



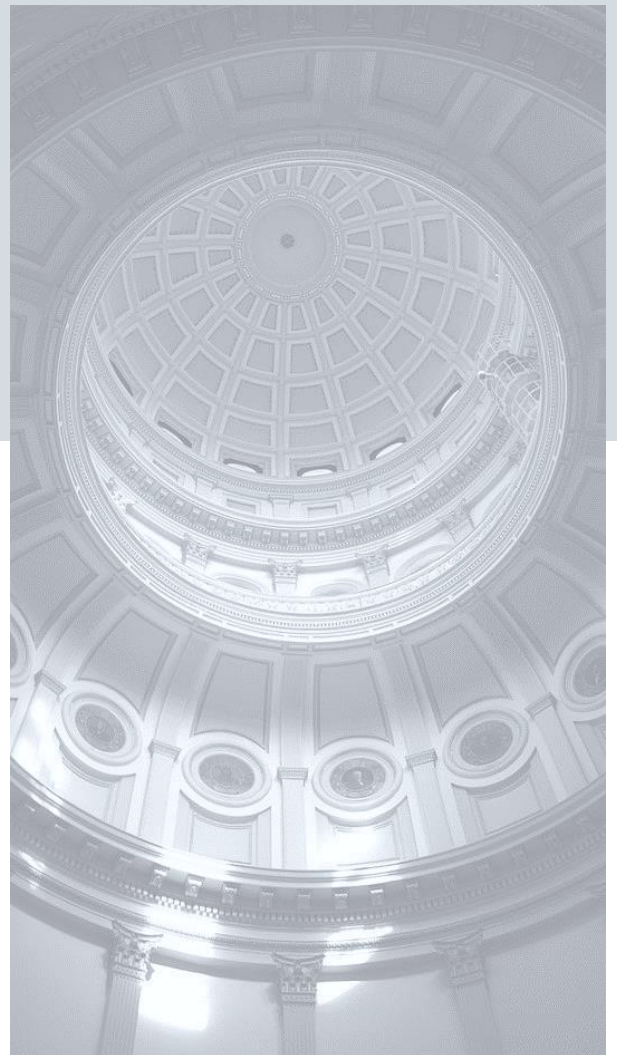
**COLORADO**

**Department of  
Regulatory Agencies**

Colorado Office of Policy, Research &  
Regulatory Reform

# 2019 Sunset Review

Farm Products Act and Commodity Handler Act



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October 15, 2019



**COLORADO**

**Department of  
Regulatory Agencies**

Executive Director's Office

October 15, 2019

Members of the Colorado General Assembly  
c/o the Office of Legislative Legal Services  
State Capitol Building  
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and
- Submit a report and supporting materials to the Office of Legislative Legal Services no later than October 15 of the year preceding the date established for termination.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the Farm Products Act and the Commodity Handler Act. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2020 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Articles 36 and 37 of Title 35, C.R.S. The report also discusses the effectiveness of the Commissioner of Agriculture in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Patty Salazar  
Executive Director





# COLORADO

## Department of Regulatory Agencies

Colorado Office of Policy, Research &  
Regulatory Reform

### 2019 Sunset Review

Farm Products Act and Commodity Handler Act

#### SUMMARY

##### ***What is regulated?***

Farm products include, but are not limited to: livestock, milk, honey, corn, hay and industrial hemp. Commodities include: soybeans, barley, rye and sunflowers. The Commissioner of Agriculture (Commissioner) has the regulatory authority over farm products dealers, small-volume dealers, farm products agents and commodity handlers.

##### ***Why is it regulated?***

The primary purpose of the Farm Products Act and the Commodity Handler Act (Acts) is to insulate producers (farmers and ranchers) from financial harm that could have devastating effects if farm products dealers or commodity handlers are unable to pay for farm products or commodity purchases from producers.

##### ***Who is regulated?***

In fiscal year 17-18, the Commissioner licensed 503 farm products dealers, which include, farm products dealers, small-volume dealers and agents. Also in fiscal year 17-18, the Commissioner licensed 216 commodity handlers.

##### ***How is it regulated?***

The Acts require farm products dealers, small-volume dealers, agents and commodity handlers to obtain a license from the Commissioner prior to purchasing or brokering farm products or commodities from Colorado producers or owners for processing or resale.

##### ***What does it cost?***

In fiscal year 17-18, the total expenditures to oversee the farm products and commodity handler programs were \$105,180, and there were 3.22 full-time equivalent employees associated with these programs.

##### ***What disciplinary activity is there?***

In fiscal years 13-14 through 17-18, the Commissioner's disciplinary activities included the issuance of two cease and desist orders.

## KEY RECOMMENDATIONS

### ***Continue the Acts for 11 years, until 2031.***

The primary purpose of the Acts is to insulate producers (farmers and ranchers) from financial harm that could have devastating effects if farm products dealers or commodity handlers are unable to pay for farm products or commodities purchases from producers. To provide adequate protection to producers, the Commissioner administers a regulatory framework that includes licensing, a surety bond requirement, inspections and comprehensive financial examinations. This review revealed that the current regulatory framework is providing effective protections to Colorado producers, specifically financial protection; therefore, the General Assembly should continue the Acts for 11 years, until 2031.

### ***Combine the Farm Products and Commodity Handler Acts.***

While farm products dealers, small-volume dealers and agents provide services for farm products, and commodity handlers provide services specifically for commodities, they essentially perform the same functions. The two licensing programs currently share the same program manager, the same legal counsel, the same cash funds for fines and expenditures and the Commissioner enforces both Acts, including imposing discipline. The Acts are, for the most part, fully integrated, which calls into question the need for two, separate Acts. Combining the Acts would serve to create uniformity in the regulatory oversight of farm products and commodities, when necessary. In order to streamline regulation and create efficiencies in the Division, the General Assembly should combine the Acts.

## METHODOLOGY

As part of this review, Colorado Office of Policy, Research and Regulatory Reform staff interviewed Department of Agriculture staff, reviewed records, interviewed officials with state and national industry groups, interviewed other stakeholders, reviewed Colorado statutes and rules, and reviewed the laws of other states.

## MAJOR CONTACTS MADE DURING THIS REVIEW

Colorado Corn  
Colorado Department of Agriculture, Division of Inspections and Consumer Services  
Colorado Farm Bureau  
Colorado Livestock Association  
Colorado Wine Industry Development Board  
Rocky Mountain Agribusiness Association  
Rocky Mountain Bean Dealers Association

### **What is a Sunset Review?**

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:  
Colorado Department of Regulatory Agencies  
Colorado Office of Policy, Research and Regulatory Reform  
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## Background

### Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- I. Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- II. If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- III. Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- IV. Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- V. Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- VI. The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- VII. Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- VIII. Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

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- IX. Whether the agency through its licensing or certification process imposes any sanctions or disqualifications on applicants based on past criminal history and, if so, whether the sanctions or disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subsection (5)(a) of this section must include data on the number of licenses or certifications that the agency denied based on the applicant's criminal history, the number of conditional licenses or certifications issued based upon the applicant's criminal history, and the number of licenses or certifications revoked or suspended based on an individual's criminal conduct. For each set of data, the analysis must include the criminal offenses that led to the sanction or disqualification; and
- X. Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Sunset reports are organized so that a reader may consider these criteria while reading. While not all criteria are applicable to all sunset reviews, the various sections of a sunset report generally call attention to the relevant criteria. For example,

- In order to address the first criterion and determine whether a particular regulatory program is necessary to protect the public, it is necessary to understand the details of the profession or industry at issue. The Profile section of a sunset report typically describes the profession or industry at issue and addresses the current environment, which may include economic data, to aid in this analysis.
- To ascertain a second aspect of the first sunset criterion--whether conditions that led to initial regulation have changed--the History of Regulation section of a sunset report explores any relevant changes that have occurred over time in the regulatory environment. The remainder of the Legal Framework section addresses the third sunset criterion by summarizing the organic statute and rules of the program, as well as relevant federal, state and local laws to aid in the exploration of whether the program's operations are impeded or enhanced by existing statutes or rules.
- The Program Description section of a sunset report addresses several of the sunset criteria, including those inquiring whether the agency operates in the public interest and whether its operations are impeded or enhanced by existing statutes, rules, procedures and practices; whether the agency performs efficiently and effectively and whether the board, if applicable, represents the public interest.
- The Analysis and Recommendations section of a sunset report, while generally applying multiple criteria, is specifically designed in response to the tenth criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

These are but a few examples of how the various sections of a sunset report provide the information and, where appropriate, analysis required by the sunset criteria. Just

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as not all criteria are applicable to every sunset review, not all criteria are specifically highlighted as they are applied throughout a sunset review.

## Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

### Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.



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## Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

## Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

## Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

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## Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

## **Sunset Process**

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at: [www.dora.colorado.gov/opr](http://www.dora.colorado.gov/opr).

The functions of the Colorado Commissioner of Agriculture (Commissioner) as enumerated in Articles 36 and 37 of Title 35, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2020, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the Commissioner pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation should be continued and to evaluate the performance of the Commissioner. During this review, the Commissioner must demonstrate that the program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

## **Methodology**

As part of this review, COPRRR staff interviewed Department of Agriculture staff (Department), reviewed records, interviewed officials with state and national industry groups, interviewed other stakeholders, reviewed Colorado statutes and rules, and reviewed the laws of other states.

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## Profile of the Industry

In a sunset review, COPRRR is guided by the sunset criteria located in section 24-34-104(6)(b), C.R.S. The first criterion asks whether regulation by the agency is necessary to protect the public health, safety, and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less, or the same degree of regulation.

In order to understand the need for regulation, it is first necessary to understand what the industry does, how it works, who it serves and any necessary qualifications.

Agriculture is big business in Colorado. In 2017, there were 33,800 farms and ranches in Colorado generating nearly \$8 billion in revenues.<sup>2</sup> In 2017, Colorado ranked among the 10 most productive states for wheat, barley, alfalfa, potatoes, sugar beets, and numerous other crops, and ranked in the top five most productive states for sheep and lambs, as well as in wool production.<sup>3</sup>

Agriculture is a difficult industry with narrow profit margins. Farming requires significant upfront investment as well as regular outlays for feed and fertilizer, and too much rain or too little can decimate crops. The viability of a harvest on the other side of the world can affect the value of farm products in Colorado. Further, variations in tariffs on exported farm products in recent years can affect the profits of Colorado farmers and ranchers, for good (e.g., a revision to a trade agreement with Korea led to a 73 percent increase in Colorado beef exports to that country in 2018) or for ill (China imposed retaliatory tariffs on hides and skins, Colorado's largest agricultural export to that country, which resulted in a 39 percent decline in such exports).<sup>4</sup>

Federal and state regulation exists, in part, to protect farmers and ranchers—also called producers, agricultural producers, or growers—from the vagaries of the market and to insulate them from financial losses.

The Farm Products and Commodity Handler Acts regulate the storage and sale of livestock, grains, beans, fruits, vegetables, and other agricultural products. The Department's Division of Inspection and Consumer Services (Division) administers both the Commodity Handler Program and the Farm Products Program.

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<sup>2</sup> Colorado Agricultural Statistics 2018, Colorado Department of Agriculture and U.S. Department of Agriculture National Agricultural Statistics Service (2018), p. 5.  
[https://www.nass.usda.gov/Statistics\\_by\\_State/Colorado/Publications/Annual\\_Statistical\\_Bulletin/Bulletin2018.pdf](https://www.nass.usda.gov/Statistics_by_State/Colorado/Publications/Annual_Statistical_Bulletin/Bulletin2018.pdf)

<sup>3</sup> Colorado Agricultural Statistics 2018, Colorado Department of Agriculture and U.S. Department of Agriculture National Agricultural Statistics Service (2018), p. 8.  
[https://www.nass.usda.gov/Statistics\\_by\\_State/Colorado/Publications/Annual\\_Statistical\\_Bulletin/Bulletin2018.pdf](https://www.nass.usda.gov/Statistics_by_State/Colorado/Publications/Annual_Statistical_Bulletin/Bulletin2018.pdf)

<sup>4</sup> *Colorado Business Economic Outlook*, Leeds School of Business, University of Colorado, Boulder (2019), p.17.  
<https://www.colorado.edu/business/centers/business-research-division/colorado-business-economic-outlook-forum>

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The Commodity Handler Act defines a commodity as,

unprocessed small, hard seeds or fruits such as wheat, corn, oats, barley, rye, sunflower seeds, soybeans, beans, grain sorghum, industrial hemp, and such other seeds or fruits as may be determined by the Commissioner [of Agriculture].<sup>5</sup>

Under the Commodity Handler Program, the Commissioner licenses businesses that store commodities for Colorado producers, conducts audits and inspections of all licensed commodity warehouses within Colorado to assure that commodities are properly stored, and ensures producers receive just compensation for their products.<sup>6</sup>

The Farm Products Act defines “farm products” as:<sup>7</sup>

- Agricultural, horticultural, viticultural, fruit, and vegetable products of the soil;
- Livestock and livestock products, except for livestock held by the buyer and not resold or processed within 90 days of the purchase date;
- Milk;
- Honey;
- Ensiled corn (corn stored in a silo);
- Baled, cubed, or ground hay; and
- Industrial hemp.

Poultry and poultry products, timber products, nursery stock, commodities, and marijuana are specifically excluded from this definition.<sup>8</sup>

Under the Farm Products Program, the Commissioner assures that businesses that purchase and store farm products are bonded and financially sound and investigates complaints against licensees,<sup>9</sup> which serves to insulate producers from harm.

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<sup>5</sup> § 35-36-102(5), C.R.S.

<sup>6</sup> Colorado Department of Agriculture. *Commodity Handler Program*. Retrieved on May 15, 2019, from <https://www.colorado.gov/pacific/aginspection/commodity-handler-program>

<sup>7</sup> § 35-37-103(8)(a), C.R.S.

<sup>8</sup> § 35-37-103(8)(b), C.R.S.

<sup>9</sup> Colorado Department of Agriculture. *Farm Products*. Retrieved on May 15, 2019, from <https://www.colorado.gov/pacific/aginspection/farm-products>

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## Legal Framework

### History of Regulation

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first sunset criterion questions whether regulation by the agency is necessary to protect the public health, safety, and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less, or the same degree of regulation.

One way that COPRRR addresses this is by examining why the program was established and how it has evolved over time.

The General Assembly enacted its first agricultural products statute in 1937. In 1985, it repealed and reenacted the statute and divided it into two parts: the Farm Products Act and the Commodity Warehouses Act (collectively, Acts).

The General Assembly changed the short title of the Commodity Warehouses Act to the Commodity Handler Act in 1991. This change reflected a new, broader focus that included commodity dealers, brokers, commission merchants and commercial livestock feedlots, as well as commodity warehouses.

In 1993, the General Assembly narrowed the definition of “dealer” in the Farm Products Act to include only those feedlot owners that feed more than 2,500 head of livestock at any one time.

In 1995, the General Assembly created a new license for small-volume dealers in the Farm Products Act, establishing a lower license fee for such dealers and exempting them from the bonding requirements.

Effective July 1, 2007, the General Assembly repealed the specific license fees from the Farm Products Act, reduced the General Fund appropriation to 25 percent of the direct and indirect costs of administering the Acts, and directed the Agricultural Commission to establish sufficient fees to cover the balance of the costs.

The General Assembly made numerous changes to the statutes in 2008, following the 2007 sunset review. Notable changes included eliminating the commodity handler agent license type and granting the Commissioner of Agriculture unimpeded access to a licensee’s property and records to assist in oversight responsibilities.

In 2013, the General Assembly passed House Bill 13-1034, which made numerous changes to the provisions governing surety bonds and credit sales contracts within the

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Acts, including reducing the time frame for producers to make claims against a surety bond from two years to 180 days.

In 2017, both acts were repealed and re-enacted, and their provisions moved from Title 12, Professions and Occupations, to Title 35, Agriculture.

In 2018, the General Assembly added industrial hemp to the definition of a “farm product.”

## Legal Summary

The second and third sunset criteria question

Whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms, and whether agency rules enhance the public interest and are within the scope of legislative intent; and

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters.

A summary of the current statutes and rules is necessary to understand whether regulation is set at the appropriate level and whether the current laws are impeding or enhancing the agency’s ability to operate in the public interest.

### ***Federal Laws***

There are several federal laws in place intended to provide financial stability and support for farmers.

The Perishable Agricultural Commodities Act (PACA), administered by the Agriculture Marketing Service within the United States Department of Agriculture,

protects businesses dealing in fresh and frozen fruits and vegetables by establishing and enforcing a code of fair business practices and by helping companies resolve business disputes.<sup>10</sup>

Larger operations must secure a license under PACA: for dealers netting less than \$230,000 per year, licensure is voluntary.

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<sup>10</sup> United States Department of Agriculture, Agricultural Marketing Service. *Perishable Agricultural Commodities Act (PACA)*. Retrieved May 13, 2019, from <https://www.ams.usda.gov/rules-regulations/paca>

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Under the United States Warehouse Act (USWA), the U.S. Secretary of Agriculture issues licenses to warehouse operators who store agricultural products. Such licensure is voluntary. The USWA requires license applicants to demonstrate they possess the financial and operational resources to run a warehouse by submitting a current review or audit-level financial statement<sup>11</sup> and evidence of a bond or other form of financial assurance,<sup>12</sup> and meeting other requirements. Commodity handlers who elect to seek a federal license are exempt from the state Commodity Handler Act.

The Commodity Credit Corporation assists agricultural producers with loans, purchases, payments, and other operations, and by providing the resources required to grow and market agricultural commodities.<sup>13</sup>

### **Colorado Laws**

The Commodity Handler Act and the Farm Products Act (Acts) are located in Articles 36 and 37, respectively, in Title 35 of the Colorado Revised Statutes (C.R.S.). The Commissioner of Agriculture (Commissioner) is vested with the authority to enforce these laws.

The Commissioner issues four license types under the Acts (Farm Products Act - farm products dealers, small-volume dealers and agents; Commodity Handler Act - commodity handlers).

Farm products dealers,<sup>14</sup>

- Buy any farm products from the owner for processing or resale,
- Receive and take possession of any farm products from the owner for storage or safekeeping,
- Solicit or negotiate sales of farm products between the vendor and purchaser,
- Receive on consignment or solicit from the owner thereof any kind of farm product for sale on commission on behalf of such owner, or
- Buy any farm products from the owner thereof for the commercial feeding of livestock that are owned wholly or in part by another.

Small-volume dealers,<sup>15</sup>

- Have a fixed or established place of business in Colorado,

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<sup>11</sup> 7 C.F.R. § 735.100.

<sup>12</sup> 7 C.F.R. § 735.102.

<sup>13</sup> United States Department of Agriculture, Farm Service Agency. *Commodity Credit Corporation Fact Sheet*. Retrieved on May 13, 2019, from [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/AboutFSA/CCC/ccf\\_fact\\_sheet.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/AboutFSA/CCC/ccf_fact_sheet.pdf)

<sup>14</sup> § 35-37-103(7)(a), C.R.S.

<sup>15</sup> § 35-37-103(15), C.R.S.

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- Buy less than \$20,000 worth of farm products or commodities annually for processing or resale and do not purchase more than \$2,500 or more worth of farm products or commodities in a single transaction, and
  - Do not purchase farm products for commercial feeding of livestock.

Agents act on behalf of any dealer or small-volume dealer, buy, receive, contract for, or solicit any farm products from or sells farm products for the owner thereof or who negotiates the consignment or purchase of any farm products on behalf of any farm products dealer or small-volume dealer.<sup>16</sup>

Commodity handlers,<sup>17</sup>

- Buy commodities from the owner for processing or resale;
- Receive commodities from the owner for storage or safekeeping;
- Solicit or negotiate sales of commodities between the vendor and purchaser;
- Receive on consignment or solicit from the owner any kind of commodity for sale on commission on behalf of the owner, or who accepts any commodity in trust from the owner thereof for the purpose of resale, or who sells or offers for sale on commission any commodity or in any way handles any commodity for the account of the owner thereof; or
- Buy any commodity for the commercial feeding of livestock that are owned wholly or in part by another, at an animal feeding operation with a capacity of more than 2,500 head of livestock.

Any person acting as a farm products dealer, farm products small-volume dealer, agent or commodity handler in Colorado must be licensed.<sup>18</sup> Commodity handlers who elect to secure a federal license are exempt from the State of Colorado's licensing requirement.

Retail grocery merchants or restaurateurs whose use of commodities or food products is directly related to the operation of their business, as well as producers who earn revenues of \$10,000 or less per calendar year from the sale of each eligible food product, are not considered commodity handlers or farm products dealers under the law.<sup>19</sup> Consequently, they are exempt from the licensing requirements.

Applicants for any license must pay a fee<sup>20</sup> and submit an application that includes:<sup>21</sup>

- The applicant's name, and if the applicant is an organization, the name of each person associated with such organization;

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<sup>16</sup> § 35-37-103(1), C.R.S.

<sup>17</sup> § 35-36-102(6)(a), C.R.S.

<sup>18</sup> §§ 35-36-103(1) and 35-37-104(1), C.R.S.

<sup>19</sup> §§ 35-36-102(6)(b) and 35-37-103(7)(b), C.R.S.

<sup>20</sup> §§ 35-36-105(1) and 35-37-105(1), C.R.S.

<sup>21</sup> §§ 35-36-105(2) and 35-37-104(2), C.R.S.



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- The applicant’s principal business address in Colorado and in any other state where the applicant does business; and
  - The names of each person authorized to receive service of process on behalf of the applicant in each state.

Each applicant must “satisfy the Commissioner of his or her character, responsibility, and good faith in seeking to carry on the business stated in the application.”<sup>22</sup>

Applicants for farm products dealer, small-volume dealer, and agent licenses must also include with their applications a list of the types of farm products they propose to handle.<sup>23</sup> Agent applicants must further include the names of each dealer or small-volume dealer they will represent: all such farm products dealers and small-volume dealers and agents must be licensed.<sup>24</sup>

Applicants for a commodity handler license must also include with their application:

- The location, total rated storage capacity in bushels, and a list of fees for handling, storage and shipment of commodities during the license year for each public warehouse (defined as any elevator, mill, warehouse, or other structure)<sup>25</sup> where the applicant will receive and store commodities;
- Evidence of insurance coverage in an amount sufficient to protect the applicant's storage obligations;<sup>26</sup> and
- A financial statement that accurately reflects the applicant’s financial condition.<sup>27</sup>

Applicants for farm products dealer and commodity handler licenses must also satisfy certain financial responsibility requirements to qualify for a license: dealers must post either a bond or an irrevocable letter of credit in an amount of no less than \$2,000 and no more than \$200,000,<sup>28</sup> and commodity handlers must secure a bond or an irrevocable letter of credit in an amount no less than \$10,000 and no more than \$1 million.<sup>29</sup>

Under the Acts, producers must make a claim on a bond, if at all, within 180 days of the transaction or the date of the loss, whichever is later.<sup>30</sup>

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<sup>22</sup> §§ 35-36-105(2)(a) and 35-37-104(2), C.R.S.

<sup>23</sup> § 35-37-104(2), C.R.S.

<sup>24</sup> § 35-37-104(3), C.R.S.

<sup>25</sup> § 35-36(102)(23), C.R.S.

<sup>26</sup> § 35-36-106(1)(a), C.R.S.

<sup>27</sup> § 35-36-106(1)(b), C.R.S.

<sup>28</sup> § 35-37-106(1)(a), C.R.S.

<sup>29</sup> § 35-36-119(1)(a), C.R.S.

<sup>30</sup> §§ 35-36-119(1)(c)(II) and 35-37-106(1)(c)(II), C.R.S.

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No bond or letter of credit is required if a dealer,

pays for farm products in cash or with a bank-certified check, a bank cashier's check, an irrevocable electronic funds transfer or a money order, at the time the dealer gains possession or control of the farm products or if the dealer operates under a bond required by the United States.<sup>31</sup>

A credit sale contract is one for the sale of farm products or commodities when the sale price is to be paid on a date later than 30 days after delivery of the farm product or commodity to the buyer.<sup>32</sup>

The Commissioner may receive and investigate complaints against any farm products dealer, small-volume dealer, farm products agent or commodity handler. However, all such complaints must be filed with the Commissioner within 120 days after the subject transaction occurred.

Upon obtaining the consent of the licensee or an administrative search warrant, the Commissioner must be granted free and unimpeded access to all buildings, yards, warehouses, storage facilities, places of business and records of any licensee.<sup>33</sup>

The Commissioner may require any applicant or licensee to undergo an audit conducted by a certified public accountant or to provide additional information necessary to ascertain the applicant or licensee's financial condition.<sup>34</sup> The Commissioner may also require a licensee or applicant to procure additional insurance: failure to provide evidence of the additional insurance within 30 days after written notice from the Commissioner constitutes grounds for the suspension or revocation of the license.<sup>35</sup>

If the Commissioner's investigation finds that reasonable grounds exist to believe that a licensee has violated the Acts or any rules promulgated thereunder, the Commissioner is required to provide notice of such to the licensee and to afford the licensee the opportunity to request a hearing.<sup>36</sup>

If the licensee requests a hearing and the Commissioner finds that a violation has not occurred, the complaint is dismissed.<sup>37</sup> However, if the Commissioner finds that a violation has occurred and that the licensee has not yet made complete restitution, the Commissioner must determine the amount of damages and order the licensee to pay the complainant.<sup>38</sup>

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<sup>31</sup> § 35-37-106(1)(e), C.R.S.

<sup>32</sup> §§ 35-36-102(8) and 35-37-103(6), C.R.S.

<sup>33</sup> §§ 35-36-111(2) and 35-37-107(3)(a), C.R.S.

<sup>34</sup> § 35-36-106(1)(b), C.R.S.

<sup>35</sup> § 35-36-106(1)(a), C.R.S.

<sup>36</sup> § 35-37-107(8)(a), C.R.S.

<sup>37</sup> § 35-37-107(8)(c), C.R.S.

<sup>38</sup> § 35-37-107(8)(c), C.R.S.

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The Commissioner may deny or refuse to renew a license, or may revoke or suspend a license, or may place a licensee on probation, if the licensee or applicant is found to have:<sup>39</sup>

- Violated any of the provisions of the Acts, any rule promulgated under the Acts, or any lawful order of the Commissioner;
- Failed to maintain the premises of the licensed business as required by law;
- Been convicted of a felony;
- Committed fraud or deception in procuring or attempting to procure a license;
- Failed or refused to provide evidence of the statutorily required surety bond;
- Been in an inadequate financial position to meet liability obligations; or
- Had a license revoked, suspended, not renewed, or placed on probation in another state if the cause leading to such action could be the basis for similar disciplinary action in Colorado.

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<sup>39</sup> § 35-36-107(1) and 35-37-108(1), C.R.S.

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## Program Description and Administration

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The third, fourth and fifth sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters;

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively; and

Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

The Commissioner of Agriculture (Commissioner) is vested with the authority to enforce the Farm Products Act and the Commodity Handler Act (Acts). The Department of Agriculture's Division of Inspection and Consumer Services (Division) handles the day-to-day oversight and implementation of the licensing programs.

In order to effectively administer and enforce the Acts, the Commissioner devoted a total of 3.22 full-time equivalent (FTE) employees to provide professional support in fiscal year 17-18 to the farm products and commodity handler programs:

- Program Management (Administrator V)—1.0 FTE (0.40 for Farm Products and 0.60 for Commodity Handler) is responsible for the day-to-day operations of the Acts.
- Administrative Assistant (Administrative Assistant II)—0.22 FTE (0.12 for Farm Products and 0.10 for Commodity Handler) is responsible for providing administrative support for the Acts, including answering inquiries concerning regulatory requirements.
- Field Staff (Compliance Specialist I, Compliance Specialist III)—1.82 FTE is responsible for conducting examinations to ensure compliance with the Acts.
- Administrative support (Program Management III, Program Management II, Program Assistant I and Administrator IV)—0.191 FTE is responsible for, among other things, strategic planning and general guidance to the Acts.

Table 1 highlights the expenditures for the farm products and commodity handlers programs in fiscal years 13-14 through 17-18.

**Table 1  
Program Expenditures**

Fiscal Year	Farm Products Expenditures	Commodity Handler Expenditures	FTE Commodity Handler	FTE Farm Products
13-14	\$93,884	\$132,210	1.83	1.39
14-15	\$102,574	\$144,447	1.83	1.39
15-16	\$100,744	\$141,870	1.83	1.39
16-17	\$93,787	\$132,074	1.83	1.39
17-18	\$105,180	\$148,117	1.83	1.39

Generally, the expenditures for the programs were associated with personal and legal services necessary to effectively regulate the Acts.

## Licensing

The eighth sunset criterion questions whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

The Commissioner issues a variety of licenses associated with the Acts. Many of the available licenses require a bond or irrevocable letter of credit, the terms of which vary depending on the type of license. Although a bond does not cover all financial losses, it does provide protection to producers in some cost recovery; it also assures credit worthiness of the licensee.

All licenses issued by the Commissioner concerning the Acts must be renewed annually. The current licenses available for farm products are:

- Farm products dealers,
- Small-volume dealers, and
- Agents.

In order to obtain a farm products dealer license, an applicant must, among other things, post either a bond or an irrevocable letter of credit in an amount of no less than \$2,000 and no more than \$200,000. Once licensed, he or she may resell any farm products, which include, but are not limited to:

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- Milk,
  - Honey,
  - Baled, cubed or ground hay,
  - Ensiled corn, and
  - Industrial hemp.

Small-volume dealers must also obtain a license from the Commissioner prior to providing services. Small volume dealers are classified as farm product dealers who do not purchase more than \$20,000 worth of farm products annually nor a single purchase for more than \$2,500 for processing or resale.

A farm products agent license is required for an individual who, on behalf of any dealer in Colorado, buys, receives, contracts for, solicits any farm product or sells farm products on behalf of a dealer.

Additionally, the Commodity Handler Act requires commodity handlers to obtain a license prior to offering services. To secure a commodity handlers license, an applicant, among other requirements, must post a bond or irrevocable letter of credit in an amount no less than \$10,000 and no more than \$1 million. Once licensed, commodity handlers may, among other things, engage in buying commodities for processing or resale or receive or take possession of commodities for storage purposes. Commodities include, but are not limited to:

- Wheat,
- Oats,
- Sunflower seeds, and
- Soybeans.

A commodity handler may also operate a public warehouse in Colorado. In order to operate a public warehouse, a commodity handler is required to provide evidence of sufficient provisional insurance coverage to protect the commodities stored.<sup>40</sup>

## Inspections

The eighth sunset criterion questions whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

When considering this criterion, it is first necessary to examine the current scope of practice as it is defined in the Act.

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<sup>40</sup> § 35-36-106(1)(a), C.R.S.

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The Commissioner, in an attempt to provide adequate financial protection to producers (farmers) and to ensure that farm products and commodities are stored in a safe manner, thereby minimizing the risk of damage, conducts comprehensive inspections of all licensees and commodity warehouses.

According to Division staff, the frequency of inspections is based on a variety of factors, including but not limited to:

- Financial statement information,
- Size of the company,
- Relative risk to producers, and
- Results of the licensee’s previous examination.

Inspections are conducted at a variety of locations including, but not limited to:

- Produce sheds,
- Livestock auctions, and
- Commodity warehouses.

Table 2 shows the total number of inspections conducted in fiscal years 13-14 through 17-18.

**Table 2**  
**Total Number of Inspections in Fiscal Years 13-14 through 17-18**

<b>Fiscal Year</b>	<b>Number of Farm Products Dealer Inspections</b>	<b>Number of Commodity Warehouse Inspections</b>
13-14	82	37
14-15	67	37
15-16	118	40
16-17	76	41
17-18	109	42

Because there are several types of products that are considered farm products, the manner in which inspections are conducted may differ. However, the main focus of an inspection is to determine whether a licensee (a person who buys farm products for processing or resale) is able to pay a producer for his or her farm products. Inspections are comprehensive and entail a detailed review of financial records to ensure that the farm products dealer is financially stable.

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Additionally, a public warehouse is a grain or dry bean warehouse that stores commodities belonging to others. Grain or dry bean warehouses have control and custody of millions of dollars of commodities at any given point in time. Due to geography and transportation costs, producers have limited options available regarding who can store their commodities. Therefore, commodity handlers and public warehouses are vital components for producers in Colorado. If a commodity handler is not properly storing commodities, millions of dollars could potentially be lost. In order to determine whether a commodity handler is operating according to the Commodity Handler Act, periodic warehouse inspections (every 1 to 12 months) are completed by Division staff.

These comprehensive inspections measure inventories of commodities in comparison with storage obligations including quality and quantity. Inspections also ensure that commodities are stored in a safe manner, which serves to minimize the risk of damage to the commodities. Further, a public warehouse examination includes reviewing contracts, settlement sheets, grain payables, receivables, scale tickets, internal controls, risk positions and uses of lines of credit. During an inspection, an inspector also examines and analyzes financial statements in order to determine whether the public warehouse has solid financial standing, including net worth and liquidity.

Inspections are conducted to ensure that producers are protected from unscrupulous acts that could potentially compromise their financial well-being by ensuring solvency of licensees and public warehouses, thereby offering enhanced protection to producers.

## **Complaint and Disciplinary Activity**

The seventh sunset criterion requires COPRRR to examine whether complaint, investigation, and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Anyone can file a complaint against farm products dealers, farm products small-volume dealers, agents or commodity handlers, including, but not limited to other licensees or producers (farmers and ranchers). Table 3 delineates the total number of complaints received for licensees under the Acts.



**Table 3**  
**Total Number of Complaints in Fiscal Years 13-14 through 17-18**

Nature of Complaints	FY 13-14	FY 14-15	FY 15-16	FY 16-17	FY 17-18
Non-payment of funds	2	10	7	8	3
<b>Total</b>	<b>2</b>	<b>10</b>	<b>7</b>	<b>8</b>	<b>3</b>

During fiscal years 13-14 through 17-18, the Commissioner received 30 complaints, and all of the complaints were associated with non-payment of funds. In fiscal years 13-14, 14-15, 15-16 and 17-18, all of the complaints were associated with farm products dealers. In fiscal year 16-17, two of the complaints were associated with commodity handlers, and six complaints were associated with farm products dealers.

One of the responsibilities of the Commissioner is to impose discipline for violations of the Acts. Specifically, the Commissioner is authorized to deny, revoke, suspend, fine or issue cease and desist orders on licensees for violations of the Acts or applicable rules. The Commissioner is also authorized to impose fines on licensees. In fiscal years 13-14 through 17-18, the Commissioner utilized cease and desist orders only.

Table 4 illustrates the total number of cease and desist orders issued by the Commissioner in fiscal years 13-14 through 17-18.

**Table 4**  
**Total Number of Cease and Desist Orders in Fiscal Years 13-14 through 17-18**

Nature of Sanction of Disqualification	FY 13-14	FY 14-15	FY 15-16	FY 16-17	FY 17-18
Cease and Desist	0	0	1	1	0
<b>Total</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>0</b>

As highlighted in Table 4, the Commissioner rarely issues cease and desist orders to licensees. The two cease and desist orders issued, (one in fiscal year 15-16 and one in 16-17), were issued for non-payment and were associated with farm products dealers.

### **Collateral Consequences - Criminal Convictions**

The ninth sunset criterion requires COPRRR to examine whether the agency under review, through its licensing processes, imposes any sanctions or disqualifications based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

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In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Sections 35-36-107(1)(c) and 35-37-108(1)(b), C.R.S., authorize the Commissioner to deny any application for a license, to refuse to renew a license and to revoke, suspend, or place a licensee on probation for a conviction of a felony.

In the past five fiscal years, the Commissioner has not denied any applications for licensure or disciplined a licensee for felony convictions.

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## Analysis and Recommendations

The final sunset criterion questions whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. The recommendations that follow are offered in consideration of this criterion, in general, and any criteria specifically referenced in those recommendations.

### Recommendation 1 - Continue the Farm Products Act and the Commodity Handler Act for 11 years, until 2031.

The Commissioner of the Department of Agriculture (Commissioner) is vested with the authority to enforce the Farm Products Act and the Commodity Handler Act (Acts). The Department of Agriculture's Division of Inspection and Consumer Services (Division) handles the day-to-day oversight and implementation of the licensing programs.

There are four licenses associated with the Acts:

- Farm products dealers,
- Small-volume dealers,
- Agents, and
- Commodity handlers.

Farm products dealers, small-volume dealers and agents are regulated under the Farm Products Act, and commodity handlers are regulated under the Commodity Handler Act.

Farm products dealers:<sup>41</sup>

- Buy any farm products from the owner for processing or resale,
- Receive and take possession of any farm products from the owner for storage or safekeeping,
- Solicit or negotiate sales of farm products between the vendor and purchaser respectively,
- Receive on consignment or solicit from the owner thereof any kind of farm product for sale on commission on behalf of such owner, or
- Buy any farm products from the owner thereof for the commercial feeding of livestock that are owned wholly or in part by another.

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<sup>41</sup> § 35-37-103(7)(a), C.R.S.

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Small-volume dealers:<sup>42</sup>

- Have a fixed or established place of business;
- Buy less than \$20,000 worth of farm products each year;
- Do not purchase in a single transaction, more than \$2,500 worth of farm products; and
- Do not purchase farm products for the commercial feeding of livestock.

Agents act on behalf of a farm products dealer or small-volume dealer to buy, receive, contracts for, or solicit any farm products from or sell farm products for the owner thereof or who negotiates the consignment or purchase of any farm products.<sup>43</sup>

Commodity handlers:<sup>44</sup>

- Buy any commodities from the owner for processing or resale,
- Receive and take possession of any commodities from the owner for storage and safekeeping,
- Solicit or negotiate sales of commodities between the vendor and purchaser respectively,
- Receive on consignment or solicit from the owner thereof any kind of commodity for sale on commission on behalf of such owner, or
- Buy any commodity from the owner thereof for the commercial feeding of livestock that are owned wholly or in part by another, at an animal operation with a capacity of more than 2,500 head of livestock.

The first sunset criterion asks whether regulation is necessary to protect the public-in this instance, consumers are producers (farmers and ranchers)-from harm. The purpose of the Acts is to insulate producers from financial harm that could have devastating effects if farm products dealers (dealers) or commodity handlers are unable to pay for farm products or commodities purchased from producers. Also, regulation exists to ensure that commodities are properly stored in these facilities.

In order to adequately protect the public, the Commissioner is charged with enforcing the Acts through licensing of farm products dealers, small-volume dealers, agents as well as commodity handlers. The Commissioner also provides protection to producers through extensive inspections (both financial audits and physical examinations of commodity warehouses).

Additionally, farm products dealers are required to post either a bond or an irrevocable letter of credit in an amount of no less than \$2,000 and no more than \$200,000.

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<sup>42</sup> § 35-37-103(15), C.R.S.

<sup>43</sup> § 35-37-103(1), C.R.S.

<sup>44</sup> § 35-36-102(6)(a), C.R.S.

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The Farm Products Act defines “farm products” as:<sup>45</sup>

- Agricultural, horticultural, viticultural, fruit, and vegetable products of the soil;
- Livestock and livestock products, except for livestock held by the buyer and not resold or processed within 90 days of the purchase date;
- Milk;
- Honey;
- Ensiled corn (corn stored in a silo);
- Baled, cubed, or ground hay; and
- Industrial hemp.

Generally, commodities are defined as grain or dry beans purchased for resale or processing. Commodity handlers must post a bond or irrevocable letter of credit in an amount no less than \$10,000 and no more than \$1 million.

The purpose of the bond requirement for farm products dealers and commodity handlers is to provide at least a portion of recoverable monies in the event that a licensee does not or cannot fulfill his or her financial obligation to the producer. The requirement serves as a *de facto* credit check on licensees to ensure that their financial status is solid enough to receive a surety bond, which adds another layer of protection to producers.

Also, public warehouses are required to demonstrate that they possess the appropriate level of insurance coverage to protect stored commodities. This provides assurance to producers that public warehouses are able to meet financial obligations to producers, thereby further insulating producers from financial harm.

The absence of the licensing and surety bond requirement, as well as the minimum level of insurance coverage for commodity warehouses, could enable individuals who do not have a solid financial status to operate as dealers or commodity handlers in Colorado, which could leave producers vulnerable to financial harm.

During this sunset review, the Colorado Office of Policy, Research and Regulatory Reform staff did not identify any major policy issues associated with the Acts. Instead, this review revealed that the current regulatory framework, which includes licensing and inspections, is providing effective protections to Colorado producers, specifically financial protection; therefore, the General Assembly should continue the Acts for 11 years, until 2031.

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<sup>45</sup> § 35-37-103(8)(a), C.R.S.

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## Recommendation 2 - Combine the Farm Products and Commodity Handler Acts.

In 1985, the General Assembly separated the regulation of farm products and commodities by creating two distinct Acts, one dedicated to licensing farm products dealers, small-volume dealers, and agents (Farm Products Act) and another dedicated to licensing commodity handlers (Commodity Handler Act).

It is unclear the reasoning for the separation of the Acts, as the Acts provide similar regulatory oversight for the various licenses. Farm products licensees provide services specifically for farm products, while commodity handlers provide services for commodities.

The third and fourth sunset criteria ask:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes; [and]

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively.

While farm products dealers, small-volume dealers and agents provide services for farm products, and commodity handlers provide services specifically for commodities, they essentially perform the same functions.

The two licensing programs currently share the same program manager, the same legal counsel, the same cash funds for fines, expenditures and the Commissioner enforces both Acts, including imposing discipline. So, the Acts are, for the most part, fully integrated, which calls into question the need for two, separate Acts.

Moreover, the Division would only need to manage one licensing act. The parts in the separate licensing acts that are the same, such as grounds for discipline, could be combined, and the parts that are different, such as the bond amounts for farm products dealers and commodity handlers, could be maintained in separate parts of the new act. Doing this would create a more efficient rulemaking process for the four license types as well. When the rules are changed that relate to both license types, it would only require one stakeholder process and one rulemaking hearing. Rulemaking can consume a significant amount of administrative and legal resources, so combining the two acts would help to streamline the regulation of farm products licensees and commodity handlers licensees.

Combining the Acts create greater efficiencies. This would benefit licensees in the long term by reducing the cost of administration, which could result in lower license fees.

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Combining the Acts would also serve to create uniformity in the regulatory oversight of farm products and commodities, when necessary. For example, the Commodity Handler Act defines the word “storage” as:

the holding of a commodity for another by a person who does not directly own the commodity. “Storage” does not include transportation of a commodity.

Farm Products Act does not contain a definition of “storage.” Since farm products dealers provide similar services to producers (farmers), such as storing farm products, combining the Acts will provide a definition of “storage” for both commodities and farm products.

In order to streamline regulation and create efficiencies in the Division, the General Assembly should combine the Farm Products and Commodity Handler Acts.

**Recommendation 3 - Direct that all funds raised through the imposition of civil fines be credited to the state’s General Fund.**

The Inspection and Consumer Services Cash Fund (Cash Fund) is created in both Acts. Specifically, sections 35-36-121(5) and 35-37-117(5), C.R.S., direct all civil fines collected pursuant to the Acts are to be deposited into it.

Ordinarily, when an agency is given fining authority, such funds are credited to the state’s General Fund. This is done so that the agency has no incentive to impose fines, other than taking legitimate disciplinary action. Examples of programs adhering to this principle include those regulating accountants,<sup>46</sup> collection agencies,<sup>47</sup> pharmacists and pharmacies,<sup>48</sup> electricians,<sup>49</sup> professional engineers,<sup>50</sup> professional land surveyors,<sup>51</sup> architects,<sup>52</sup> chiropractors,<sup>53</sup> lay midwives,<sup>54</sup> physical therapists,<sup>55</sup> plumbers<sup>56</sup> and veterinarians<sup>57</sup> to name a few.

The seventh sunset criterion asks whether, among other things, final dispositions of complaints are in the public interest or are self-serving to the profession. Arguably, when civil fines are credited to a cash fund, fees paid by the regulated industry should be reduced accordingly, thus casting a shadow over the legitimacy of the fines.

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<sup>46</sup> § 12-2-123(5)(b), C.R.S.

<sup>47</sup> § 5-16-134(2), C.R.S.

<sup>48</sup> § 12-42.5-124(5)(b), C.R.S.

<sup>49</sup> § 12-23-118(7), C.R.S.

<sup>50</sup> § 12-25-105(9), C.R.S.

<sup>51</sup> § 12-25-205(8), C.R.S.

<sup>52</sup> § 12-25-308(4)(b), C.R.S.

<sup>53</sup> § 12-33-117(1.5), C.R.S.

<sup>54</sup> § 12-37-107(2)(b), C.R.S.

<sup>55</sup> § 12-41-122(2), C.R.S.

<sup>56</sup> § 12-58-116.5(4), C.R.S.

<sup>57</sup> § 12-64-111(4), C.R.S.

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Importantly, no allegations of impropriety were made during the course of this sunset review. Rather, this is simply a “good government” recommendation.

Therefore, the General Assembly should direct all funds raised through the imposition of civil fines be credited to the state’s General Fund.

**Recommendation 4 - Direct the Commissioner to define, in rule, specific administrative functions.**

Sections 35-36-111(1) and 35-37-120, C.R.S., grant the Commissioner broad rulemaking authority for the regulation of commodity handlers and farm products dealers, respectively. However, there are numerous important administrative functions that are not currently reflected in the rules governing the programs. Specifically, while applicants and licensees are expected to secure bonds or irrevocable letters of credit, meet recordkeeping and reporting requirements, and maintain their warehouses in a safe manner, there are no rules addressing these areas. The Commissioner has relied on administrative procedures to assure licensees are fulfilling their statutory responsibilities; enshrining these requirements in rule via a public rulemaking process would ensure clarity and transparency for licensees. Both the Commodity Handler Act and the Farm Products Act should require the Commissioner to promulgate rules addressing:

- Bond schedule,
- Record-keeping requirements,
- Minimum financial requirements,
- Licensing and renewal requirements,
- Credit sale contract requirements, and
- Standard warehouse operation requirements.

Rules addressing these areas would provide guidance to licensees in meeting their statutory obligations. This recommendation addresses sunset criterion ten, which asks whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

**Recommendation 5 – Require financial statements to be prepared by a certified public accountant who has no financial interest in the company under review.**

Current law defines a “financial statement” as “a statement that accurately presents the financial condition of an applicant or licensee and that includes, at a minimum, a balance sheet and a statement of income.”<sup>58</sup> Financial statements are submitted to the Division, and their purpose is to disclose the transactions and financial

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<sup>58</sup> § 35-36-102(10), C.R.S.



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responsibilities of licensees. However, there is no requirement that such statement be prepared by anyone who possesses expertise in analyzing and interpreting financial records. In any industry where the collapse of a single business can have far-ranging financial consequences, financial statements submitted should be prepared by certified public accountants who are held to a high professional standard.

Division staff stated that oftentimes, financial statements that are submitted to the Division are incomplete and inaccurate, which may compromise consumers protection.

This recommendation addresses the first sunset criterion, which asks whether regulation is necessary to protect the public. Requiring financial statements to be prepared by certified public accountants will serve to provide protection to consumers.

As such, the General Assembly should require financial statements to be prepared by someone who possess expertise in analyzing and interpreting financial records. Doing so would insulate producers from financial harm.

### **Recommendation 6 - Increase the maximum bond requirements for farm products dealers from \$200,000 to \$1 million.**

Section 35-37-106(1)(a), C.R.S., states that the maximum amount of any bond for a farm products dealer cannot exceed \$200,000. This maximum amount has been set in statute since at least 1990, and should be increased to get closer to covering producers' losses. Looking at inflation alone, \$200,000 in 1990 dollars is equivalent to \$400,000 in today's dollars.<sup>59</sup>

Additionally, the current bond maximum for farm products dealers is inconsistent with the commodity handler maximum, which is \$1 million.

The purpose of the bond requirement for farm products dealers and commodity handlers is to provide at least a portion of recoverable monies in the event that a licensee does not or cannot fulfill his or her financial obligation to the producer. The requirement serves as a *de facto* credit check on licensees to ensure that their financial status is solid enough to receive a surely bond, which adds another layer of protection to producers.

This recommendation ensures that consumers are financially protected, which is consistent with the first sunset criterion, which asks whether regulation is necessary to protect the public. Increasing the bond requirement will serve to enhance consumer protection.

As such, the General Assembly should increase the maximum bond requirement for farm products dealers from \$200,000 to \$1 million.

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<sup>59</sup> These figures were calculated using the Consumer Price Index Inflation Calculator provided by the federal Bureau of Labor Statistics. Retrieved on May 29, 2019, from <https://data.bls.gov/cgi-bin/cpicalc.pl>

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**Recommendation 7 - Repeal the “single transaction” threshold established for small-volume dealers.**

The current definition of “small-volume dealer” states that small-volume dealers do not purchase \$2,500 worth of farm products or commodities or more in a single transaction.<sup>60</sup> This provision prevents certain licensees from qualifying for the small-dealer license. For example, there could be a winemaker who purchases three grape harvests per year at \$3,000 each. The language in section 35-37-103(15)(d), C.R.S., would disqualify that dealer from a small-volume-dealer license, even though their annual take is well below the \$20,000 annual aggregate threshold established in section 35-37-103(15)(c), C.R.S. This creates an undue burden on small businesses.

This recommendation addresses the second sunset criterion, which asks whether the current regulation is the least restrictive form of regulation consistent with public protection.

As such, the General Assembly should repeal the single transition threshold of \$2,500 per transaction, which is unnecessary. Doing so would enable small-volume dealers to purchase farm products up to the current annual aggregate amount, which is \$20,000.

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<sup>60</sup> § 35-37-103(15)(d), C.R.S.