achieve the purpose of the amendment, which is to benefit the entire Pennsylvania dairy industry.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

Based on input and consultation with the Pennsylvania Association of Milk Dealers, there are sections intended to mitigate adverse impacts on both milk dealers and farmers, the majority of which are small businesses.

(c) and (d) allow financially-endangered milk dealers to qualify for a 28-day notice period, rather than the 90 day period provided for in the amendment.

(e) allows milk dealers to qualify for a 28-day notice period in the event of the loss of a major customer or customers.

(f) allows milk dealers to qualify for a 28-day notice period in the event of a catastrophic event.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The Board initially considered a 90-day termination period with no provisions for exceptions. This was rejected because it could have led to milk dealers being required to purchase milk for which they had no market for potentially 62 additional days. There is a very real possibility that such a requirement would lead to a milk dealer going out of business and therefore all of the producers shipping to that milk dealer losing a market (rather than some number less than all that would represent the dealer's lost wholesale business).

The alternative adopted is the least burdensome and was developed with extensive input from, and consultation with, the Pennsylvania Association of Milk Dealers.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and

- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

As noted in prior responses, the majority of milk dealers and dairy farmers impacted by this regulation are small businesses. The Board worked extensively to minimize impacts on both milk dealers and dairy farmers.

The exceptions to the 90-day notice requirement to allow a 28 day notice period to terminate a dealer-producer relationship are all intended to minimize the effects of the 90 day requirement on both milk dealers and farmers. A shorter notice period will better allow financially-endangered milk dealers to stay in business by terminating some, but not all, producer relationships. Requiring financially-endangered milk dealers to continue to purchase milk for which they have no customers would eventually put all of the producers shipping to such a dealer at risk of termination.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Not applicable

(29) Include a schedule for review of the regulation including:

- | | |
|---|----------------------------------|
| A. The length of the public comment period: | 30 days after publication |
| B. The date or dates on which any public meetings or hearings will be held: | not applicable |
| C. The expected date of delivery of the final-form regulation: | May 11, 2021 |
| D. The expected effective date of the final-form regulation: | August 21, 2021 |
| E. The expected date by which compliance with the final-form regulation will be required: | August 21, 2021 |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | August 21, 2021 |

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Board will continually monitor milk markets and the financial conditions of dairy farmers and milk dealers, as it does now, and will determine if there is any adverse impact on any segment of the dairy industry.

PENNSYLVANIA MILK MARKETING BOARD
7 PA. CODE SEC. 143.31
TRANSACTIONS BETWEEN DEALERS AND PRODUCERS
TERMINATION OF DEALER-PRODUCER CONTRACT

The Pennsylvania Milk Marketing Board (“Board”) proposes to amend 7 Pa. Code sec. 143.31 (termination of dealer-producer contract) to read as set forth in Annex A.

Effective date

The amendments will be effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory authority

Section 301 of the Pennsylvania Milk Marketing Law (“Law”) (31 P.S. § 700j-301) gives the Board the authority to “supervise, investigate, and regulate the entire milk industry of the Commonwealth . . . , including the purchase and sale of milk . . . in this Commonwealth, and including the establishment of reasonable trade practices” Section 307 of the Law (31 P.S. § 700j-307) gives the Board the authority to adopt and enforce regulations necessary or appropriate to carry out the provisions of the Law.

Purpose and explanation

This is an amendment extending the current 28-day notice requirement to terminate a dealer-producer relationship to 90 days. It also provides for waivers to address situations where a 90-day notice would financially imperil a milk dealer.

At the beginning of March 2018 approximately 27 independent Pennsylvania dairy farmers received termination notices from the milk dealer purchasing their milk. These producers received 90 days’ notice that their agreements would be terminated, yet many had difficulty finding new markets. One purpose of the amendment is to provide additional time for dairy farmers to find an alternative market when they lose their current market.

In the case of the 27 producers that received notices in March 2018, their dealer could not, from a financial and economic standpoint, continue to purchase their milk. The exceptions to the 90-day notice requirement in the amendment are intended to provide a shorter notice period in the case of a dealer’s financial hardship, business loss, or catastrophic event. The exceptions also provide for a dealer to make a charitable donation of packaged milk and maintain its purchasing agreement with a producer.

The amendment is intended to provide additional time to producers in a manner that minimizes adverse impact on milk dealers.

Description of proposed amendments

Section 143.31(a) is amended to increase the required notice period for dealers to terminate a dealer-producer purchasing agreement from 28 days to 90 days. Carried over from the current regulation is the requirement that dealers provide the reason(s) for termination in the notice; providing the reason(s) for termination provides producers an opportunity to correct any issues under their control as they attempt to find a new market for their milk.

The proposed version of section 143.31(a) also required producers to give 90 days' notice to terminate a dealer-producer relationship. This requirement has been removed from the final form regulation. As evidenced by past milk marketing conditions, and due to current and foreseeable milk marketing conditions, 28 days is sufficient time for a dealer to acquire any milk necessary to make up for the loss of a producer or producers.

The payment provision is also carried forward in a modified manner to account for the extended notice period. The time period provides that producers who may be searching for a new milk market receive income as they search.

Section 143.31(c) is added to provide an exception to the 90-day notice requirement for dealers in "financial distress." Financial distress is determined objectively by calculating the dealer's Ohlson O-score. The O-Score was developed in the 1980s using financial information from over 2,000 companies. It is generally considered to be more accurate than its predecessor, the Altman Z-score, which was developed in the 1960s using information from just 66 companies. The O-Score was selected as the primary objective metric for determination of dealer financial distress because of its reliability (consistent results over time) and validity (accurate results over time) in financial accounting since 1980. It is a result of a 9-factor linear combination of business-related ratios readily obtained through milk dealer financial statements currently filed with the Board by milk dealers on an annual basis. The O-Score is significantly more reliable than its predecessors as it was derived from a study of over 2,000 companies; it has over 90% accuracy. The O-Score provides an accurate determination of dealer financial distress to be used in a review of dealer applications for waiver of the 90-day producer termination notice requirement.

"Necessary documentation" is defined in the regulation and includes reports already filed annually with the Board. "Necessary documentation" is the Balance Sheet and Statement of Operations found in the Milk Dealer's Financial Statement (PMMB-60), and the Statement of Cash Flows which is prepared annually with a dealer's financial statements.

Section 143.31(d) is added as an objective backup to address cases of potential dealer financial distress that are not captured in the O-score.

Section 143.31(e) is added to provide an exception to the 90 day notice requirement for dealers not in financial distress but which lose customers and/or sales resulting in potential financial distress if required to continue to make producer purchases for which there is no customer for the packaged milk.

Section 143.31(f) was included in the proposed form to provide an opportunity for milk dealers with producer milk purchase obligations in excess of customer sales to make a charitable

donation of the associated excess packaged milk rather than to terminate producers. This section was not intended to limit or affect other charitable contributions that milk dealers make. As the Board drafted the final-form regulation it decided that charitable-related contributions should be addressed in the context of a complete review of charitable contributions. The Board concluded that this regulation is not the place to undertake such a review and has deleted this section from the regulation.

Section 143.31(g) is added to provide an exception to the 90 day notice requirement when a dealer suffers a sudden and large scale (“catastrophic”) event affecting its ability to handle, process, or sell/deliver packaged milk products.

Section 143.31(h) is added to clarify when the exceptional 28 day notice requirement begins.

Sections 143.31(i) and (k) are added to clarify that the notice period does not apply when contracts between dairy farmers and their cooperatives, and producers and dealers, respectively provide for a different notice requirement.

Proposed section 143.31(k), now section 143.31(j), is added because a common issue raised by producers who received termination notices in March 2018 was that they did not know who to contact for assistance. The Board will develop through industry contacts a list of government agencies and non-governmental organizations that provide services and assistance to address issues faced by producers who are losing a market and who want to find a new market. Dealers will be able to download the list from the Board’s website to include with termination notices. Any person, including producers, will be able to independently access the list as well.

Section 143.32 is deleted. As milk marketing conditions have changed and evolved, and continue to change and evolve, there is a likelihood that a producer may be selling some of its milk to a dealer while also processing, packaging, and selling its own milk at its farm. At one time, exempting those producers from receiving notice may have been appropriate, but the Board has determined that current conditions are such that these producers should receive the same notice as other producers.

Public comments

The Board received comments from the Pennsylvania Association of Milk Dealers (“PAMD”) and the Independent Regulatory Review Commission (“IRRC”).

The Board removed two provisions in the final-form regulation. First, the Board removed the requirement that producers provide a 90-day notice to dealers when producers want to terminate a contract. The Board removed this provision for two main reasons: 1. no party requested this provision; and 2. milk marketing conditions are, have been, and are anticipated to continue to be such that dealers can replace producer milk in 28 days or less if a producer terminates its contract with a dealer. Second, the Board removed subsection (f) regarding charitable donations. The Board concluded that charitable donations should be addressed in a separate regulation. The Board concluded that keeping regulations involving charitable

donations together in one regulation is more logical and would be best for the industry, as opposed to requiring the regulated community to search for regulations related to charitable donations throughout the Pennsylvania Code. Comments regarding the 90-day producer notice and the subsection related to charitable donations will not be further addressed.

Based on comments from IRRC and PAMD the Board provided additional detail in the Regulatory Analysis Form (“RAF”) and made changes to Annex A.

Regarding section 143.31(a), based on IRRC comments, the Board clarified that payment from dealers to producers would be due by the 20th day of the month following actual termination; this would essentially mirror the provision in the existing regulation and there was no request to change it. Similarly, the Board carried forward the requirement in the current regulation that dealers provide a reason(s) to producers when producers are terminated. No change to this provision was requested, and it has been used and followed by dealers since 1978 with no issue.

The Board added additional detail to the RAF regarding the definition of “necessary documentation” in section 143.31(c). “Necessary documentation” is defined in the regulation and consists of items already filed each year with the Board by dealers. In developing the regulation, the Board attempted to minimize any additional requirements for dealers. Based on IRRC comments, the Board also added detail regarding notification requirements to the regulation and described those additions in the RAF. The regulation maintains the existing 28-day notice requirement for dealers to terminate a contract in cases of financial hardship as determined by the objective measures found in the regulation.

The Board also added detail to the RAF regarding the requirements of Section 143.31(k), now Section 143.31(j). When producers are terminated, they have many questions and concerns. The Board added this section to ensure that producers received information regarding resources to assist them with their questions and concerns when they receive a termination notice from a dealer. The information will be available on the Board’s website at mmb.pa.gov at any time for any interested individual to download.

PAMD commented, and IRRC suggested the Board address, that the proposal to enlarge the notice period from 28 days to 90 days exceeds the Board’s authority. PAMD based its comment on section 404(1) of the Milk Marketing Law (700 P.S. sec. 700j-404(1)). As the Board interprets section 404(1), that section is expressly not applicable to a milk dealer terminating a contract; inclusion in section 404(1) of the phrase “. . . except where the contract has been lawfully terminated . . .” establishes that.

Section 404(1) applies to situations where a dealer rejects “without either reasonable cause, or reasonable advance notice, milk delivered or made available . . . in ordinary continuance of a previous course of dealing, except where the contract has been lawfully terminated[.]” Section 404(1) defines “reasonable advance notice” as not less than 14 days nor more than 45 days in the absence of an express or implied term in the contract specifying a longer period. However, Section 404(1) does not provide a definition of “lawfully terminated” or “reasonable cause.” The legislature, by including the phrase “except where the contract has

been lawfully terminated” left it to the Board’s discretion to adopt regulations regarding the lawful termination of a contract, just as the legislature left to the Board’s discretion to adopt regulations regarding “reasonable cause” to reject producer milk.

The legislature expressly provided a standard for reasonable advance notice to reject producer milk. If the legislature had meant that reasonable notice standard to apply to lawfully terminating a contract, the legislature would have either expressly said so, or not included in Section 404(1) the phrase “except where the contract has been lawfully terminated.” Therefore, the Board adopted 7 Pa. Code section 143.31 to provide direction regarding the notice period required to terminate a contract. Similarly, the Board adopted 7 Pa. Code sec. 143.44 to provide direction regarding reasonable cause to reject producer milk. The milk marketing conditions that were present in 1978 when the Board adopted existing Section 143.31 have changed. Therefore, the Board has concluded that it is necessary to amend Section 143.31 to recognize those changed conditions and provide for a 90-day notice period for a dealer to terminate a dealer-producer relationship.

Based on IRRRC and PAMD comments, the Board clarified that any notice required by the regulation to be given by dealers to producers shall be made via certified mail return receipt requested and filed simultaneously with the Board. This clarification is important and necessary because the period of notice begins when a producer receives the notice. The notice period begins on the date of delivery, or the date of first attempted delivery, whichever is earlier. PAMD also suggested that provision be made for hand delivery or express delivery. To maintain consistency and reduce potential for confusion regarding effective dates of notice, the Board is not providing for hand delivery or express delivery in the final-form rulemaking.

IRRC commented that the Board should explain the reasonableness of the 10-business day period to perform the analyses required in Sections 143.31(c), (e), and (f). The 10-business day period was chosen to account for the possibility that the two employees who would perform the analysis would be on vacation or otherwise unable to complete the analysis more quickly. As of the drafting of this preamble the Board has a total of 15 employees and there are no opportunities to cross-train additional employees to perform the analysis. The Board also anticipates that dealers contemplating terminating producers under an exception to the 90-day notice requirement will be in contact with the Board for a sufficient time prior to petitioning for an exception to plan for the unlikely, but potential unavailability of the Board employees who would perform the analysis. In practice the analysis and notice of approval/disapproval from the Board to the dealer and producers should take less than five business days.

IRRC suggested that the regulation be revised to explicitly provide for dealer notice under sections 143.31(c), (d), (e), and (f). IRRC also suggested that the regulation be revised to explicitly provide that the Board would notify dealers and affected producers of its decision under those sections. These changes were made to the final-form submission.

IRRC asked if a plant shut down or slow down should be considered “catastrophic” in the same category as a massive fire or tornado damage and whether it would be more appropriate to include such an event as a separate exception to the notice requirement. The Board relied on the definition of “catastrophic” found in Google’s English dictionary as provided by Oxford

Languages (<https://www.google.com/search?q=catastrophic+definition>) as “involving a sudden and large-scale alteration in state.” A sudden plant shut down or slow down would thus be “catastrophic” and it is not possible to define every circumstance that may lead to a sudden shut down or slow down. Since it is not possible to define every circumstance that may lead to a sudden shut down or slow down, the Board concluded that a separate exception would not be appropriate.

IRRC also suggested that the Board take into account the federal Worker Adjustment and Retraining Notification (WARN) Act when it prepares the final-form regulation. Producers do not fall within the criteria of the WARN Act.

IRRC and PAMD commented that subsection (h), now subsection (g) in the final-form rulemaking, could potentially have the effect of turning a 28-day notification period into a 43-day notification period. The Board understands this possibility and its impact of dealers. The Board has weighed the potential effects on dealers and producers. Given the nature of milk markets and the difficulty producers can have finding new markets, the nature of the producer-dealer relationship, and the relative general financial conditions of producers and dealers, the Board concluded that the 28-day notice should begin upon the Board’s approval of the request for exemption from the 90-day requirement. The Board also considered, and took into account, that Board Staff would in most cases complete its analysis and notify affected dealers and producers in less than 10 business days of its decision on an exemption petition. The required analysis can be completed by one Board employee; only in cases where both Board employees qualified to perform the analysis are not able to due to vacation, illness, etc., will the analysis potentially take longer than five business days.

In determining the fiscal impact, the Board has noted that the costs associated with purchasing milk are different for each dealer and are based on many factors, such as utilization, location, monthly milk price, and volume purchased. In the RAF, the Board determines the fiscal impact based on the January 2021 simple average of minimum value due from 15 Class I processing dealers to producers. January 2021 was chosen because it is the most recent month for which the Board has audited data. The Board uses a simple average because weighting the average based on any factor would potentially materially mis-state the illustrative amount due from any dealer by mis-weighting any particular factor as it applies to any specific dealer. This regulation will basically apply only to Class I processors and their independent producers and the 15 Class I processing dealers that comprise the cross-section are used for this example purchase the majority of independent producer milk.

IRRC suggested that the Board clarify where the subsection (k), now subsection (j), list of resources to be provided by dealers with termination notices could be found. The Board will maintain this list on its website, as provided in the final-form regulation. The final-form regulation was also changed based on IRRC’s suggestion to refer to this list in section 143.31(a).

Based on an IRRC comment the “=” before “0.285Y” in Section 143.31(c) was changed to a “+.”

Based on an IRRC comment section 143.32 is now marked “(Reserved),” instead of being bracketed, to denote its deletion.

Based on an IRRC comment the Board has included in this final-form rulemaking a change to section 143.33 to remove the reference to deleted section 143.32.

Based on an IRRC comment the phrase “include, but not limited to” has been changed to “including” in section 143.31(f)(1).

Fiscal impact

The proposed amendments would have little fiscal impact on the Commonwealth, its political subdivisions, or the public.

Exceptions to the amended 90 day notice requirement that would allow milk dealers to essentially provide the current 28 day notice requirement would not be effective for up to 10 business days after a dealer requests the exception. Therefore, there is the possibility that a dealer may be required to purchase producer milk for up to 10 business days longer under the amendment than dealers are currently required. The cost associated with purchasing milk is different for each dealer and is based on many factors, including, but not limited to, utilization, location, monthly milk price, and volume purchased. Given the uncertainties, a precise quantification of this impact is not possible, but at a minimum could be as much as \$14,000.00.

Regulatory review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 10, 2019, the Board submitted a copy of the notice of proposed rulemaking, published at 49 Pa. Bulletin 5455 (September 21, 2019) to IRRC and to the Chairs of the House and Senate Committees on Agriculture and Rural Affairs for review and comment.

Under section 5(g) of the Regulatory Review Act, the Board is required to submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5(a)(j.2)), on _____, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved this final-form rulemaking.

Contact person

Interested persons may obtain information regarding this final-form rulemaking by contacting Doug Eberly, Chief Counsel, Pennsylvania Milk Marketing Board, 2301 North Cameron Street, Harrisburg, PA 17110, ra-pmmb@pa.gov, within 30 days after publication in

the Pennsylvania Bulletin. Individuals who require this information in a different format may call the Board at 717-787-4194 or the PA Relay Service for TDD Users at 800-654-5984.

Findings

The Board finds that:

- (1) Public notice of the intention to adopt these final-form regulations was given under sections 201 and 202 of the Act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) The regulation is necessary and appropriate for the administration of the act.

Order

The Board, acting under authorizing statute, orders that:

- (a) The regulations of the Board, 7 Pa. Code Chapter 143.31, are amended to read as set forth in Annex A.
- (b) The Board will submit this order and Annex A to the Office of Attorney General for review and approval as to legality and form as required by law.
- (c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (d) The order shall take effect upon publication in the Pennsylvania Bulletin.

Robert N. Barley
Chairman

ANNEX A
TITLE 7. AGRICULTURE
PART VI. MILK MARKETING BOARD
CHAPTER 143. TRANSACTIONS BETWEEN DEALERS AND PRODUCERS
TERMINATION OF DEALER-PRODUCER CONTRACT

143.31. Written notice required.

(a) No dealer shall terminate [his] its contract or purchasing agreement or ordinary continuance of a previous course of dealing with a producer [and no producer shall terminate [his] its contract or selling agreement with a dealer] except by giving such producer [or dealer] at least a [28] 90-day written notice before termination. No producer shall terminate its contract or purchasing agreement or ordinary continuance of a previous course of dealing with a dealer except by giving such dealer at least a 9028-day written notice before termination. The period of notice shall begin when the producer or dealer receives the notice. The dealer shall specify in such notice the reasons for termination, SHALL INCLUDE THE LIST OF AGENCIES AND ORGANIZATIONS REQUIRED BY SECTION (J), and shall pay in full the producer whose contract has been terminated by the 20th day of the ~~following~~ month FOLLOWING ACTUAL TERMINATION. If a dealer petitions for a shorter notice period UNDER CLAUSES (C), (D), (E), AND (F), the notice to the producer must inform the producer that the dealer is petitioning for the shorter notice period, SUCH NOTICE MUST BE PROVIDED SIMULTANEOUSLY TO THE BOARD, AND SUCH NOTICE SHALL BE SENT VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED TO AFFECTED PRODUCERS AND THE BOARD WITH NOTICE EFFECTIVE NO LATER THAN ON THE FIRST DATE OF ATTEMPTED DELIVERY. IF A DEALER PETITIONS FOR A SHORTER NOTICE PERIOD UNDER CLAUSES (C), (D), (E), OR (F), THE BOARD SHALL NOTIFY THE DEALER AND AFFECTED PRODUCERS VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED WITHIN 10 BUSINESS DAYS OF RECEIVING FROM THE DEALER THE INFORMATION REQUIRED BY THE RESPECTIVE CLAUSE ITS DECISION TO EITHER APPROVE OR DISAPPROVE THE PETITION.

(b) Repetitions of the causes set forth in sec. 143.44 (relating to rejection of producer's milk) may, however, cause termination of the contract without the requisite notice.

(c) A dealer may terminate a contract or purchasing agreement or ordinary continuance of a previous course of dealing with a producer by giving a 28-day written notice if the dealer is in financial distress. "Financial distress" means an Ohlson O-score of 0.5 and higher. The dealer's Ohlson O-score shall be calculated as follows:

$$O = -1.32 - 0.407\log(TA_t/GNP) + 6.03TL_t/TA_t - 1.43 WC_t/TA_t + 0.0757 CL_t/CA_t - 1.72X - 2.37NI_t/TA_t - 1.83FFO_t/TL_t \equiv + 0.285Y - 0.521(NI_t - NI_{t-1})/(|NI_t| + |NI_{t-1}|)$$

Where

TA = total assets

GNP = Gross National Product price index level found at
(<https://fred.stlouisfed.org/series/A001RG3A086NBEA>)
TL = total liabilities
WC = working capital = (current assets) – (current liabilities)
CL = current liabilities
CA = current assets
X = 1 if TL > TA, 0 otherwise
NI = net income after taxes
FFO = cash flow from operating activities
Y = 1 if a net loss for the last two years, 0 otherwise
t = most recent year data
t – 1 = prior year data

The Board shall complete its computation and review of the Ohlson O-score, and notify the dealer and affected producers, within 10 business days of receiving the necessary documentation from a dealer. “Necessary documentation” is the Balance Sheet and Statement of Operations found in the Milk Dealer’s Financial Statement (PMMB-60), and the Statement of Cash Flows prepared annually with the dealer’s financial statements.

(d) A dealer may terminate a contract or purchasing agreement or ordinary continuance of a previous course of dealing with a producer by giving a 28-day written notice if the dealer’s Ohlson O-score is between -1.0 and 0.5 if any 3 of the following five solvency ratio conditions are met

- i. Quick ratio less than or equal to 0.6, where quick ratio = (cash on hand + accounts receivable)/current liabilities;
- ii. Current ratio less than 1.0, where current ratio = current assets/current liabilities;
- iii. Current liabilities/total equity greater than 2/3;
- iv. Total liabilities/total equity greater than 1.0;
- v. Fixed assets/total equity greater than 3/4.

(e) A dealer may terminate a contract or purchasing agreement or ordinary continuance of a previous course of dealing with a producer by giving a 28-day written notice if the dealer has raw milk volumes for which there are insufficient customer sales. Raw milk volumes for which there are insufficient customer sales shall be determined as follows:

- (1) Identify sales reductions or customer losses experienced within any 90-day rolling period;
- (2) Document weekly average sales history in pounds for the customer(s) decreased volume or for the lost customer(s) based on a 26-week rolling average, or a lesser time period if such customer was a customer for less than 26 weeks or was a school(s) and the school contract was lost during the school year;

- (3) Affirm that good faith efforts were made to replace the lost sales;
- (4) If the lost sales calculated according to (e)(2) above amount to at least 40,000 pounds or 3% of raw milk receipts, whichever is less, of raw milk per week and the dealer has made the affirmation required by section (e)(3) above, the Board shall approve the 28 day written notice based on the dealer having raw milk volumes for which there are insufficient customer sales.
- (5) The Board shall determine if a dealer has raw milk volumes for which there are insufficient customer sales, and notify the dealer and affected producers, within 10 business days of receiving the necessary documentation from a dealer.

~~(f) If a dealer has raw milk in excess of customer sales as calculated by (e)(1) and (e)(2) above and has affirmed that it has made a good faith effort to dispose of the excess raw milk and has no other more economically sound disposal alternatives than dumping, skimming and dumping, or donating, and the dealer packages and donates the surplus milk to a Food Bank licensed by the Board, the producer milk packaged for such donation shall be exempt from any Pennsylvania-mandated premiums. The value of the donation may be reported to the Board as an authorized contribution. The value of the donation shall be equal to the minimum wholesale price applicable to the donation including discounts, less any Pennsylvania-mandated premiums incorporated into the minimum wholesale price. The donation shall not be considered a dealer inducement under Chapter 146 of the Regulations of the Milk Marketing Board. The Board shall determine if a dealer has raw milk in excess of customer sales for purposes of this subsection, and notify the dealer and affected producers, within 10 business days of receiving the request and supporting information from a dealer.~~

(gF) A dealer may terminate a contract or purchasing agreement or ordinary continuance of a previous course of dealing with a producer by giving a 28-day notice if the dealer has raw milk volumes for which there is insufficient plant output due to a verifiable catastrophic event affecting a milk plant's ability to handle, process, or sell/deliver historical volumes of packaged milk products, which is reasonably expected to last beyond 28-days. Raw milk volumes for which there is insufficient plant output shall be determined as follows:

- (1) Identify catastrophic event to ~~include but not be limited to~~ INCLUDING mechanical failure; weather-related damage; infrastructure-related damage; shut down or slow down of plant operations; government-imposed plant shutdown, partial or otherwise; or other similar catastrophic circumstance;
- (2) Document weekly average plant output as measured by sales in pounds of packaged milk products prior to catastrophic event based on a 26-week rolling average;
- (3) Document weekly average raw milk receipts in pounds prior to catastrophic event based on a 26-week rolling average;
- (4) Document reasons, nature, and extent (estimated in pounds) of reduced ability to handle, process, or sell/deliver historical output of packaged milk products;
- (5) Affirm that good faith efforts have been made to return to historical plant output documented pursuant to (g)(2);
- (6) Affirm that despite good faith efforts the reduction in output will last beyond 28-days;

(7) If the reduction in plant output documented in (g)(4) amounts to at least 40,000 pounds or 3% of historical raw milk receipts in (g)(3), whichever is less, of raw milk per week and the dealer has made the affirmations required in section (g)(5) and (g)(6), the Board shall approve the 28-day written notice based on the dealer having raw milk volumes for which there is insufficient plant capacity due to catastrophic event.

(8) The Board shall determine if a dealer has raw milk volumes for which there is insufficient output due to catastrophic event and notify the dealer and affected producers within 10 business days of receiving the information required by this subsection.

(hG) Any 28-day notice period as provided by this section shall commence on the day the 28-day notice is approved by the Board.

(iH) If a contract between a cooperative and a member of such cooperative provides for the amount of notice required to terminate the contract, this section 143.31 shall not apply.

(jI) Notwithstanding section 143.31(a), a producer and dealer may contract for either more or less than a 90 day notice period to terminate a contract or purchasing agreement. Section 143.31(a) shall apply when the contract, purchasing agreement, or ordinary continuance of a previous course of dealing between a producer and dealer does not contain a termination provision.

(kJ) The Board shall maintain AND MAKE AVAILABLE ON ITS WEBSITE a current list of government agencies and nonprofit organizations which are available to assist producers who receive a termination notice. The termination notice shall not be considered received by the producer unless it includes this list.

143.32. (Reserved).

143.33. Individual variations.

Nothing in § § 143.31 and ~~143.32~~ (relating to written notice required ~~and forfeiture of notice rights~~) shall prohibit a contract or agreement providing for a longer period of notice, or severing a relation between dealer and producer by mutual agreement on shorter period of notice.