



Marketing Orders, Organizations, and Associations

This document provides an overview of the legal issues on commodity regulations, in particular price-setting and gear use restrictions. First, it presents the definition and legality of *marketing orders* for commodity-based industries, such as agriculture and fisheries. It also investigates the legal powers and responsibilities of *marketing organizations* in relation to establishing collective price-setting and gear use restrictions. Price-setting is generally prohibited under the Sherman Antitrust Act. Lastly, this document looks at limited antitrust exemptions provided to *marketing associations* under the Fishermen's Collective Marketing Act.

1. Marketing Orders

A *marketing order* is defined by the California Marketing Act of 1937 (FAC 58601-59603) as: "an order which is issued by the director...prescribes rules and regulations that govern the processing, distributing, or handling in any manner of any commodity within this state during any specified period." Marketing orders are the legal rules and regulations that establish Market Advisory Boards, Councils, and Commissions (i.e. marketing organizations) under the California Food and Agriculture Code (FAC 58841) (State of California Department of Food and Agriculture Marketing Branch 2007).

2. Marketing Organizations

A *marketing organization* provides agricultural and seafood producers and handlers an organizational structure, operating under government sanction, which allows them to solve production and marketing problems collectively that they could not address individually. Primary responsibilities of a marketing organization may include commodity promotion, research, maintenance of quality standards, and advising the Fish and Game Commission on management (FAC 63901-63905)(See "Case Studies of Existing Advisory Bodies for Select Marine Resources" for more details on specific organizations, such as the California Sea Urchin Commission and the California Salmon Council).

Price-setting

In general, collective price-setting is prohibited by the federal Sherman Antitrust Act (15 USC 1-27). The purpose of this law is to minimize anti-competition activities, such as agreements by some to sell the same product at the same price, which will place other competitors at a disadvantage. In accordance with the Antitrust Act, none of the rules and regulations in the California Food and Agriculture Code (FAC) on marketing organizations (Section 63901-93905) state directly to the ability for marketing organizations to establish volume control and collective price-setting. The closest language that indicates marketing organizations' potential authority to set prices is that their responsibilities include:

- "elimination of tariff and nontariff trade barriers" (63901.3.b)
- "industry self-regulation to establish and maintain grade, size, and maturity standards and to stabilize the flow of product to market" (63901.3.i).

According to FAC, marketing organizations (with approval from the director) can also make marketing agreements. The California Salmon Council, for example, has a provision in FAC that allows the Council



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to “make contracts and other agreements that may be proper to promote the sale of salmon and salmon products on either a local, state, national, or international basis”(76750.f). Prior to the issuance of any market agreements, however, the director of a marketing organization must ensure the agreement has been approved by a sufficient number of handlers who contribute sufficient funding toward carrying out the agreement (FAC 58746). According to the Antitrust Act and language of the California FAC, marketing organizations may have limited to no legal authority to make marketing agreements regarding price-setting.

Gear Use Restrictions

Although no rules or regulations on gear use restrictions have been included in FAC’s sections on marketing orders and marketing organizations, the California Marketing Act of 1937 does state that “a marketing order may contain provisions for limiting the total quantity of any commodity, or of any grade, size, or quality of it” that is produced, handled, and processed (FAC 58883-58886; State of California Department of Food and Agriculture Marketing Branch). These rules and regulations may be inferred as potential legal authority for a marketing organization to establish or link gear use with restrictions for commodity extraction.

3. Marketing Associations

While federal antitrust laws prohibit price-setting for most industries, the Fishermen’s Marketing Act of 1934 (15 USC 521) provides limited protection for fishery-based marketing associations or cooperatives from antitrust scrutiny. FCMA defines a marketing association as any “persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds” (15 USC 521). A marketing association is further defined by the California Salmon Council (a marketing organization) as:

Any commercial fishermen's organization established on either a local, county, or statewide level, incorporated in this state, to enable fishermen to collectively negotiate and issue orders and agreements with receivers for the purchase of their catches, or to otherwise engage in activities permitted of agricultural cooperatives. (FAC 76540)

According to Kitts and Edwards in *Cooperatives in US Fisheries: realizing the potential of the fishermen's collective marketing act*: “cooperative (or association) members may agree on terms of sale and on minimum prices that they will accept for products...A representative of the cooperative may also negotiate and enter into agreements with a single buyer” (Kitts and Edwards 2003). A cooperative or marketing association, however, is not exempt from all antitrust regulation. The FCMA provides explicit rules on what associations can or cannot do, as following (15 USC 521):

- a. associations must be operated “for the mutual benefit of their members”;
- b. no association member is allowed more than one vote;
- c. association members may not pay dividends of greater than 8% per year; and
- d. members cannot “deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.”

Typically, marketing organizations and associations operate in close collaboration. For example, a marketing association may support a marketing organization through activities such as nominating



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candidates as industry representatives (e.g. Salmon Council member), and providing input on industry assessment fee changes (FAC 76702 and 76705).

Case Study of Antitrust Exemption: Oregon Commercial Crab Fishery

The following case study on the Oregon commercial crab fishery demonstrates the limits of antitrust exemption as it relates to marketing associations, as well as the uncertainty and potential conflict between federal and state antitrust laws.

In 1995-1996, the Oregon Department of Justice (DOJ) reviewed an agreement among Oregon fishermen to set a single minimum, "coast-wide," price on commercial crab. In addition, DOJ investigated unlawful coercion by fishermen against non-cooperative fishermen to agree on this price. Drawing upon the FCMA, DOJ ruled that fishermen can "voluntarily agreeing among themselves on a single price in order to facilitate negotiations with the processors on the price of their catch" (Oregon DOJ 1996). However, it also decided that a cooperative or marketing association cannot not coerce, engage in boycotts, and organize concerted refusals to deal with non-cooperating fishermen (Oregon DOJ 1996). Furthermore, market association members and non-members cannot make any arrangements or even informally discuss pricing. Fishermen who are not part of an association cannot engage in any price-setting activity with any other fishermen (Oregon DOJ 1996).

While the Oregon DOJ found that limited antitrust exemptions under FCMA allows marketing associations to agree on a collective price, it is unclear as to Oregon law allows such exemptions. However, through this case DOJ decided that any protection from federal antitrust laws established under the FCMA is also allowed in Oregon. Therefore marketing associations that engage in voluntary price-setting (e.g. commercial crab fishery) will not be prosecuted under Oregon antitrust law (Oregon DOJ 1996). Importantly, Oregon DOJ's position is legal only in Oregon, and may not in any way apply to California's legal system. No case study on antitrust exemptions in California has been found.



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