

SUNSET REVIEW

OF

**FARM PRODUCTS ACT AND
COMMODITY HANDLER ACT**

**Submitted by
The Colorado Department of Regulatory Agencies
Office of Policy & Research
June 1994**

July 29, 1994

The Honorable Vickie Agler, Chair
Joint Legislative Sunrise/Sunset Review Committee
State Capitol Building
Denver, CO 80203

Dear Representative Agler:

The Colorado Department of Regulatory Agencies has completed the evaluation of the Farm Products Act and the Commodity Handler Act in the Department of Agriculture. We are pleased to submit this written report, which will be the basis for my office's oral testimony before the Joint Legislative Sunrise/Sunset Review Committee. The report is submitted pursuant to Section 24-34-104 (8)(a), of the Colorado Revised Statutes, which states in part:

"The Department of Regulatory Agencies shall conduct a 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 such supporting materials as may be requested, to the Sunrise and Sunset Review Committee created by joint rule of the Senate and House of Representatives, no later than July 1 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 12-16-101, et. seq. C.R.S. The report also discusses the effectiveness of the department and staff in carrying out the intention of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Joseph A. Garcia
Executive Director

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EXECUTIVE SUMMARY

The Department of Regulatory Agencies has concluded its sunset review of the licensing function of the Commissioner of the Department of Agriculture with regards to the Farm Products and Commodity Handler Act. Farm Products Dealers and Commodity Handlers are in a position to cause tremendous financial hardship to farm producers and other owners of agricultural products. Producers and other owners (hereinafter "producers/owners") are not always in the position to evaluate the financial stability of dealers and commodity handlers with whom they do business. The unique characteristics of the agricultural industry puts producers/owners of agricultural products at an unreasonable risk of economic loss. An unregulated free market system does not achieve parity or security for them. The risks are not only to producers/owners. In small towns in rural Colorado, an elevator or public warehouse default on its financial obligations could prove devastating to the entire town.

OPR found that the Farm Products Section of the Colorado Department of Agriculture pursued its mandate of protecting producers/owners of agricultural products with diligence, flexibility, and with respect for all parties.

During our research, we found that many people affected by the statute did not really understand it or their obligations under it. Some licensees expressed dissatisfaction with portions of the statute because they could not see the value of the regulation, while others saw state involvement as an unnecessary interference with their business. While we considered their criticism and ideas in formulating our recommendations, quite often we found that their criticisms were based on false information and misunderstanding of how the program worked. We believe it is important that the Colorado Department of Agriculture do its best to educate licensees and producers as to what the program is trying to accomplish and how the statute helps reach that goal. It is also important for the Department to educate law enforcement agencies of the problems producers/owners may be having with violators of this statute. The Department of Agriculture has already instituted some educational programs in southwest Colorado alerting law enforcement and others to the problems producers are having with theft of their agricultural products.

One of the most effective aspects of the Farm Products and Commodity Handler statute is its flexibility in the way it allows the Department of Agriculture to respond to current problems. It gives them the power to respond to trends they see happening in the industry. The statute also allows them to respond to problems with a variety of remedies that fit the particular situation.

This sunset report recommends some technical changes to the statute in order to clear up confusion and to have both parts of the statute conform to each other. We have also recommended some definition changes. This report also addresses the contentious issue of bonding. We believe that a solution to this issue is beyond the scope of this review, but we have addressed it because of its importance.

BACKGROUND

THE SUNSET PROCESS

The licensing functions of the commissioner of the Colorado Department of Agriculture in accordance with Article 16 of Title 12, C.R.S. shall terminate on July 1, 1995 unless continued by the General Assembly. § 24-34-104(24.1)(i), C.R.S.. During the year prior to this date, it is the duty of the Department of Regulatory Agencies to conduct an analysis and evaluation of licensing pursuant to the Farm Products and Commodity Handlers Acts.

COLORADO

Ranch and farm land comprise approximately 50% of the total land in Colorado with about 25,500 ranches or farms. Of these, 59% are either livestock or poultry ranches and 41% are crop farms. Agriculture contributes significantly to Colorado's economy. In 1991, Colorado Farm Market receipts totaled \$37,613,000,000 (\$37 billion, 613 million).

The Colorado Department of Agriculture (hereinafter "the Department") was created in 1949; however, the first agricultural products statute was enacted by the legislature in 1937. This statute has been amended many times since its inception. In 1985, the entire statute was repealed and reenacted. At that time the statute was divided into two parts. Part one became the "Farm Products Act" and part two became the "Commodity Warehouse Act."

In 1988, the legislature amended the statute and removed the bonding requirement for transporters of agricultural products; however, they must still send in their application and fee to the Department for a license. The Colorado Department of Revenue, however, enforces the licensure requirement at its inspection stations. Although it is unlawful for a transporter to operate without a license, currently the only consequence of such a violation is to pay for a license.

In 1991, the statute was amended again. A definition for "commercial feeding" was added and part two was changed to the "Commodity Handler Act." The focus of part two of the statute became the licensing and inspecting of commodity handlers instead of the licensing and inspecting of public warehouses. The 1991 amendment also added a definition for commodity handler. This definition is broad enough to include commodity dealers, brokers, commission merchants, and commercial livestock feedlots in addition to public warehouses.

In 1992, the cattle feedlot industry objected to its inclusion in the Commodity Handler Act. They asserted that the smaller feedlots did not have the financial resources necessary to comply with the licensing and bonding requirements of the statute. They had understood that the 1991 amendment would not impact the smaller feedlots, and therefore were disturbed when those businesses were told that they had to obtain licenses. At that time, the legislature gave the cattle feeders a one year exemption from inclusion under the statute with the understanding they would come up with a solution. One year later, no compromise had been fashioned; therefore, the 1993 Senate Agricultural Committee proposed a compromise which was passed into law. The compromise requires commercial feeders who feed more than 2,500 head of livestock at any one time which are owned, wholly or in part, by another, to follow the Farm Products and Commodity Handler Statute. It exempts the smaller commercial feeding operations. This compromise becomes effective July 1, 1994.

The statute was amended this year to include a new licensing category under the Farm Products Act. The new category is "small-volume dealer." It lowers the license fee and exempts them from the bonding requirement. It will become effective March 1, 1995. This category recognizes that dealers who do not contract for large amounts of farm products and are less of a risk to producers do not need as much oversight by the government as do the larger volume farm product dealers.

FEDERAL

Federal governmental regulation of agriculture became an important element during the latter part of the 19th century. The regulations were enacted to protect farmers from unfair and fraudulent trade practices. Some states enacted restrictive laws for railway companies who practiced fraudulent discrimination and fixed freight rates. ❶

Federal laws that are relevant to Colorado's farm products and commodity statute are the United States Warehouse Act, 7 U.S.C. §§ 241-173; the Packers and Stockyards Act, 7 U.S.C. §§ 181-229; the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a-499t; and the Commodity Credit Corporation Charter Act (15 U.S.C. § 714).

The federal government began regulating warehouses that stored agricultural products in 1916 with the **United States Warehouse Act** ("Warehouse Act"). It was amended in 1919, 1923, and 1931. The Warehouse Act was established to provide a uniform regulatory system for governing proper financing and physical care of agricultural products while in storage. Until 1931, the Warehouse Act was subservient to the state laws that regulated warehouses. After the 1931 amendment, the federal statute preempted state laws. (Act of Mar. 1, 1931, Ch. 366, § 29, 46 Stat. 1463); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). It provides a **voluntary** alternative to state regulation. If a public warehouse chooses a federal license instead of a state license, the Warehouse Act preempts state warehouse laws. ②

If a warehouse is licensed under the Warehouse Act it does not need to get a state warehouse license. The United States Department of Agriculture ("USDA") attempts to physically inspect a federal warehouse every 12 months. The USDA and the Department work together and share information so as not to duplicate their efforts. The USDA forwards their warehouse inspection results to the Department; therefore, Colorado knows if the warehouse passed the federal inspection. If the USDA does not inspect a warehouse within 12 months, the Department will go ahead and inspect it. The Warehouse Act requires a licensee to furnish a bond to secure faithful performance of its obligations under the Act. As of 1983, the Warehouse Act allows a federally licensed warehouse to substitute a certification of participation in a state operated indemnity or insurance fund in lieu its bond.

The **Packers and Stockyard Act** ("PASA") was enacted by Congress in 1921 to "assure fair competition and fair trade practices in livestock marketing and in the meat packing industry." (House Report No. 1048, Aug. 9, 1957). It is an economic regulatory program which includes oversight of stockyards, commission firms, livestock auctions, order buyers, dealers, meat packers, meat brokers, meat wholesalers and distributors, and live poultry dealers and handlers.

PASA requires livestock dealers and owners who operate in interstate and international commerce to register with the USDA. Livestock dealers are required to file and maintain bonds, trust funds, trust agreements, letters of credit, or a combination thereof to secure the performance of their obligations. The 1976 amendment to PASA created a statutory trust in all livestock, and receivables or proceeds derived from meat, meat food products, or livestock products purchased by a packer in cash sales. This trust is held for the benefit of unpaid cash sellers and is administered outside of a debtor's bankrupt estate. Sellers must comply with statutory requirements in order to preserve their trust status. Smaller packers are exempt from this trust.

A Colorado Farm Product Act licensee may also need to be registered under PASA if he trades any livestock or meat interstate and/or internationally. It is only when the licensee's product leaves Colorado that PASA is applicable.

The **Perishable Agricultural Commodities Act** ("PACA") was enacted by Congress in 1930 to encourage fair trading practices and provide economic support and protection to handlers of perishable commodities. (House Report No. 98-543 of the Agriculture Committee, Nov. 12, 1983). Pursuant to PACA, dealers, brokers, and commission merchants engaged in interstate or foreign transactions of perishable agricultural commodities must be licensed by the USDA. PACA does not require the licensee to furnish a surety bond unless the licensee has had a financial failure or he has previously had his license revoked.

The 1984 amendment to PACA impressed a statutory trust on the perishable agricultural commodities, the buyer's inventories of food or other products derived from the perishable agricultural commodities, and any receivables or proceeds from the sale of the commodities or products. In a bankruptcy, trust assets are not considered part of the debtor's estate to be distributed to other creditors or sold unless all trust beneficiaries have been paid. In order to qualify as a beneficiary of the trust, the seller of perishable agricultural commodities must comply with the relevant statutory requirements. PACA authorizes the Secretary of the USDA to initiate an action to preserve the assets of the trust for the benefit of unpaid sellers. This provision recognizes that when a buyer experiences financial difficulty, its lenders and creditors may act to collect their debts to avoid presenting their claims in bankruptcy court.

A Colorado Farm Product Act licensee may also need to be licensed under PACA if the dealer's product is traded interstate and/or internationally. It is only when the licensee's product leaves Colorado that PACA is applicable.

The **Commodity Credit Corporation** ("CCC") was established in 1933 to encourage an efficient agricultural marketing system and to provide income and price support protection to farmers. It is an agency of the USDA authorized to support agricultural commodity prices through loans, purchases, payments, storage, transfer, export, and any other operations authorized by Congress.

The CCC is relevant to the Department because of a lending feature of its commodity program. This program allows eligible farmers to pledge their stored crops to the CCC as collateral for a non-recourse loan. If the price for a stored commodity is high enough, the farmer may sell and pay off the principal and interest. However, if the commodity price is below the loan rate at the end of the loan contract, the commodity pledged as collateral may be transferred to CCC ownership. Transferring ownership satisfies full payment of the principal and interest of the loan. Because of this relationship with the farmer, the CCC is interested in the safe storing of the commodities used as collateral as well as the financial stability of the warehouse where they are stored. The USDA has a cooperative agreement with the Department to inspect state warehouses where CCC grain is stored. The USDA pays the state for half of the cost of inspection.

(See Appendix B for chart of federal laws)

SUMMARY OF STATUTE AND RULES

The Farm Products and Commodity Handler Act is one statute divided into two parts. Part One governs the licensing of dealers, small-volume dealers, agents, and transporters of farm products. Part Two governs the licensing of commodity handlers, public warehouses, agents and transporters of commodities. The two parts of the statute are very similar, but the nature of the agricultural products and concomitant businesses that each part addresses are dissimilar enough that the law is separated.

Farm products are defined as agricultural products, horticultural products, viticultural products, vegetable products of the soil, livestock and livestock products, hay, ensiled corn, honey, fruit, and milk. Not included in the definition are poultry and poultry products, timber products, nursery products, and commodities. Farm products are more perishable than commodities. They are usually sold by the farmer and then stored at another's business. The farmer may rent a bin in which to store his products. Most of the time there is no commingling of farmers' products, and the identity of the owner of the products is preserved.

Commodities include unprocessed hard seeds or fruits such as wheat, corn, oats, barley, rye, sunflower seeds, soybeans, grain sorghum, and beans. The Department may add to this list if necessary. Commodities are sold on the futures market, and are often stored by another while still owned by the farmer. A farmer's commodity may be stored in the same bin or warehouse along with commodities owned by others, but sometimes the identity of the owner of the commodities may be preserved.

LICENSING

(See Appendix C for a chart illustrating licensing)

When the title to farm products or commodities is transferred within Colorado, or is stored in a public warehouse within Colorado, those involved in the transactions must be licensed. Licensing is intrinsically tied to the Department's goal to ensure the honesty and financial stability of those entities doing business with Colorado producers and other owners of agricultural products. The Department achieves this goal through physically inspecting public warehouses that store farm products or commodities; auditing or examining business records and financial statements of dealers, agents, and commodity handlers; bonding or letters of credit requirements; and denying, suspending, or revoking a person's license to operate such a business.

Farm Products Act

Dealer

Among other things, the Farm Products Act licenses professions and businesses. A "Dealer" license is required if a person engages in one of the five following activities with respect to farm products:

1. Storage;
2. Commercial Livestock Feeding (beginning July 1, 1994);
3. Broker;
4. Commission Merchant;
5. Buyer.

The information a license applicant must provide is designed to demonstrate whether the applicant is financially stable and responsible, and will conduct business in good faith. For instance, an applicant for a Dealer license must post a surety bond or an irrevocable letter of credit before the Department will give that applicant a license. The statute states that the bond or letter of credit may not be less than two thousand dollars nor more than two hundred thousand dollars. The commissioner for the Department has discretion to set bond amounts. The Department also has discretion to require additional bonds, letters of credit, or other evidence of financial responsibility when an action is brought against a current bond or letter of credit, or if the current bond is insufficient.

Agent

There are special criteria a person must meet if that person acts as an "Agent" under the statute. An agent's liability is tied to the liability of his principal; therefore,

1. All of an agent's principals must be licensed;
2. An agent's license expires on the same date as his principal's license expires;
3. An agent must list the name and address of each dealer he represents, and have the written endorsement of those dealers; and
4. An agent may be required to hold a separate license for each principal he represents.
5. An agent does not need to post a surety bond or letter of credit in order to get a license.

Transporter

Transporters of farm products must obtain a "Transporter" license in order to legally carry agricultural products in Colorado. They do not need to furnish a surety bond or letter of credit.

Small-Volume Dealer

In the most recent legislative session, House Bill 1056 was passed into law. This bill added a fourth licensing category - Small-volume Dealer - to the Farm Products Act. This classification was added in order to reduce the amount of regulation for those persons who deal only with small amounts of farm products and are not a great risk to producers. A Small-volume Dealer license costs \$20.00 per year, but there is no surety bond or letter of credit requirement. To qualify as a "Small-volume Dealer" a person must

1. Have an established place of business in Colorado; and,
2. Buy less than \$20,000.00 worth of farm products per year for processing or resale; and,
3. Buy less than \$2,500.00 worth of farm products in a single transaction; and,
4. Not buy farm products for commercial livestock feeding; and,
5. Not qualify as a "Dealer."

This amendment to the Farm Products Act becomes effective March 1, 1995.

Commodity Handler Act

Commodity Handler

Part Two of the statute - Commodity Handler Act - governs those persons who conduct business involving commodities. The statute requires those acting as commodity handlers, transporters, and agents have a license from the Colorado Department of Agriculture. A person is considered a "Commodity Handler" if that person engages in one of the five following activities with respect to commodities:

1. Storage;
2. Commercial Livestock Feeding (Beginning July 1, 1994);
3. Broker;
4. Commission Merchant;
5. Buyer.

Exemptions

Public Warehouses:

The Commodity Handler License has a sub-category that requires a public warehouse to be licensed. However, a public warehouse does not need to be licensed if

1. The warehouse has a federal license as provided under the "United States Warehouse Act," OR
2. Only receives commodities he has purchased or that he is processing or cleaning for the owners.

Commercial Livestock Feeding:

The definition of commercial livestock feeding does not include those feeders who feed less than 2,500 head of livestock at any one time which are owned wholly or in part by another. Therefore, those feeders do not have to get a commodity handler license.

Reciprocity between Commodity Handler Act and Farm Products Act:

A person licensed as a Commodity Handler under the Commodity Handler Act may also apply for a license as a Dealer under the Farm Products Act. That applicant does not have to pay the license fee for a Dealer. He may have to post an additional bond or irrevocable letter of credit to cover the value of the farm products he is dealing. However, there is no such reciprocity if a person is licensed under the Farm Products Act and wishes to act as a Commodity Handler. This was an oversight when the statute was repealed and reenacted.

BONDING

A Commodity Handler must furnish a surety bond or an irrevocable letter of credit in order to be licensed. Pursuant to memorandums from the Department, the amount of that bond or irrevocable letter of credit is determined through one of two methods. One calculation method computes the amount to be equal to 2% of the Commodity Handler's annual commodity purchases. The amount cannot be less than \$10,000.00 nor more than \$200,000.00. The other calculation method computes the amount by figuring the businesses storage capacity for grain or beans and assess a price accordingly. For grain the fee is \$.10/bushel and for beans it is \$.50/cwt (hundred weight). The amount may not be less than \$25,000.00 nor more than \$500,000.00. To determine the amount of the bond, the Commodity Handler must use the calculation method that yields the highest dollar amount.

A Farm Products Dealer must also furnish a surety bond or an irrevocable letter of credit in order to be licensed. The most recent departmental memorandum declares the bond amount for all Farm Products Dealers (except Produce Dealers) to be 2% of their annual Colorado purchases. The minimum amount of the bond is \$5,000.00. The current bond amount for Produce Dealers, who are those dealers who trade in potatoes, apples, etc., is 2% of their annual Colorado purchases with a \$3,000.00 minimum. If a Produce Dealer has storage facilities, the minimum bond amount is \$10,000.00. Farm Product Brokers must furnish a bond equal to 2% of their annual Colorado transactions with a \$10,000.00 minimum.

With the Farm Products Dealer and the Commodity Handler, the Department may also require additional bonds, letters of credit, or other evidence of financial responsibility when an action is brought against the current bond or letter of credit, or if the current bond is insufficient.

Cash buyers do not need to furnish bonds or irrevocable letters of credit.

ENFORCEMENT

Warehouse Examinations and Commodity Handler Audits

Warehouse Examination

All public warehouses are examined by either state agriculture inspectors or federal agriculture inspectors. If a warehouse is federally licensed, it is examined by the United States Department of Agriculture (hereinafter "U.S.D.A."). If a warehouse is licensed by the state, the state does the examination. Both the federal and state warehouse exams concentrate on maintaining the physical integrity of the stored commodity. The examination looks to see that the commodity is stored in a safe manner that minimizes the risk of damage to the commodity. It also focuses on the storage transaction. Through business records and warehouse inspections, the examiner verifies the actual presence of the commodity in the warehouse in the amount asserted in the records.

Through a cooperative agreement with the U.S.D.A., the Department examines state warehouses that store C.C.C. commodities. This is done in addition to the standard state warehouse examination. The U.S.D.A. does not duplicate the Department's efforts. Both the federal and state examinations are designed to guard against a warehouseman selling commodities that do not belong to him, and it protects the commodity from damage. Among other things, both warehouse examinations look at:

- Insurance coverage
- Warehouse receipts
- Scale tickets
- Comparison of storage obligations and inventory by kind/grade
- Funding for credit sales
- Physical environment of storage of commodity
- Amount of commodity stored

Commodity Handler Audit

The commodity handler audit is different from the warehouse exam. It looks for different factors from the warehouse exam; therefore, even if a warehouse is federally licensed and undergoes a federal warehouse examination, the business is still subject to a state commodity handler audit.

Among other things, the Commodity Handler Audit looks at:

- Payment practices
- Market Risk
- Contracting Practices
- Credit Sales Contracting
- Financial Stability
- Determine Purchase Volume
- Financial Statement
- Stability in community

If the state inspector finds a problem with the business during the audit, he drafts a "Memorandum of Adjustments." This memorandum discloses conditions that are violations of federal or state statutes, or a contract with the Commodity Credit Corporation. The warehouseman must respond to the memorandum and correct the infractions. Depending on the violation, the Department may also require the warehouseman to furnish an additional irrevocable letter of credit or bond. The Department may levy a civil fine in addition to the other remedies. A portion of the civil fine may be suspended if the licensee does not violate the statute for twenty-four months.

Complaints and Actions

Under the statute, the Department may investigate complaints or instigate an action for any violation of the statute, conduct hearings on such complaints or actions pursuant to the "State Administrative Procedure Act, C.R.S. § 24-4-101 *et seq.* The Department deals with the situation informally at first. It has the power to effectuate a settlement between parties of a dispute without pursuing the option of conducting a hearing. The Department may also assess civil penalties or prosecute criminally for violations of the statute. The first formal remedy the Department may pursue is a civil action or an action against the license such as revocation, suspension, or probation. If they do not get cooperation or are unsuccessful with that option, they may file a criminal complaint.

After the Department investigates a complaint they may:

1. Dismiss the complaint if the Department determines the licensee did not violate the statute,
2. Compel the licensee to pay restitution to injured parties,
3. Suspend or revoke the license or place the licensee on probation.

Denial, Revocation, Suspension, Non renew, or Probation of License

Currently under the statute, the Department may revoke, suspend, refuse to renew, or place a licensee on probation for the standard disciplinary reasons ranging from fraud or misrepresentation on the application to felony convictions. The Department may deny an application if the applicant has previously violated this statute, or any person connected with the applicant in the business for which he seeks to be licensed has violated this statute. In the case of a partnership or corporation applicant, the Department may deny an application for a license for any previous violations by a partner, officer, director, or stockholder of more than thirty percent of the outstanding shares of the partnership or corporation.

Cease and Desist Orders

The Department may issue a cease and desist order against a dealer or commodity handler if it determines the statute has been or is being violated. This order may not be stayed before a hearing is held on the matter.

Unlicensed Businesses

There is not a large problem with unlicensed businesses operating in Colorado. In 1993, the Department successfully petitioned the courts to issue approximately twelve permanent injunctions against unlicensed violators. Producers and owners of agricultural products may easily distinguish between licensed and unlicensed dealers, commodity handlers, and agents by asking to see a state license.

(See Appendix D for a chart illustrating current enforcement)

LICENSE AND COMPLAINT INFORMATION

YEAR	1989 -1990	1990 -1991	1991 - 1992	1992 - 1993	1993 - 1994
Dealer / Handler	1148	1178	1267	1189	1157
Agent	260	200	175	175	175
Transporter	5500	5500	5700	6000	6000
Complaints	162	150	247	208	175

PERFORMANCE

Title of Performance	1991 - 1992	1992 - 1993
Warehouse Exams	144	125
Dealer Audits	486	348
Cease and Desist Issued	215	182
Civil Penalties Issued	32	26

CIVIL PENALTIES

The Department may assess civil penalties for any violation of the statute. For the purposes of assessing civil penalties, the statute is divided into three types of penalties. Each type of violation carries a range of presumptive penalties. The three types of violations are:

Type 1 violations: These are violations regarding failing to keep proper records, failing to remit funds and make proper settlements to consignors, and deception while attempting to procure a license.

Type 2 violations: These are violations regarding failing to pay for products, fraudulent billing practices, intentionally making false and misleading statements about market and/or product conditions, and interfering with an authorized representative of the commissioner.

Type 3 violations: These are violations regarding willful transgressions from the statute including failure to comply with a cease and desist order, failing to provide a true accounting of sales or storage, defrauding producer/owners through collusion, fictitious sales, and unfair practices, unlawfully converting agricultural products of another, and acting as a licensed dealer/commodity handler without a license.

There are numerous factors the Department may take into account when determining the severity of the penalty such as whether or not the violation was isolated, negligent or willful. The Department also will consider the severity and frequency of the violation when determining what civil penalty to impose. Severity is gauged by potential monetary consequences, potential for personal injury, and degree of disregard for the law.

CRIMINAL ACTIVITIES AND PENALTIES

In addition to civil penalties, the statute also provides for criminal prosecution under the statute for fraud, theft, making false or misleading statements about market and product conditions, interfering with or failing to comply with lawful orders of the commissioner or a designated representative, and acting as a licensed dealer/commodity handler without a license. The criminal penalties range from a Class 1 misdemeanor to a Class 6 felony.

SUNSET ANALYSIS

The mission of the Farm Products Program is to protect the Colorado producers/owners of agricultural products from unscrupulous dealers and fraudulent business practices in marketing their products, and to ensure that producers/owners of Colorado agricultural products will have a secure and equitable warehouse industry for storing commodities. This is accomplished by licensing, inspecting public warehouses, auditing dealers and commodity handlers, reviewing complaints, taking disciplinary actions, and facilitating settlements between producers and defaulting businesses.

Agriculture occupies an unique position in our country's history. The agrarian tradition was and is an important contributor to our nation's history. Our government recognizes that the stability of the agricultural industry is essential to maintaining dependable food supplies and consistent prices, all of which benefits the consumer. The federal government began promoting and assisting farmers over a century ago. For example, Congress was sympathetic to the agricultural cooperative movement in the early part of this century and partially exempted them from anti-trust laws. By 1933, the Farm Credit System was in place with special banks designed to assist agriculture.

Agriculture is also a major industry in Colorado with unique characteristics. Unlike other businesses and industries, biological cycles and seasonal patterns direct agricultural decisions and transactions more than the supply and demand of the market place. Another characteristic particular to agricultural producers is that they do not have any real control over prices they receive for their goods, nor do they have an extensive choice regarding to whom they sell their products.

In most commercial transactions the marketing structure consists of relatively few producers selling to a larger number of buyers. In agriculture the exact opposite is true. There are thousands of producers in Colorado who must sell their goods to a substantially smaller number of buyers (commodity handlers, food product dealers, agents, and commercial feeders). In 1992-93 Colorado had 25,500 operating farms. That year the Department issued 1364 Dealer/Handler or Agent licenses. Thus, the ratio of producers to dealers and commodity handlers is about 20:1. This ratio has not changed significantly.

The producers' marketing outlets are further restricted by geography and transportation considerations. Theoretically, the number of buyers of agricultural products is numerous, but, realistically, the farmer's options are limited by the cost of transporting his product to the seller and his ability to get it there. Therefore, the farmer is more likely to sell his product to the public warehouse close to his farm rather than the one located fifty miles away. Furthermore, harvest season is short and widespread throughout an area. At harvest time, the farmer is at a disadvantage with regard to whom he does business.

One common complaint from licensees was that farmers need to take more responsibility regarding their business dealings. They should investigate the financial soundness and personal integrity of those with whom they do business and should not rely on the government to do it for them. While this argument sounds valid, it is not very feasible. How many public warehouses, commodity handlers, produce dealers, or commercial feedlots would be willing to open their books to the scrutiny of individual farmers? They may be willing to hand over a prepared financial statement, but financial statements provide only a snapshot of the financial health of a company taken at a specific period of time. Even if these businesses allowed a farmer to look at their books, how many farmers could understand what it was they were viewing? An analogy would be whether or not an individual bank depositor could understand his bank's business records. Furthermore, it would be more disruptive to all parties if individual farmers audited the business records of licensees rather than rely on a periodic state inspection.

The Farm Products and Commodity Handler statute was originally enacted during the Great Depression in order to protect farmers from unscrupulous trade practices. For many years, the focus of the farm products program was (1) to ensure the warehouse properly protected the agricultural product from physical degradation, and (2) to ensure the warehouse had the farmer's product that he said he did. Now the focus of the program has changed, due to the changing financial circumstances in our country since the 1940's. It is (1) to ensure the warehouse has the farmer's product that it says it does, and (2) to ensure those doing business with producers/owners are financially sound.

One issue which disturbs licensees is the perception that the law does not treat everyone equally. For example, if commercial feedlots must comply with the statute why not dairies? After all, they both buy commodities to feed to livestock, and if a dairy experiences financial problems a producer/owner could be injured economically. There is a basic difference between a dairy who buys farm products to feed its own livestock, and a commercial feeder who does not own the livestock it is feeding. If the dairy experiences financial hardship, the producer has the option of putting a lien on the livestock, thus becoming a secured creditor with all of the legal protections given a secured creditor. Should the dairy go out of business, a secured creditor is in a better position to be paid compared to an unsecured creditor. The commercial feeder, however, does not own the livestock he is feeding; therefore, the producer/owner could not protect his assets by putting a lien on the livestock. Should the commercial feeder experience financial hardships, the producer/owner would be an unsecured creditor in a poor economic position compared to secured creditors. This situation also explains the relationship between dealers and commodity handlers and producer/owners.

While reviewing this program, two issues were consistently raised. First, government intrusion into personal business affairs is often resented. Some people do not like the idea of state employees auditing their records or inspecting their warehouses. On the other hand, many licensees do not object to governmental scrutiny. They only want the inspections and audits to be done fairly and for a reasonable cost.

Bonding

Second, and perhaps the most contentious issue, is the bonding obligation required under the statute. Many licensees feel that the expense and work required to get a bond or irrevocable letter of credit is overly burdensome to their business. They also think that it is unfair for them to pay for the protection of producers while the producers do not share in that expense. It was continually brought up that the bond or irrevocable letter of credit is not really going to help producers because the amount of the bond usually cannot cover the amount of any potential loss. This observation is true, but the argument is valid only if the bonding obligation is used solely to clean up the financial mess left when the licensee becomes bankrupt or otherwise cannot meet his financial responsibilities.

Five years ago the Department attempted to address this issue. It implemented a strong dealer/commodity handler audit program. The goal was to track businesses and to catch them before they were in such poor financial shape that they had to shut down. If a commodity handler shuts down, the small bond is not large enough to pay producers/owners of commodities for their loss. The Department has found that if a warehouse has financial problems it usually starts with the commodity handler portion of the business. Therefore, the dealer/commodity handler audit is designed to discover any financial problems the business might be experiencing.

The commodity handler audit program is successful in detecting businesses that may be having financial problems. When the Department finds that a business might be in trouble it steps in and may require the licensee furnish additional bonding, another irrevocable letter of credit, or guarantee performance with other capital. If the Department discovers financial difficulties, it tries to either work with the business to keep them from going under or it tries to minimize the loss to producers/owners while they do go out of business. The Department has the authority to negotiate a settlement between the licensee and affected parties, and the bond is one means the Department has to get the licensee to the negotiation table. Another value of the surety bond is that it is not included in a bankruptcy estate. Therefore, producers/owners can recoup at least part of their loss from the surety bond and not have to divide it with other creditors of the estate.

TEN YEAR REVIEW OF COMMODITY HANDLER LOSSES TO PRODUCERS

1984 - 1989 (pre Handler Audit)

Losses = \$4,291,000.00

Recovered = \$588,000.00

1990 - 1994 (After Handler Audit Began)

Losses = \$271,000.00
(current case of \$180,000 loss not included)

Recovered = \$105,000.00
(current case recovery of \$151,000 not included).

The bonding requirement is also a good way to weed out applicants who are not financially healthy. If an applicant is not strong enough to secure a surety bond or irrevocable letter of credit, it is fair to assert that this business is too risky for the state to license. The exercise of getting a bond is one method of keeping out the fly-by-night operators.

Each year the Department sets the bonding amounts for commodity handlers, farm products dealers, produce dealers, and farm products brokers. Produce dealers trade in potatoes, apples, onions, etc., and farm product dealers trade in all other farm products. A commodity handler must furnish a bond that is either 2% of his annual Colorado commodity purchases, with a minimum of \$10,000.00 and maximum bond of \$200,000.00, or \$.10/bushel for grain storage capacity and/or \$.50/hundred weight of bean storage capacity, with a minimum of \$25,000.000 and a maximum of \$500,000.00. The calculation that yields the higher bond amount must be used.

A farm products dealer must furnish a bond that is equal to 2% of his annual Colorado purchases with a \$5,000.00 minimum and no maximum. A produce dealer must furnish a bond that is equal to 2% of his annual Colorado purchases with a \$3,000.00 minimum and no maximum. If a produce dealer has storage facilities the minimum amount of the bond is \$10,000.00 with no maximum. A farm products broker must furnish a bond equal to 2% of his annual Colorado transactions with a \$10,000.00 minimum and no maximum.

A bond or irrevocable letter of credit is certainly an expense which licensees must bear, but the actual cost of acquiring one is a matter in dispute. In a previous agriculture legislative hearing (House Agriculture Hearing for H.B. 1180, 2/4/93 & 2/11/93), one commercial feeder stated it would cost him \$6,500.00 per year to furnish a bond for the license; however, he could not give an accounting as to why it would cost that much. He said the expense included the cost of getting a financial statement prepared as well as paying the premium. The Department testified that a bond would cost much less than \$6,500.00. They had done a survey of banking and surety companies and found that the cost for a bond was between 1-2 % per value of the bond; therefore the premium for a \$10,000 bond would be \$100.00 - \$200.00. The testimony in the hearing did not clarify whether or not the Department took into account the peripheral costs of obtaining a bond, such as preparing a financial statement.

Our research showed that premiums for a bond would cost between 1-2% of the value of the bond. Some bonding companies require a percentage of collateral for security in addition to the premium for the bond. For example, this additional security could be a letter of credit or certificate of deposit. They also require an applicant to furnish a financial statement. Some require both a personal and business financial statement for all applicants. Others only require a personal financial statement if they believe the business financial statement is not strong enough. The financial statements do not have to be certified by a certified public accountant nor must they be prepared by an outside company. The statements may be prepared in-house or they may be ones that the business has prepared already for other reasons such as taxes. There was no hard and fast cost that applied to each one. Each application is taken on an individual basis. A financially healthy business would probably pay less or put up less additional security and have less paperwork to fill out in order to get a bond than would a business that is in questionable financial health.

OPR could not find any significant harm resulting from the current bonding requirement, although it may reduce potential working capital for individual businesses. We received anecdotal evidence of potential individual hardship, but no one could furnish statistics of actual harm. There are alternatives to surety bonds and irrevocable letters of credit, and some states are utilizing them. Three alternatives are (1) a state administered indemnity or insurance fund; (2) joint or cooperative bond purchases between consenting businesses; and (3) a statewide bond. If the legislature is interested in changing the bonding requirements, these options could be investigated.

A recent amendment to this statute may demonstrate the necessity, or lack thereof, of bonding. The commercial livestock feeding exemption for small feedlot operations became effective July 1, 1994. It is a controversial compromise created last year when livestock feeders objected to the requirement that they be licensed and bonded under the Farm Products and Commodity Handler Acts. The amendment exempts commercial livestock feeders who feed less than 2,500 head of livestock at any one time from meeting bonding requirements in the statute. Those commercial livestock feeders who feed 2,500 head of livestock or more must continue to do so, however.

The wisdom of such an exemption is controversial. Some believe that it is the smaller feedlot that is the greatest risk to producer/owners. While it may not purchase as many commodities as the large operators, it is the smaller operator that is more susceptible to market fluctuations and poor business conditions. A large commercial feedlot such as Monfort puts the producer/owner at risk because of the large volume of commodities it purchases, but it can weather poor business conditions better than the smaller operator.

At this time, it is not apparent which feedlots will go out of business or what effect this will have on producer/owners. A recent *Rocky Mountain News* article addresses the current financial situation in the commercial feedlot industry (See attached Appendix E). Without hard data to demonstrate that bonding is a real problem for commercial feeders, OPR recommends that the legislature wait and see whether the exemption for smaller commercial livestock feeders makes any difference in losses to producers/owners.

(See Appendix E for copy of the news article).

RECOMMENDATIONS

RECOMMENDATION 1: CONTINUE THE LICENSING PROGRAMS FOR COMMODITY HANDLERS, PUBLIC WAREHOUSES, FARM PRODUCT DEALERS, SMALL-VOLUME DEALERS, AND AGENTS THROUGH THE COLORADO DEPARTMENT OF AGRICULTURE.

The primary question answered by a sunset review is whether or not regulation should continue. For the sake of brevity, detailed arguments for the continuation of regulation for the above licensing programs will not be repeated in this analysis except to point out licensees under the Farm Products and Commodity Handler Act are in positions similar to banks and securities companies. Commodity handlers and farm product dealers control the property of producers/owners through storage and trading of the agricultural product. The owners' products are comparable to money sitting in a bank or securities being traded. Producer/owners are dependent on the financial soundness of the commodity handler or farm products dealer. The state requires banks to be licensed and regulated. Banks must submit business information and the state periodically inspects bank records to ensure that depositors are protected. Because of the monetary consequences to consumers and because of potential fraudulent business practices, the state regulates the securities industry. The same monetary consequences exists for producers/owners of agricultural products as do owners who trade in the securities market.

The small-volume dealer license is a new category which will begin in 1995. It is too soon to gauge the effectiveness of this change. There is strong support for this new license. The risk to producers/owners does not appear to be unreasonably high.

Beginning July 1, 1994, commercial livestock feedlots of 2,500 or more head of livestock must comply with this statute. Again, it is premature to effectively analyze what sort of effect this will have on producers/owners. The Department does not know how many smaller feedlots may choose to be licensed even though they are not required to do so. The Department does not know if there will be a problem with feedlots misstating the size of their operation in order to fall within the exemption or if the smaller feedlots turn out to be the ones who pose the greater risk to producers. The Department should keep a watchful eye out for potential problems presented by this compromise.

RECOMMENDATION 2: DISCONTINUE LICENSING PROGRAM FOR TRANSPORTERS.

True licensing involves the state endorsing a person as meeting a minimum degree of competency, and regulatory oversight to ensure that the public health, safety, and welfare will be reasonable well protected. Transporters are not really licensed in the true definition of the word. They do not have to take an exam or furnish a bond to get a license. The Department does not inspect their vehicles nor do they review their business records. All the Department does is collect the applications and take in money.

An agricultural transporter must also get a motor vehicle carrier license from the Public Utilities Commission. This is duplicative licensing

Discontinuing the transporter license would result in a loss of approximately *\$300,000.00 to the General Fund; however, because this "licensing program" is not licensing in the regulatory meaning of the word, OPR recommends that it be discontinued.

The revenue generated by the transporter "license" is the major reason why this program is self-supporting. If the revenue is lost, the Department would have to get it from somewhere else. Increasing the other license fees to make up this loss would make them cost prohibitive.

*This estimate is based on last year's figures of the number of transporter licenses issued (approximately 5,600) multiplied by the annual license fee of \$50.00, plus money collected from civil penalties.

RECOMMENDATION 3: REMOVE ALL LICENSING FEES FROM THE STATUTES.

All licensing fees are allocated to the General Fund, unlike many regulatory agencies which are cash funded. The amount for licenses are fixed in statute at §§ 12-16-105 and 12-16-205, C.R.S. . The amounts are:

Dealers	-	\$50.00
Handlers	-	\$50.00
Agents	-	\$10.00
Transporters	-	\$50.00

The last time the fees were changed was in the 1976 legislative session (18 years ago), and even then the increase was not very significant. The previous fees were \$40.00 for dealers and brokers and \$5.00 for agents.

Section 35-1-104(1)(e), C.R.S., of the State Department of Agriculture Act of 1949, lists one of the functions, powers, and duty of the Department as "To annually fix such inspection and license fees and service charges within maximum limits provided by law as may be necessary to pay the cost of service performed and reasonable reserves for contingencies, including cost of depository, accounting, disbursement, auditing, and rental or quarters and facilities furnished by the state;"

This subsection shows that it was clearly the intent of the legislature that the Department generate enough revenue to pay for the cost of the services it performs. License fees are one of the components of revenue. The license fees set in statute were to be considered a maximum amount the Department could charge. According to the Department, the amount of revenue the license fees generate do not pay for the costs of the services they perform. Therefore, the license fees as set in statute are not accomplishing their purpose.

It is not a very efficient use governmental resources to require legislation in order to adjust fees. It is a very timely and expensive process. It makes more sense to delegate the responsibility to set license fees to the Agricultural Commission. The state agricultural commission is comprised of members who are active in the agricultural industry, who are appointed by the governor, and two must be appointed from each of the state's four agricultural districts; therefore, industry's concerns and interests are represented by the commission. The possibility of a fee "fiasco" is slight.

Furthermore, the commission meetings are open to the public and it must meet at least once every three months. This process affords any interested person the opportunity for input into any rules and regulations the commission establishes, and works as a check and balance against any inappropriate exercise of regulatory authority.

RECOMMENDATION 4: CLARIFY THE STATUTE IN THE FOLLOWING WAYS:

A) ADD A DEFINITION FOR "LIVESTOCK" TO §§ 12-16-103 AND 12-16-202 C.R.S.

B) AMEND THE DEFINITION FOR "LIVESTOCK" UNDER § 35-1-102(6) C.R.S. TO INCLUDE ELK AND FALLOW DEER.

The statutory definition for farm products includes livestock and livestock products. Commercial feeding is defined as feeding livestock for compensation. But neither the Farm Products Act nor the Commodity Handler Act defines livestock. The Department has been using the definition for livestock as it is defined in § 35-1-102(6); however, that fact is not referenced in the Farm Products and Commodity Handler Acts. Therefore, a definition for "livestock" should be added to §§ 12-16-103 and 12-16-202 by referencing it to § 35-1-102(6).

The current definition for "livestock" in § 35-1-102(6) is "cattle, sheep, goats, swine, mules, poultry, horses, and such domesticated animals as fox, mink, marten, chinchilla, beaver, and rabbits, and all other animals raised or kept for profit." If the definition should change, it is more efficient to change only one definition in one statute than to change every statute that defines "livestock."

The 1994 legislature passed a bill (H.B. 1096) that transferred the elk and fallow deer ranching program from Division of Wildlife administration to the Department of Agriculture. As a result, these ranchers will have to comply with Department of Agriculture statutes, among them the Farm Products and Commodity Handler Acts. Therefore, elk and fallow deer should be added to § 35-1-102(6).

C) ADD A DEFINITION FOR "AGENT" TO THE COMMODITY HANDLER ACT, § 12-16-202 C.R.S.

D) AMEND § 12-16-201 ET SEQ., C.R.S. TO INCLUDE LICENSING REQUIREMENTS FOR "AGENT."

The Department requires that agents for commodity handlers obtain a license, however, as currently written, the Commodity Handler Act does not make this clear. The Act does not define agent, nor is there a section in the statute that requires an agent who deals with commodities be licensed. Furthermore, it is not illegal for someone to act as an agent without first obtaining an agent license.

The Farm Products Act; however, clearly states that an agent must be licensed. It has a definition for agent, a subsection that requires agents be licensed, and it declares that it is illegal for someone to act as an agent without first obtaining a license.

There is further confusion because the "Agent License" application misstates the statute. The application states:

REQUIRED TO BE FILED BY AN "AGENT" as defined in Article 16 of Title 12 COLORADO REVISED STATUTES, 1978 Repl. Vol, as amended

"Agent" means: "Any person who, on behalf of any dealer, BUYS, receives, contracts for, or solicits any farm product or commodity from OR SELLS FARM PRODUCTS OR COMMODITIES FOR the owner thereof or who negotiates the consignment or purchase of any farm products or commodities on behalf of any dealer or handler."

Agent does not include a salaried employee of the dealer or commodity handler.

This is not a true representation of what the statute states.

To clear up any confusion, OPR recommends that:

(1) a definition for "Agent" should be added to the Commodity Handler Act. The definition should read,

"Agent" means any person who, on behalf of any commodity handler, buys, receives, contracts for, or solicits any commodities from or sells commodities for the owner thereof or who negotiates the consignment or purchase of any commodity on behalf of any commodity handler.

(2) the Commodity Handler Act should be amended to include a section that clearly states an agent for a commodity handler must be licensed. This could be accomplished by renaming and amending § 12-16-203. The new title could be "Commodity handler and agent licenses." Two subsections could be added that declare

**No person shall act as an agent without having obtained a license as provided in this part 2.
Every person intending to act as an agent in this state shall, before March 1 of each year, obtain a license from the department.**

(3) Section 12-16-205 should be amended to include agent application requirements. Currently, it only lists licensing requirements for commodity handlers. The new provision could state

No person shall act as an agent without having obtained a license as provided in this part 2. Every person acting as an agent shall file an application in writing with the commissioner for a license to transact the business of agent, and such application shall be accompanied by the license fee.

Such application shall state the principal business address of the applicant in the state of Colorado and elsewhere and the names of the persons authorized to receive and accept service of summons and legal notices of all kinds for the applicant. The applicant shall further satisfy the commissioner of his character, responsibility, and good faith in seeking to carry on the business stated in the application. In determining a person's character, the commissioner shall be governed by the provisions of § 24-5-101, C.R.S.

Each application for an agent's license shall include such information as the commissioner may consider proper or necessary, and such application shall include the name and address of the applicant and the name and address of each commodity handler represented or sought to be represented by said agent and the written endorsement or nomination of such commodity handler. No person shall be licensed as an agent unless all of his principals are licensed under this part 2. The license of an agent shall expire upon the date of expiration of the license of the principal for whom the agent acts. The commissioner may also issue a license to each agent, with a separate agent's license being required for each principal.

- (4) The licensing requirements for commodity handlers listed in § 12-16-206, C.R.S. should be amended as follows to include agents.

To receive or maintain a license, each applicant, commodity handler, or agent shall satisfy the following requirements:

If any commodity handler or agent fails to apply for license renewal before March 1 of each year, such handler shall, upon application for a renewal license and before such license is issued, pay a penalty fee equal to the license fee. Such penalty fee shall be in addition to the license fee.

(5) Amend subsection § 12-16-221(1)(e) to make it unlawful for someone to act as an agent without first obtaining a license.

Acts as a commodity handler or agent without having obtained a license or act as a commodity handler without having filed a surety bond or an irrevocable letter of credit, as provided in this part 2. Violation of this paragraph shall constitute a class 6 felony.

E) AMEND § 12-16-115(1)(E), C.R.S. TO CONFORM TO BONDING REQUIREMENTS IN § 12-16-106(1)(A), C.R.S..

There is confusion in the bonding requirements of agents under the Farm Products Act. The Act states that it is unlawful for an agent to act as one without furnishing a surety bond or an irrevocable letter of credit with the Department "as provided in part 1 of the statute." Part 1 of the statute is the Farm Products Act; however, the Farm Products Act does not require agents to furnish a bond. It only requires farm products dealers to furnish a bond or irrevocable letter of credit. See § 12-16-106(1)(a), C.R.S.. Furthermore, the bond schedule published by the Department does not include any bonding amount for agents. To clear up this discrepancy § 12-16-115(1)(e), C.R.S. should be amended to read:

Acts as a dealer, or agent without having obtained a license or act as a dealer without having filed a surety bond or an irrevocable letter of credit, as provided in this part 1. Violation of this paragraph (e) shall constitute a class 6 felony.

F) AMEND THE DEFINITION OF "LOSS" IN THE COMMODITY HANDLER ACT [§ 12-16-202(10), C.R.S.], AND ADD A DEFINITION FOR "LOSS" TO THE FARM PRODUCTS ACT [§ 12-16-103, C.R.S.]

The purpose of the statute is to protect producers and owners of agricultural products from business practices that may result in an economic loss to them.

Currently, "Loss" is defined in § 12-16-202(10) as "any monetary loss to a producer or owner which is of an **extraordinary nature** and which includes, but is not limited to, bankruptcy, embezzlement, theft, fraud, or negligence. (Emphasis added).

In practical terms, when a producer/owner incurs a loss the amount is not a small monetary loss; it is in the thousands of dollars. In the past when this definition was originally written, perhaps thousands of dollars was considered extraordinary. In today's monetary terms \$5,000.00 may not be considered extraordinary. There could be a problem if someone wanted to avoid paying a producer/owner for his loss. To avoid this potential problem it would be simple to remove the word extraordinary from the definition.

The Farm Products Act should have a definition for "Loss" but it does not. Producers and owners of farm products face monetary loss from dealers and agents just as they do from commodity handlers. Therefore, the Farm Products Act should include a definition of "loss."

G) AMEND DEFINITION OF "CREDIT SALE CONTRACT" IN § 12-16-103(3.5), C.R.S. TO INCLUDE FARM PRODUCTS.

Presently, the Farm Products Act defines "credit sale contract" as "a contract for the sale of a **commodity** when the sale price is to be paid on a date later than sixty days after delivery of the **commodity** to the buyer and includes but is not limited to those contracts commonly referred to as deferred payment contracts, deferred pricing contracts, and price later contracts." (Emphasis added) Commodity has a statutory definition in both the Farm Products Act and Commodity Handler Act which does not include farm products. Thus it would appear that farm products are not legally within the meaning of "credit sale contract." However the Farm Products Act in § 12-16-110.5 entitled "**Credit sale contracts**" states "When a dealer receives farm products for which payment has not been made, . . ." this section of the statute makes it appear that credit sale contracts are relevant to farm products. In fact, both commodities and farm products can be and are sold via a credit sale contract, so the statute should be changed to reflect that fact. Section 12-16-103(3.5), C.R.S. should be amended to read,

"Credit sale contract" means a contract for the sale of a farm product when the sale price is to be paid on a date later than sixty days after delivery of the farm product to the buyer and includes but is not limited to those contracts commonly referred to as deferred payment contracts, deferred pricing contracts, and price later contracts."

H) AMEND §§ 12-16-107(9) AND 12-16-215(7), C.R.S. TO EXPAND THE REMEDIES AGAINST A LICENSEE.

As currently written, the commissioner may deny, suspend or revoke the license of a licensee or may place the licensee on probation if the licensee has violated the statute or has committed any unlawful acts specified in the statute. This list omits an important remedy. Sometimes it is appropriate to place restrictions on the use of the license. It is a less drastic solution than denial, revocation or suspension, and it allows the licensee to stay in business while still under the Department's supervision.

RECOMMENDATION 5: ADD A PROVISION TO THE FARM PRODUCTS ACT AND COMMODITY HANDLER ACT THAT WOULD PERMIT THE COMMISSIONER TO DENY AN APPLICATION FOR A LICENSE, REVOKE, SUSPEND, RESTRICT, OR REFUSE TO RENEW A LICENSE OR PLACE A LICENSEE ON PROBATION IF THE APPLICANT HAS LOST HIS LICENSE IN ANOTHER STATE PROVIDED THE CAUSE OF THE LOSS WAS A VIOLATION SUBSTANTIALLY SIMILAR TO WHAT IS CONSIDERED A VIOLATION UNDER THIS STATUTE.

The Department may deny an application for licensing, revoke, refuse to renew, or suspend a license, or place a licensee on probation for a variety of reasons. However, the statute does not give the Department the power to use such remedies should the applicant have violations in other states. The purpose of the statute is to protect producers/owners from unscrupulous and unfair business practices. To fulfill this purpose the commissioner should have the authority to consider an applicant's or licensee's conduct in another jurisdiction when deciding whether or not to issue a license or take some other action.

RECOMMENDATION 6: AMEND THE "FARM PRODUCTS DEALER" LICENSE APPLICATION AND "COMMODITY HANDLER" LICENSE APPLICATION.

Question 6 on the "Farm Products Dealer" License asks:
"Have you acted as a farm products dealer without having a valid Farm Products Dealer license?"

Question 7 of the "Commodity Handler License asks:
"Have you acted as a commodity handler without having a valid Commodity Handler license?"

These questions are not appropriate. If an applicant were to answer yes to either one of those questions, he would be admitting that he had committed a class 6 felony. A person filling out the application has no notice that a yes answer would mean he had committed a crime. The Department is asking this information because they want to find out if the applicant has outstanding debts to any Colorado producers/owners. Therefore, the questions should be tailored to discover this information.

RECOMMENDATION 7: ADD A SECTION TO THE COMMODITY HANDLER ACT THAT EXEMPTS CERTAIN PERSONS WHO ARE LICENSED UNDER THE FARM PRODUCTS ACT FROM PAYING THE COMMODITY HANDLER LICENSE FEE AND FURNISHING A SEPARATE BOND.

The way the statute is currently written a commodity handler who also wants to act as a farm products dealer would have to pay two license fees and furnish two bonds or irrevocable letters of credit; however, the Department does not require two licenses or two bonds.

The Farm Products Act allows any person already licensed under the Commodity Handler Act to apply for a license as a dealer without subjecting the applicant to a dealer's license fee, or additional bonding. There is no such reciprocity in the Commodity Handler Act. This was an oversight when the laws were repealed and reenacted; therefore, we recommend that the statute be amended to eliminate confusion.

ORGANIZATIONAL INFORMATION

EMPLOYEE INFORMATION	
Farm Products Section	8.5 FTE
Agriculture Program Specialist V	1
Agriculture Program Specialist III	1
Agriculture Program Specialist II	4
Agriculture Program Specialist Intern	1
Administrative Assistant III	1.5

APPENDIX A - SUNSET STATUTORY EVALUATION 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 of the Department of Regulatory Agencies 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 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;
- IX. Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.

APPENDIX B - APPLICABLE FEDERAL LAW

FARM PRODUCTS ACT

PACKERS & STOCKYARD ACT

1. Required registration of livestock dealers and stockyard owners who operate interstate and internationally.
2. Bond is required.
3. Statutory trust created for the benefit of unpaid cash sellers of livestock suppliers.
4. Trust is administered outside of debtor's bankrupt estate.

PERISHABLE AGRICULTURAL COMMODITIES ACT

COMMODITY HANDLER ACT

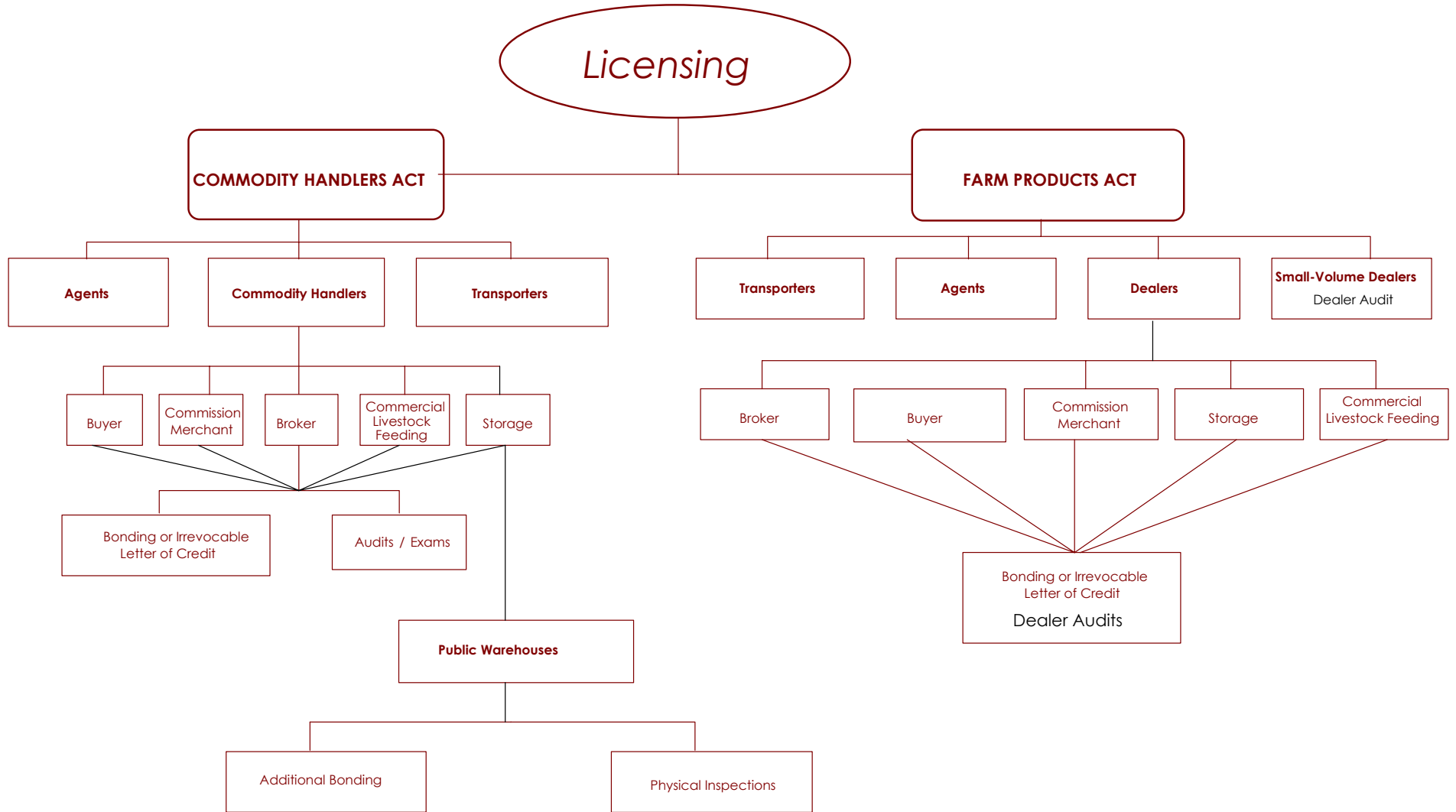
UNITED STATES WAREHOUSE ACT

1. Voluntary Federal Warehouse License.
2. No state warehouse license required if federally licensed.
3. However, a state commodity handler license is required.
4. Federal inspection (physical) of warehouse every 12 months.
5. State will not duplicate federal warehouse inspection if it occurred within 12 months.
6. Federal warehouse bond required covers the warehouse; however,

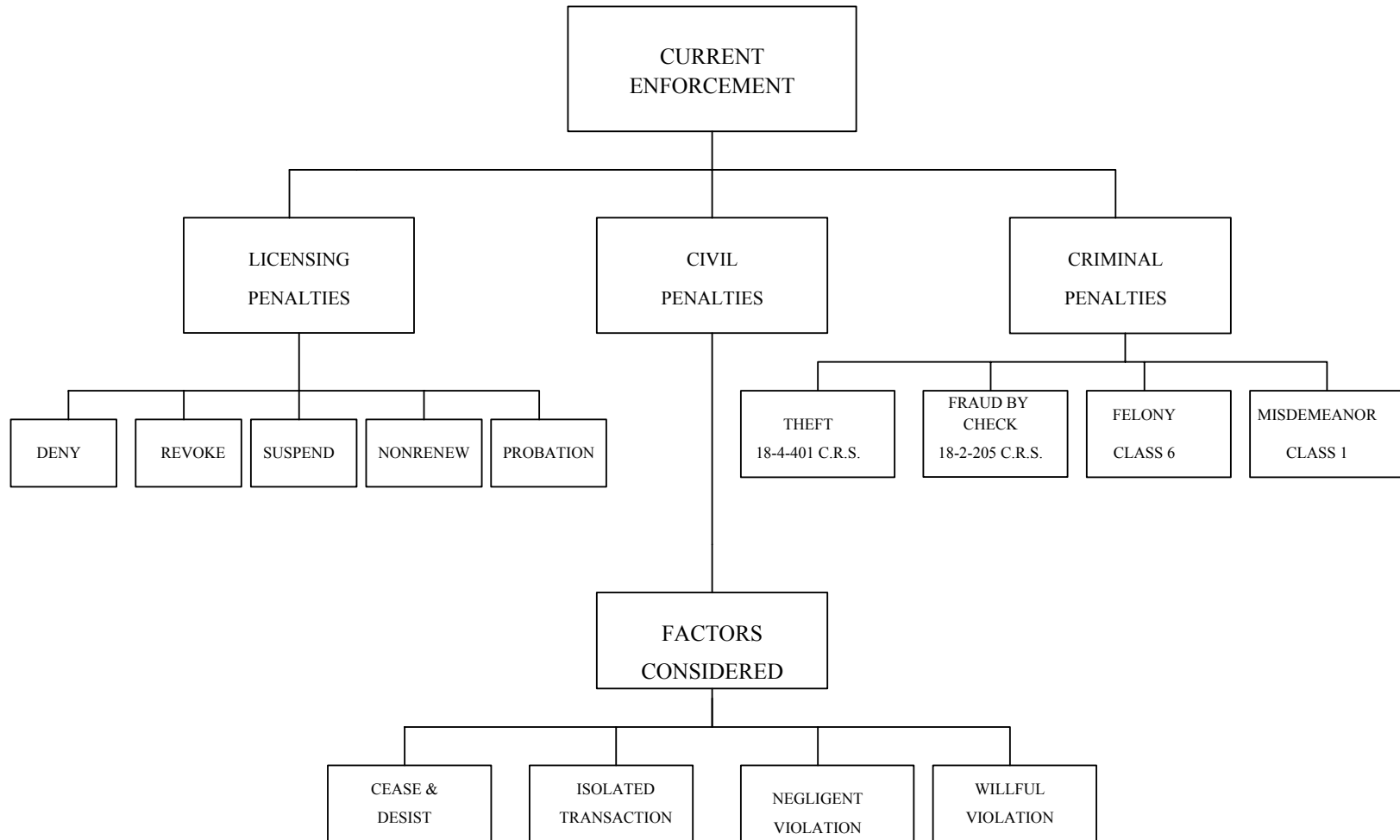
COMMODITY CREDIT CORPORATION

1. An agency of U.S.D.A.
2. Lending feature of commodity program is relevant to state's program.
 - a) Stored crops used as collateral for non-recourse loan;
 - b) Therefore, C.C.C. has interest in safe storage of "C.C.C. grain."
3. Colorado and U.S.D.A. agreement for Colorado to inspect state warehouses

APPENDIX C - CURRENT LICENSING SCHEME



APPENDIX D - CURRENT ENFORCEMENT SCHEME



APPENDIX E - ROCKY MOUNTAIN NEWS ARTICLE

APPENDIX F - STATE COMPARISONS

ENDNOTES/BIBLIOGRAPHY

1. Buck, Solon J., The Granger Movement, (Cambridge: Harvard University Press 1913), 123-126.
2. Keith G. Meyer *et al.*, Agricultural Law Cases and Materials, (St. Paul: West Publishing Co., 1985), 194.