

Chapter ATCP 140

AGRICULTURAL MARKETING ORDERS, MARKETING AGREEMENTS AND MARKETING BOARDS

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Note: Chapter Ag 140 was renumbered chapter ATCP 140 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1993, No. 448.

Subchapter I — Definitions

ATCP 140.01 Definitions. As used in this chapter:

(1) “Department” means the state of Wisconsin department of agriculture, trade and consumer protection.

(1m) “Electronic communication” means Internet, electronic mail, facsimile, or any other form or process of communication that does not directly involve the physical transfer of paper and that is suitable for the retention, retrieval and reproduction of information by the recipient.

(2) “Marketing agreement” means a marketing agreement created or proposed under ch. 96, Stats.

(3) “Marketing board” means a marketing board created or proposed under ch. 96, Stats.

(4) “Marketing order” means a marketing order created or proposed under ch. 96, Stats.

(5) “Secretary” means the secretary of the department of agriculture, trade and consumer protection.

(6) “Sponsor” means a person submitting a request or petition for the adoption, amendment or repeal of a marketing order.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; CR 07-067: cr. (1m) Register July 2008 No. 631, eff. 8-1-08.

Subchapter II — Marketing Orders; Adoption, Amendment and Repeal

ATCP 140.10 Rulemaking proceedings. Proceedings to adopt, amend or repeal a marketing order shall be conducted as rulemaking proceedings under ch. 227, Stats., except as otherwise provided in ch. 96, Stats. Every proposal to adopt, amend or repeal a marketing order shall be prepared in the form of a proposed order of the department adopting, amending or repealing rules under ch. 227, Stats.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.11 Decision to initiate proceedings. The secretary may, in consultation with the board of agriculture, trade and consumer protection, initiate proceedings to adopt, amend or repeal a marketing order. To initiate proceedings, the secretary shall hold a public hearing on the proposal, as provided under ss. 96.05 and 96.06, Stats., and this subchapter. The decision to initi-

ate proceedings may be made in response to a petition under s. 96.05 (2), Stats., or on the secretary’s own motion. A decision to proceed on the secretary’s own motion may be made in response to a request by any person. A decision to initiate proceedings shall be made in writing, and set forth the basis for the decision. A decision to initiate proceedings may be withheld until the sponsors of a proposal have complied with any requirements established by the secretary under s. ATCP 140.13.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.12 Refusal to initiate proceedings; denial of petition or request. (1) The secretary may deny a petition under s. 96.05 (2), Stats., if the secretary determines that the proposal does not effectuate the declared policy of ch. 96, Stats., or exceeds the purposes or limitations of ch. 96, Stats. The secretary’s decision to deny a petition shall be made in consultation with the board of agriculture, trade and consumer protection. If a petition under s. 96.05 (2), Stats., is denied, the secretary shall publish notice setting forth the specific reasons for the denial, as provided in s. 96.05, Stats. If denied, the petition may not be reconsidered by the secretary for a period of one year from the date of notice of the denial.

(2) If a proposal to adopt, amend or repeal a marketing order is not received in the form of a petition under s. 96.05 (2), Stats., the proposal may be summarily denied by the secretary, with or without a written or published explanation. The denial of a proposal does not preclude the secretary from reconsidering the proposal within one year of the denial, except as provided under sub. (1).

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.13 Petition or request to initiate proceedings; requirements. (1) Before initiating proceedings on any proposal to adopt, amend or repeal a marketing order, the secretary may require the sponsors of the proposal to submit or deposit with the secretary:

(a) A written draft of the proposed marketing order or marketing order amendment, if the sponsors propose to adopt or amend a marketing order. A written draft shall be included with all petitions under s. 96.05 (2), Stats., and with other proposals if required by the secretary. The draft proposal may be modified by the department as provided in s. ATCP 140.14 before any hearing is held on the proposal.

(b) A clear statement of the substance or nature of the proposal. The statement shall be included with all petitions under s. 96.05 (2), Stats., and with other proposals if required by the secretary. If the sponsors propose to adopt a marketing order, the statement shall include:

1. The objectives of the proposed marketing order. Objectives shall be consistent with the provisions of s. 96.03 (2), Stats.

2. A description of the class of producers or handlers who would be affected by the proposed marketing order, including the approximate number of producers or handlers who would be affected.

3. A specific statement describing how marketing order assessments would be computed and paid under the marketing order. The description shall indicate:

a. How the basis for assessments would be determined.

b. The situations in which handlers would be expected to collect and remit assessments.

c. The situations in which producers would be expected to collect and remit assessments.

d. The point at which assessments would become due and payable.

e. The records which producers or handlers would be required to keep in order to document whether assessments are due and payable, and in what amounts.

4. The size of the marketing board and the representation of producers and handlers on the marketing board under the proposed marketing order, pursuant to s. 96.10, Stats.

5. The amount of revenue, in the form of producer or handler assessments, needed each year to accomplish the purposes of the proposed marketing order.

6. A proposed voting requirement to be used in determining whether the proposal is approved or disapproved in a referendum of affected producers or handlers. The voting requirement shall be chosen from among the alternative voting requirements set forth in s. 96.08, Stats. A proposal to amend or repeal a marketing order shall be subject to the same voting requirement that was used to adopt the marketing order.

(c) An amount of money sufficient to defray the reasonably anticipated expenses which may be incurred by the department in the proposed proceedings to adopt, amend or repeal the marketing order, pursuant to s. 96.05 (6), Stats. In lieu of a single deposit to cover the entire proceedings, the secretary may permit the sponsors of the proposed marketing order to make deposit installments at various stages of the proceedings. Deposit installments shall be sufficient to defray the department's reasonably anticipated expenses for each stage of the proceedings. The department shall provide the sponsors with an accounting of all expenses incurred by the department, and refund any portion of the sponsor's deposit which exceeds the department's actual expenses. Actual expenses may include general overhead and operating expenses which are reasonably attributable to the marketing order proceedings.

(2) Sponsors of a proposal to adopt, amend or repeal a marketing order may withdraw their sponsorship at any point in the proceedings. A sponsor shall be liable for any expenses incurred by the department up to the time of the withdrawal of sponsorship. If sponsorship is withdrawn, the department may terminate the proceedings or proceed at the department's expense.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; **CR 07-067: am. (1) (b) 3. (intro.) and a. Register July 2008 No. 631, eff. 8-1-08.**

ATCP 140.14 Hearing draft proposal; format. (1) If a decision is made to initiate proceedings for the adoption, amendment or repeal of a marketing order, a hearing draft including a proposed voting requirement shall be prepared by the department in the form required for administrative rules under s. 227.14, Stats. The proposal submitted by the sponsors of a marketing order may be modified by the department to conform with ch. 96, Stats., this chapter and other applicable law. The hearing draft of a proposed

order adopting, amending or repealing a marketing order shall be submitted to the legislative council staff for review prior to hearing, as provided in s. 227.15, Stats.

(2) To the maximum extent feasible, consistent with the objectives of each proposal, the department shall maintain a consistency of terms, provisions, organization and drafting style between marketing orders. Terms defined in s. 96.01, Stats., shall be used consistently in every marketing order. The following terms shall be used consistently in marketing orders and when used shall have the following meanings:

(a) "Producer-handler" means an affected producer who sells the affected commodity to a nonresident handler.

(b) "Nonresident handler" means a handler who takes title to the affected commodity outside of this state.

(c) "Transfer of title" means the passing of title from seller to buyer as provided in s. 402.401, Stats., or as otherwise provided under a written sales agreement.

(d) "Assessment due" means an assessment for which a producer, handler or producer-handler has incurred a specific legal obligation of payment under the marketing order.

(e) "Assessment payable" means an assessment due for which the time specified for payment under the marketing order has arrived. An assessment becomes payable on the payment date prescribed under the marketing order.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; corrections in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1993, No. 448; **CR 07-067: am. (2) (d) Register July 2008 No. 631, eff. 8-1-08.**

ATCP 140.15 List of affected producers or handlers; compilation prior to hearing. If a decision is made to initiate proceedings for the adoption, amendment or repeal of a marketing order, the secretary shall establish a current list of producers and handlers who will be affected by the proposal, as provided in s. 96.05 (3) through (5), Stats. The list shall be used in determining whether the proposal to adopt, amend or repeal a marketing order is approved in a referendum of producers and handlers, as provided in s. ATCP 140.19. The list shall be established and updated using the procedures under s. 96.05 (3) through (5), Stats., before any notice of public hearing is issued on the proposal.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; am. Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 140.16 Hearing notices. Notice of hearing on any proposal to adopt, amend or repeal a marketing order shall be given as provided under ss. 96.06 and 227.17, Stats. The department may issue such press releases or public announcements concerning the hearings as it may consider appropriate. The times and places of hearing shall be determined at the discretion of the secretary and be included in the hearing notice. The hearing notice may also specify a deadline date after the conclusion of the hearings for filing written comments on the proposal. Written comments received on or before the deadline date shall be included in the hearing record.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; correction made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1993, No. 448.

ATCP 140.17 Hearing. Hearings on any proposal to adopt, amend or repeal a marketing order shall be conducted as rulemaking hearings, pursuant to ss. 96.06 (2) and 227.18, Stats. Nothing in this chapter or ch. 96, Stats., shall be construed as requiring a contested case hearing within the meaning of ch. 227, Stats.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; correction made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1993, No. 448.

ATCP 140.18 Decision after hearing. (1) Following hearing on a proposal to adopt, amend or repeal a marketing order, the secretary shall make and publish a decision on the proposal, as provided under s. 96.07, Stats., in consultation with the board of agriculture, trade and consumer protection. The decision shall be issued within 45 days after close of the hearing record, and shall set forth the factual basis and rationale for the decision, including

the findings or determinations required under sub. (2). The decision shall determine:

(a) Whether the proposal is denied, or advanced to a referendum of affected producers or handlers under s. ATCP 140.19. No proposal may be advanced to a referendum unless the secretary makes findings or determinations as provided in s. 96.07 (1) (a) through (c), Stats.

(b) Whether, and how the proposal will be modified for referendum. The decision shall include the complete text of the final proposal to be submitted to referendum. Changes from the hearing draft proposal shall be clearly noted.

(c) The voting requirement to be used in determining whether the proposal is approved or disapproved upon referendum. The voting requirement shall be chosen from among the alternatives set forth under s. 96.08, Stats., and may be different from the voting requirement requested by the sponsors or included in the hearing draft. A proposal to amend or repeal a marketing order shall be subject to the same voting requirement that was used to adopt the marketing order. Bloc voting is permitted in connection with the voting requirements under s. 96.08 (1) (b) 1., 3., 5., and 6., Stats. Bloc voting is not permitted in connection with the voting requirements under s. 96.08 (1) (b) 2. or 4., Stats.

(2) The secretary's decision under sub. (1) shall include:

(a) A list of persons testifying at the hearings, or submitting written comments within the comment period specified in the hearing notice.

(b) The identity of the sponsors of the marketing order proposal, if proceedings on the proposal were initiated in response to a petition or request.

(c) The history of the proposal.

(d) The nature and objectives of the proposal, as presented by the sponsors and represented in the hearing draft.

(e) A discussion and analysis of the hearing arguments for and against the proposal.

(f) A projection and analysis of the financial impact of the proposal on affected producers and handlers.

(g) The projected market impact of the proposal, including the potential impact on consumers and small business.

(3) If the proposal would create or expand the size of a marketing board, and if the secretary's decision advances the proposal to referendum, the decision shall include a call for nominations to the marketing board, pursuant to s. 96.10, Stats., and s. ATCP 140.20.

(4) Copies of the secretary's findings and decision shall be mailed, within the time period provided under sub. (1), to all persons appearing at the hearings or submitting written comments for the hearing record. If the decision includes a call for nominations under sub. (3), the decision shall be announced in a statewide press release by the department.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.19 Referendum. (1) GENERAL. Based on the secretary's decision under s. ATCP 140.18, a proposal to adopt, amend or repeal a marketing order may be submitted to a referendum of affected producers or handlers, as provided in s. 96.08, Stats. No proposal to adopt, amend or repeal a marketing order may be adopted by the department unless the proposal is approved in a referendum of affected producers and handlers. The referendum shall be scheduled and announced as provided in sub. (4), and be conducted according to the procedures set forth in this section. The results of the referendum shall be determined according to the voting requirement specified in the decision of the secretary under s. ATCP 140.18 (1) (c).

(2) VOTER ELIGIBILITY. In a referendum held on a proposal to adopt, amend or repeal a marketing order, the eligible voters shall consist of producers or handlers who are affected by the proposed marketing order, or by the current marketing order which is to be amended or repealed under the proposal. The department may establish the marketing year or years for which the voting eligibil-

ity of a producer or handler is to be determined. Each affected producer or handler is entitled to one vote in the referendum. A corporation, partnership, trust, or other entity or association engaged in business as a producer or handler is entitled to only one vote as a producer or handler, except where an incorporated cooperative association casts a bloc vote as provided under sub. (3). A producer or handler may not vote by proxy or agent, except that the vote of a business entity or association may be cast by its officer, employee or representative. The department may audit the list of affected producers or handlers compiled under s. ATCP 140.15, or the voting status of any person casting a ballot, to ensure that all producers or handlers appearing on the list or casting ballots are eligible to vote in the referendum. The secretary may require supporting documentation from any person claiming to be an eligible producer or handler.

(3) BLOC VOTING. (a) If the secretary's decision prescribes a referendum voting requirement under s. ATCP 140.18 (1) (c) which allows for possible bloc voting, an incorporated cooperative association engaged in marketing the affected commodity on behalf of the cooperative's affected producer members may cast a bloc vote on behalf of its affected members, as provided in s. 96.08 (3), Stats. A bloc vote may be cast by the board of directors of the cooperative with the authorization of the cooperative members. A bloc referendum vote may be cast for or against a proposal to adopt, amend or repeal a marketing order. The bloc vote shall be counted as the equivalent of multiple individual votes, according to the number of affected producer members represented in the bloc vote. If production volume is relevant to the referendum voting requirement, the volume of the affected commodity represented by a bloc vote shall be the combined volume produced by the individual producer members represented in the bloc vote. An incorporated cooperative association marketing an affected commodity as the agent of its members, and not as a purchaser, shall exclude from its bloc vote any of its affected producer members for whom a bloc vote will be cast by a second incorporated cooperative association in which the same producers are also members, if the second incorporated cooperative association markets the affected commodity as a purchaser from the producers.

(b) At least 45 days prior to the referendum, an incorporated cooperative association intending to cast a bloc vote shall file the following with the secretary:

1. A copy of the resolution adopted by the cooperative's membership or board of directors authorizing the cooperative to cast a bloc vote in the marketing order referendum on behalf of its members.

2. Proof that the affected producer members of the cooperative have been notified in writing of their right to vote individually and be excluded from the cooperative's bloc vote, as provided under par. (d).

3. A certified list of cooperative members who qualify as affected producers for purposes of the marketing order and referendum, and for whom the cooperative claims the right to cast a bloc vote in the referendum. The list shall include the names and addresses of the affected producers or handlers in a format specified by the department. At the request of the secretary, the cooperative shall submit documentation to prove that the listed producers are eligible to vote in the marketing order referendum, and that the cooperative is authorized to cast a bloc vote on their behalf.

4. Any other information or documentation required by the secretary in order to determine the validity of the cooperative's bloc vote.

(c) At any time before or during a referendum, the secretary may invalidate the bloc vote of an incorporated cooperative association if the secretary determines that the cooperative has failed to file the information and documentation required under par. (b).

(d) If an incorporated cooperative association intends to cast a bloc vote in a marketing order referendum, it shall so notify its individual members in writing at least 45 days prior to the referen-

dum. The notice shall further inform the members of their right to vote as individuals and be excluded from the cooperative's bloc vote, as provided under par. (e). Notice published in an official publication of the cooperative, and distributed to all members of the cooperative, constitutes adequate written notice. Notice need not state whether the cooperative intends to cast its bloc vote for or against the marketing order proposal.

(e) Affected producers who are members of an incorporated cooperative association may, by notifying the secretary in writing during the referendum period, exclude themselves from the cooperative's bloc vote in the referendum, and may cast their votes as individuals. Upon receiving notice from an affected producer, the department shall remove the producer from the list of cooperative members included in the cooperative's bloc vote, and shall mail an individual referendum ballot to the producer.

(f) The bloc vote of an incorporated cooperative association shall be cast within the referendum period prescribed under sub. (4). The secretary may prescribe a separate ballot for cooperative bloc voting, or the cooperative may cast a bloc vote in the form of a letter addressed to the secretary and sent by certified mail.

(4) REFERENDUM SCHEDULE; ANNOUNCEMENT. (a) The referendum on a proposal to adopt, amend or repeal a marketing order shall begin on the date set forth in the secretary's final decision under s. ATCP 140.18 advancing the proposal to referendum. The referendum period during which affected producers or handlers may cast their votes shall extend for at least 14 days.

(b) At least 10 days before the start of the referendum period, the department shall issue a statewide press release announcing the referendum. The department may publish additional notices to affected areas or persons. Notice under this paragraph shall state:

1. The nature and purpose of the referendum.
2. The beginning and ending dates of the referendum period.
3. The class of affected producers or handlers who are eligible to vote in the referendum.
4. The voting requirement under s. 96.08, Stats., which will be used to determine the results of the referendum.
5. Whether bloc voting by incorporated cooperative associations is permitted in the referendum. If bloc voting is permitted, the notice or announcement shall set forth the procedure by which producer members may be excluded from a cooperative's bloc vote and be permitted to cast their votes individually.
6. Balloting instructions, indicating whether the referendum is to be conducted by mail or electronic communication, or at polling places under sub. (5) (e). If the referendum is to be conducted at polling places, rather than by mail or electronic communication, the notice of announcement shall give the locations of polling places and the times during which votes may be cast at the polling places.
7. Instructions to eligible producers and handlers for obtaining a ballot if the producer or handler does not receive a ballot by mail from the department.

(5) DISTRIBUTION OF REFERENDUM BALLOTS. (a) Referendum ballots and related materials shall be prepared and distributed by mail or electronic communication, or at polling places pursuant to par. (e). Every ballot shall be designed and handled so as to insure the secrecy of the producer's or handler's vote. Ballots shall be accompanied by the instructions required under par. (b). Every ballot shall be accompanied by a separate certificate, certifying that the producer or handler is eligible to vote in the referendum. No vote is valid unless accompanied by a certificate of eligibility. Ballots and certificates shall be returned together, but shall be designed and handled so that the department removes and separates the certificates from the ballots before any vote can be examined or counted, so that no vote when revealed can be identified with a certificate.

(b) Every referendum ballot shall be accompanied by instructions to the producer or handler. Instructions shall include:

1. An objective statement of the nature and purpose of the referendum.
2. An explanation of voter eligibility requirements for producers or handlers wishing to vote in the referendum.
3. Instructions for entering a vote on the ballot and returning the certificate of eligibility which accompanies the ballot. Instructions shall state that no vote may be counted unless returned with a valid certificate of eligibility.
4. Instructions for reporting the volume of the affected commodity produced or handled by the voter, if the applicable voting requirement under s. 96.08, Stats., takes volume into consideration. Ballot forms shall be designed and handled so that reported volumes may be tabulated without being identifiable to an individual producer or handler.
5. Instructions for returning the ballot and certificate. If the referendum is to be conducted by mail ballot, the instructions shall include mailing instructions.
6. The time period within which the ballot must be delivered to the department or otherwise cast. Ballots cast by mail shall be postmarked not later than the last day of the referendum period prescribed under sub. (4) (a). Ballots postmarked after the last day of the referendum period are invalid.

(c) Except as provided in par. (e), the department shall mail or send by electronic communication a referendum ballot to every producer or handler who is included on the list of affected producers or handlers compiled by the department under s. ATCP 140.15. The department shall exclude from its mailing list those producers for whom an incorporated cooperative association has been authorized to cast a bloc vote, and who are listed by the cooperative as being represented in the bloc vote. A producer or handler who is not on the department's mailing list, or who did not receive a referendum ballot, may request a ballot from the department. A producer who desires to be excluded from a cooperative's bloc vote may request an individual ballot as provided in sub. (3) (e). The department may require documentation to verify that any person requesting a ballot is eligible to vote in the referendum.

(d) Ballots mailed to producers or handlers under par. (c) shall be mailed first class unless third class mail is approved by the secretary. Outbound envelopes for third class mail shall contain the statement "FORWARDING AND ADDRESS CORRECTION REQUESTED," or the statement "RETURN POSTAGE GUARANTEED." Producers or handlers to whom ballots are mailed shall be provided with postage paid return envelopes, pre-addressed to the department at a post office box reserved exclusively for the receipt of marketing order referendum and election ballots.

(e) If the secretary determines that it would be unreasonably costly or difficult to conduct a referendum by mail or electronic communication, the secretary may direct that ballots be cast at polling places announced by the secretary as provided in sub. (4) (b) 6. The secretary may further direct that ballots be pre-distributed to producers by mail or electronic communication, rather than at the designated polling places.

(6) TABULATION OF BALLOTS. (a) Referendum ballots shall be tabulated by the department, according to procedures set forth in this subsection. Before tabulating ballots, the department shall examine voting certificates to determine the validity of each ballot cast. All referenda, including referenda conducted at polling places, shall be conducted so as to exclude ineligible voters and assure the secrecy of individual votes. Certificates of eligibility shall be obtained from all voters in conjunction with the casting of ballots, but shall be separated from all ballots before any vote is examined or counted, so that no vote can be identified with a certificate of eligibility.

(b) A ballot shall be invalidated before being counted if the department determines that:

1. The ballot was not cast within the prescribed referendum period.

2. The person who cast the ballot was not an eligible voter.
3. The certificate of eligibility required to accompany the ballot was not properly returned.
4. The person casting the ballot was included in a valid bloc vote of an incorporated cooperative association, and did not file a timely request to be excluded from the bloc vote.
5. The ballot duplicates another ballot cast by the same person, or the same business entity.
6. The person casting the ballot failed to report the volume of the affected commodity produced or handled by that person, if that information is required by the applicable voting requirement under s. 96.08, Stats.
7. The ballot was otherwise not properly completed or cast.

(c) Every ballot which is invalidated by the department shall be marked "INVALID," and be subscribed with a notation stating the reason for invalidation. Invalidated ballots shall not be counted in determining the outcome of the referendum but shall be separately counted and recorded by the department as provided in par. (e).

(d) After the department has excluded all invalid ballots, the department shall record the total number of ballots validly cast, the number of valid ballots cast in favor of the referendum proposal, and the number of valid ballots cast in opposition to the referendum proposal. An unmarked ballot shall not be invalidated if otherwise validly cast, and shall be counted among the total ballots validly cast. If the applicable voting requirement under s. 96.08, Stats., takes into consideration the volume of the affected commodity produced or handled by each voter, the volume shall be counted accordingly, based on information supplied by the voter on the ballot or on a related form provided to the voter by the department. Based on validly cast ballots counted and recorded, the department shall apply the applicable voting requirement under s. 96.08, Stats., to determine the result of the referendum.

(e) In addition to recording the validly cast ballots to determine the results of the referendum under par. (d), the department shall separately record:

1. The total number of ballots cast in the referendum, whether valid or invalid.
2. The total number of invalid ballots cast. The department shall identify the principal reasons for which ballots were invalidated, and shall record the number of ballots invalidated for each principal reason cited.

(7) REFERENDUM RESULTS; ANNOUNCEMENT; EFFECT. After the results of the referendum are determined, the secretary shall issue a referendum decision certifying the results. If the proposal to adopt, amend or repeal a marketing order is approved by referendum, the department shall proceed toward adopting the proposal by rule, pursuant to ch. 227, Stats. A proposed rule to adopt, amend or repeal a marketing order is subject to legislative committee review prior to adoption, as provided in ch. 227, Stats., and may be submitted for review prior to referendum. If the proposal is disapproved by referendum, the proceedings to adopt the proposal shall be terminated. Referendum results may not be published or disseminated until the secretary's decision is issued.

(8) INVALIDATION OF REFERENDUM BY SECRETARY. The secretary may invalidate a referendum if the secretary determines that the outcome of the referendum was significantly affected by electioneering practices of the type prohibited under ch. 12, Stats.; by errors or omissions in referendum procedure; or by wrongful claims of voter eligibility. If a referendum is invalidated, the secretary may extend or reschedule the referendum. If the referendum is invalidated because of fraud or prohibited electioneering practices by the sponsors of a marketing order proposal, proceedings to consider the proposal may be terminated.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; **CR 07-067: am. (4) (b) 6., (5) (a), (b) 3., (c), (e), (6) (a) and (b) 3. Register July 2008 No. 631, eff. 8-1-08.**

ATCP 140.20 Election of marketing board. (1) INITIAL ELECTION. Every proposed marketing order shall provide for the establishment of a marketing board, pursuant to s. 96.10, Stats. No marketing order may take effect until a marketing board has been elected. The secretary's decision under s. ATCP 140.18 advancing a proposed marketing order to referendum shall include a call for marketing board nominations, and shall further specify a deadline by which nominations must be filed with the secretary. Marketing board members shall be elected by affected producers or handlers from the list of candidates nominated in accordance with sub. (5), or entered as write-in candidates. If the election results in a tie between candidates, the secretary may determine the winner by means of an impartial method, such as the drawing of lots. The election of marketing board members may be held concurrently with the referendum under s. ATCP 140.19, at the discretion of the secretary.

(2) ELECTION PROCEDURE; GENERAL. The election of marketing board members shall be conducted by the department according to applicable procedures set forth under s. ATCP 140.19 for marketing order referenda. In a marketing board election, as an alternative to sending a ballot to every producer and handler, the department may send to each producer or handler a notice by mail, electronic communication or other effective means explaining how the producer or handler may obtain a ballot. The department may also make other changes in the procedure under s. ATCP 140.19 that are necessary to accommodate relevant differences between a marketing order referendum and an election of marketing board members. Supplementary procedures, not inconsistent with this chapter, may be set forth in the marketing order. A marketing board shall reimburse the department for its costs in conducting an election of marketing board members. Bloc voting is not permitted in the election of marketing board members.

(3) ELECTION DISTRICTS; CONSTITUENCY. Pursuant to s. 96.10, Stats., marketing board members shall be elected by affected producers or handlers according to area, size or any other measure providing for fair representation, as determined under the marketing order and approved by the secretary. Except when marketing board members are to be elected at large, the electoral district represented by each marketing board member shall be set forth in the marketing order, and be identified by the secretary in the secretary's call for marketing board nominations and in the notice of the marketing board election. Separate ballots and voting instructions for affected producers or handlers shall be distributed in each electoral district.

(4) TERM OF OFFICE. Every marketing order shall prescribe the terms of office for marketing board members. A term of office may not exceed 4 years, or be less than one year. A marketing order may prescribe terms of varying lengths for members elected to the initial marketing board, and uniform terms for all members elected thereafter, so that terms will be staggered and a proportionate number of marketing board members will be elected at each regular election.

(5) NOMINATIONS. (a) Only an affected producer or handler may serve as a member of a marketing board, or nominate another affected producer or handler for election to a marketing board. The secretary shall certify the eligibility of all persons nominated for election to a marketing board.

(b) The secretary shall call for nominations for the initial election of members to a marketing board as provided in sub. (1). Nominations for any subsequent election may be called for by the secretary, or by the marketing board as provided in the marketing order, but shall in all cases be filed with the secretary within the time period prescribed in the call for nominations. The call for nominations shall precede the deadline date for the filing of nominations by at least 14 days, and shall announce the availability of nomination forms from the department. Nominations need not be filed on official forms, but shall be filed in writing according to instructions included in the call for nominations.

(c) If an insufficient number of nominations are filed with the secretary during the time period prescribed by the secretary or the marketing board in the call for nominations, the secretary or marketing board may extend the nomination period until sufficient nominations are received to fill the available positions on the marketing board.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; CR 07-067: am. (2) Register July 2008 No 631, eff. 8-1-08.

ATCP 140.21 Producer and handler assessments; rate adjustments. (1) Producer and handler assessments shall be levied at the rates established in the marketing order. A marketing order may provide for a variable assessment rate, to be determined annually by the marketing board, provided the annual rate does not exceed a maximum rate established in the marketing order. An annual adjustment in the variable assessment rate may be made by the marketing board, without a rule amendment under ch. 227, Stats., if approved by a two-thirds vote of the marketing board and by the secretary. If approved by the secretary, the adjusted assessment rate shall take effect on the first day of the marketing board's next fiscal year, provided the marketing board gives notice to affected producers and handlers as required under sub. (3).

(2) No adjustment of a variable assessment rate is effective unless approved by the secretary. A proposed adjustment approved by the marketing board shall be referred to the secretary at least 60 days before the adjustment is intended to take effect, unless the 60 day advance referral requirement is waived by the secretary. The proposal shall be accompanied by a written justification of the adjustment, and by an annual budget proposal which reflects the adjustment. The secretary shall approve or disapprove a proposed adjustment within 30 days after receipt. Pursuant to s. 96.11 (2), Stats., the secretary may disapprove a proposed assessment rate adjustment if the secretary determines that the adjustment violates ch. 96, Stats., or the marketing order.

(3) No adjustment of a variable assessment rate is effective unless the marketing board mails written notice of the adjustment to affected producers and handlers at least 30 days prior to the scheduled effective date, unless this requirement is waived by the secretary. Notice shall be mailed to every producer or handler who paid an assessment during the fiscal year in which the adjustment is approved.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

Subchapter III — Marketing Agreements

ATCP 140.30 Adoption, amendment, and repeal.

(1) Proceedings to adopt, amend or repeal a marketing agreement shall be conducted as rulemaking proceedings under ch. 227, Stats., in accordance with procedures set forth under ss. ATCP 140.10 through 140.20, except as otherwise provided in ch. 96, Stats., or this section.

(2) No marketing agreement may be adopted until the secretary finds that at least 50% of the affected producers or handlers assent to the proposed marketing agreement. The percentage of affected producers or handlers assenting to the proposed marketing agreement shall be determined according to s. ATCP 140.19, except as provided in this section.

(3) Except as provided in s. ATCP 140.35, no marketing agreement may be amended or repealed until the secretary finds that at least 50% of the current assentors to the marketing agreement have assented to the amendment or repeal. Current assentors include current affected producers or handlers who assented to the marketing agreement at the time of its adoption, or at any time subsequent to its adoption pursuant to sub. (4), and who have not withdrawn their assent. The percentage of current assentors who assent to the proposed amendment or repeal shall be determined

according to the procedures under s. ATCP 140.19, except as otherwise provided under this section.

(4) A marketing agreement, once adopted, is binding only upon producers or handlers who assent to the agreement. A marketing agreement shall permit eligible producers or handlers to assent to the marketing agreement at any time after the marketing agreement is adopted. A marketing agreement shall further permit assenting producers or handlers to withdraw their assent at the end of each year by giving the secretary advance notice in writing of their intent to withdraw. To be effective, notice of withdrawal shall be given to the secretary at least 30 days prior to the anniversary date of the agreement, except as otherwise provided in the marketing agreement. A withdrawal of assent shall be effective on the anniversary date of the marketing agreement, following written notice as provided in this subsection.

(5) In an assent proceeding under this section, the department shall distribute assent forms on which affected producers or handlers may certify their eligibility to participate in the assent proceeding, and signify their assent to the proposed adoption, amendment or repeal of a marketing agreement. The assent forms serve in place of ballots and certificates of eligibility under s. ATCP 140.19. The secret ballot requirements of s. ATCP 140.19 do not apply to assent proceedings under this subsection.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.31 Marketing agreement provisions.

A marketing agreement may include only those provisions enumerated under s. 96.04 (2), Stats. A marketing agreement may not include any provision which is authorized solely for marketing orders under s. 96.03 (2), Stats. Marketing agreement fees collected by the department under s. 96.04 (2) (f), Stats., and s. ATCP 140.33 may be used only to compensate the department for costs incurred by the department in the administration and enforcement of the marketing agreement. Fees may not be used for any other purpose.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.32 Marketing agreement councils.

(1) **GENERAL.** The secretary shall appoint a marketing agreement council if a council is authorized by the marketing agreement. The marketing agreement shall specify the number of council members and all requirements related to their selection, term of office, and duties. Duties of a marketing agreement council shall include, but not be limited to those set forth in s. 96.09 (2), Stats.

(2) **QUALIFICATIONS.** A marketing agreement council member shall be an affected producer or handler who has assented to the marketing agreement. A new council member shall be appointed to fill the unexpired portion of the term of office of any council member who fails to meet the qualifications for serving on the council.

(3) **TERM OF OFFICE.** Each marketing agreement shall set forth the term of office for marketing agreement council members. A term of office may be not less than one nor more than 4 years. Initial terms of office may extend for varied lengths of time to allow for regular staggered terms over the duration of the marketing agreement.

(4) **NOMINATIONS.** Procedures for nominating affected producers or handlers for appointment to the council may be set forth in the marketing agreement or by the secretary. The call for nominations shall be published by the secretary at least 14 days prior to the deadline date for filing of nominations. The call for nominations shall be published in a statewide press release issued by the department. An advance notice, announcing the impending call for nominations, shall also be published in a statewide press release, issued at least 10 days prior to the publication of the call for nominations. The department may publish additional notices to specifically affected areas or persons. Nominations shall be

filed with the secretary within the time period specified in the call for nominations.

(5) APPOINTMENTS. The secretary may appoint members to the marketing agreement council from those persons nominated in accordance with sub. (4).

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.33 Marketing agreement administration; fees. The department shall administer every marketing agreement adopted under ch. 96, Stats. Pursuant to s. 96.04 (2) (f), Stats., every marketing agreement shall include provisions for the collection of fees from affected producers or handlers as reimbursement for costs incurred by the department in the administration and enforcement of the marketing agreement. A written schedule of fees shall be established by the secretary, and distributed to affected producers or handlers. Fees shall be assessed against affected producers or handlers on an equitable basis. Fees may include reimbursement for general overhead and operating expenses of the department which are reasonably attributable to the administration of the marketing agreement. Affected producers or handlers shall be liable for the payment of fees in the manner set forth in the marketing agreement. Fees due from affected producers or handlers under any marketing agreement shall constitute a personal debt of the producer or handler, collectable pursuant to s. 96.17, Stats. The department shall notify producers or handlers of changes in a fee schedule at least 60 days prior to the beginning of the fiscal year in which the change becomes effective.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.34 Records and audits. The department shall keep separate records of all fees received and deposited and all expenses incurred in the administration of each marketing agreement. The department shall prepare an annual operating statement, and review annually all receipts and expenses for each marketing agreement. A copy of the annual operating statement shall be made available to affected producers or handlers within 120 days after the close of the fiscal year.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.35 Suspension of marketing agreements. The secretary may suspend a marketing agreement if after public hearing, the secretary determines that the marketing agreement cannot be reasonably enforced, or is contrary to the purposes of ch. 96, Stats.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

Subchapter IV — Marketing Board Organization and Operation; Procedures

Note: Marketing boards are incorporated as nonstock, nonprofit corporations under ch. 181, Stats., and are authorized to administer marketing orders under ch. 96, Stats. Under ch. 96, Stats., the department is not directly involved in the administration of marketing orders, but is authorized to monitor marketing board operations for compliance with law.

ATCP 140.40 Articles of incorporation and bylaws. Every marketing board shall adopt articles of incorporation and bylaws, as provided in s. 96.10 (3), Stats. Proposed articles of incorporation, bylaws, and amendments to bylaws shall be developed in consultation with the secretary, and shall be submitted to the secretary for review prior to final adoption. No articles of incorporation may be filed with the department of financial institutions or become effective until approved by the secretary. The secretary may disapprove proposed articles of incorporation or bylaws if the secretary determines that the proposed articles of incorporation or bylaws are inconsistent with ch. 96, Stats., the marketing order or this chapter, or otherwise violate applicable law. No articles of incorporation may be approved by the secretary until the articles of incorporation meet the requirements of s.

96.10 (3), Stats., and s. ATCP 140.49 (6) concerning procedures for assuring the confidentiality of business information.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85; CR 04-005: am. Register October 2004 No. 586, eff. 11-1-04.

ATCP 140.41 Written operating procedures; general. (1) Every marketing board shall adopt written operating procedures to govern essential operations of the marketing board, including the procedures required under sub. (2). Operating procedures may be adopted as bylaws. Proposed operating procedures shall be filed with the secretary for review prior to adoption by a marketing board. Operating procedures shall conform to ch. 96, Stats., the marketing order and this chapter.

(2) The written operating procedures of a marketing board shall include provisions for:

(a) Receiving and depositing assessments.

(b) Collecting assessments from producers and handlers, pursuant to s. ATCP 140.51.

(c) Receiving and acting upon requests by producers or handlers for assessment refunds pursuant to s. ATCP 140.50, if the marketing order provides for refunds.

(d) Developing and adopting annual budgets and approving expenditures, pursuant to ss. ATCP 140.42 and 140.45.

(e) Soliciting and evaluating project proposals, and reviewing the progress and results of projects funded by the marketing board.

(f) Protecting the confidentiality of business information pertaining to producers and handlers under s. ATCP 140.49 (6). This is in addition to procedures required to be set forth in the articles of incorporation under s. 96.10 (3), Stats.

(g) Monitoring compliance with the marketing order by producers and handlers, reviewing compliance problems, and referring compliance problems to the department for appropriate action pursuant to ch. 96, Stats., and this chapter.

(h) Preparing and disseminating the annual report of the marketing board, pursuant to s. ATCP 140.46 (4).

(i) Calling for nominations to fill a membership vacancy on the marketing board, pursuant to ch. 96, Stats., this chapter and the marketing order.

(j) The custody, handling and disposition of marketing board documents and records, pursuant to s. ATCP 140.49.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.42 Annual budget. (1) **REQUIREMENT.** Every marketing board shall adopt a budget for each fiscal year. The budget shall comply with the requirements of this section. The marketing board shall adopt and file the budget with the secretary prior to the start of the fiscal year, or prior to contracting for any expenditure which was not contracted for during the preceding fiscal year. The fiscal year shall begin on July 1 of each year except as otherwise provided in the marketing order or bylaws of the marketing board. The marketing board may not expend or contract for the expenditure of moneys until the budget is filed, unless the expenditures were properly contracted for during the preceding fiscal year. No expenditure may be made or committed by a marketing board except pursuant to a budget filed under this subsection, except as provided under sub. (6). A marketing board may continue to meet normal administrative operating and overhead expenses and prior contractual obligations pending the timely filing of its budget and pending review of the budget by the secretary under sub. (4).

(2) **CONTENTS.** The marketing board's annual budget shall include:

(a) A statement of projected annual receipts, including a separate statement of each of the following:

1. Projected receipts from producer and handler assessments, and the specific assumptions or methods by which the projection was derived.

2. Surplus receipts carried over from the preceding fiscal year, if any.

3. Other projected receipts, if any, and the sources of the receipts.

(b) A statement of projected annual expenditures. Projected expenditures shall be categorized by program objective, pursuant to s. 96.03, Stats., and the marketing order. General overhead and operating expenditures, if not identifiable to a program objective, may be set forth in a separate expenditure category. Within each expenditure category, the budget shall identify the nature and amount of proposed expenditures. Expenditures for salaries, supplies, travel expenses, or other routine overhead and operating expenses incurred in the ordinary course of program operations may be budgeted as a maximum authorized total for each expenditure subcategory. Expenditure subcategories shall be identified to facilitate budget review under sub. (4). The proposed budget shall include a description of proposed contract expenditures, including the nature of each proposed expenditure, the specific program objective toward which the proposed expenditure is directed, and the identity of the proposed contract recipient if known.

(c) A reasonable contingency reserve consisting of a projected surplus of receipts over expenditures, sufficient to protect the marketing board against unforeseen revenue shortages or cost increases, or other unforeseen contingencies which may affect the accuracy of the budget projections and the ability of the marketing board to meet its payment obligations.

(3) BUDGET AMENDMENTS. A marketing board shall file a budget amendment with the secretary if, at any time during the fiscal year, the marketing board anticipates a significant change in the previously submitted budget. The secretary may require a marketing board to submit a current, revised budget at any time during the fiscal year.

(4) BUDGET REVIEW. The department shall review marketing board budgets and budget amendments for compliance with ch. 96, Stats., and this chapter. Pursuant to s. 96.11 (2), Stats., the secretary may disapprove a budget or a proposed expenditure if the secretary determines that the budget fails to comply with the requirements of this subsection, or that the proposed expenditure violates s. ATCP 140.47. Written notice of disapproval shall be issued to the marketing board within 30 days after the budget or budget amendment is submitted to the secretary. Notice shall specify the reasons for disapproval, and the budget provisions or proposed expenditures which are disapproved. Failure to disapprove a budget or budget amendment within 30 days does not prevent the secretary from disapproving the budget or budget amendment at a later time, if the disapproval is based on information which was not available to the secretary during the original 30-day review period, and if the information reveals that the budget or budget amendment is not in compliance with ch. 96, Stats., or this chapter. No marketing board may make or contract for any expenditure which is disapproved under this subsection, or which is proposed pursuant to a disapproved budget.

(5) ADDITIONAL INFORMATION. The secretary may require a marketing board to file additional information which the secretary deems necessary for the review of a marketing board budget or expenditure under this subsection. The secretary may disapprove a budget or proposed expenditure upon failure of a marketing board to submit the required information.

(6) WAIVER; FIRST YEAR OF MARKETING BOARD OPERATIONS. The secretary may waive the filing of an annual budget for the first fiscal year of marketing board operations, provided that the marketing board submits its proposed contracts and expenditures for review by the secretary as they are proposed during the fiscal year. Additional conditions may be established at any time, if deemed necessary by the secretary. The secretary may disapprove a proposed expenditure if the secretary determines that the proposed expenditure violates s. ATCP 140.47. No marketing board may

expend or contract for any expenditure of moneys if the proposed expenditure has been disapproved by the secretary.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.43 Record of expenditures. Every marketing board shall maintain a written or retrievable computerized record of each expenditure of moneys by the marketing board. The record shall identify the amount of the expenditure, the recipient, and the purpose for which the expenditure was made. Records shall be kept on file by the marketing board for at least 7 years, and be made available for inspection, copying and audit by the department. Upon termination of a marketing order, all records shall be filed with the department.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.44 Written contracts. (1) REQUIREMENT. All expenditures of marketing board funds shall be made pursuant to a written contract or purchase order, except for budgeted expenditures for employee salaries, supplies, travel expenses, and other overhead and operating expenses incurred by a marketing board in the ordinary course of its operations.

(2) CONTENTS. Every contract or purchase order under this section shall include:

(a) The names and addresses of the contracting parties.

(b) A specific description of the materials to be provided, or the services to be performed under the contract or purchase order.

(c) The time period for contract performance.

(d) The amount to be paid by the marketing board under the contract or purchase order, the time of payment, and any applicable terms and conditions of payment. If a contract or purchase order provides for payment out of funds receivable by a marketing board in any future fiscal year, other than the current budgeted fiscal year, the contract or purchase order shall be made contingent on the availability of revenues for the contract or purchase order in the future fiscal year.

(e) A provision whereby the contractor agrees to provide documentation which may be reasonably necessary for the marketing board to review contract performance. The secretary may direct a marketing board to review a contractor's contract performance, and provide answers to specific questions asked by the secretary. Marketing boards may be audited by the department at the discretion of the secretary to determine whether expenditures under contracts executed by the marketing board are in accordance with s. ATCP 140.47 or ch. 96, Stats.

(f) Any other provision which the secretary may require prior to the execution of a contract or purchase order, including a provision requiring a contractor to:

1. Maintain segregated accounts for moneys received from a marketing board, if necessary, to assure that expenditures are made in accordance with ch. 96, Stats., and s. ATCP 140.47.

2. Use generally accepted accounting principles when accounting for moneys received from a marketing board.

3. Adhere to specified restrictions on the use of funds, in accordance with s. ATCP 140.47 or other applicable law.

4. File interim and final reports with the marketing board on contract performance.

5. File with the marketing board a copy of the contractor's annual financial statement or security for performance.

(3) CONTRACT RECORDS; INSPECTION. Contracts and purchase orders shall be made available for inspection, copying and audit by the department. Proposed contracts and purchase orders shall be made available for inspection by the department prior to execution, if requested by the secretary. Contracts and purchase orders shall be kept on file with the marketing board for at least 7 years after the completion date specified in the contract or purchase

order. Upon termination of a marketing order, all contracts and purchase orders shall be filed with the department.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.45 Expenditure authorizations. (1) PERSONS AUTHORIZED. No person may expend, or contract for the expenditure of moneys on behalf of a marketing board except under a direct written delegation of authority from the marketing board. Upon request by the secretary, a marketing board shall identify every person who is authorized to expend or contract for the expenditure of moneys on behalf of the marketing board.

(2) APPROVAL OF EXPENDITURES. No person, including any person authorized under sub. (1), may expend or contract for the expenditure of moneys on behalf of a marketing board unless the expenditure has been specifically approved by the marketing board. Procedures for the approval of expenditures shall be set forth in the bylaws of the marketing board. A marketing board may, by means of a budget authorization, grant prospective approval for routine overhead or operating expenditures, and may delegate authority to a bonded officer or employee to make individual payments or expenditures pursuant to the budget authorization. The budget authorization shall specify the nature of the authorized expenditures, the maximum total expenditure authorized in each expenditure subcategory, and the time period to which the authorization is applicable. The marketing board shall adopt bylaws or written procedures for the exercise of delegated expenditure authority by a bonded officer or employee, including any required requisition and voucher procedures.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.46 Accounting systems; audits; reports.

(1) ACCOUNTING SYSTEM. Every marketing board shall maintain a complete accounting system for the management of marketing board receipts and expenditures. Accounting procedures shall conform to generally accepted accounting principles. Accounting systems shall provide for the periodic generation of balance sheets, income statements, statements of account balances, and other indicators of marketing board financial position. A marketing board shall provide the secretary with such reports of a marketing board's financial position as the secretary may require.

(2) AUDITS. (a) Marketing board receipts, expenditures, accounts and fiscal operations shall be independently audited on an annual basis by a certified public accountant, in accordance with generally accepted accounting and audit principles. The audit shall include a review of compliance with applicable law, and with the established bylaws and procedures of the marketing board. The results of the audit shall be filed with the secretary within 120 days after the end of the marketing board's fiscal year.

(b) Marketing board receipts, expenditures, accounts, fiscal operations, and all other records and operations of a marketing board may be audited by the department at any time, for the purpose of ascertaining compliance with applicable law. The department may exercise its authority under ch. 93, Stats., in support of its audit.

(3) FINANCIAL STATEMENTS. Every marketing board shall prepare a year-end financial statement, independently audited and certified by a certified public accountant. The financial statement shall be filed with the secretary within 120 days after the end of the marketing board's fiscal year.

(4) ANNUAL REPORTS. Every marketing board shall prepare an annual report on marketing board operations for each fiscal year, to be published at the conclusion of the fiscal year. The annual report shall include, at a minimum, a description of the projects funded during the year, the progress or results of each funded project, and the audited financial statement prepared under sub. (3). The annual report shall be filed with the secretary within 120 days after the end of the fiscal year. The annual report shall be made available for inspection and copying by the public. Within 180 days after the end of the fiscal year, the marketing board shall

either mail a free copy of the annual report to each affected producer or handler, or publish notice to affected producers and handlers informing them that the annual report is available for free distribution to affected producers and handlers upon request.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.47 Prohibited expenditures and business practices. A marketing board may not:

(1) Expend, or contract for the expenditure of moneys:

(a) For any purpose which is not authorized under ch. 96, Stats., and the marketing order, or which is inconsistent with ch. 96, Stats., and the marketing order.

(b) In violation of ch. 96, Stats., the marketing order or this chapter.

(c) Whose aggregate amount exceeds the annual receipts of the marketing board for the fiscal year in which the expenditures occur. Annual receipts, for purposes of this paragraph, include any surplus receipts carried over from the preceding fiscal year. This paragraph does not prohibit a marketing board from contracting for the expenditure of anticipated receipts during the current fiscal year in which the receipts are anticipated, if the expenditure is budgeted and approved in compliance with ss. ATCP 140.42 and 140.45. A marketing board shall periodically review its projections of anticipated receipts during the fiscal year, to determine whether the projections are accurate, and whether any adjustment of proposed expenditures may be necessary to comply with this paragraph.

(d) To promote or fund any other marketing order. This does not prohibit joint funding of marketing order projects and programs with other marketing boards.

(e) To influence state or federal legislation or rulemaking. This does not prohibit any of the following activities, unless the secretary determines that expenditures for activities are excessive in relation to the purposes for which the marketing order is created:

1. The publication and distribution of information describing the programs, activities and accomplishments of the marketing board.

2. The publication and distribution of information related to any proposal under subch. I for the amendment or repeal of the marketing order, if the information is published and distributed prior to the secretary's decision under s. ATCP 140.18 advancing the proposed amendment or repeal to a referendum of producers or handlers.

3. Communication by a marketing board member or employee with any state public official or employee concerning the proposed amendment or repeal of the marketing order, or concerning any other rulemaking which is directly related to the marketing order.

4. The publication and distribution of information concerning an impending advisory referendum on the marketing order, provided that the marketing board does not directly recommend or suggest how producers or handlers should vote in the advisory referendum.

(f) For salaries, administrative expenses, travel expenses or personal expenses, except those which are reasonable and necessary for the operation of the marketing board, or which are a reasonable and necessary incident to the performance of administrative or contract services for the marketing board.

(g) For any market development program which makes false or unwarranted claims on behalf of an affected commodity or disparages the quality, value, sale or use of any other agricultural commodity.

(h) For any market research or development program which makes reference to, or which exclusively promotes a private brand or trade name of the affected commodity.

(2) Expend or contract for the expenditure of moneys if the expenditure is exclusively or primarily intended to promote an individual private interest without regard to the general interest of

producers or handlers of the affected commodity. This does not prohibit the expenditure of moneys for the general benefit of affected producers or handlers where the expenditure also has incidental benefits to an individual private interest.

(3) Make any loan or extend credit. This does not prohibit a marketing board from depositing moneys in a savings and loan association, state bank, savings and trust company, mutual savings bank, or national bank in this state which receives or holds public deposits pursuant to ch. 34, Stats.

(4) Engage in the purchase or sale of agricultural commodities. This does not prohibit limited and occasional purchases of agricultural commodities, or limited and occasional sales of agricultural commodities at cost, where the purchase or sale is incidental to the conduct of a research, educational or promotional program under ch. 96, Stats., and the marketing order.

(5) Engage in the business of selling goods or services. This does not prohibit the occasional sale of educational or promotional materials at cost, where the sale is incidental to the conduct of an educational or promotional program under ch. 96, Stats., and the marketing order.

(6) Make any gift or gratuitous payment for which the recipient gives no bona fide consideration.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.48 Administrative services provided by department. (1) Pursuant to s. 96.10 (5), Stats., a marketing board may request the department to provide administrative services to the marketing board in the administration of a marketing order. This does not prohibit a marketing board from employing its own staff, or contracting with other persons for the provision of administrative services to the marketing board. Administrative services provided by the department may include accounting, clerical, financial, managerial, printing and secretarial services. A marketing board shall reimburse the department for all costs incurred by the department, pursuant to a written contract between the marketing board and the department. Reimbursed costs shall include overhead and operating costs which may be reasonably attributed to the administrative service. The department shall record and account for all administrative service costs incurred by the department, according to generally accepted accounting principles.

(2) All contracts or agreements for the provision of administrative services to a marketing board shall be in writing. Contracts under this subsection shall comply with s. ATCP 140.44. Contracts with the department need not comply with s. ATCP 140.44 (2) (e). This subsection does not require a marketing board to have written contracts with its employees.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.49 Marketing board meetings; records. (1) **FILING OF MINUTES.** Within 15 days after every meeting of a marketing board or a formally constituted subunit of a marketing board, the marketing board shall file complete minutes of the meeting with the secretary.

Note: Every meeting of a "governmental body" is subject to the Wisconsin open meeting law, ss. 19.81 through 19.98, Stats. Under s. 19.82 (1), Stats., a "governmental body" includes a state or local "agency, board, committee, council, department or public body corporate and politic created by constitution, statute, rule or order; a governmental or quasi-governmental corporation; or a formally constituted subunit of any of the foregoing..."

(2) **CUSTODY OF RECORDS; GENERAL.** Every marketing board, and every officer and employee of a marketing board shall safely keep and preserve all documents and records which are lawfully in the possession or custody of the marketing board. Every marketing board shall adopt written bylaws or procedures to govern the custody, handling and disposition of marketing board documents and records. Proposed bylaws and procedures shall be filed with the secretary for review by the department prior to adoption.

Note: Under the Wisconsin public records law, ss. 19.31 through 19.35, Stats., members of the public have certain rights to inspect and copy records which are in the possession of an "authority." Under s. 19.32 (1), Stats., an "authority" includes a

"... board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance rule or order ...," and also includes a "quasi-governmental corporation."

(3) **DISPOSAL OF RECORDS; AUTHORIZATION.** No marketing board may dispose of documents or records except under a specific records disposal policy adopted by the marketing board. The policy shall be adopted in writing, and specify the types of records for which disposal is authorized, the length of time each type of record must be kept prior to disposal, and the disposal procedures to be observed. Proposed records disposal policies shall be filed with the department for review prior to adoption. The secretary may disapprove a proposed records disposal policy if the policy may impede the administration of ch. 96, Stats., or otherwise adversely affect the public interest. No bylaw or procedure authorizing the disposal of records is effective if disapproved by the secretary.

(4) **RECORDS TO BE FILED WITH DEPARTMENT UPON TERMINATION OF MARKETING ORDER.** Upon termination of a marketing order, all documents and records of the marketing board shall be filed with the department.

(5) **RECORDS FILED WITH DEPARTMENT; PUBLIC ACCESS.** (a) No marketing board may fail or refuse to file a document or record with the department as provided under ch. 96, Stats., or this chapter on the ground that the document or record is protected from public inspection by law. If a marketing board determines that a document or record required to be filed with the department is protected from public inspection by law, the marketing board shall give written notice to the department identifying that information which, in the opinion of the marketing board, is protected from public inspection. Notice shall further specify the legal grounds on which the information may be withheld from public inspection.

(b) The department shall promptly notify a marketing board of any public request for inspection of marketing board documents or records on file with the department, if the documents or records have been designated as confidential by the marketing board under par. (a).

(c) The department may make available to the public upon request, for inspection and copying, any marketing board documents or records which are on file with the department if the department determines that disclosure is required by law, notwithstanding the contrary request of the marketing board. In making the decision, the department shall consider the notice and request of a marketing board under par. (a). If the department determines that disclosure is required by law, the department shall give the marketing board reasonable notice prior to disclosure.

(6) **CONFIDENTIAL BUSINESS RECORDS.** (a) Information obtained by a marketing board under ch. 96, Stats., relating to the individual businesses of producers and handlers shall be kept on a confidential basis, pursuant to s. 96.20 (5), Stats. Confidential business information includes names and addresses or any production, sales, price or purchase data which are identifiable to an individual producer or handler, and any aggregate summary or analysis of individual business information which, if disseminated to marketing board members or others, may have the effect of restraining trade, or conferring a competitive advantage on any person. Confidential business information under this subsection shall not be disclosed either to the public or to marketing board members. This prohibition applies at all times, and is applicable during any marketing board consideration of compliance and collection problems pertaining to producers and handlers. This paragraph does not prohibit the required disclosure of confidential business information in a court proceeding, or the disclosure of confidential business information to the department pursuant to a contract for administrative services or a request for collection or enforcement action.

(b) The duty to maintain the confidentiality of business records under this subsection applies to the marketing board, the department, and all employees and agents of a marketing board, including all suppliers of administrative services to the marketing board.

Every contract between a marketing board and its agent, whereby the agent may acquire access to confidential business information, shall clearly set forth the agent's duty to keep the information confidential, and include adequate procedures to insure confidentiality.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.50 Refund of assessments. If a marketing order provides for the refund of producer assessments pursuant to s. 96.13 (2), Stats., the marketing board shall adopt written forms and procedures to be used by affected producers in filing refund claims. Claim forms shall be promptly mailed to producers or handlers upon request. Refund procedures shall comply with s. 96.13 (2), Stats. No refund may be paid on a claim which is filed with the marketing board more than 90 days after the assessment became due and payable.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.51 Collecting assessments; reports by producers and handlers; audit of amounts due. (1) COLLECTION PROCEDURE; GENERAL. The marketing board is responsible for the receipt and collection of assessments from affected producers and handlers under a marketing order, except as otherwise provided in ch. 96, Stats., and this chapter. Any assessment which is due and payable by an affected producer or handler under the marketing order constitutes a personal debt of the producer or handler, as provided in s. 96.17 (1), Stats. Each marketing board shall adopt and file with the secretary written procedures and forms to govern the collection of assessments from affected producers and handlers. Procedures may include the preliminary collection procedures set forth under sub. (2). Procedures shall comply with applicable law, and with the provisions of s. 427.104, Stats. If a marketing board is unable, through the use of preliminary collection procedures, to obtain payment of assessments which are due and payable from a producer or handler, the marketing board may request action by the secretary under s. 96.17, Stats. The request shall be accompanied by evidence and documentation substantiating the existence and amount of the debt, the identity and address of the debtor, and the fact that the marketing board has exhausted its preliminary collection procedures. Pursuant to s. 96.17, Stats., the secretary may impose an assessment surcharge not exceeding 10% of the assessment to cover the department's costs of collection, and may bring a civil action against the debtor under sub. (3) to collect the assessment and surcharge. The secretary shall give the debtor at least 10 days advance written notice, by mail, of any intended civil action under this paragraph. Notice shall include a statement of any assessment surcharge imposed by the secretary under s. 96.17, Stats.

(2) PRELIMINARY COLLECTION PROCEDURES. Sequential procedures used by a marketing board in the collection of marketing order assessments may include the issuance of:

- (a) A generalized or personalized reminder letter.
- (b) A personalized warning letter.
- (c) A final demand letter, setting forth the facts and circumstances giving rise to the final demand, and stating a final deadline for payment. The final demand letter shall be personally addressed to the debtor and sent by certified mail. In its final demand letter, a marketing board may notify the debtor of the actions which will be requested by the marketing board under s. 96.17 (1), Stats., in the event of nonpayment. A marketing board may not threaten a producer or handler with any civil forfeiture or criminal action for nonpayment of assessments, or threaten to request either action of the department.

(3) COURT ACTION TO COLLECT ASSESSMENTS. Upon written request of a marketing board, the secretary may bring a civil action pursuant to s. 96.17 (1), Stats., for the collection of unpaid marketing order assessments, together with any assessment surcharges imposed by the secretary under s. 96.17 (1), Stats. No court action for the collection of assessments may be brought by a marketing

board on its own behalf, or by the secretary except upon specific request of a marketing board. The decision to take action under s. 96.17 (1), Stats., is discretionary with the secretary. Before bringing any court action to collect assessments, the secretary shall review the adequacy of the marketing board's preliminary collection procedures under subs. (1) and (2).

(4) REPORTS BY PRODUCERS AND HANDLERS. Pursuant to s. 96.14 (1), Stats., a marketing board may request a producer or handler to file with the marketing board such information or reports as may be necessary to determine or verify the assessment amounts which may be due and payable by the producer or handler under the marketing order. If a producer or handler fails or refuses to submit information or reports upon request of a marketing board, the marketing board may request the department to exercise its authority under ch. 93, Stats., and s. 96.14 (1), Stats., to compel submission of the required information or reports to the department. The exercise of the department's authority is discretionary with the department.

(5) AUDIT OF PRODUCERS AND HANDLERS. (a) Department audit; request by marketing board. A marketing board may request the department to audit any producer or handler, for the purposes set forth in par. (b), if the marketing board reasonably believes that the producer or handler may be an affected producer or handler. The request shall specify the purposes for which the audit is requested. The department may conduct a requested audit at its discretion, for the purposes set forth under par. (b). Pursuant to an audit under this subsection, the department may require a producer or handler to produce documents and records, and may otherwise exercise its authority under ch. 93, Stats., and s. 96.14, Stats. The marketing board shall reimburse the department for all costs incurred by the department in conducting the audit, including general overhead and operating expenses which are reasonably attributable to the audit service.

(b) Audit purposes. A producer or handler may be audited by the department under this subsection for any of the following purposes:

1. To determine whether the producer or handler is an affected producer or handler under ch. 96, Stats., and the marketing order.
2. To determine or verify the assessment amounts which may be due and payable by the producer or handler under the marketing order.
3. To determine or verify the accuracy of any report or claim submitted by the producer or handler to the marketing board.
4. To determine whether the producer or handler has paid the full amount of assessments which are due and payable by the producer or handler under the marketing order.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.

ATCP 140.52 Marketing board code of ethics. No member, employee or agent of a marketing board may:

(1) Use his or her position with the marketing board, or the prestige or influence of that position, to obtain financial gain or anything of substantial value for his or her private benefit, or for the benefit of his or her immediate family, or an organization with which he or she is associated. Financial gain, for purposes of this paragraph, does not include salaries or other normal compensation received from the marketing board by the employee, agent or marketing board member.

(2) Solicit or accept from any person or organization, directly or indirectly, anything of value if the thing of value:

(a) Could reasonably be expected to influence the actions or judgment of the marketing board member, employee or agent, in his or her capacity as a member, employee or agent of a marketing board; or

(b) Could reasonably be considered as a reward for any action or inaction by the marketing board member, employee or agent,

acting in his or her capacity as a member, employee or agent of the marketing board.

(3) Intentionally use or disclose information gained in the course of or by reason of his or her position as a member, employee or agent of a marketing board in any way that could result in the receipt of anything of value by him or her, by his or her immediate family, or by any other person or organization with which he or she is associated, if the information is not public information and has not been communicated to the public.

(4) Use or attempt to use his or her position as a member, employee or agent of a marketing board to influence or gain unlawful benefits, advantages or privileges for himself or herself, or for others.

Note: According to unpublished opinions of the attorney general, dated September 16, 1983 and January 30, 1984, marketing board members are public officers within the meaning of s. 946.13, Stats., which provides in part as follows:

946.13 (1) Any public officer or public employee who does any of the following is guilty of a Class E felony:

(a) In the officer's or employee's private capacity, negotiates or bids for or enters into a contract in which the officer or employee has a private pecuniary interest, direct or indirect, if at the same time the officer or employee is authorized or required by law to participate in the officer's or employee's capacity as such officer or employee in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer's or employee's part; or

(b) In the officer's or employee's capacity as such officer or employee, participates in the making of a contract in which the officer or employee has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's or employee's part.

History: Cr. Register, November, 1985, No. 359, eff. 12-1-85.