WEST VIRGINIA CODE CHAPTER 19 ARTICLE 11A

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§19-11A-1. Purpose.

Advances in food technology have resulted in the development of a variety of products of similar usage as standardized dairy products that are so similar in appearance, odor and taste that they are difficult to differentiate from dairy products. Therefore, it is the purpose of this article to regulate these products in addition to dairy products and to regulate their marketing, to protect, promote and preserve the public health and general welfare, to prevent fraud and deception in the manufacture and trade of products covered under this article, to establish labeling requirements and to establish standards of identity for dairy products and imitation dairy products intended primarily for human consumption.

Except where otherwise indicated, it is the intent of the Legislature that this article substantially conform with the federal regulations promulgated under the authority of the United States secretary of health and human services in order to provide for the movement of milk products, cheeses and frozen desserts and imitation dairy products in interstate and intrastate commerce with a minimum of economic barriers.

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§19-11A-2. Definitions.

(a) "Adulterated" means dairy products or imitation dairy products meeting one or several of the conditions listed in section five of this article.

(b) "Approved laboratory" means a laboratory approved by the commissioner under section nine of this article.

(c) "Cheese" means blue, cheddar, cottage, cream, edam, gouda, gruyere, limburger, monterey jack, mozzarella, muenster, neufchatel, romano, roquefort, swiss or cold-pack cheese; pasteurized blended cheese whether made from cow or goat milk; and such other products as established by rule as a cheese.

(d) "Clean" means the condition where no residue remains on a surface that will, or is likely to, cause adulteration.

(e) "Commissioner" means the commissioner of agriculture of the State of West Virginia or his or her duly authorized agent.

(f) "Dairy products" means milk products, frozen desserts and cheeses as defined in this article which are intended for human consumption.

(g) "Distributor" means any person who distributes dairy products or imitation dairy products. The term does not include persons who are exclusively retailers.

(h) "Distribute" means the act of transporting, holding for sale, offering for sale, selling, bartering, parceling out, giving or otherwise disposing of dairy products or imitation dairy products. This term does not apply to a firm listed as a distributor on the label if the firm is not engaged in the activities listed in this subsection within the State of West Virginia.

(i) "Embargo" means an order to withdraw a dairy product or imitation dairy product from distribution or to stop a manufacturing operation. An embargo shall detain such product and prohibit the manufacturing process as provided in section ten of this article.

(j) "Freezer" means mechanical equipment used to lower the temperature of a mix, with or without incorporating air into the mix during the freezing process. Freezers may operate on a continuous or batch basis.

(k) "Frozen dessert" means ice cream, frozen custard, French ice cream, French custard ice cream, ice milk, goat's milk ice cream, goat's milk ice milk, fruit sherbet, nonfruit sherbets, frozen dietary dessert, frozen yogurt, frozen lowfat yogurt, milkshakes, any mix used to make such frozen desserts whether quiescently frozen or frozen while mixed and such other products as established by rule as a frozen dessert whether made with milk products from a cow or goat.

(l) "Imitation dairy products" means products that are manufactured, packaged or labeled so

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as to resemble the composition, physical and sensory properties of dairy products, which contain dairy products or milk-derived ingredients and which are intended to be used as a substitute for a dairy product.

(m) "Label" means the display of written, printed or graphic matter upon or affixed to the package in which the dairy product or imitation dairy product is distributed.

(n) "Labeling" means all representations disseminated in any manner or by any means other than by the label, which induce or which are likely or intended to induce the purchase or use of dairy products or imitation dairy products.

(o) "Manufacture" means pasteurizing, ultrapasteurizing, formulating, compounding, freezing, packaging or preparation for distribution of dairy products or imitation dairy products.

(p) "Manufacturer" means any person who manufactures dairy products or imitation dairy products.

(q) "Milk-derived ingredients" means whey, modified whey products, casein, caseinates, lactose, lactalbumins and lactoglobulins used in fluid, concentrated or dry form and such other ingredients established by rule as a milk-derived ingredient.

(r) "Milk products" means milk, acidified milk, cultured milk, concentrated milk, sweetened condensed milk, sweetened condensed skim milk, lowfat dry milk, nonfat dry milk, nonfat dry milk fortified with vitamins A and D, evaporated milk, evaporated skim milk, lowfat milk, acidified lowfat milk, cultured lowfat milk, skim milk, acidified skim milk, cultured skim milk, dry whole milk, cream, dry cream, heavy cream, light cream, light whipping cream, sour cream, acidified sour cream, eggnog, half-and-half, sour half-and-half, acidified sour half-and-half, butter, yogurt, lowfat yogurt, nonfat yogurt and such other products established by rule as a milk product whether made with milk products from a cow or goat.

(s) "Milk fat" means fat in dairy products or in milk-derived ingredients.

(t) "Misbranded" means dairy products or imitation dairy products meeting one or several of the conditions listed in section six of this article.

(u) "Mix" means the product that when frozen produces a frozen dessert or an imitation of a frozen dessert.

(v) "Official sample" means any sample taken in accordance with the provisions of this article.

(w) "Package" means any container holding dairy products or imitation dairy products.

(x) "Pasteurized" means the process of uniformly heating every particle of a dairy product or imitation dairy product, holding it in the heated state and cooling it, in equipment under

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conditions of temperature and time that is established in the Grade "A" Pasteurized Milk Ordinance, 1989 revision, published by the United States department of health and human services: Provided, That nothing contained in this definition shall be construed as barring any other process which may be approved by the commissioner or the state director of health that results in products that are free from pathogens.

(y) "Person" means any individual, partnership, association, fiduciary, firm, company, corporation, or any organized group of persons whether incorporated or not. The term "person" extends to the agents, servants, officers and employees of the person.

(z) "Retailer" means the person who sells dairy products or imitation dairy products only to the ultimate consumer, who does not transport dairy products or imitation dairy products in any manner except between buildings on the same lot or within the retail premises and who sells frozen desserts from a freezer only at the firm where the freezer is located.

(aa) "Sanitization" means the application of any effective method or substance to a clean surface for the destruction, as far as practicable, of pathogens and other organisms. Such treatment shall not adversely affect the equipment, the milk or the health of the consumers consuming the products manufactured in the equipment and shall be a method acceptable to the commissioner.

(bb) "Transport" means the movement from one facility to another of dairy products and imitation dairy products in a manner that maintains adequate temperatures and protects the product from freezing temperatures, exposure to the sun and from sources of contamination.

(cc) "Ultrapasteurized" means the process of heating every particle of a dairy product or imitation dairy product at or above two hundred eighty degrees Fahrenheit for at least two seconds either before or after packaging so as to produce a product which has an extended shelf life under refrigerated conditions.

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§19-11A-3. Permits.

(a) Permits are not transferable with respect to persons or locations.

(b) Application for all permits shall be made on forms supplied by the commissioner and shall provide such information as may be considered necessary by the commissioner.

(c) Permits shall be posted prominently at the place of operation.

(d) A dairy products distributors permit shall be issued by the commissioner to each person distributing dairy products in this state, even if there is no permanent location maintained in this state. Persons maintaining multiple permanent locations in this state or distributing into this state from several locations shall obtain a permit for each location. Application shall be made at least fifteen days before the date that the current permit expires or within fifteen days of the date that the person intends to engage in business. The application shall be accompanied by a fee of $15. A penalty of $2 shall be added to all permits that are not applied for or renewed within this time limit. Permits shall expire on March 31 following date of issue: Provided, That firms that have a permit with an expiration date of June 30, 1991, on the date of implementation of this article shall be allowed to make application for a dairy products permit for the period of July 1, 1991, through March 31, 1992, at a fee of $10.

(e) A dairy products distributors permit is not required for persons who distribute only aseptically processed and hermetically sealed dairy products or frozen desserts, dry dairy products or dry frozen dessert mixes.

(f) A temporary marketing permit may be issued by the commissioner for the marketing of dairy products that are not covered by an established standard. The temporary permit may be issued according to procedures established by rule. Persons applying for a temporary marketing permit shall have a valid dairy products distributors permit. There is no fee for the permit.

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§19-11A-4. Labeling.

(a) All packages of dairy products or imitation dairy products shall have a label upon or affixed to the package. The label shall be legible and of a print size and style easily readable by the ordinary citizen. The information required in this section shall be on each label and shall be stated in English.

(b) The label shall contain the following information:

(1) The name of the product;

(2) The quantity of the contents;

(3) The name and address of the manufacturer, packer or distributor: Provided, That the manufacturer's plant code or name and address shall always appear on the label for Grade "A" products; and

(4) Such other information as the commissioner shall require by rule.

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§19-11A-5. Adulteration.

Any dairy product or imitation dairy product referred to in this article is considered adulterated within the meaning of this article if it:

(a) Bears or contains any poisonous or deleterious substance or compound in a quantity which may render it injurious to health;

(b) Contains any coloring substance or flavoring matter that may be deleterious to health;

(c) Bears or contains any added poisonous or deleterious substance for which no safe tolerance has been established by state or federal law or regulation or which is found in the product in excess of an established tolerance;

(d) Does not meet the quality standards set forth in this article;

(e) Is or has been manufactured under conditions not in conformity with the provisions of this article;

(f) Is or has been produced, processed, prepared or held under unsanitary conditions;

(g) Has not been manufactured according to the provisions of the applicable standard of identity or that contains pathogens after manufacture;

(h) Is or has been stored in a package composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

(i) Contains any substance added thereto or mixed or packed therewith so as to make it appear better or of greater value than it is; or

(j) Meets or has met other conditions of adulteration as established by rule.

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§19-11A-6. Misbranded.

Any dairy product or imitation dairy product referred to in this article is considered misbranded within the meaning of this article if:

(a) It is labeled as a product for which there is a standard established by this article and it does not conform to such standards;

(b) Its label or labeling is false or misleading in any particular;

(c) It is not labeled in accordance with the requirements of this article;

(d) Any word, statement or other information required by this article to appear on the label or the labeling is not prominently placed thereon with such conspicuousness as compared with other words, statements, designs or devices in the labeling and in such terms as to render it likely to be read or understood by the ordinary person under customary conditions of purchase and use;

(e) Damage or inferiority has been concealed by any means; or

(f) It meets or has met other conditions of misbranding as established by rule.

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§19-11A-7. Prohibited acts.

(a) No person may distribute, sell, offer for sale, hold for sale or have in his possession with the intent to sell any dairy product or imitation dairy product which is adulterated or misbranded within the meaning of this article.

(b) No person may interfere with or prohibit the commissioner from performing the duties of his office.

(c) No person may fail to comply with the provisions of an embargo order issued under this article.

(d) No person may fail to comply with the provisions of a revocation, suspension or denial order issued under this article.

(e) No person who, in any official capacity, obtains any information under the provisions of this article that would be considered trade secrets regarding the quality, source and disposition of dairy products or imitation dairy products may use this information to his or her own personal gain.

(f) No person may bring into, send into or receive into this state, distribute within this state or have in storage dairy products without a valid dairy products distributors permit, except that retailers are exempt from this requirement.

(g) No person may distribute, sell, offer for sale, hold for sale or have in their possession with intent to sell, a dairy product or imitation dairy product in a container if the whole or any part of the item(s) required by this article to be on the label have been altered, mutilated, destroyed, obliterated, removed, concealed, replaced or otherwise falsely represented.

(h) No person may alter or deface any part of the items required by this article to be on the label after packaging.

(i) No person may offer for sale, transport, or distribution dairy products or imitation dairy products subsequent to packaging that have been allowed to exceed a temperature of forty-five degrees Fahrenheit for refrigerated noncultured products or zero degrees Fahrenheit for frozen products, except that dairy products or imitation dairy products containing active cultures shall not be allowed to exceed a temperature of fifty degrees Fahrenheit; and cheeses or imitations of cheeses shall not be allowed to reach temperatures that will allow for spoilage or mold organisms, other than those mold organisms that may be in the product as a result of the process used to make the product, to grow on or in the product. Dairy products or imitation dairy products that have been aseptically processed and hermetically sealed and dry dairy products or dry imitation dairy products are exempted from the requirements of this subsection.

(j) No person may transport dairy products or imitation dairy products in a vehicle that has

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previously been used to haul a chemical or foreign substance unless such vehicle has been cleaned according to rules promulgated by the commissioner.

(k) No person may sell or reprocess for human consumption dairy products or imitation dairy products that are in, or have been in, broken or opened retail packages that have been out of the possession of the manufacturer. Nothing in this provision prohibits the return of these containers to the distributor for inspection purposes only.

(l) No person may distribute or use for human consumption products manufactured from packaged dairy products or imitation dairy products that have been out of the possession of the manufacturer.

(m) No person may distribute or use dairy products or imitation dairy products that have been repasteurized subsequent to transportation in bulk, except for products that have been handled in a sanitary manner and maintained at forty-five degrees Fahrenheit or less prior to repasteurization.

(n) No person may sell, offer for sale or expose for sale any product containing milk products or milk-derived products that are from a herd that does not meet the requirements for animal health as set by rules promulgated under this article.

(o) No person may sell or exchange or have in his possession with intent to sell or exchange in this state any milk powder originating from any country or area outside the United States with reported cases of rinderpest, African swine fever or foot and mouth disease unless that product is imported into this state under conditions set by rules promulgated under this article.

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§19-11A-8. Approved sampling and testing methods.

(a) All sampling and testing methods shall be those set forth in the fifteenth edition of and supplement to the Official Methods of Analysis of the Association of Official Analytical Chemists, published by the Association of Official Analytical Chemists; or the fifteenth edition of the Standard Methods for the Examination of Dairy Products, published by the American Public Health Association, Inc.; or methods approved by the commissioner.

(b) The Babcock method or other methods approved by the commissioner for determining the milk fat content of dairy products shall be used as the reference method to establish and maintain the calibration of automated testing instruments.

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§19-11A-9. Approved laboratories.

(a) Each person who desires to have his laboratory approved by the commissioner for testing official dairy product or imitation dairy product samples as herein provided shall first satisfy the commissioner that tests to be made in such laboratory shall be conducted by qualified persons, with adequate facilities and that such tests are performed accurately and according to methods approved by the commissioner.

(b) For the purpose of determining whether a laboratory shall be designated as an approved laboratory the commissioner shall designate a qualified person or persons to inspect the laboratory, its equipment, facilities and personnel at the expense of the applying laboratory, and thereafter may have similar inspections made at the expense of the approved laboratory for the purpose of determining whether or not such approval should be continued.

(c) The commissioner may accept the test results of any laboratory that has been approved under this article: Provided, That the commissioner shall not accept the test results of any approved laboratory for samples manufactured, distributed or used by a firm the same as or related to the approved laboratory.

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§19-11A-10. Powers and duties of commissioner.

The commissioner has the power and duty to:

(a) Adopt, promulgate and enforce rules to carry out the purpose of this article, including establishing definitions and standards of quality and identity for dairy products and imitation dairy products;

(b) Have access to and enter at all reasonable times all places where dairy products or imitation dairy products are manufactured, packaged, stored, held, transported, distributed or used in this state and where records, papers or documents relating to these transactions are kept;

(c) Inspect and photograph all places where dairy products or imitation dairy products are manufactured, packaged, stored, held, transported, distributed or used, inspect, audit and copy records and papers relating to the manufacturing, distribution, sampling, testing and sale of dairy products or imitation dairy products, examine measuring and testing apparatus; and examine equipment used in manufacturing and transportation of dairy products or imitation dairy products, except that inspections performed under authority of the provisions of article seven, chapter sixteen of this code will not be duplicated;

(d) Examine and sample dairy products or imitation dairy products, including, but not limited to, ingredients and packages that are used in the manufacture of these products, and may open any package containing or believed to contain any dairy product or imitation dairy product, or an ingredient to be used in the manufacture of these products for the purpose of inspecting and sampling;

(e) Issue, suspend, revoke or deny permits;

(f) Collect fees and expend moneys under the terms of this article;

(g) Collect evidence, including samples, of the condition of equipment, holding tanks, storage rooms and vehicles used, or intended to be used in the processing, packaging, transporting or holding of dairy products or imitation dairy products;

(h) Examine the labels and labeling of dairy products or imitation dairy products;

(i) Issue embargoes for any dairy product or imitation dairy product which is or is believed to be adulterated, misbranded or that is not in compliance with this article and to cause the manufacturing and distributing of same to cease. Nothing in this article may be construed as requiring the commissioner to issue embargoes for minor violations of this article when he or she believes that a written notice of the violation will serve the public interest.

(1) When an embargo is issued, the commissioner shall affix to such product or manufacturing device in an appropriate manner a tag or other marking giving warning that such product is under embargo.

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(2) The commissioner shall give written notice to the custodian of the product or process under embargo describing the violation and stating that the product is prohibited from being sold, offered for sale, exposed for sale or distributed and is ordered to be held on the premises and, further, that all manufacturing processes in the State of West Virginia for this product shall cease until the embargo is released. This notice shall notify the custodian of the right to request an immediate hearing under the rules adopted by the commissioner.

(3) The commissioner may take action to seize and condemn any product that is not brought into compliance with this article and the rules issued within ninety days of the notice to the custodian of the product.

(4) The commissioner has the authority to issue an embargo against a perishable product, even if the practical result is to bring about the involuntary disposal of the product. The commissioner shall exercise this power using all reasonable means to determine if the product is adulterated or otherwise not in compliance with this article in as short a time frame as possible and shall promptly lift the embargo order if the product is found to be in compliance with this article;

(j) Establish, maintain and make provision for dairy product and imitation dairy product testing facilities, to establish reasonable fees for such tests and to incur such expenses as may be necessary to maintain and operate these facilities;

(k) Approve sampling and testing methods and evaluate and approve official laboratories;

(l) Obtain from any state court an order directing any person to submit to inspection and sampling subsequent to the refusal of any person to allow inspection and sampling;

(m) Conduct hearings as provided by this article; and

(n) Assess civil penalties and refer violations to a court of competent jurisdiction: Provided, That the commissioner is not required to report for prosecution minor violations of the article when he or she believes that the public interest will be best served by a written notice of violation.

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§19-11A-11. Suspension, revocation or denial of permits.

(a) The commissioner may deny any application for a permit whenever said permit has been applied for fraudulently, the applicant has grossly interfered with the duties of the commissioner, or the applicant is determined to be not in compliance with or not able to comply with this article.

(b) The commissioner may suspend a permit whenever a health hazard exists or is believed to exist, the permit has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or it is determined that the permit holder is dishonest, deceitful, incompetent or not in compliance with or is unable to comply with this article. Any person whose permit has been suspended shall immediately discontinue all operations covered under the permit. The commissioner may issue a summary suspension in cases where violations of this article constitute a hazard to the public health, safety or welfare or where the public interest requires immediate action.

(1) Except for summary suspensions, the commissioner shall give written notice to the persons affected of the pending suspension, stating that the suspension of the permit is being contemplated and giving reasons therefor. The suspension notice shall appoint a time and place for hearing and shall be mailed by certified mail to the business address of the permit holder at least ten days before the date set for the hearing. The commissioner shall review the evidence presented at the hearing prior to issuing his decision.

(2) All summary suspensions shall be followed by a notice of suspension, the reasons for the suspension, and an opportunity for a hearing in accordance with this article.

(3) At the end of the period of suspension, the permit holder may resume operations without reapplication for a permit.

(c) The commissioner may revoke any permit issued under this article whenever a health hazard exists, the permit has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or it is determined that the holder is dishonest, deceitful, incompetent or not in compliance with or is unable to comply with this article. Any person whose permit has been revoked shall immediately discontinue all operations covered under the permit.

(1) Before revoking any permit the commissioner shall give written notice to the persons affected, stating that the revocation of the permit is being contemplated and giving reasons for the revocation. The revocation notice shall appoint a time and place for hearing and shall be mailed by certified mail to the business address of the permit holder at least ten days before the date set for the hearing. The commissioner shall review the evidence presented at the hearing prior to issuing his decision.

(2) At the end of the period of revocation the permit will not be issued without an application, payment of required fee and the compliance with all conditions that the

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commissioner shall require for the reissuing of such permit.

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§19-11A-12. Hearings and appeals.

(a) Any person aggrieved by any action taken under this article shall be afforded the opportunity for a hearing before the commissioner under rules promulgated by the commissioner.

(b) Hearings shall be conducted according to procedures set forth by rule.

(c) All the testimony and evidence at a hearing shall be recorded by mechanical means, which may include the use of tape recordings. The mechanical record shall be maintained for ninety days from the date of the hearing and a transcript shall be made available to the aggrieved party.

(d) Any party who feels aggrieved of the suspension, revocation or denial order may appeal within sixty days to the circuit court of the county in which the person has located its principal place of business or to the circuit court of Kanawha County.

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§19-11A-13. Criminal penalties; civil penalties; negotiated agreement.

(a) Criminal penalties. -- Any person violating any provision of this article or rule adopted hereunder is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $100 nor more than $500 for the first offense, and for the second or subsequent offense, shall be fined not less than $500 nor more than $1,000, or imprisoned in the county jail not more than six months, or both fined and imprisoned. Magistrates have concurrent jurisdiction with circuit courts to enforce the provisions of this article.

(b) Civil penalties. --

(1) Any person violating a provision of this article or rules adopted hereunder may be assessed a civil penalty by the commissioner. In determining the amount of any civil penalty, the commissioner shall give due consideration to the history of previous violations of any person, the seriousness of the violation, including any irreparable harm to the environment, any hazards to the health and safety of the public and any economic damages to the public and the demonstrated good faith of any person charged in attempting to achieve compliance with this article before and after written notification of the violation.

(2) The commissioner may assess a civil penalty of up to $1,000 for a violation.

(3) The civil penalty is payable to the State of West Virginia and is collectible in any manner now or hereafter provided for collection of debt. If any person liable to pay the civil penalty neglects or refuses to pay the same, the amount of the civil penalty, together with interest at ten percent, is a lien in favor of the State of West Virginia upon the property, both real and personal, of such a person after the same has been entered and docketed to record in the county where such property is situated. The clerk of the county, upon receipt of the certified copy of such, shall enter same to record without requiring the payment of costs as a condition precedent to recording.

(c) Notwithstanding any other provision of law to the contrary, the commissioner may promulgate and adopt rules which permit consent agreements or negotiated settlements for the civil penalties assessed as a result of violation of the provisions of this article.

(d) Upon application by the commissioner for an injuntion, the circuit court of the county in which the violation is occurring, had occurred or is about to occur, as the case may be, may grant a temporary or permanent injunction restraining any person from violating or continuing to violate any of the provisions of this article or any rule promulgated under this article, notwithstanding the existence of other remedies at law. Any such injunction shall be issued without bond.

(e) No state court may allow for the recovery of damages for any administrative action taken, if the court finds that there was a probable cause for such action.

(f) It is the duty of the prosecuting attorney of the county in which the violation occurred to

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represent the Department of Agriculture, to institute proceedings and to prosecute the person charged with such violation.

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§19-11A-14. Payment of fees.

All fees, penalties or other moneys collected by the commissioner under the provisions of this article shall be paid into a special account and expended upon the order of the commissioner for the purpose of the enforcement and administration of this article.

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§19-11A-15. Cooperation with other entities.

The commissioner may cooperate with and enter into agreements with governmental agencies of this state, other states, agencies of the federal government, agencies of foreign governments, and private associations in order to carry out the purpose and provisions of this article.

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§19-11A-16. Confidentiality of trade secrets.

The commissioner may not make public information which contains or relates to trade secrets, commercial or financial information obtained from a person or privileged or confidential information: Provided, That when the information is necessary to carry out the provisions of this article, this information may be revealed, subject to a protective order, to any federal, state or local agency consultant or may be revealed, subject to a protective order, at a closed hearing or in findings of fact issued by the commissioner.

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