



Dora
Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

**2008 Sunset Review:
Farm Products Act and
Commodity Handler Act**

October 15, 2008





Executive Director's Office
D. Rico Munn
Executive Director

Bill Ritter, Jr.
Governor

October 15, 2008

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 mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA 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 my office's oral testimony before the 2009 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall 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 report discusses the question of whether there is a need for the regulation provided under Article 16 of Title 12, C.R.S. The report also discusses the effectiveness of the Department of Agriculture and staff in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

D. Rico Munn
Executive Director



Bill Ritter, Jr.
Governor

D. Rico Munn
Executive Director

2008 Sunset Review: Farm Products and Commodity Handler Act

Summary

What is Regulated?

The Colorado Department of Agriculture (CDA) has regulatory authority over Farm Products Dealers (which includes Farm Products Cash Buyers), Small-Volume Dealers, Farm Products Agents, Commodity Handlers, Commodity Handler Agents and Commodity Warehouses.

Why is it Regulated?

The purpose of the Farm Products Act and the Commodity Handler Act (Acts) is to insulate producers (farmers) from financial harm that could have devastating effects if a Farm Products Dealer or Commodity Handler is unable to pay for farm products or commodities. Also, Commodity Warehouses are regulated to ensure that commodities are properly stored at these facilities.

Who is Regulated?

In fiscal year 06-07, the CDA licensed 347 Farm Products Dealers, 15 Small-Volume Dealers, 38 Farm Products Cash Buyers, 36 Farm Products Agents, 257 Commodity Handlers, 0 Commodity Handler Agents and 40 Commodity Warehouses.

How is it Regulated?

The Acts require Farm Products Dealers, Small-Volume Dealers and Farm Products Agents to obtain a license from the CDA prior to purchasing or brokering farm products from Colorado producers, owners and dealers for processing or resale. Each of the available licenses, with the exception of the Small-Volume Dealer and the Farm Products Cash Buyer, requires a bond or irrevocable letter of credit.

Commodity Handlers and Commodity Handler Agents are also required to obtain a license from the CDA and possess a surety bond or irrevocable letter of credit. Commodity Warehouses must provide evidence of sufficient provisional insurance coverage to protect the commodities stored.

What Does it Cost?

In fiscal year 06-07, the total expenditures to oversee the farm products and commodity handler programs were \$410,636. There were 3.75 full-time equivalent employees associated with these programs.

What Disciplinary Activity is There?

Between fiscal years 02-03 and 06-07, the CDA's disciplinary activities included:

- Cease and Desist Orders – 527
- Felony Cases - 11

Where Do I Get the Full Report?

The full sunset review can be found on the internet at: www.dora.state.co.us/opr/oprpublications.htm.

Key Recommendations

Continue the Farm Products Act and the Commodity Handler Act for 11 years, until 2020.

The purpose of the Acts is to insulate producers (farmers) from financial harm that could have devastating effects if a Farm Products Dealer or Commodity Handler is unable to pay for farm products or commodities purchased from producers. Also, Commodity Warehouses are regulated to ensure that commodities are properly stored at these facilities. To provide adequate protection to producers, the CDA administers a regulatory framework that includes licensing, which includes a surety bond requirement, and comprehensive financial examinations.

Authorize the Commissioner to have unimpeded access to all properties and records pertaining to the Farm Products Act and the Commodity Handler Act.

Certain sections within the Acts are inconsistent concerning when the Commissioner of Agriculture (Commissioner) may have access to a licensee's property and records. In order to provide protection to producers in Colorado, the Commissioner should have the authority to scrutinize any property or records of a licensee at any time. This improves transparency of the regulated community under the Acts and prevents licensees from potentially withholding information from the Commissioner.

Major Contacts Made During This Review

Colorado Department of Agriculture
Colorado Farm Bureau
Colorado Livestock Association

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not 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:
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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 Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ 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:

- 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;
- 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;
- 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;
- 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;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- 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;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

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

Types of Regulation

Regulation, when appropriate, can serve as a bulwark of consumer protection. Regulatory programs can be designed to impact individual professionals, businesses or both.

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.

Regulation, then, has many positive and potentially negative consequences.

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.

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.

Regulation of Businesses

As regulatory programs relate to businesses, they can enhance public protection, promote stability and preserve profitability. But they can also reduce competition and place administrative burdens on the regulated businesses.

Regulatory programs that address businesses can involve certain capital, bookkeeping and other record-keeping requirements that are meant to ensure financial solvency and responsibility, as well as accountability. Initially, these requirements may serve as barriers to entry, thereby limiting competition. On an ongoing basis, the cost of complying with these requirements may lead to greater administrative costs for the regulated entity, which costs are ultimately passed on to consumers.

Many programs that regulate businesses involve examinations and audits of finances and other records, which are intended to ensure that the relevant businesses continue to comply with these initial requirements. Although intended to enhance public protection, these measures, too, involve costs of compliance.

Similarly, many regulated businesses may be subject to physical inspections to ensure compliance with health and safety standards.

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. To facilitate input from interested parties, anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: www.dora.state.co.us/pls/real/OPR_Review_Comments.Main.

The regulatory functions of the Colorado Department of Agriculture (CDA), relating to the Farm Products Act and the Commodity Handler Act (Acts) in Article 16 of Title 12, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2009, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the CDA pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the Acts should be continued for the protection of the public and to evaluate the performance of the Acts and staff of the CDA. During this review, the CDA must demonstrate that the regulation serves to protect the public health, safety or welfare, and that the regulation is the least restrictive regulation consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the legislative committee of reference of the Colorado General Assembly.

Methodology

As part of this review, DORA staff interviewed CDA staff as well as representatives of the Colorado Livestock Association. DORA staff also reviewed Colorado statutes and the rules associated with the Acts, as well as reviewed the laws of other states.

Profile of the Program

The agricultural industry in Colorado is an important component of the state's overall economy. Colorado producers (farmers) serve as an essential component of the state's agricultural economy. Due to geography and transportation costs, producers have limited options available regarding who can buy and store their commodities. The Acts were created in response to these limited options in order to provide producers protection from financial harm through a regulatory framework that includes licensing and examinations.

In an attempt to provide an adequate level of regulatory oversight, the farm products and commodity handler programs provide regulation in three areas:

- Farm Products Dealers (Dealers);
- Commodity Handlers; and
- Commodity Warehouses.

Farm products are defined in the Farm Products Act as:²

- Unprocessed products of the soil (e.g., vegetables and fruit, etc.);
- Livestock (cattle, sheep, goats, swine, mules, horses, domesticated elk and domesticated fallow deer);
- Milk;
- Honey; and
- Hay.

It should be noted that farm products do not include the following:³

- Poultry;
- Nursery stock;
- Timber products; or
- Livestock purchased and not resold or processed within 90 days.

Dealers, which include Farm Products Cash Buyers, Small-Volume Dealers and Farm Products Agents are required to obtain a license from the CDA. Licensed Dealers are permitted to buy farm products for processing or resale. With the exception of Small-Volume Dealers and Farm Products Cash Buyers, Dealers in Colorado are required to maintain a surety bond or irrevocable letter of credit prior to purchasing and processing or reselling farm products.

² § 12-16-103(5)(a)(I), C.R.S.

³ § 12-12-103(5)(b), C.R.S.

Commodities are defined as unprocessed small, hard seeds or fruits such as wheat, corn, oats, barley, rye, sunflower seeds, soybeans, beans, grain sorghum and other seeds or fruits as determined by the Commissioner of Agriculture.⁴ Commodity Handlers buy commodities from producers for processing or resale and are required to obtain a license from the CDA, as well as possess a surety bond or irrevocable letter of credit.

Commodity Handlers may also operate Commodity Warehouses, which are facilities that store commodities owned by others. In order to operate a Commodity Warehouse, a Commodity Handler must demonstrate that it possesses the appropriate level of insurance coverage to protect the stored commodities.

The CDA conducts extensive examinations of licensees and Commodity Warehouses. Examinations include a detailed financial analysis of licensees, as well as examinations of Commodity Warehouses in order to ensure that current inventories of commodities compare with current storage obligations.⁵

In order to enhance the effectiveness of the regulatory model concerning the Acts, the Colorado Agricultural Mediation Program (CAMP) was created in 2002. The purpose of CAMP is to effectuate settlements in its complaint process through mediation. CAMP is funded through federal funds received from the United States Department of Agriculture (USDA). In 2007, the CDA received approximately \$24,000 from the USDA to administer the program. According to CDA staff, CAMP is utilized by Coloradans, on average, 20 to 30 times per year.

History of Regulation

The General Assembly enacted its first agricultural products statute in 1937. That statute has been amended many times since enactment, and in 1985 it was repealed and reenacted. At that time, the statute was divided into two parts: the Farm Products Act and the Commodity Warehouses Act.

In 1988, the General Assembly repealed the bonding requirement for those who transport agricultural products. Although transporters are required to obtain a license as such from the CDA, this requirement is enforced exclusively by the Colorado Department of Revenue (DOR). DOR verifies licensure at its inspection stations throughout the state and if a transporter is found to be transporting agricultural products without a license, he or she is required to purchase a license.

⁴ § 12-16-202(4), C.R.S.

⁵ Colorado Department of Agriculture. ICS Budget Information and Narrative

In 1991, the Commodity Warehouse Act was renamed the Commodity Handler Act. This change corresponded with a regulatory shift away from Commodity Warehouses, with the new focus landing upon Commodity Handlers. The new focus was broad enough to encompass commodity dealers, brokers, commission merchants and commercial livestock feedlots, as well as Commodity Warehouses.

In 1993, the inclusion of commercial livestock feedlots was limited such that the Farm Products Act applied to only those that feed more than 2,500 head of livestock at any one time, and which livestock are owned wholly or in part by another.

In 1995, a new license category was created within the Farm Products Act: the Small-Volume Dealer. A Small-Volume Dealer pays a lower license fee than a dealer, and is exempt from any bonding requirements.

In 2002, the General Assembly exempted Dealers that pay cash in each of their transactions from having to pay a license fee, but not from licensure.

In 2003, the General Assembly fundamentally altered the way regulation under the Farm Products Act and the Commodity Handler Act is funded. Prior to this time, administration of both acts was funded entirely by appropriations from the state's General Fund. Effective July 1, 2007, however, specific license fees were repealed from the statute and the General Assembly reduced the General Fund appropriation to 25 percent of the direct and indirect costs of administering the acts. Cash funding makes up the balance of the funding.

Also in 2007, the General Assembly again addressed the issue of commercial livestock feedlots by clarifying that the licensing requirements of the Farm Products Act apply to those feedlots with a capacity to hold more than 2,500 head of livestock.

Legal Framework

Farm Products Dealers and Commodity Handlers are subject to a variety of federal and state laws. Among the federal laws applicable to farm products dealers are the Packers and Stockyard Act (P&S) and the Perishable Agricultural Commodities Act (PACA).

In short, P&S regulates entities that are engaged in the business of marketing livestock, meat, and poultry, including: stockyard owners, market agencies, dealers, packers, swine contractors, and live poultry dealers.⁶ However, P&S does not have jurisdiction over dealers that operate within Colorado. P&S demands financial surety from all livestock dealers to help ensure that sellers receive prompt payment for animals sold.⁷

PACA, which is administered by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS), regulates interstate and international transactions involving perishable agricultural products. The primary purpose of PACA is to prevent unfair and fraudulent conduct in the marketing and selling of perishable agricultural products and to facilitate the orderly flow of such products in commerce.⁸

Among the federal laws applicable to Commodity Handlers are the United States Warehouse Act (USWA) and certain services offered by the Commodity Credit Corporation (CCC).

Under the USWA, the USDA issues, on a voluntary basis, licenses to warehouse operators that agree to comply with USWA and its regulations.⁹ These requirements include issues pertaining to care of farm products, charges and tariffs, and warehouse receipts.¹⁰

The CCC is an agency of the USDA and operates to stabilize, support and protect farm income and prices. CCC also helps to maintain balanced and adequate supplies of agricultural commodities and aids in their orderly distribution. CCC accomplishes these tasks by aiding producers through loans, purchases and payments, and making available materials and facilities necessary to the production and marketing of agricultural commodities.¹¹

In Colorado, the Farm Products Act¹² and the Commodity Handler Act¹³ (Acts) regulate those who deal in farm products and commodities. These two Acts are the subject of this sunset review, and they are more similar than they are dissimilar.

⁶ USDA, *Livestock, Meat, & Poultry*, Regulated Entities, Retrieved March 25, 2008, from <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=imp&topic=re>

⁷ USDA, The Grain Inspection, Packers and Stockyards Administration, February 2007,

⁸ The National Agricultural Law Center, *Perishable Agricultural Commodities Act (PACA)*. Retrieved September 10, 2008, from www.nationalaglawcenter.org/readingrooms/perishablecommodities

⁹ U.S. Department of Agriculture, Farm Service Agency, *Commodity Operations: United States Warehouse Act*. Retrieved September 10, 2008, from www.fsa.usda.gov/FSA/webapp?area=home&subject=coop&topic=was-ua

¹⁰ See 7 C.F.R. § 735.1, *et seq.*

¹¹ U.S. Department of Agriculture, Farm Service Agency, *About FSA: About the Commodity Credit Corporation*. Retrieved September 10, 2008, from www.fsa.usda.gov/FSA/webapp?area=about&subject=landing&topic=sao-cc

¹² § 12-16-101, *et seq.*, C.R.S.

The Farm Products Act governs those who deal in unprocessed products produced in Colorado or owned by any Colorado resident, Farm Products Dealer (Dealer) or Small-Volume Dealer, including:¹⁴

- Agricultural, horticultural, viticultural, fruit and vegetable products of the soil;
- Livestock and livestock products;
- Milk;
- Honey;
- Ensiled corn; and
- Baled, cubed or ground hay.

Farm products do not include poultry, poultry products, timber products, nursery stock or commodities.¹⁵

A commodity is any unprocessed small, hard seeds or fruits, such as wheat, corn, oats, barley, rye, sunflower seeds, soybeans, beans, grain sorghums, and such other seeds or fruits as may be determined by the Colorado Commissioner of Agriculture (Commissioner).¹⁶ Those who deal in commodities are regulated under the Commodity Handler Act.

Any person who acts as a Dealer, Small-Volume Dealer of farm products, or an agent of such, or who acts as a Commodity Handler, or an agent of such, must be licensed as such by the Commissioner.¹⁷

A Dealer is one who:¹⁸

- Buys any farm products from the owner for processing or resale;
- Receives and takes possession of any farm products from the owner for storage or safekeeping;
- Solicits or negotiates sales of farm products between the vendor and purchaser respectively;
- Receives on consignment or solicits from the owner thereof any kind of farm product for sale on commission on behalf of such owner; or
- Buys any farm products from the owner thereof for the commercial feeding of livestock that are owned wholly or in part by another.

¹³ § 12-16-201, et seq., C.R.S.

¹⁴ § 12-16-103(5)(a), C.R.S.

¹⁵ § 12-16-103(5)(b), C.R.S.

¹⁶ § 12-16-103(2.5), C.R.S.

¹⁷ §§ 12-16-104(1) and 12-16-203(1), C.R.S.

¹⁸ § 12-16-103(4)(a), C.R.S.

A Small-Volume Dealer of farm products is one who is not a Dealer because the Small-Volume Dealer:¹⁹

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

A Commodity Handler is one who:²⁰

- Buys any commodities from the owner for processing or resale;
- Receives and takes possession of any commodities from the owner for storage or safekeeping;
- Solicits or negotiates sales of commodities between the vendor and purchaser respectively;
- Receives on consignment or solicits from the owner thereof any kind of commodity for sale on commission on behalf of such owner; or
- Buys any commodity from the owner thereof for the commercial feeding of livestock that are owned wholly or in part by another.

In accepting commodities for storage, a Commodity Handler operates under the principals of bailment and not sale. This means, among other things, that the commodities are not liable to seizure by a court in an action against the Commodity Handler.²¹

An agent is one who, on behalf of any Dealer, Small-Volume Dealer or Commodity Handler, buys, receives, contracts for, or solicits any farm products from or sells such for the owner thereof, or who negotiates the consignment or purchase of any farm products on behalf of any Dealer, Small-Volume Dealer or Commodity Handler.²²

To obtain a license as a Dealer, Small-Volume Dealer, Commodity Handler, or an agent thereof, an applicant must provide the Commissioner with:²³

- The full name of the person applying for the license, or if the applicant is a business entity, the names of each member of the firm or the firm's officers;
- The principal business address of the applicant in Colorado and elsewhere; and
- The names of the people authorized to receive service of process for the applicant.

¹⁹ § 12-16-103(10.5), C.R.S.

²⁰ § 12-16-202(4.5)(a), C.R.S.

²¹ § 12-16-207(1), C.R.S.

²² §§ 12-16-103(1) and 12-16-202(1), C.R.S.

²³ §§ 12-16-104(2) and 12-16-205(2)(a), C.R.S.

Applicants for a Dealer, Small-Volume Dealer, or agent thereof, license must also inform the Commissioner of the class or classes of farm products the applicant proposes to handle.²⁴

Applicants for a Commodity Handler license must also provide the Commissioner with a financial statement that accurately presents his or her financial condition,²⁵ and:²⁶

- The location of each Commodity Warehouse of the applicant;
- The total rated storage capacity, in bushels, of each Commodity Warehouse;
- The tariff schedule of charges to be made at each Commodity Warehouse for the handling, storage and shipment of commodities; and
- Any other information required by the Commissioner.

Applicants for agent licenses must provide the Commissioner with the names and addresses of each Dealer, Small-Volume Dealer or Commodity Handler represented or sought to be represented by the applicant; and the written endorsement or nomination of such principals. No agent may be licensed as such unless all of such agent's principals are properly licensed.²⁷ An agent must obtain a separate license for each principal represented, and the agent license expires on the date of expiration of the relevant principal's license.²⁸

Applicants for Dealer and Commodity Handler licenses must also satisfy certain financial responsibility requirements before the Commissioner can issue a license. Such licensees must either post a bond or an irrevocable letter of credit:

- For a Dealer, in an amount that is not less than \$2,000 nor more than \$200,000;²⁹ and
- For a Commodity Handler, in an amount that is not less than \$10,000 nor more than \$1 million.³⁰

A Commodity Handler must maintain minimum provisional insurance coverage in an amount sufficient to protect the Commodity Handler's storage obligations.³¹

The instruments of financial responsibility may be acted upon by any producer, owner, Small-Volume Dealer or other Dealer claiming to have been injured by the fraud, deceit, willful negligence or failure to comply with the provisions of the Acts.³² Any such action must be commenced within 24 months after the date of the transaction upon which the claim is based.³³

²⁴ § 12-16-104(2), C.R.S.

²⁵ § 12-16-206(1)(b), C.R.S.

²⁶ § 12-16-205(2)(b-e), C.R.S.

²⁷ §§ 12-16-104(3), 12-16-205(2.5)(a) and 12-16-205(2.5)(b)(I), C.R.S.

²⁸ §§ 12-16-104(4) and 12-16-205(2.5)(b)(II) and (c), C.R.S.

²⁹ § 12-16-106(1)(a), C.R.S.

³⁰ § 12-16-218(1)(a), C.R.S.

³¹ § 12-16-206(1)(a), C.R.S.

³² §§ 12-16-106(1)(d)(I) and 12-16-218(1)(c)(I), C.R.S.

³³ §§ 12-16-106(1)(d)(II) and 12-16-218(3)(1)(c)(II), C.R.S.

No bond or letter of credit is required 1) if the 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 obtains possession or control of the farm products, or 2) if the Dealer operates under a bond required by the United States.³⁴

Additionally, a bond is not required for transactions involving credit sale contracts.³⁵ 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 60 days after delivery of the farm product to the buyer.³⁶

For all license types, the Commissioner must be satisfied as to the applicant's character, responsibility and good faith in seeking to carry on the business stated in the application.

Each application for initial licensure and renewal must be accompanied by a fee, as determined by the Agricultural Commission (Commission).³⁷ However, those Dealers who pay in cash for each transaction to which they are a party, pay no fee.³⁸

Effective July 1, 2007, the regulatory structures created by the Acts are 75 percent cash funded. The remaining 25 percent is funded through the state's General Fund.³⁹

Additionally, the Commission is specifically authorized to consult with industry groups in fixing, assessing and collecting fees for the inspection of Commodity Handlers.⁴⁰

The Commissioner may receive and investigate complaints against any Dealer, Small-Volume Dealer, Commodity Handler, agent or transporter.⁴¹ However, all such complaints must be filed with the Commissioner within 120 days after the subject transaction occurred.⁴²

At any reasonable time during regular business hours, and 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.⁴³

On the other hand, the Commissioner, as the enforcement authority of the Acts, has free and unimpeded access to a licensee's premises during regular business hours.⁴⁴

³⁴ § 12-16-106(1)(f), C.R.S.

³⁵ §§ 12-16-106(3) and 12-16-218(3), C.R.S.

³⁶ §§ 12-16-103(3.5) and 12-16-208(1), C.R.S.

³⁷ §§ 12-16-105(1)(a) and 12-16-205(1)(a), C.R.S.

³⁸ §§ 12-16-105(1)(a)(I), C.R.S.

³⁹ §§ 12-16-105(1)(b) and 12-16-205(1)(b), C.R.S.

⁴⁰ § 12-16-217(1), C.R.S.

⁴¹ §§ 12-16-107(1) and 12-16-215(1), C.R.S.

⁴² §§ 12-16-107(5) and 12-16-215(5), C.R.S.

⁴³ §§ 12-16-107(3) and 12-16-215(2), C.R.S.

⁴⁴ §§ 12-16-114(1) and 12-16-210(2), C.R.S.

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.⁴⁵

If the licensee requests a hearing, and the Commissioner finds that a violation has not occurred, the complaint is dismissed. 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. In addition, the Commissioner may order that the licensee's license be suspended, revoked or placed on probation.⁴⁶

The Commissioner may deny any application, refuse to renew a license, revoke or suspend a license, place a licensee on probation, or issue an order to cease and desist if the Commissioner finds that the person has:⁴⁷

- Violated the provisions of the Acts or any of the rules promulgated thereunder;
- Been convicted of a felony;
- Committed fraud or deception in the procurement or attempted procurement of a license;
- Failed or refused to file with the Commissioner a surety bond or an irrevocable letter of credit;
- Been determined by the Commissioner to be in an inadequate financial position to meet liability obligations;
- Failed to comply with any lawful order of the Commissioner; or
- Had a license revoked, suspended or not renewed or has been placed on probation in another state.

Additionally, the Commissioner may refuse to renew the license of any Dealer, Small-Volume Dealer, or agent thereof:

- Who fails to file a bond or irrevocable letter of credit within 90 days of the date of license application;⁴⁸
- Against whose surety a claim has been collected or any person against whom an irrevocable letter of credit has been drawn by the Commissioner;⁴⁹ or
- Who has a verified complaint pending with the Commissioner.⁵⁰

Finally, the Commissioner may impose a civil penalty of not more than \$1,000 per violation per day on any licensee who has violated the Acts.⁵¹ All money collected from civil penalties is credited to the Inspection and Consumer Services Cash Fund.⁵²

⁴⁵ § 12-16-107(8)(a), C.R.S.

⁴⁶ §§ 12-16-107(8)(c), 12-16-107(9), 12-16-215(8)(c) and 12-16-215(9), C.R.S.

⁴⁷ §§ 12-16-108(1), 12-16-109, 12-16-206.5(1) and 12-16-219(1), C.R.S.

⁴⁸ § 12-16-105(5), C.R.S.

⁴⁹ § 12-16-105(3), C.R.S.

⁵⁰ § 12-16-105(4), C.R.S.

⁵¹ §§ 12-16-114.5(1) and 12-16-219.5(1), C.R.S.

In addition to these administrative remedies, the Acts also make several types of actions criminal offenses. The following constitute Class 6 felonies and are punishable by between 12 and 18 months' imprisonment:⁵³

- Making fraudulent charges or returns for the handling, sale or storage or for the rendering of any service in connection with the handling, sale, or storage of any farm products or commodities;⁵⁴
- Willfully failing or refusing to: 1) render a true account of sales or storage, 2) make a settlement thereon, or 3) pay for farm products received within the time and in the manner required by the Acts;⁵⁵
- Intentionally making false or misleading statements as to the market conditions of farm products or commodities or false or misleading statements as to the condition, quality or quantity of farm products or commodities received, handled, sold or stored;⁵⁶
- Engaging in fictitious sales, in collusion, or in unfair practices to defraud the owners;⁵⁷
- Acting as a Dealer, Small-Volume Dealer, Commodity Handler, or an agent thereof, without a license or without a surety bond or irrevocable letter of credit;⁵⁸ or
- Holding a Commodity Handler license and willfully altering or destroying any negotiable warehouse receipt without preserving a record thereof or issuing a negotiable warehouse receipt when the commodity described is not in the building certified in the receipt.⁵⁹

The following acts constitute Class 1 misdemeanors and are punishable by between 6 and 18 months' imprisonment, a fine of between \$500 and \$5,000, or both.⁶⁰

- Committing fraud or deception in the procurement or attempted procurement of a license;⁶¹
- Failing to comply with any lawful order of the Commissioner;⁶²
- Interfering with or hindering an authorized representative of the Commissioner;⁶³
- Acting as a Dealer who works only in cash, and failing to make payment and not maintaining a bond or irrevocable letter of credit;⁶⁴ or

⁵² §§ 12-16-114.5(5) and 12-16-219.5(5), C.R.S.

⁵³ § 18-1.3-401(1)(a)(IV), C.R.S.

⁵⁴ §§ 12-16-115(1)(a) and 12-16-221(1)(a), C.R.S.

⁵⁵ §§ 12-16-115(1)(b) and 12-16-221(1)(b), C.R.S.

⁵⁶ §§ 12-16-115(1)(c) and 12-16-221(1)(c), C.R.S.

⁵⁷ §§ 12-16-115(1)(d) and 12-16-221(1)(d), C.R.S.

⁵⁸ §§ 12-16-115(1)(e) and 12-16-221(1)(e), C.R.S.

⁵⁹ § 12-16-221(1)(j), C.R.S.

⁶⁰ § 18-1.3-501(1)(a), C.R.S.

⁶¹ §§ 12-16-115(1)(g) and 12-16-221(1)(g), C.R.S.

⁶² §§ 12-16-115(1)(h) and 12-16-221(1)(h), C.R.S.

⁶³ §§ 12-16-115(1)(i) and 12-16-221(1)(i), C.R.S.

⁶⁴ § 12-16-115(1)(l), C.R.S.

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- Holding a Small-Volume Dealer license and purchasing \$20,000 or more worth of farm products in one year, or \$2,500 or more worth of farm products in any single transaction.⁶⁵

Willfully converting to his or her own use, the farm products of another constitutes theft when perpetrated by a Dealer or Small-Volume Dealer.⁶⁶ Additionally, selling farm products or commodities for less than current market price to any person with whom such Dealer, Small-Volume Dealer or Commodity Handler has any financial connection also constitutes theft.⁶⁷ The punishment for theft depends upon the value of the products involved.⁶⁸

Finally, it is fraud by check for any Dealer, Small-Volume Dealer, Commodity Handler, or agent thereof, with the intent to defraud, make, draw, utter or deliver any check, draft or order for the purchase of any farm products or commodities when, at the time of the making, drawing, uttering or delivery, the maker has insufficient funds or credit to fulfill the obligation.⁶⁹ The punishment for fraud by check depends upon the amount of money involved.⁷⁰

When a Dealer, Small-Volume Dealer or Commodity Handler receives farm products or commodities for which payment has not been made, the Dealer, Small-Volume Dealer or Commodity Handler must, within 60 days after receiving the farm products or commodities, provide the producer or owner of the farm products or commodities with a credit sale contract, which must contain:⁷¹

- The type of farm products, or the class and grade of the commodities received;
- The quantity received;
- The date the farm products or commodities were received;
- The charges for handling, if any;
- The name and address of the producer or owner, and the signature of the Dealer, Small-Volume Dealer, Commodity Handler, or the agent thereof;
- The contract number; and
- The statement, "This contract constitutes a voluntary extension of credit by the owner to the [Dealer/Commodity Handler] and is not protected by the surety bond or irrevocable letter of credit of the [Dealer/Commodity Handler]."

Additionally, a Commodity Handler's credit sale contract must contain the statement, "not a storage contract."⁷²

⁶⁵ § 12-16-115(1)(m), C.R.S.

⁶⁶ § 12-16-115(1)(f), C.R.S.

⁶⁷ §§ 12-16-115(1)(j) and 12-16-221(1)(k), C.R.S.

⁶⁸ § 18-4-401(1), C.R.S.

⁶⁹ §§ 12-16-115(1)(k) and 12-16-221(1)(l), C.R.S.

⁷⁰ § 18-5-502, C.R.S.

⁷¹ §§ 12-16-110.5(1) and 12-16-208(1), C.R.S.

⁷² § 12-16-208(1)(e), C.R.S.

Records pertaining to credit sale contracts must be retained for two years.⁷³

In addition to purchasing and selling farm products on their own account, Dealers and Small-Volume Dealers may receive farm products on consignment.

If a Dealer receives farm products from a consignor, a record must be maintained that includes:⁷⁴

- The name and address of the consignor;
- The date received;
- The condition and quantity upon arrival;
- The date of such sale for the account of the consignor;
- The price for which sold;
- An itemized statement of the charges to be paid by the consignor in connection with the sale;
- The names and addresses of the purchasers if the Dealer or Small-Volume Dealer has any financial interest in the business of the purchasers or if the purchasers have any financial interest in the Dealer;
- A lot number of other identifying mark for each consignment; and
- Any claims which have been filed by the Dealer against any person for overcharges or for damages resulting from the injury or deterioration of the farm products by the act, neglect or failure of such person.

If a consignor so requests, a Dealer must, by the close of the next business day following the sale of any farm products consigned to the Dealer, provide the consignor a report of the sale showing the amount sold and the selling price. The Dealer must make full remittance to the consignor within 10 days after receipt of the money by the Dealer.⁷⁵

Small-Volume Dealers must maintain records, as required by the Commissioner.⁷⁶

A Commodity Handler may issue a negotiable warehouse receipt,⁷⁷ which is a receipt that specifies, by its terms, that the goods are to be delivered to the bearer or to the order of a named person.⁷⁸ Only the Colorado Department of Agriculture is authorized to print such receipts.⁷⁹

⁷³ §§ 12-16-110.5(2) and 12-16-208(2), C.R.S.

⁷⁴ § 12-16-111(1), C.R.S.

⁷⁵ § 12-16-112(1), C.R.S.

⁷⁶ § 12-16-111.5, C.R.S.

⁷⁷ § 12-16-212(4), C.R.S.

⁷⁸ § 12-16-202(12), C.R.S.

⁷⁹ § 12-16-212(1), C.R.S.

A Commodity Handler must issue a scale ticket, which contains the net weight of each separate load of commodity, to the person delivering the commodity for storage or handling.⁸⁰

If the Commissioner determines, after an investigation, that a Commodity Handler does not possess sufficient commodities to cover the outstanding negotiable warehouse receipts, scale tickets or other obligations, the Commissioner may require the Commodity Handler to:⁸¹

- Cover such shortage;
- Give an additional bond or irrevocable letter of credit; or
- Submit to such inspection as the Commissioner may deem necessary.

If the Commodity Handler fails to comply within 24 hours, the Commissioner may:⁸²

- Issue a cease and desist order;
- Take possession of all commodities in the Commodity Handler's warehouse; or
- Petition a court of competent jurisdiction to require the Commodity Handler to surrender his or her commodities, books, papers, records or other property to the Commissioner.

⁸⁰ § 12-16-212(4), C.R.S.

⁸¹ § 12-16-216(1), C.R.S.

⁸² § 12-16-216(2), C.R.S.

Program Description and Administration

The Farm Products Act and the Commodity Handler Act (Acts) are administered and enforced by the Colorado Department of Agriculture (CDA).

In order to effectively administer and enforce the Acts, the CDA devoted a total of 3.75 full-time equivalent (FTE) employees to provide professional support in fiscal year 06-07 to the farm products and commodity handlers programs:

- Administrative Assistant – 0.5 FTE;
- Farm Products and Commodity Warehouse Inspectors – 2.0 FTE;
- Program Administrator – 1.0 FTE; and
- Section Chief – 0.25 FTE.

Table 1 highlights the total program expenditures for the farm products and commodity handlers programs in fiscal years 02-03 through 06-07. In the fiscal years outlined in Table 1, the farm products and commodity handlers programs were cash funded. However, beginning in fiscal year 07-08, the programs have been 75 percent cash funded and 25 percent General Funded.

**Table 1
Program Expenditures**

Fiscal Year	Cash Fund Expenditures
02-03	\$447,728
03-04	\$444,884
04-05	\$413,381
05-06	\$407,798
06-07	\$410,636

Licensing

The CDA issues a variety of licenses associated with the Acts. Many of the available licenses require a bond or irrevocable letter of credit to be included, which vary depending on the type of license. However, Dealer licenses covering Farm Products Cash Buyers and Small-Volume Dealers do not require a bond or irrevocable letter of credit. Although a surety bond typically 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 CDA concerning the Acts must be renewed annually. The current licenses available are:

- Farm Products Dealer (Dealer);
- Farm Products Broker;
- Farm Products Dealer Agent;
- Small-Volume Dealer;
- Commodity Handler; and
- Commodity Handler Agent.

A Dealer license is required prior to purchasing or brokering farm products from Colorado producers, owners and dealers for processing or resale. Once an individual possesses a Dealer license, he or she may resell any farm products, which include, but are not limited to:

- Produce;
- Livestock;
- Milk; and
- Hay.

In order to obtain a Dealer license, an individual must complete an application offered by the CDA and pay the licensing fee, which is currently \$350.

Licensed Dealers are also required to possess a surety bond or an irrevocable letter of credit prior to conducting business in Colorado. The size of the surety bond or irrevocable letter of credit varies, depending on whether a licensee acts as a farm produce Dealer, a Farm Product Broker or Dealer selling products other than produce.

A Dealer selling produce is required to maintain a surety bond covering two percent of annual purchases, with a minimum of \$3,000.

Dealers who sell farm products other than produce are required to maintain a surety bond covering two percent of annual purchases, with a minimum of \$5,000. Also, Dealers who have a storage facility for their products are required to maintain a two percent surety bond, with a minimum of \$10,000.

A Farm Products Cash Buyer, which is licensed as a Dealer, must purchase all farm products with cash, cashier's check or money order at the time of purchase.⁸³ It is important to note that personal or company checks may not be used in a cash transaction concerning the purchase of farm products for resale or processing. Although cash buyers who purchase farm products for processing or resale are required to obtain a Dealer license from the CDA, they are not required to pay the annual application fee, which is currently \$350.

⁸³ Colorado Department of Agriculture. *Farm Products Forms and Downloads*. Retrieved September 10, 2008, from <http://www.colorado.gov/cs/Satellite/Agriculture-Main/CDAG/1167928360784>

A Farm Products Broker (Broker) does not physically take possession or title of the farm product. Rather, a Broker functions as an intermediary between buyers and sellers of farm products. A Broker is required to maintain a surety bond covering two percent of annual purchases, with a minimum of \$10,000.

A Farm Products Dealer Agent license is required for an individual that, on behalf of any Dealer in Colorado, buys, receives, contracts for or solicits any farm product or sells farm products on behalf of a company. A Farm Products Dealer Agent must pay the licensing application fee, which is \$25.

Additionally, a Small-Volume Dealer is classified as a farm product dealer who does not purchase more than \$20,000 worth of farm products annually nor a single purchase for more than \$2,500 for processing or resale. In order to obtain a Small-Volume Dealer license from the CDA, an individual must complete an application and pay the licensing fee, which is currently \$50.

In order to operate as a Commodity Handler in Colorado, a person, which the Commodity Handler Act defines as including companies as well as individuals, is required to obtain a license from the CDA. To obtain a license, the applicant must complete an application and pay the \$100 licensing fee.

A Commodity Handler may also operate a Commodity Warehouse in Colorado. In order to operate a Commodity Warehouse, a Commodity Handler is required to provide evidence of sufficient provisional insurance coverage to protect the commodities stored.⁸⁴ Operators must also submit a schedule of charges to be made for the handling, storage and shipment of commodities for the license year.⁸⁵

A Commodity Handler Agent license is required for an individual who, on behalf of any Dealer in Colorado, buys, receives, contracts for or solicits any farm product or sells farm products on behalf of a Dealer. A Commodity Handler Agent must pay the applicable licensing fee, which is \$100.

Table 2 illustrates the total number of licensed Dealers (including Farm Products Cash Buyers), Small-Volume Dealers, Farm Products Dealer Agents, Commodity Handlers, Commodity Handlers Agents and Commodity Warehouses.

⁸⁴ Colorado Department of Agriculture. *Application for "Commodity Handler" License*. Retrieved September 15, 2008, from https://publish.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadername2=MDT-Type&blobheadervalue1=inline%3B+filename%3Dch_appodbc_blank.pdf&blobheadervalue2=abinary%3B+charset%3DUTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1205189511388&ssbinary=true

⁸⁵ Colorado Department of Agriculture. *Application for "Commodity Handler" License*. Retrieved September 15, 2008, from https://publish.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadername2=MDT-Type&blobheadervalue1=inline%3B+filename%3Dch_appodbc_blank.pdf&blobheadervalue2=abinary%3B+charset%3DUTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1205189511388&ssbinary=true

Table 2
Total Number of Licensees

Fiscal Year	Farm Products Dealers	Small-Volume Dealers	Farm Products Cash Buyers	Farm Products Agents	Commodity Handlers	Commodity Handler Agents	Commodity Warehouses	Total
02-03	397	127	45	2	269	0	55	895
03-04	372	138	44	9	248	0	49	860
04-05	356	144	41	58	231	0	52	882
05-06	357	147	41	2	223	0	46	816
06-07	347	150	38	36	257	0	40	868

During fiscal years 02-03 through 06-07, one Dealer in Colorado has utilized Farm Products Dealer Agents. According to CDA staff, the wide variation in the number of licensed Farm Product Dealer Agents is attributable to a variety of factors. One explanation offered by CDA staff was that the Dealer that uses Farm Products Agents varied the number of agents depending on current economic conditions. Various years in which prolonged drought or other financially challenging times existed, the company chose to have fewer licensed Farm Products Dealer Agents.

Also, CDA staff stated that its record-keeping concerning Farm Products Dealer Agents might not have been completely accurate in the past. However, CDA staff maintains that its record-keeping practices have since improved and each license is accurately tracked.

The data in Table 2 illustrate that no Commodity Handler Agents have been licensed by the CDA during the last five fiscal years. According to CDA staff, there has not been a licensed Commodity Handler Agent in Colorado since the Commodity Handler Act was created in 1991. CDA staff stated that the commodity industry does not utilize Commodity Handler Agents. Rather, only the livestock industry (farm products) conducts business with Agents.

Examinations

The CDA, in an attempt to provide adequate financial protection to producers (farmers) and to ensure that commodities are stored in a safe manner minimizing the risk of damage, conducts comprehensive examinations of all licensees as well as Commodity Warehouses.

According to CDA staff, the frequency of examinations 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.

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

- Produce sheds;
- Livestock auctions; and
- Other places of business that harbor farm products.

Because there are several types of products that are considered farm products, the manner in which an examination is conducted may differ. However, the main focus of an examination 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 or commodities.⁸⁶ Examinations are comprehensive and entail a detailed review of financial records to ensure that the dealer is financially stable.

Additionally, a Commodity 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 time.⁸⁷ Due to geography and transportation costs, producers have limited options available regarding who can store their commodities. Therefore, Commodity Handlers and Commodity 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 examinations (every 12 to 16 months) are completed by CDA staff.

These comprehensive examinations, which are conducted by inspectors at Commodity Warehouses, measure inventories of commodities in comparison with storage obligations including both quality and quantity.⁸⁸ Examinations also ensure that commodities are stored in a safe manner, which serves to minimize the risk of damage to the commodities. Further, a Commodity Warehouse examination includes reviewing contracts, settlement sheets, grain payables, receivables, scale tickets, internal controls, risk positions and uses of lines of credit.⁸⁹ During an examination, an inspector also examines and analyzes financial statements to determine whether the Commodity Warehouse has solid financial standing, including net worth and liquidity.

The examinations of Dealers, Commodity Handler and Commodity Warehouses 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 Commodity Warehouses, thereby offering enhanced protection to producers.

⁸⁶ Colorado Department of Agriculture. ICS Budget Information and Narrative

⁸⁷ Colorado Department of Agriculture. ICS Budget Information and Narrative

⁸⁸ Colorado Department of Agriculture. ICS Budget Information and Narrative

⁸⁹ Colorado Department of Agriculture. *Farm Products and Commodity Handler Program Fees Reduced*. Retrieved September 9, 2008, from

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadername2=MDT-Disposition&blobheadername3=filename&blobheadername4=charset&blobheadername5=id&blobheadername6=table&blobheadername7=where&blobheadername8=ssbinary&blobheadername9=true&blobtable=MungoBlobs&blobwhere=1191379298751&ssbinary=true>

Commodity Handlers and Commodity Warehouses are assessed a fee for examinations completed by CDA staff. A complete fee schedule is located in Appendix A on page 31.

Complaints/Disciplinary Actions

One of the responsibilities of the CDA is to impose discipline for violations of the Acts. Specifically, the Commissioner of Agriculture is authorized to issue cease and desist orders for violations of the Acts. Table 3 delineates the total number of cease and desist orders issued in fiscal years 02-03 through 06-07. According to CDA staff, the vast majority of cease and desist orders were issued because licensees failed to renew their licenses by the date (March 1) outlined in both Acts.

**Table 3
Cease and Desist Orders for Farm Products Dealers and Commodity Handlers**

Cease and Desist Orders	FY 02-03	FY 03-04	FY 04-05	FY 05-06	FY 06-07
Farm Products Dealers	8	185	101	71	81
Commodity Handlers	5	32	20	0	24

According to CDA staff, the large variations in the number of cease and desist orders issued in various fiscal years is attributable to a failure in the CDA's internal system that identifies when a license has expired.

Table 4 highlights the total number of felony cases that the CDA has pursued concerning violations of the Acts in fiscal years 02-03 through 06-07.

**Table 4
Total Number of Felony Cases Concerning Farm Products Dealers and Commodity Handlers**

Felony Cases	FY 02-03	FY 03-04	FY 04-05	FY 05-06	FY 06-07
Farm Products Dealers	0	0	0	1	5
Commodity Handlers	1	1	0	0	3

The felony cases outlined in Table 4 originate from either a complaint filed with the CDA or the examination process. Nine of the felony cases pursued by the CDA in the last five fiscal years were due to complaints filed, while the remaining two cases were identified during routine examinations. The majority of the felony cases were based on nonpayment/insufficient funds or operating without a license or a licensee possessing an improper license.

For example, in fiscal year 05-06, the CDA received a complaint regarding a Dealer. The complaint alleged that the Dealer entered into an agreement to purchase 6.73 tons of hay for approximately \$1,562. The check was returned for insufficient funds. The owner of the hay attempted to get his hay back from the Dealer; however, the Dealer had already sold the hay. The investigation completed by CDA staff revealed that the Dealer was not licensed, and was in violation of the Farm Products Act. The Dealer was ultimately convicted of a felony and was required to pay restitution to the owner of the hay in the amount of \$1,562.

The CDA is also authorized to make claims against a licensee's surety bond for failure to pay. During the last five fiscal years, there were 12 claims against surety bonds, varying from \$5,300 to \$2.5 million.

Analysis and Recommendations

Recommendation 1 – Continue the Farm Products Act and the Commodity Handler Act for 11 years, until 2020.

The first sunset criterion asks whether regulation is necessary to protect the public from harm. The purpose of the Farm Products Act and the Commodity Handler Act (Acts) is to insulate producers (farmers) 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, Commodity Warehouses are regulated to ensure that commodities are properly stored at these facilities. Farm products include, but are not limited to:

- Produce;
- Livestock;
- Milk; and
- Hay.

In order to adequately protect the public, the Colorado Department of Agriculture (CDA), is charged with enforcing the Acts through licensing of a variety of Dealers as well as Commodity Handlers. The CDA also provides protection to producers through extensive examinations (both financial audits and physical examinations of Commodity Warehouses).

Dealers, with the exception of Small-Volume Dealers and Farm Products Cash Buyers, are required to possess a minimum surety bond or irrevocable letter of credit. The amount of the bond required depends on the type of Dealer license an individual requests. The purpose of the surety bond requirement 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 a producer. Also, the surety bond 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.

Commodities are defined in the Commodity Handler Act as grain or dry beans purchased for resale or processing. Commodity Handlers are also required to possess a minimum surety bond or irrevocable letter of credit, which provides financial protection to producers who sell commodities to Commodity Handlers.

Commodity Warehouses are required to demonstrate that they possess the appropriate level of insurance coverage to protect stored commodities. This provides assurance to producers that Commodity 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. Doing so could compromise the integrity of the current system, which could result in financial loss for producers.

During this sunset review, the Department of Regulatory Agencies (DORA) did not identify any major policy issues associated with the Acts. Instead, this review revealed that the current regulatory framework, which includes licensing and examinations, is providing effective protection to Colorado producers, specifically financial protection; therefore, the General Assembly should continue the Acts for 11 years, until 2020.

Recommendation 2 – Repeal the specification of a late filing date for license renewal (March 1), and authorize the Commissioner of Agriculture to establish renewal dates by rule.

Currently, sections 12-16-105(2) and 12-16-206(2), Colorado Revised Statutes (C.R.S.), state that any licensee who fails to renew his or her license before March 1 of each year must pay a late fee. The CDA issues approximately 27,000 licenses each year for nine different programs, including Dealers and Commodity Handlers.

In an attempt to streamline the licensing process for all of the programs administered by the CDA, CDA staff is in the process of creating a centralized licensing system that would allow a person to renew his or her license *via* an online system.

To achieve this goal, the CDA needs the flexibility to coordinate the renewal periods for each of the nine programs. Removing the licensing renewal requirement of March 1 of each year would enable the Commissioner of Agriculture (Commissioner) to establish a uniform renewal period for all of the programs within the CDA, thus creating a uniform licensing system and increasing efficiency and enhancing customer service.

Recommendation 3 – Require Farm Products Cash Buyers to pay licensing fees to the CDA.

Currently, a Farm Products Cash Buyer is required to obtain a Dealer license from the CDA prior to operating as a Dealer in Colorado. To purchase farm products with cash, a cashiers check or money order at the time of purchase, a Dealer must file, with the CDA, a cash buyer declaration.

Although a Farm Products Cash Buyer is required to obtain a license from the CDA, he or she is not required to pay a licensing fee. This is inconsistent with the basic premise of fees for regulation; licensing fees are assessed to assist in paying the cost of regulating an industry.

The CDA examines Farm Products Cash Buyers on a regular basis to ensure payments for farm products are, in fact, being purchased with cash. According to CDA staff, it takes more resources to effectively regulate Farm Products Cash Buyers because they are examined more frequently than other Dealers.

If CDA staff identifies a Farm Products Cash Buyer who is out of compliance with the cash buyer declaration, he or she is required to pay the Dealer licensing fee and obtain the appropriate surety bond or, if appropriate, obtain a Small-Volume Dealer license. A Farm Products Cash Buyer is out of compliance when he or she purchases farm products with a personal check, on credit or does not pay for farm products at the time of purchase.

In order to eliminate the inconsistency within the Farm Products Act, the General Assembly should require Farm Products Cash Buyers to be licensed as Small-Volume Dealers and pay the same licensing fee, which is currently \$50. Doing so will assist the CDA in effectively enforcing the Farm Products Act as well as create consistency in terms of requiring all regulated entities to pay for their licenses.

Recommendation 4 – Authorize Small-Volume Dealers to sell farm products and commodities.

Currently, a Small-Volume Dealer cannot purchase more than \$20,000 worth of farm products annually, of which no single transaction can exceed \$2,500. According to CDA staff, the majority of Small-Volume Dealers in Colorado are produce dealers, but they also sell dry edible beans (such as pinto beans) at their produce stands.

Pinto beans are classified as commodities and in order to resell them, a Small-Volume Dealer is required to obtain a Commodity Handler license. To obtain a Commodity Handler license, an individual must submit a financial statement and possess a minimum of a \$10,000 surety bond. In the scenario presented above, a regulatory burden is placed on a Small-Volume Dealer by requiring it to post a surety bond at approximately 50 percent of its annual purchase volume in order to sell a small quantity of pinto beans.

To address this barrier for a Small-Volume Dealer in Colorado, the General Assembly should allow a Small-Volume Dealer to purchase commodities, as long as the combined (farm products and commodities) purchases do not exceed the purchase levels granted for a Small-Volume Dealer. This will allow a Small-Volume Dealer to purchase and resell a limited amount of dry edible beans or other commodities. Releasing a Small-Volume Dealer from this current regulatory burden will not compromise public protection; rather, it will allow a Small-Volume Dealer to sell a larger variety of products to consumers.

Recommendation 5 – Authorize the Commissioner to have unimpeded access to all properties and records pertaining to the Acts.

Currently, sections 12-16-107(3) and 12-16-215(2), C.R.S., authorize the Commissioner to access a licensee's properties and records during normal business hours and upon consent of the licensee.

Conversely, sections 12-16-114(1) and 12-16-210(2), C.R.S., allow the Commissioner free and unimpeded access to all places of business and records.

There is inconsistency within the Acts concerning when the Commissioner has access to a licensee's property as well as his or her records. In order to effectively regulate the persons licensed under the Acts, the Commissioner should have unimpeded access to both properties and records. Granting unimpeded access will serve two purposes: remove a current barrier that exists for the Commissioner with respect to having access to information and remove the inconsistency within the Acts.

In order to provide protection to producers in Colorado, the Commissioner should have the authority to scrutinize any property or records of a licensee at any time. This improves transparency of the regulated community under the Acts and prevents licensees from potentially withholding information from the Commissioner.

Therefore, the General Assembly should modify both of the current Acts, thereby granting the Commissioner unimpeded access to properties and records of licensees at all times, regardless of whether access is requested during normal business hours or whether or not the licensee consents.

Recommendation 6 – Direct that all money collected through fines be credited to the state's General Fund.

Sections 12-16-114.5 and 12-16-219.5(5), C.R.S., require all fines collected pursuant to the Acts be credited to the Inspection and Consumer Services Cash Fund, which is the program's cash fund. There are two basic reasons that this change is necessary.

Typically, when a state agency is granted fining authority, funds generated by fines are credited to the state's General Fund. This is done so that a state agency has no incentive to impose fines other than taking legitimate, disciplinary action. When fines are credited to a state agency's cash fund, there can be a perceived conflict of interest that the state agency is imposing fines in an attempt to increase its revenue. Although DORA has no reason to believe that the Commissioner or CDA staff has acted improperly, this recommendation is important as a policy matter to prevent any such allegation that may arise concerning the imposition of fines.

For cash funded state agencies, any increase in revenue can require them to reduce fees. Civil penalties are meant to be used for discipline, not to raise revenue, and licensing fees are meant to pay for agency operations. When all funds are comingled, the lines between enforcement and operations can become blurred. In a paradox to the first premise, if a state agency takes in more revenue than it can spend under state law, then it may open itself to allegations that it is being too lenient in enforcing the law and issuing fines because it cannot keep the money.

As a result, the General Assembly should require fines collected for violations of the Acts to be credited to the state's General Fund. Doing so will serve to remove the appearance of impropriety concerning the collection of fines by state agencies.

Recommendation 7 - Remove the Commodity Handler Agent licensing category from the Commodity Handler Act.

Currently, section 12-16-203(1), C.R.S., outlines the requirement for obtaining a Commodity Handler Agent license. The Commodity Handler Agent license is not utilized in Colorado. Specifically, there has not been a licensed Commodity Handler Agent under the Commodity Handler Act since the requirement was created in 1991. According to CDA staff, only the livestock (which is defined as a farm product) industry conducts business with agents.

The Commodity Handler Agent license was created in 1991 when the law was amended by the legislature. Prior to the amendment, Part 1 of the Farm Products Act included commodities as farm products. Part 2 was the public warehouse law, which only regulated facilities that stored commodities for the public.

The 1991 amendment removed the definition of commodities from farm products and separated Dealers from Commodity Handlers. The amended Part 1 regulated Dealers, while the amended Part 2 included the regulation of Commodity Handlers and Commodity Warehouses.

Additionally, the 1991 amendment included the licensing requirement for Commodity Handlers, who were previously licensed as Dealers under Part 1 of the laws. In order to achieve this, the licensing sections under part one were repeated in Part 2 and adopted as part of the Commodity Handler license.

Because the licensing sections were repeated in both parts, the licensing requirement for Commodity Handler Agents was created. In order to streamline the current statute, the General Assembly should remove the Commodity Handler Agent licensing requirement.

Recommendation 8 – Remove the authority of the Commissioner to investigate complaints against transporters of farm products.

Section 12-16-107(1), C.R.S., states that the Commissioner may receive and investigate complaints against any Dealer, Small-Volume Dealer, agent or transporter. However, the licensing requirements for transporters related to the Farm Products Act were removed in 1995. According to CDA staff, this was initiated by a recommendation in the 1994 Farm Products Act and Commodity Handlers Act sunset review completed by DORA staff.

The sunset review recommendation stated that transporters were already required to obtain a license from the Public Utilities Commission, in essence, a duplicative license was issued. As a result of the 1994 sunset review, Senate Bill 95-006 repealed the requirement stipulating that transporters obtain a license prior to transporting farm products in Colorado. Although the aforementioned bill removed the licensing requirement from statute, the bill did not remove the Commissioner's authority to receive and investigate complaints against transporters. According to CDA staff, failing to remove the Commissioner's authority to investigate complaints was an oversight.

As a result, the General Assembly should remove the provision in statute that authorizes the Commissioner to investigate complaints concerning transporters. Doing so would not compromise public protection because transporters are currently regulated by the U.S. Department of Transportation (USDOT), under the federal Motor Carrier Safety Administration. All interstate transporters are required to obtain authority from the USDOT to transport goods for hire. Also, it is common practice for brokers or shippers to require transporters to provide cargo insurance prior to entering into a contract to provide freight services. CDA staff did not recall receiving a complaint related to transporters of farm products.

Administrative Recommendation 1 – Implement a system for record-keeping concerning the number of licensees.

During this sunset review, DORA identified instances in which CDA staff were unable to provide accurate information related to the number of licensees for a specific licensing category, as well as the number of felony cases pursued for violations of the Acts.

Tracking such information constitutes a basic governmental accountability measure. How can the General Assembly, voters and taxpayers determine the validity of government programs without knowing who is licensed or which licensees have been disciplined?

According to CDA staff, a new system of accurately tracking licensees as well as disciplinary action has been implemented. Regardless, this Administrative Recommendation is included in this sunset review to ensure that accurate record-keeping is maintained.

Appendix A – Inspection Fee Schedules

Commodity Handler Inspection Fees

Dollar Volume	Inspection Fee
\$1.00 to \$249,999.00	\$50.00
\$250,000 to \$999,999.00	\$150.00
\$1,000,000.00 to \$2,999,999.00	\$250.00
\$3,000,000.00 to \$4,999,999.00	\$350.00
\$5,000,000.00 to \$14,999,999.00	\$550.00
\$15,000,000.00 or More	\$750.00

Public Warehouse Inspection Fees

Capacity in Bushels	Inspection Fee
1 to 150,000	\$155.00
150,001 to 250,000	\$310.00
250,001 to 500,000	\$455.00
500,001 to 750,000	\$615.00
750,001 to 1,000,000	\$765.00
1,000,001 to 1,200,000	\$920.00
1,200,001 to 1,500,000	\$1,070.00
1,500,001 to 2,000,000	\$1,220.00
2,000,001 to 2,500,000	\$1,375.00
2,500,001 to 5,000,000	\$1,525.00
5,000,001 to 7,500,000	\$1,685.00
7,500,001 to 10,000,000	\$1,840.00

Source: Colorado Department of Agriculture. Application for Commodity Handler License. Retrieved on September 2, 2008, from http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadname1=Content-Disposition&blobheadname2=MDT-Type&blobheadvalue1=inline%3B+filename%3D54%2F445%2Fch_appodbcb_blank.pdf&blobheadvalue2=abinary%3B+charset%3DUTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1191379384578&ssbinary=true