



TITLE 35 ARTICLE 28

# **MARKETING ACT OF 1939**

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MARKETING AND SALES

ARTICLE 28

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**35-28-101. Short title.**

This article shall be known and may be cited as the "Colorado Agricultural Marketing Act of 1939".

**Source:** L. 39: p. 193, 1. CSA: C. 106, 46. CRS 53: 7-3-1. C.R.S. 1963: 7-3-1.

**ANNOTATION**

**Marketing Act of 1939 is not unconstitutional on its face.** Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965).

**35-28-102. Legislative declaration.**

(1) It is declared that the marketing of agricultural commodities in Colorado, in excess of reasonable and normal market demand therefor; disorderly marketing of such commodities; improper preparation for market and lack of uniform grading and classification of agricultural commodities; unfair methods of competition in the marketing of such commodities; and the inability of individual producers to develop new and larger markets for Colorado grown agricultural commodities, result in an unreasonable and unnecessary economic waste of the agricultural wealth of this state. Such conditions and the accompanying waste jeopardize the future continued production of adequate food supplies for the people of this and other states, and prevent agricultural producers from obtaining a fair return from their labor, their farms, and the agricultural commodities which they produce. As a consequence, the purchasing power of such producers has been in the past, and may continue to be in the future, unless such conditions are remedied, low in relation to that of persons engaged in other gainful occupations. Colorado agricultural producers are thereby prevented from maintaining a proper standard of living and from contributing their fair share to the support of the necessary governmental and educational functions, thus tending to increase unfairly the tax burdens of other citizens of this state.

(2) These conditions vitally concern the health, peace, safety, and general welfare of the people of this state. It is declared to be the policy of this state to aid agricultural producers in preventing economic waste in the marketing of their agricultural commodities, to develop more efficient and equitable methods in the marketing of agricultural commodities, and to aid agricultural producers in restoring and maintaining their purchasing power at a more adequate, equitable, and reasonable level.

(3) The marketing of agricultural commodities is declared to be affected with a public interest. The provisions of this article are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state.

**Source:** L. 39: p. 193, 2. CSA: C. 106, 47. CRS 53: 7-3-2. L. 55: p. 146, 1. C.R.S. 1963: 7-3-2. L. 69: p. 111, 1.

**ANNOTATION**

**Am. Jur.2d.** See 3 Am. Jur.2d, Agriculture, 30; 52 Am. Jur.2d, Markets and Marketing, 16.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**Statutes regulating agriculture may be adopted as exercise of police power.** Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965).

**35-28-103. Purposes of article.**

(1) The purposes of this article are:

- (a) To enable agricultural producers of this state, with the aid of the state, more effectively to correlate the marketing of their agricultural commodities with market demands therefor;
- (b) To establish orderly marketing of agricultural commodities;
- (c) To provide for uniform grading and proper preparation of agricultural commodities for market;
- (d) To provide methods and means for the development of new and larger markets for agricultural commodities produced in Colorado;
- (e) To eliminate or reduce unfair competition and economic waste in the marketing of agricultural commodities;
- (f) To restore and maintain adequate purchasing power for the agricultural producers of this state.

**Source:** L. 39: p. 194, 3. CSA: C. 106, 48. CRS 53: 7-3-3. L. 55: p. 147, 2. C.R.S. 1963: 7-3-3. L. 69: p. 112, 2.

**ANNOTATION**

**Am. Jur.2d.** See 3 Am. Jur.2d, Agriculture, 30; 52 Am. Jur.2d, Markets and Marketing, 16.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**Applied** in Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965).

**35-28-104. Definitions.**

As used in this article, unless the context otherwise requires:

(1) (a) "Agricultural commodity" means any agricultural, horticultural, floricultural, viticultural, and vegetable products, livestock and livestock products, wheat, hay, corn, bees and honey, poultry and poultry products, and milk and milk products, either in their natural state or as processed, including any marketable agricultural product, but does not include sugar beets, timber and timber products, oats, malting barley, barley, hops, rice milo, and other feed grains. These exceptions shall be the sole exemptions, irrespective of any other exemptions provided by law, and particularly as set forth in section 35-28-122.

(b) Nothing in paragraph (a) of this subsection (1), as amended by House Bill 05-1180, as enacted at the first regular session of the sixty-fifth general assembly, shall be construed as changing the property tax classification of property owned by a floricultural operation.

(2) "Commissioner" means the commissioner of agriculture or his duly authorized representative.

(3) "Distributor" means any person engaged in the operation of selling, offering for sale, marketing, or distributing an agricultural commodity which he has produced, purchased, or acquired from a producer, handler, or other distributor, or which he is marketing in behalf of a producer, handler, or other distributor, whether as owner, agent, employee, broker, or otherwise, but shall not include a retailer as defined in this section except a retailer who purchases or acquires from, or handles on behalf of any

producer, handler, or other distributor an agricultural commodity not theretofore subject to regulation by the marketing order covering such commodity.

(4) "Grade" means the official United States or Colorado terminology applied to agricultural commodities as determined by the presence or absence of certain quality and other factors.

(5) "Handler" means any person engaged in the operation of purchasing, packing, grading, selling, offering for sale, or marketing any marketable agricultural product; or any person who, as the producer, owner, agent, or otherwise, ships or causes an agricultural product to be shipped; or any governmental entity that obtains from a producer any interest in an agricultural commodity covered by a marketing agreement or order in connection with a governmental agricultural commodity program. The commissioner shall have the power to determine or specify who is a "handler" with respect to an agricultural commodity under a marketing agreement or order.

(6) "Marketable agricultural product" is a product which meets the requirements for regulation under any marketing order, marketing agreement, or regulation in effect in the area in which the same is produced, handled, or distributed.

(7) "Marketing agreement" means a voluntary agreement between producers, handlers, processors, or distributors and the commissioner of agriculture in which the producers, handlers, processors, or distributors who sign such agreement agree to follow certain rules set forth by the agreement.

(8) "Marketing order" means an order issued by the commissioner of agriculture pursuant to this article, prescribing rules and regulations governing the processing, distributing, sale of, or handling in any manner of any agricultural commodity in Colorado during any specified period or periods.

(9) "Person" means an individual, firm, corporation, association, or any other business unit.

(10) "Processor" means any person engaged in the operation of producing for processing, or in the operation of receiving, grading, packing, canning, fermenting, distilling, extracting, preserving, grinding, crushing, or changing the form of an agricultural product for the purpose of marketing such commodity, but shall not include a person engaged in manufacturing from an agricultural commodity, so changed in form, another and different product.

(11) "Producer" means any person engaged within this state in the business of producing, or causing to be produced for market, any agricultural commodity.

(12) "Product" means an agricultural commodity which has been placed in condition for sale or distribution.

(13) "Retailer" means any person who purchases or acquires any agricultural commodity for resale at retail to the general public at a fixed business location in the state for consumption off such premises, but such person shall also be included within the definition of distributor, as set forth in this section, to the extent that he engages in the business of a distributor as defined in this section.

(14) "To distribute" means to engage in the business of a distributor as defined in this section.

(15) "To handle" means to engage in the business of a handler as defined in this section.

(16) "To process" means to engage in the business of a processor as defined in this section.

(17) "Unfair competition" means the use of unfair methods of competition and unfair or deceptive practices in business for the purpose of, or having the natural and probable effect of, eliminating or injuring competition, and shall include, but not be limited to: Sales below cost, except those made in good faith to meet a legal price of a competitor; discriminatory pricing; discriminatory discounting and rebating, either direct or indirect; unreasonable extensions of credit; subsidizing of customers; misleading labeling or advertising; and solicitation by misleading or false statements.

**Source:** L. 39: p. 195, 4. CSA: C. 106, 49. L. 51: p. 559, 1. L. 53: p. 116, 1. CRS 53: 7-3-4. L. 55: pp. 147, 148, 3, 4. L. 57: p. 133, 1. L. 58: p. 101, 1. L. 63: p. 161, 1. C.R.S. 1963: 7-3-4. L. 69: p. 112, 3. L. 70: p. 116, 1, 2. L. 79: (1) amended, p. 1324, 1, effective May 31. L. 94: (1) amended, p. 327, 12, effective March 1, 1995. L. 2001: (5) amended, p. 3, 1, effective August 8. L. 2005: (1) amended, p. 351, 11, effective August 8.

### **35-28-105. Administration of article.**

(1) The commissioner of agriculture shall administer and enforce the provisions of this article and shall have all of the administrative powers conferred upon the head of a department of the state. In order to effectuate the declared purposes of this article, the commissioner of agriculture is authorized to issue, administer, and enforce the provisions of marketing orders.

(2) Whenever the commissioner has reason to believe that the issuance of a marketing order will tend to effectuate the declared policy of this article with respect to any agricultural commodity, either upon his own motion or upon application of any producer or handler of such commodity, he shall give due notice of and an opportunity for a public hearing upon a proposed marketing order.

(3) Due notice of any hearing called for such purpose shall be given to all persons, who may be directly affected by any action of the commissioner pursuant to the provisions of this article, and whose names appear upon lists to be filed by such agricultural industry with the commissioner. Such hearing shall be open to the public. All testimony shall be received under oath and a full and complete record of all proceedings at any such hearing shall be made and filed by the commissioner at his office.

(4) In order to effectuate the declared policy of this article, the commissioner has the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, distributors, handlers, producers, and others engaged in the handling of any agricultural commodity, regulating the preparation, sale, and handling of such agricultural commodity, which said marketing agreement shall be binding upon the signatories thereto exclusively. The execution of such marketing agreement shall in no matter affect the issuance, administration, or enforcement of any marketing order provided for in this article. The commissioner may issue such marketing order without executing a marketing agreement or may execute a marketing agreement without issuing a marketing order covering the same commodity. The commissioner, in his discretion, may hold a concurrent hearing upon a proposed marketing agreement and a proposed marketing order in the manner provided for giving due notice and opportunity for hearing for a marketing order as provided in this article.

**Source:** L. 39: p. 196, 5. CSA: C. 106, 50. L. 53: p. 116, 2. CRS 53: 7-3-5. L. 55: p. 148, 5. C.R.S. 1963: 7-3-5. L. 69: p. 113, 4.

### **ANNOTATION**

**Am. Jur.2d.** See 3 Am. Jur.2d, Agriculture, 21, 30; 52 Am. Jur.2d, Markets and Marketing, 21.

**C.J.S.** See 3 C.J.S., Agriculture, 19-22, 24, 25; 16 C.J.S., Constitutional Law, 142-148.

**There is nothing in agricultural marketing act which requires that marketing order be drafted at or following public hearing.** Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

**Whether particular marketing order is reasonable and adapted to objects sought to be accomplished, must be determined on factual considerations.** Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965).

**Marketing agreements and orders are to be issued and administered separately,** neither being a prerequisite to the other. Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

### **35-28-106. Marketing order issued, when.**

(1) After such notice and hearing the commissioner may issue a marketing order if he finds and sets forth in such marketing order that such order will tend to:

(a) Reestablish or maintain prices received by producers for such agricultural commodity at a level which will give to such commodity a purchasing power, with respect to the articles and services which farmers commonly buy, equivalent to the purchasing power of such commodity in the base period. The base period shall be such period in which the commissioner finds that the volume of production of such commodity was adequate to supply the requirements of consumers thereof and the net returns to producers thereof were sufficient to provide an adequate standard of living to the farm operator and his family.

(b) Approach such equality of purchasing power at as rapid a rate as is feasible in view of the market demand for such commodity;

(c) Prevent the unreasonable or unnecessary waste of agricultural wealth because of improper preparation of such agricultural commodity for market, lack of uniform grading and inspection, or excessive shipments to markets;

(d) Protect the interests of consumers of such commodity, by exercising the powers of this article only to such extent as is necessary to effectuate the declared purposes of this article;

(e) Eliminate unfair competition.

(2) In making the findings set forth in subsection (1) of this section, the commissioner shall take into consideration all facts available to him with respect to the following economic factors:

(a) The quantity of such agricultural commodity available for distribution;

(b) The quantity of such agricultural commodity normally required by consumers;

(c) The cost of producing, processing, distributing, and marketing such agricultural commodity as determined by available statistics and surveys;

(d) The purchasing power of consumers as indicated by reports and indices;

(e) The level of prices of commodities, services, and articles which the farmers commonly buy;

(f) The level of prices of other commodities which compete with or are utilized as substitutes for such agricultural commodity.

**Source: L. 39:** p. 197, 6. **CSA:** C. 106, 51. **CRS 53:** 7-3-6. **L. 55:** p. 148, 6. **C.R.S. 1963:** 7-3-6. **L. 69:** pp. 113, 114, 5, 6.

**ANNOTATION**

**Am. Jur.2d.** See 3 Am. Jur.2d, Agriculture, 21; 52 Am. Jur.2d, Markets and Marketing, 21-23.

**C.J.S.** See 3 C.J.S., Agriculture, 19-22, 24, 25; 16 C.J.S., Constitutional Law, 142-148.

**Only one criterion needed for market order.** Legislative intent is that any one or more of the four specified criteria in subsection (1) can be found to be in need of accomplishment for the commissioner to issue a market order. *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

**All that is required is that commissioner's findings substantially conform to findings which this section provides** as the basis of the marketing order. *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

**And it is neither reasonable nor desirable that marketing order should be predicated solely on information obtained at hearings.** *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

**35-28-107. Board of control.**

(1) Any marketing order pursuant to this article shall provide for the establishment of a board of control to administer such order in accordance with its terms and provisions. The members of the board shall be appointed by the commissioner from nominations submitted by the industry and shall hold office until the expiration of their term or until such appointment is withdrawn by the commissioner for cause. All nominations for board members submitted by the industry affected by the marketing order affecting wheat shall be submitted to the commissioner prior to the beginning of the fiscal year for such industry established pursuant to section 35-28-113 (4) or by rule. If the marketing order affects directly only producers of a particular commodity, the members of the board shall be producers. If the marketing order affects directly only handlers of a particular commodity, the members of the board shall be handlers. If the marketing order affects directly both producers and handlers of a particular commodity such board shall be composed of both producers and handlers. The number of producers or handlers upon any such board shall be such number of producers or handlers as the commissioner finds is necessary to properly administer such order.

(2) No member of any such board shall receive a salary but each shall be entitled to his actual expenses incurred while engaged in performing his duties authorized in this article. The commissioner may authorize such board to employ necessary personnel, including an attorney approved by the attorney general, fix their compensation and terms of employment, and to incur such expenses, to be paid by the commissioner from moneys collected as provided in sections 35-28-113 and 35-28-114, as the commissioner may deem necessary and proper to enable such board properly to perform such of its duties as are authorized in this article. The duties of any such board shall be administrative only and may include only the following:

- (a) Subject to the approval of the commissioner to administer such marketing agreement or order;
- (b) To recommend to the commissioner administrative rules and regulations relating to the marketing agreement or order;
- (c) To receive and report to the commissioner complaints of violations of the marketing agreement or order;
- (d) To recommend to the commissioner amendments to the marketing agreement or order;

- (e) To submit to the commissioner for his approval an estimated budget of expense necessary for the operation of any marketing agreement or order established by authority of this article and also to submit for approval a method of assessing and collecting such funds, as the commissioner may find necessary for the administration of such marketing agreement or order;
- (f) To assist the commissioner in the collection of such necessary information and data as the commissioner may deem necessary to the proper administration of this article;
- (g) To cooperate with colleges and universities, other research institutions, or groups for the purpose of seeking methods of greater utilization of wheat and wheat products.

**Source:** L. 39: p. 198, 7. CSA: C. 106, 52. L. 41: p. 90, 1. CRS 53: 7-3-7. C.R.S. 1963: 7-3-7. L. 77: (2)(g) added, p. 1606, 1, effective June 2. L. 92: (1) amended, p. 164, 1, effective March 16.

#### ANNOTATION

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 20.

**C.J.S.** See 3 C.J.S., Agriculture, 19-22, 24, 25; 16 C.J.S., Constitutional Law, 142-148.

#### **35-28-108. Contents of marketing order.**

(1) In accordance with the provisions, restrictions, and limitations set forth in this article, any marketing agreement or order issued by the commissioner pursuant to this article may contain any of the following provisions for regulating, within this state, the handling, sale, and operations of processing or distributing by producers, handlers, or distributors of any agricultural commodity, but no others:

(a) Provisions for determining the existence and extent of the surplus of any agricultural commodity, or of any grade, size, species, or other classification or quality thereof, for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers, processors, distributors, or other handlers affected;

(b) Provisions for limiting the total quantity of any agricultural commodity, or of any grade, size, species, or other classification, or quality or portions or combinations thereof, which may be processed, distributed, or otherwise handled by any persons engaged in such processing, distributing, or handling during any specified period. The total quantity of any such commodity so regulated and permitted to be processed, distributed, or otherwise handled shall not be less than the quantity which the commissioner finds is reasonably necessary to supply the market demand of consumers for such commodity.

(c) Provisions for allotting the quantity of any agricultural commodity, or of any grade, size, species, or other classification, or quality thereof, which each handler may purchase or acquire from or handle on behalf of any producers thereof during any specified period under a uniform rule, applicable to all handlers so regulated, based upon the amounts produced or sold by such producers in a prior period which the commissioner finds to be representative, or upon the current season's production or sales of such products, or both, to the end that the total quantity of such commodity, or of any grade, size, species, or other classification, or quality or portions or combinations thereof, so purchased or handled shall be apportioned equitably among the producers thereof;

(d) Provisions for allotting the quantity of any agricultural commodity, or of any grade, size, species, or other classification, or quality or portions or combinations thereof, which each handler may process, distribute, or handle under a uniform rule, applicable to all handlers so regulated, based upon quantities

of such commodity or of any grades, size, species, or other classification, or quality thereof, of the current season's crop which each such handler has available for such processing, distribution, or handling, or upon the quantities of such commodity or of any grade, size, species, or other classification, or quality thereof, so processed, distributed, or handled by each such handler in a prior period which the commissioner finds to be representative, or based upon both, to the end that the total quantity of such commodity, or any grade, size, species, or other classification, or portion or combinations or quality thereof, processed, distributed, or handled during any specified period shall be equitably apportioned among all such handlers thereof;

(e) Provisions regulating the period during which any agricultural commodity, or any grade, size, species, or classification, or quality or portions or combinations of such commodity, may be processed, distributed, or otherwise marketed;

(f) Provisions for the establishment of surplus or reserve pools of any agricultural commodity, or of the representative value of such commodity, or of any grade, size, species, or other classification, or quality, or portions, or combination thereof, and providing for the sale of such surplus commodity and the equitable distribution, among the persons interested therein, of the net returns derived from the sale of such commodity or such commodity or such distribution of the representative value of such commodity;

(g) Provisions for the establishment of uniform grading and inspection of any agricultural commodity delivered by producers to handlers, processors, distributors, or others engaging in the handling, processing, or distributing thereof and for the establishment of grading standards of quality, condition, size, or pack for any agricultural commodity, and the inspection and grading of such commodity in accordance with such grading standards so established. Such grading standards for any such commodity shall not be established below any minimum standards now prescribed by law for such commodity. All inspections made necessary by such provisions shall be performed by the federal-state inspection service or by such other agent as designated by the commissioner.

(h) Provisions for the establishment of plans for advertising and sales promotion to create new or larger markets for agricultural commodities grown in the state of Colorado. The commissioner is authorized to prepare, issue, administer, and enforce plans for promoting the sale of any agricultural commodity. Any such plan shall be directed toward increasing the sale of such commodity without reference to a particular brand or trade name. No advertising or sales promotion program shall be issued by the commissioner which makes use of false or unwarranted claims on behalf of any such product, or disparages the quality, value, sale, or use of any other agricultural commodity.

(i) Provisions for price posting; but any grade, size, species, or other classification, quality, portion, or combinations thereof of any marketable agricultural product shall be sold by producers, handlers, or distributors thereof only at prices filed by such producers, handlers, or distributors in the manner provided for in such order;

(j) Provisions for requiring the labeling, marking, or branding of any agricultural commodity to be in conformity with the regulations specified in any marketing agreement or order issued under authority of this article;

(k) Provisions for establishing convenient stations for inspection, weighing, and receiving payment for any agricultural commodities sold or delivered by producers or distributors in conformity with any marketing agreement or order issued under authority of this article, and providing for the collection of expenses of operating such stations;

- (l) Provisions allowing a board of control to cooperate with any other state or federal agency whose activities may be deemed beneficial to the purposes of this article;
- (m) Provisions for requiring the packaging of any agricultural commodity to be in containers, and setting standards for such containers, or pack thereof, in conformity with the regulations or authority contained in any marketing agreement or order issued, adopted, or promulgated under the authority of this article;
- (n) Provisions for the establishment of programs in the field of research for the improvement of production, control of insects or disease, harvesting, storing, transporting, marketing, handling, processing, or any other phase of research work which would benefit any agricultural commodity produced in Colorado;
- (o) Provisions for establishing processing plants or necessary arrangements with persons or companies for the processing of agricultural products, which processing would tend to effectuate the purposes of the article;
- (p) Provisions establishing methods whereby agricultural commodities and products other than marketable products may be disposed of and prohibiting dispositions thereof except as so provided;
- (q) Provisions for the limitation and prevention of unfair methods of competition in the marketing of agricultural products.
- (2) Notwithstanding any other provisions of law, whenever a marketing order issued by the commissioner pursuant to this article contains any terms or conditions regulating the handling, processing, or distribution of any agricultural commodity that may be marketed in the area covered by such order, the importation into the area of any such commodity shall be prohibited unless the handler, processor, or distributor of such commodity complies with such terms and conditions.

**Source:** L. 39: p. 198, 7. CSA: C. 106, 52. L. 41: p. 90, 1. L. 53: p. 116, 3. CRS 53: 7-3-8. L. 55: pp. 148-150, 7, 8. L. 63: p. 164, 2. C.R.S. 1963: 7-3-8. L. 69: p. 114, 7.

#### ANNOTATION

**Am. Jur.2d.** See 3 Am. Jur.2d, Agriculture, 30; 52 Am. Jur.2d, Markets and Marketing, 21.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**Marketing order cannot be extended to retail outlets.** The general assembly did not intend that marketing orders, agreements, and regulations issued under the agricultural marketing act should cover any retail functions. *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

**Marketing order not violative of federal antitrust laws.** A milk marketing order which provides for the posting of prices, discounts, and rebates by handlers and distributors, but does not specify what those prices should be, nor requires that all handlers and distributors post the same prices, which allows for the changing of prices after notice and to meet unregulated competition, plus requires that prices be uniform and without discrimination between customers, in no way involves the fixing of prices, nor is a conflict with the federal antitrust laws or the commerce and supremacy clauses of the United States Constitution. *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

#### **35-28-109. When marketing order effective.**

- (1) No marketing agreement or amendments thereto, directly affecting handlers, issued pursuant to this article, shall become effective unless and until the commissioner finds that such agreement has been

assented to in writing by the handlers engaged in the operation covered by the marketing agreement who handle not less than fifty percent of the volume of the commodity covered thereby which is processed or distributed within the area defined in such agreement and by not less than fifty percent of the number of such handlers engaged in the operation covered by such agreement.

(2) (a) No marketing order or amendments thereto directly affecting producers shall become effective unless and until the commissioner determines that the issuance of such order is approved and favored by at least two-thirds of the producers who participated in a referendum on the question of its approval, and who, during such representative period, have produced for market the commodities specified therein in commercial quantities within the production area specified in such marketing agreement or order, and who, during such respective period, have produced at least two-thirds of the volume voted of such commodity sold within the marketing area specified in such marketing agreement or order. This paragraph (a) shall not apply to marketing orders which contain provisions for refunds of assessments as provided in section 35-28-113.5.

(b) Except as provided in section 35-28-113 (3) and notwithstanding paragraph (a) of this subsection (2), no marketing order or amendments thereto directly affecting producers of wheat shall become effective unless or until the commissioner determines that the issuance of such order is approved and favored by at least two-thirds of the producers of wheat who participated in a referendum. For purposes of this provision, a "producer of wheat" means a person who harvested or intends to harvest in any manner in excess of fifteen acres of wheat and who is entitled to share in the proceeds of such wheat crop as owner-operator, cash tenant, standing rent or fixed rent tenant, landlord of a share tenant, share tenant, or sharecropper in the calendar year determined by the commissioner to be representative for purposes of voting approval. Wheat acreage placed in the federal soil bank program shall be regarded as wheat acreage for this purpose.

(c) Repealed.

(3) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers of more than fifty percent of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the commissioner of agriculture, with the approval of the governor determines:

(a) That the refusal or failure to sign a marketing agreement, by the handlers of more than fifty percent of the volume of the commodity or product thereof specified therein which is produced or marketed within the production or marketing area specified therein, tends to prevent the effectuation of the declared policy of this article with respect to such commodity or product; and

(b) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored by at least two-thirds of the producers who participated in a referendum on the question of its approval and who, during a representative period determined by the commissioner, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the marketing area specified in such marketing agreement or order; and by producers who, during such representative period, have produced for market at least two-thirds of the volume voted of such commodity produced for market within the production area specified in such marketing agreement or

order, or who, during such representative period, have produced at least two-thirds of the volume voted of such commodity sold within the marketing area specified in such marketing agreement or order.

(c) Notwithstanding paragraph (b) of this subsection (3), approval of a marketing order affecting wheat must be approved or favored by at least two-thirds of the producers of wheat who participated in a referendum on the question of its approval. For purposes of this paragraph (c), a "producer of wheat" means a person who harvested or intends to harvest in any manner in excess of fifteen acres of wheat and who is entitled to share in the proceeds of such wheat crop as owner-operator, cash tenant, standing rent or fixed rent tenant, landlord of a share tenant, share tenant, or sharecropper in the calendar year for purposes of voting approval. Wheat acreage placed in the federal soil bank program shall be regarded as wheat acreage for this purpose.

(4) In finding whether such order is assented to pursuant to the provisions of this article, the commissioner may consider the expression of any nonprofit agricultural cooperative marketing association which is authorized by its members to so express the approval or disapproval of the producers who are members of, or stockholders in, such nonprofit agricultural cooperative marketing association.

**Source:** L. 39: p. 201, 8. CSA: C. 106, 53. L. 51: pp. 559, 560, 2, 3. CRS 53: 7-3-9. L. 57: p. 133, 2. L. 58: pp. 101-103, 2, 3. L. 59: p. 185, 1, 2. C.R.S. 1963: 7-3-9. L. 77: (2)(c) added, p. 1606, 2, effective June 2. L. 87: (2)(a) amended, p. 1288, 2, effective April 6. L. 88: (2)(b) amended, p. 1222, 1, effective April 13. L. 96: (2)(c) repealed, p. 1217, 8, effective August 7.

**Cross references:** For the legislative declaration contained in the act repealing subsection (2)(c), see section 1 of chapter 237, Session Laws of Colorado 1996.

#### ANNOTATION

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 21-23.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**Referendum is required of producers but not handlers on a marketing agreement.** Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

**The 50% requirements of subsection (1) clearly apply only to marketing agreements, and not to marketing orders.** Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

**Additional requirements of subsection (3) apply only where there has been attempted marketing agreement which has failed to gain the requisite approval.** Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

#### 35-28-110. Orders regulating processing.

Subject to the provisions, restrictions, and limitations imposed in this article, the commissioner may issue marketing orders regulating within this state the processing, distributing, or handling in any manner of agricultural commodities by all persons engaged in such processing, distributing, or handling of such commodities.

**Source:** L. 39: p. 201, 8. CSA: C. 106, 53. L. 51: pp. 559, 560, 2, 3. CRS 53: 7-3-10. L. 55: p. 150, 9. C.R.S. 1963: 7-3-10.

#### ANNOTATION

**Am. Jur.2d.** See 3 Am. Jur.2d, Agriculture, 26; 52 Am. Jur.2d, Markets and Marketing, 21.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

### **35-28-111. Termination of marketing order.**

The commissioner shall suspend, amend, or terminate any marketing order, or any provision of any marketing order, whenever he finds that such provision or order does not tend to effectuate the declared purposes of this article within the standards and subject to the limitations and restrictions imposed in this article, but such suspension or termination shall not be effective until the expiration of the current marketing season. If the commissioner finds that the termination of any marketing order is requested in writing by more than fifty percent of the producers, who are engaged within the designated production area in the production for market of the commodity specified in such marketing order, or who produce for market more than fifty percent of the volume of such commodity produced within the designated production area for market, the commissioner shall terminate or suspend for a specified period such marketing order or provision thereof, but such termination shall be effective only if announced on or before such date, as may be specified in such order.

**Source: L. 39:** p. 201, 8. **CSA:** C. 106, 53. **CRS 53:** 7-3-11. **C.R.S. 1963:** 7-3-11.

#### **ANNOTATION**

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 21-23.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**Commissioner has no jurisdiction to hear claim relating to constitutionality of marketing order**, since an administrative agency is generally without jurisdiction to decide the constitutionality of its own enabling legislation. *People ex rel. Commissioner of Agriculture v. Webster*, 40 Colo. App. 144, 570 P.2d 560 (1977).

### **35-28-112. Notice of issuance.**

Upon the issuance of any marketing order, or any suspension, amendment, or termination thereof, a notice shall be posted on a public bulletin board to be maintained by the commissioner in his office and a copy of such notice shall be published in a newspaper of general circulation published in the capital of the state and in such other newspapers as the commissioner may prescribe. No order and no suspension, amendment, or termination thereof shall become effective until the termination of a period of five days from the date of such posting and publication. It is also the duty of the commissioner to mail a copy of the notice of said issuance to all persons, directly affected by the terms of such order, suspension, amendment, or termination, whose names and addresses may be on file in the office of the commissioner and to every person who files in the office of the commissioner a written request for such notice.

**Source: L. 39:** p. 201, 8. **CSA:** C. 106, 53. **CRS 53:** 7-3-12. **C.R.S. 1963:** 7-3-12.

#### **ANNOTATION**

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 16, 21.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

### **35-28-113. Budgeting and collection of fees.**

(1) For the purpose of providing funds to defray necessary expenses, the board of control shall prepare a budget for the administration and operating costs and expenses, including advertising and sales

promotion when same are requested in any marketing agreement or order executed under this article, which budget shall be approved by the commissioner. The collection of such necessary fees and the times and conditions of payment, in no case to exceed five percent of the gross dollar volume of such sales, or five percent of the gross dollar volume of purchases or amounts handled, distributed, or processed, shall become a part of any marketing order upon adoption as provided in this article.

(2) Every person engaged in the production, processing, distributing, or handling of any marketable agricultural product produced, sold, or marketed in this state and directly affected by any marketing order issued pursuant to this article for such commodity shall pay, or collect and pay, to the commissioner at such time and in such manner as prescribed by the order as adopted an assessment covering the budget provided by this article, which assessment shall be the percentage of the gross dollar volume or amount per unit of such sales, or percentage of the gross dollar volume of purchases or amounts handled, distributed, or processed, of any commodity affected by such marketing order, as is necessary to defray the expenses of the enforcement of this article, but in no case to exceed five percent of the gross dollar volume.

(3) Except as provided in section 35-28-113.5, whenever the board of control deems it necessary to raise the amount collected under the provisions of this section for a marketing order involving wheat, the commissioner shall ask for approval of the raise by a referendum on the question of the raise, which must be favored and approved by at least two-thirds of the producers who participate in the referendum.

(4) The fiscal year for the marketing order issued pursuant to section 35-28-106 affecting wheat shall be the period so established by the commissioner by rule and regulation after consideration of recommendations by the board of control of such order.

(5) (a) Notwithstanding any other provision of this article, if requested by a board of control affecting wheat, corn, or dry edible beans, the commissioner may amend a marketing order as described in this article to require the first handler of such commodity or product in this state to pay, or collect and pay, to the commissioner an assessment at such time and in such manner as shall be prescribed by the commissioner if the commissioner, with the approval of the governor, determines that:

(I) Wheat, corn, or dry edible beans produced in another state and shipped into this state for sale or distribution tends to prevent the effectuation of the declared policy of this article with respect to such commodity or product produced in this state; and

(II) The effectuation of the declared policy of this article would be furthered by collection of assessments on such commodity or product shipped into this state.

(b) Any assessment authorized pursuant to this subsection (5) shall be equivalent to the assessment required by the provisions of the marketing order.

**Source:** L. 39: p. 203, 9. CSA: C. 106, 54. CRS 53: 7-3-13. L. 55: p. 150, 10. C.R.S. 1963: 7-3-13. L. 73: p. 199, 1. L. 77: (3) added, p. 1606, 3, effective June 2. L. 79: (3) amended, p. 1324, 2, effective May 31. L. 88: (3) amended, p. 1222, 2, effective April 13. L. 92: (4) added, p. 164, 2, effective March 16. L. 2001: (1) and (2) amended and (5) added, p. 3, 2, effective August 8.

### **35-28-113.5. Refunds of assessments - request by producer.**

(1) Marketing orders issued after July 1, 1987, as well as amendments to such marketing orders and amendments to marketing orders in existence prior to July 1, 1987, which marketing orders and

amendments are issued pursuant to the provisions of this article and which directly affect producers, may contain provisions for refunds of assessments or for refunds of portions of assessments. Any marketing order or amendment which contains such a provision shall not become effective unless and until the commissioner determines that the issuance of such order is approved and favored by at least a simple majority of the producers who participated in a referendum on the question of its approval and who, during such representative period, have produced for market the commodities specified therein in commercial quantities within the production area specified in such marketing agreement or order. Only the assessment or assessment raise or raises approved by a simple majority of the producers as provided in this subsection (1) or that portion of the assessment or assessment raise which is actually levied by the commissioner shall be subject to the provisions of this section.

(2) A producer may request a refund of assessments or a refund of a portion of assessments within thirty days after payment of such assessments. The commissioner shall promulgate such rules and regulations as are necessary for the implementation of this section.

**Source:** L. 87: Entire section added, p. 1288, 1, effective April 6. L. 88: Entire section amended, p. 1222, 3, effective April 13.

### **35-28-114. Disposition of funds.**

(1) Any moneys collected by the commissioner pursuant to this article shall be deposited in a bank or other depository approved by the state treasurer, allocated to each marketing order under which they are collected, and disbursed by the commissioner only for the necessary expenses incurred by the board of control and the commissioner and approved by the commissioner with respect to each such separate marketing order. Funds so collected shall be deposited and disbursed in conformity with appropriate rules and regulations prescribed by the commissioner. All such expenditures by the commissioner shall be audited at least annually and a copy of such audit shall be delivered within thirty days after the completion thereof to the governor and the commissioner of agriculture.

(2) Any moneys remaining in such fund, allocable to any particular agricultural commodity affected by a marketing order, at the discretion of the commissioner, may be refunded at the close of any marketing season, upon a pro rata basis, to all persons from whom assessments were collected, or such portion of such moneys as may be recommended by the board of control and approved by the commissioner may be carried over into the next succeeding marketing season whenever the commissioner finds that such moneys may be required to assist in defraying the cost of operating such marketing order in such succeeding season. Upon termination by the commissioner of any marketing order, any moneys remaining, and not required by the commissioner to defray the expenses of such marketing order, shall be returned by the commissioner, upon a pro rata basis, to all persons from whom assessments were collected. If the commissioner finds that the amounts so returnable are so small as to make impractical the computation and remitting of such pro rata refund to such persons, the commissioner may use the moneys in such fund to defray the expenses incurred by him in the formulation, issuance, administration, or enforcement of any subsequent marketing order for such commodity.

**Source:** L. 39: p. 203, 9. CSA: C. 106, 54. L. 51: p. 560, 4. CRS 53: 7-3-14. C.R.S. 1963: 7-3-14.

### **ANNOTATION**

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**35-28-115. Limitation of marketing orders.**

(1) Marketing orders issued by the commissioner under this article may be limited in their application by prescribing the marketing areas or portions of the state in which a particular order shall be effective. No marketing order shall be issued by the commissioner unless it embraces all persons of a like class in a given area who are engaged in a specific and distinctive agricultural industry or trade within this state.

(2) Within the terms of this article, production or marketing areas as to peaches shall be classified as early maturing, which shall be at altitudes of less than five thousand feet, and late maturing, which shall be at altitudes of more than five thousand feet, and such areas shall be separate and distinct classes for all purposes under this article insofar as peaches are concerned.

**Source:** L. 39: p. 205, 10. CSA: C. 106, 55. CRS 53: 7-3-15. C.R.S. 1963: 7-3-15.

**ANNOTATION**

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 21-23.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**35-28-116. Administration and enforcement.**

(1) The commissioner of agriculture shall be responsible for the administration and enforcement of this article.

(2) Every person who violates any provision of this article or any provision of any marketing order duly issued by the commissioner under this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than six months, or by both such fine and imprisonment. Each day during which any such violations continue constitutes a separate offense.

(3) Upon the filing of a verified complaint charging violation of any provisions of this article or of any provision of any marketing order issued by the commissioner under this article, and prior to the institution of any court proceeding authorized in this section, the commissioner in his discretion may refer the matter to the attorney general or any district attorney of this state for action pursuant to the provisions of this article or call a hearing to consider the charges set forth in such verified complaint. In such case, the commissioner shall cause a copy of such complaint, together with a notice of the time and place of hearing of such complaint, to be served personally, or by mail, upon the person named as respondent therein. Such service shall be made at least three days before said hearing date. The hearing shall be held in the city or town in which is situated the principal place of business of the respondent, or in which the violation complained of is alleged to have occurred, or in the nearest office of the department of agriculture, at the discretion of the commissioner. At the time and place designated for such hearing, the commissioner or his agents shall hear the parties to said complaint and shall enter in the office of the commissioner at Denver his findings based upon facts established at such hearing.

(4) If the commissioner finds that no violation has occurred he shall forthwith dismiss such complaint and notify the parties to such complaint.

(5) If the commissioner finds that a violation has occurred he shall so enter his findings and notify the parties to such complaint. Should the respondent thereafter fail, neglect, or refuse to desist from such

violation, within the time specified by the commissioner, the commissioner may thereupon file a complaint against such respondent in a court of competent jurisdiction as set forth in this section.

(6) Each district attorney of this state may upon his own initiative and shall upon any complaint of any person, if, after investigation he believes a violation has occurred, bring a criminal action in the proper court in his district in the name of the people of this state in any court of competent jurisdiction in the state of Colorado against any person violating any provision of this article or of any marketing order duly issued by the commissioner under this article.

(7) (a) Any person who violates any provision of this article or of any marketing order or rule adopted pursuant to this article is subject to a civil penalty as determined by a court of competent jurisdiction or by the commissioner. The penalty shall not exceed one thousand dollars per violation; except that such penalty may be doubled if it is determined, after notice and an opportunity for hearing, that the person has violated the provision, marketing order, or rule on at least one prior occasion occurring after March 23, 1995.

(b) No civil penalty may be imposed by the commissioner unless the person charged is given notice and opportunity for a hearing pursuant to article 4 of title 24, C.R.S.

(c) If the commissioner is unable to collect the civil penalty, or if any person fails to pay all or a set portion of the civil penalty as determined by the commissioner, the commissioner may bring suit to recover such amount plus costs and attorney fees by action in any court of competent jurisdiction.

(d) Before imposing any civil penalty, the court or the commissioner may consider the effect of such penalty on the person charged.

(e) All penalties collected pursuant to this section shall be transmitted to the general fund.

(8) (a) The commissioner shall enforce the provisions of this article.

(b) Whenever the commissioner has reasonable cause to believe a violation of any provision of this article or any marketing order or rule issued pursuant to this article has occurred and immediate enforcement is deemed necessary, the commissioner may issue an order requiring any person to cease and desist from such violation. Such cease and desist order shall set forth the provisions alleged to have been violated, the facts alleged to have constituted the violation, and the requirement that all actions cease immediately. At any time after service of the order to cease and desist, the person may request a prompt hearing to determine whether or not such violation has occurred. Such hearing shall be conducted pursuant to the provisions of article 4 of title 24, C.R.S., and shall be determined promptly.

(c) Whenever the commissioner possesses evidence satisfactory to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this article or of any marketing order or rule issued under this article, the commissioner may apply to a court of competent jurisdiction to temporarily or permanently restrain or enjoin the act or practice in question and to enforce compliance with this article or any marketing order, rule, or order under this article. In any such action, the commissioner shall not be required to plead or prove irreparable injury or the inadequacy of the remedy at law. Under no circumstances shall the court require the commissioner to post a bond.

(9) The judgment, if in favor of the plaintiff, shall provide that the defendant pay to the plaintiff reasonable costs of such suit including attorney's fees incurred by an advisory board in the prosecution of such action.

(10) Any such action may be commenced either in the county where defendant resides or where any act or omission or part thereof complained thereof occurred.

(11) The penalties and remedies prescribed in this article with respect to any violation mentioned in this article shall be concurrent and alternative, and neither singly nor combined shall the same be exclusive and either singly or combined the same shall be cumulative with any other civil, criminal, or administrative rights, remedies, forfeitures, or penalties provided or allowed by law with respect to any such violation.

(12) Any handler or processor located outside of this state who processes products which are marketed or distributed in this state on a continuing basis, whether directly or indirectly, shall be considered to be engaged in the transaction of business within this state and shall be subject to the jurisdiction of the courts of this state pursuant to the provisions of section 13-1-124, C.R.S. Any action to enforce any provision of this article or any marketing order issued pursuant to this article against such out-of-state handler or processor by the commissioner shall be considered to have arisen from the transaction of business in this state and shall subject the handler or processor to the jurisdiction of the courts of this state.

**Source:** L. 39: p. 205, 11. CSA: C. 106, 56. CRS 53: 7-3-16. C.R.S. 1963: 7-3-16. L. 73: p. 200, 1. L. 95: (7) and (8) amended, p. 65, 1, effective March 23. L. 2004: (7)(a), (8)(b), and (8)(c) amended, p. 65, 1, effective March 8.

**Editor's note:** Section 2 of chapter 19, Session Laws of Colorado 2004, provides that the act amending subsections (7)(a), (8)(b), and (8)(c) applies to marketing orders issued before, on, or after March 8, 2004.

#### ANNOTATION

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 20, 28.

**C.J.S.** See 3 C.J.S., Agriculture, 19-22, 24, 25; 16 C.J.S., Constitutional Law, 142-148.

**Option in initiating complaint proceedings.** Under this section, the commissioner of agriculture has the option of initiating complaint proceedings in the administrative agency or in the district court. *People ex rel. Commissioner of Agriculture v. Webster*, 40 Colo. App. 144, 570 P.2d 560 (1977).

**Once commissioner chooses to proceed in district court,** the district court is clothed with exclusive jurisdiction to hear the entire matter. *People ex rel. Commissioner of Agriculture v. Webster*, 40 Colo. App. 144, 570 P.2d 560 (1977).

**Assertion of affirmative defenses prior to exhaustion of administrative remedies.** Where the commissioner elects to initiate the enforcement proceeding in the district court, the defendant can assert his affirmative defenses without first exhausting his administrative remedies. *Clasby v. Klapper*, 636 P.2d 682 (Colo. 1981).

**Proper notice to defendant of action by commission,** see *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

**Applied** in *People ex rel. Orcutt v. District Court*, 167 Colo. 162, 445 P.2d 887 (1968).

**35-28-117. Assessment a personal debt.**

Any assessment levied in such specified amount as may be determined by the commissioner pursuant to the provisions of section 35-28-113 shall constitute a personal debt of every person so assessed and shall be due and payable to the commissioner when payment is called for by the commissioner. In the event of failure of such person to pay any such assessment upon the date determined by the commissioner, the commissioner may file a complaint against such person in a state court of competent jurisdiction for the collection thereof, as provided in section 35-28-116.

**Source:** L. 39: p. 207, 12. CSA: C. 106, 57. CRS 53: 7-3-17. C.R.S. 1963: 7-3-17.

**ANNOTATION**

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**Only when commissioner files claim for collection may assessment be contested.** After the agriculture commissioner has determined the amount of the assessment and called for collection, if payment is not forthcoming, then the commissioner may file a claim for collection of the assessment. It is at such time that the taxpayers have a full and complete opportunity to challenge the assessment. Until the commissioner makes a determination of the amount of the assessment, the judiciary has no jurisdiction to interfere where the commissioner is merely exercising his statutory duties. *People ex rel. Orcutt v. District Court*, 167 Colo. 162, 445 P.2d 887 (1968).

**35-28-118. No personal liability.**

The members of any such board of control, including employees of such board, shall not be held responsible individually in any way whatsoever to any producer, processor, distributor, or other handler or any other person for errors in judgment, mistakes, or other acts, either of commission or omission, as principal, agent, person, or employee, except for their own individual acts of dishonesty or crime. No such person or employee shall be held responsible individually for any act or omission of any other member of such board. The liability of the members of such board shall be several and not joint and no member shall be liable for the default of any other member.

**Source:** L. 39: p. 207, 13. CSA: C. 106, 58. CRS 53: 7-3-18. C.R.S. 1963: 7-3-18.

**ANNOTATION**

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 20.

**C.J.S.** See 3 C.J.S., Agriculture, 19-22, 24, 25; 16 C.J.S., Constitutional Law, 142-148.

**35-28-119. Records - information - hearings.**

(1) The commissioner may require all processors or distributors subject to the provisions of any marketing order issued pursuant to this article to maintain books and records reflecting their operations under said marketing order, and to furnish to the commissioner or his duly authorized or designated representatives such information as may be from time to time requested by them relating to operations under said marketing order, and to permit the inspection by said commissioner, or his duly authorized or designated representatives, of such portions of such books and records as relate to operations under said marketing order.

(2) Information obtained by any person under this article shall be confidential and shall not be by him disclosed to any other person save to a person with like right to obtain the same, or any attorney employed to give legal advice thereupon, or by court order.

(3) To carry out the purposes of this article, the commissioner may hold hearings, take testimony, administer oaths, subpoena witnesses, and issue subpoenas for the production of books, records, or documents of any kind. Upon failure or refusal of any witness to obey any subpoena, the commissioner may petition the district court, and upon proper showing, the court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the order of court shall be punishable as a contempt of court.

(4) No person shall be excused from attending and testifying or from producing documentary evidence before the commissioner in obedience to the subpoena of the commissioner on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may be so required to testify or produce evidence, documentary or otherwise, before the commissioner in obedience to a subpoena issued by him; except that no natural person so testifying shall be exempt from prosecution and punishment for perjury in the first degree committed in so testifying.

**Source:** L. 39: p. 207, 14. CSA: C. 106, 59. CRS 53: 7-3-19. C.R.S. 1963: 7-3-19. L. 72: p. 554, 1.

**Cross references:** For perjury in the first degree, see 18-8-502.

#### ANNOTATION

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 20, 21.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

**Procedure of this section takes precedence over rules of civil procedure.** If the procedure and practice set forth in this section is in any particular inconsistent or in conflict with the rules of civil procedure, the statute -- and not the rules -- would govern. People ex rel. Orcutt v. District Court, 164 Colo. 385, 435 P.2d 374 (1967).

**Subpoena may be quashed.** A party may file a motion to quash a subpoena if they feel that the subpoena calls for information that is not reasonably related to the matter under inquiry by the administrative body, or is otherwise oppressive or unreasonable in its demands. People ex rel. Orcutt v. District Court, 164 Colo. 385, 435 P.2d 374 (1967).

#### **35-28-120. Deposit to defray expenses.**

(1) Prior to the issuance of any marketing order by the commissioner, he may require the applicants therefor to deposit with him such amount as the commissioner may deem necessary to defray the expenses of preparing and making effective such marketing order. Such funds shall be received, deposited, and disbursed by the commissioner in accordance with the provisions as set forth in section 35-28-114.

(2) The commissioner may reimburse the applicant in the amount of any such deposit from any funds received by the commissioner pursuant to the provisions of section 35-28-114.

**Source:** L. 39: p. 208, 15. CSA: C. 106, 60. CRS 53: 7-3-20. C.R.S. 1963: 7-3-20.

#### ANNOTATION

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

### **35-28-121. General provisions.**

(1) In the event the commissioner finds that it tends to effectuate the declared purposes of this article within the standards prescribed in this article, the commissioner may issue a marketing order, applicable to the marketing of any agricultural commodity containing like terms, provisions, methods, and procedures as any license or order regulating the marketing of such commodity issued by the secretary of agriculture of the United States pursuant to the provisions of any law or laws of the United States. In selecting the members of any board or other advisory agency under such marketing order, the commissioner shall utilize, insofar as practicable, the same persons as those serving in a similar capacity under such federal license or order, so as to avoid duplicating or conflicting personnel.

(2) The commissioner is authorized to confer with and cooperate with the legally constituted authorities of other states and of the United States, for the purpose of obtaining uniformity in the administration of federal and state marketing regulations, licenses, or orders. Said commissioner is authorized to conduct joint hearings and issue joint or concurrent marketing orders for the purposes and within the standards set forth in this article, and he may exercise any administrative authority prescribed by this article to effect such uniformity of administration and regulation.

(3) Nothing in this article applies to any order, rule, or regulation issued or issuable by the public utilities commission with respect to the operation of common carriers.

(4) In any civil or criminal action or proceeding for violation of any rule of statutory or common law against monopolies or combinations in restraint of trade, proof that the act complained of was done in compliance with the provisions of this article or a marketing order issued under this article and in furtherance of the purposes and provisions of this article shall be a complete defense to such action or proceeding.

**Source:** L. 39: p. 208, 16. CSA: C. 106, 61. L. 53: p. 118, 4. CRS 53: 7-3-21. L. 55: p. 151, 11. L. 61: p. 167, 1. L. 62: p. 124, 1. L. 63: p. 165, 1. C.R.S. 1963: 7-3-21.

#### **ANNOTATION**

**Am. Jur.2d.** See 52 Am. Jur.2d, Markets and Marketing, 16, 21.

**C.J.S.** See 16 C.J.S., Constitutional Law, 142-148.

### **35-28-122. Application of article.**

The provisions of this article shall not be applicable to retailers of agricultural commodities except to the extent that any retailer also engaged in the processing or distribution of agricultural commodities as defined in this article; but all persons acting as producers, handlers, processors, or distributors shall conform with all the provisions of any applicable marketing order, marketing agreement, or regulations issued pursuant to this law before shipping or causing to be shipped any agricultural commodity.

**Source:** L. 39: p. 209, 17. CSA: C. 106, 62. CRS 53: 7-3-22. L. 55: p. 151, 12. C.R.S. 1963: 7-3-22. L. 69: p. 115, 8.

#### **ANNOTATION**

**Limited applicability to retailers.** This section applies to retailers only as to any operation they may be engaged in at the processing and distribution level. *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

**35-28-123. Other laws superseded.**

It is the legislative intent that the provisions of this article shall control, to the exclusion of any general law of this state in conflict therewith, and specifically shall supersede the provisions of article 23 of this title, if said article is in conflict herewith.

**Source:** L. 39: p. 209, 18. CSA: C. 106, 63. CRS 53: 7-3-23. C.R.S. 1963: 7-3-23.

**ANNOTATION**

**Specific procedural requirements for issuance and administration of marketing orders are set forth in agricultural marketing act**, superseding the general procedure of the administrative code. *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 166 Colo. 199, 444 P.2d 277 (1968).

**35-28-124. Agricultural commodities - preferences - promotion - task force - legislative declaration - repeal. (Repealed)**

**Source:** L. 2004: Entire section added, p. 1733, 1, effective June 4.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective May 1, 2005. (See L. 2004, p. 1733.)