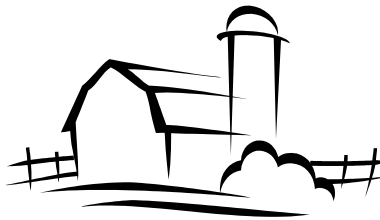

Occupational Regulation Review

Grain Dealer



**Report of the Agriculture Committee Pursuant to the
Occupational Board Reform Act (§§84-933 to 84-948)**

Date: December 15, 2022

Introduction

The Occupational Board Reform Act (§§84-33 to 84-948 of the Nebraska Revised Statutes) was enacted by the Nebraska Legislature to establish a process for systematic examination of occupational regulations in Nebraska. The Act assigns a primary responsibility to the standing committees of the Legislature to perform periodic evaluation of those occupational regulations that fall within the subject matter jurisdiction of each committee.

Such evaluation is to include identifying the underlying public welfare objectives intended to be served by a set of occupational regulations and whether such public welfare concerns remain valid or have evolved. The goal of the Occupational Board Reform Act is to realize the public welfare interests with the least burdensome forms of regulation. The evaluation is to determine whether existing regulations impose an excessive or unnecessary barrier to entry into, or burden to participate in, that occupation that limits competition, entrepreneurial opportunities or availability of services in relation to the public welfare benefits intended.

§84-940 defines occupational regulation to mean “a statute, rule, regulation, practice, policy or other state law requiring an individual to possess certain personal qualifications or to comply with registration requirements to use an occupational title or work in a lawful occupation.” Beginning in 2019, each standing committee of the Legislature shall annually review and analyze approximately twenty percent of the occupational regulations within the jurisdiction of the committee and prepare and submit an annual report electronically to the Clerk of the Legislature by December 15 of each year. Each report shall include the committee's recommendations regarding whether the occupational regulations should be terminated, continued, or modified.

Licensing of grain dealers under the Nebraska Grain Dealer’s Act is an occupational regulation that falls within the jurisdiction of the Agriculture Committee. This report is submitted to fulfill the requirements of the Agriculture Committee under §84-948 of the Occupational Board Reform Act with respect to this occupational regulation.

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Occupation: Grain Dealer

Occupational Board: Public Service Commission

Statutory Citation: Nebraska Grain Dealers Act (§§75-901 to 75-910)

Description of Occupation:

A grain dealer is any individual or business entity purchasing grain for immediate or eventual resale. Thus, grain dealers are intermediaries in the grain marketing chain between growers and the end users of grain and provide an avenue of liquidity for producers or other owners of grain. Dealers may acquire and hold title to grain for a period of time while seeking out buyers of the grain with the compensation to the dealer being any markup in the price they eventually sell the grain for over what was paid to purchase the grain. More typically, dealers act as agents to locate and aggregate grain, and provide or arrange transportation and other services, in order to source grain for immediate demand by end user clients and receive a commission, reimbursement for costs, or a markup in the price paid to the dealer by the ultimate purchaser. Traditionally, grain dealers often owned one or more grain transport vehicles and performed the physical delivery of grain. The industry today has largely transitioned to dealers primarily negotiating and consummating transactional details with the majority of grain moved utilizing independent contractors or leased trucks with contract drivers. Some grain dealing occurs as an incident to processing or feeding as end users may resell surplus grain in excess of needs or storage capacity or in response to market conditions.

Description of Occupational Regulation:

Grain dealers are regulated under the Grain Dealer Act. §75-902 of the Act defines a dealer as follows:

“Grain dealer means any person, partnership, limited liability company, corporation, or association that (i) buys grain from the producer of the grain within this state for purposes of selling such grain or (ii) acts as an employee or agent of a buyer or seller for purposes of collective bargaining in the marketing of grain.”

While grain dealers can act as an intermediary between any buyer and seller, the Grain Dealers Act only applies to dealers who are a first purchaser of grain from a producer of that grain. The Act also expressly exempts certain categories of first purchasers:

- Livestock and poultry feeders
- State or federal warehouse licensees who buy and sell only grain deposited in the licensees warehouse facilities (see Regulation of Warehouse Licensees as Dealers, Appendix A)

The Act does not limit or prescribe the use of the term “grain dealer” as an occupational title but prohibits engaging in grain dealing activities without a valid license issued by the Public Service Commission. Conditions of licensure include:

- Initial and annual license renewal fee of \$100

- File evidence of security in the form of a bond, letter of credit or certificate of deposit for the benefit of producers to secure payment to a producer. The amount of security is the greater of \$35,000 or 7% of the value of the dealer's purchases for the preceding year, not to exceed \$300,000.
- Annually file a reviewed or audited financial statement, disclosing cash flow and other business financial information and reporting on the dollar amount of grain purchases in the preceding year.
- For initial licensure, submit fingerprinting for a criminal history background check. If the licensee is a business entity, the criminal history check shall be submitted by the CEO, general manager or president of the business entity. Cost of the criminal history check are paid by the applicant to the criminal check agency. An applicant having a felony financial crime conviction is disqualified from licensure.
- Demonstrate and maintain a minimum net worth of \$10,000 and a working capital ratio of assets to liabilities of not less than 1 to 1.

Dealers are required to provide a seller with appropriate documentation of all transactions and such documentation shall disclose to the seller the terms under which a seller shall have recourse to the dealer's security for losses due to nonpayment or rejected instrument of payment. The Public Service Commission has sole authority to deny, restrict or revoke licensure for violations of the Act. The Commission has authority to inspect the property and records of a licensee and to refer potential criminal violations to law enforcement and prosecutorial authorities. Violations of the Act, including engaging in grain dealing without a license, are a Class IV felony and violators may also be subject to civil penalty assessed by the Commission.

Occupational Board Information:

Report contents specified under subdivision (3) (a) through (f) of §84-948 are not applicable to this occupation. The Public Service Commission (PSC), a constitutional sovereign agency, is solely responsible for the receipt and processing of license applications, monitoring of licensees and enforcement of license infractions, including lack of licensure. These duties are not delegated to an industry licensing board. The Act prescribes no personal qualifications as defined by §84-941 of the Occupational Board Reform Act to qualify for licensure, nor delegates authority to establish such qualifications.

Regulatory Activity and Costs:

To assist the Agriculture Committee in preparing this report for purposes of the Occupational Board Reform Act with respect to regulations governing the grain dealer occupation, Chairman Steve Halloran submitted an inquiry form to the Public Service Commission. The information in this section consists of information provided by the Commission.

Licensure Activity: (table next page)

Grain Dealer Licensure – 5 year Summary of Activity

	2021/22	2020/21	2019/20	2018/19	2017/18
Licensure Activity					
New	3	6	3	13	1
Renewal	117	125	122	113	129
Applications Denied	1	0	0	0	1
Revenue					
License Fees*	\$120,000	\$131,000	\$125,000	\$126,000	\$130,000
Other Cash Revenue**	0	0	\$5,000	0	\$10,000
Disciplinary/Enforcement Activity					
Complaints Received	2	1	1	0	1
Investigations	0	0	0	0	0
Examinations	0	0	0	0	0
Inspections and Audits	61	36	49	27	52
Licenses Suspended, Revoked, Cancelled or Limited	4	4	3	4	7
Criminal Referrals	1	0	0	0	0

* License Fees go to the State General Fund ** Civil Penalties go to the Common School Fund

Grain Dealer Licensee Characteristics

Active Licensees (As of current date)		119
Location of Active Licensees	In-state	Out-of-State
	74	45
Active Licensees by Category		
Individual/Sole Proprietor		1
Grain Dealer Businesses*		84
Processors or other end-users and purchasers due to incidental dealer activity		0
Warehouses licensees (due to direct delivery activity)		34**
Other		

* Business entity primarily or exclusively engaged in, grain dealing.

** Have both Warehouse & Grain Dealer License

Enforcement Activity

A List and describe disciplinary actions taken against licenses for the past 5 years;

- 5/15/18 – Roberts Seed – Operating without a Grain Dealer License - \$10,000 Civil Penalty
- 3/26/20 – Organic Producers of Nebraska, Iowa, South Dakota – Failure to meet financial and renewal requirements - \$5,000 Civil Penalty
- 8/5/21 – Pipeline Foods, LLC – Inspection conducted not giving “Warning to Seller” notice to producers – \$22,000 Civil Penalty, License revoked

- 10/21/21 – Banghart Properties, LLC – Operation without a Grain Dealer License - \$290,000 Civil Penalty
- 6/1/22 – Mercaris Corporation – Not meeting financial requirements to have a Grain Dealer License – License voluntarily surrendered

B. Does the agency perform routine or regular examinations/inspections/audits of licensees? If so, how many are performed per year;

Yes, regular grain dealer inspections are done each year. Presently, we have 119 licensed Grain Dealers and 7 pending applications. 125 inspections on average are completed each year.

C. Does the agency perform complaint/investigative examinations/inspections/audits of licensees? If so, how many of these have been performed over the past 5 years;

An investigation is done regarding a Grain Dealer if there is a complaint. In the past 5 years there have been approximately 5 investigative examinations which resulted in the filing of a complaint. Those outcomes are listed under A.

D. For any applications denied, please describe the reason(s) for denial;

We have had two applications denied in the last 5 years, both were unlicensed grain dealers and they failed to meet requirements to become a licensed grain dealer.

Cost of Regulation:

A. Please list staff positions to support the Agency’s operations under the Grain Dealer Act and whether dedicated or shared staff;

The Grain Director, Grain Program Officer, Two Grain Examiners, and additional administrative staff support the agency’s operations under the Grain Dealer Act. These positions are all shared staff.

B. If possible to isolate costs, please provide annual expenditures by the Agency to carry out the Grain Dealer Act for each of the past 5 fiscal years;

It is not possible to isolate costs specific to the Grain Dealer Act. Neither the Commission’s accounting nor timekeeping system have the functionality to isolate such costs. The Grain Department oversees all Commission activities related to enforcement of the Grain Warehouse Act and the Grain Dealer Act, and also inspects Grain Moisture Meters. The Grain Department has a general fund appropriation of \$760,862 for all Department activities.

Comparison to Other States’ Regulation:

Included as an appendix to this report is an overview of state regulation of grain dealers and grain warehouses compiled by the National Agricultural Law Center, a congressionally established and funded research center. Although the report was completed in 2014 and its information may be

somewhat dated, the Center's overview identifies several elements of state regulation that are applied to grain dealers and warehouses across the nation and the number of states that apply that element. The Center identified 31 states required licensure to operate as a grain dealer.

The following provides a more detailed comparison of the elements of regulation between Nebraska and surrounding states.

Nebraska

Licensure required: Yes

Exemptions: Livestock feeders, Warehouse licensees unless engaging in direct delivery

License fee: \$100 (initial and annual renewal)

Minimum Net Worth -- \$10,000;

Security Amount – Greater of \$35,000 or 7% of previous year's grain purchases (\$300,000 max)

Financial filings: Annual CPA reviewed or audited financial statement

Prompt payment: No direct statutory requirement to issue payment within a period of time (statutory assumption of cash transaction unless other terms specified by contract). Security conditioned upon payment on demand or within 15 days of completed delivery.

Iowa

Licensure required: Yes

Exemptions: Purchases less than 100,000 bu/yr, Custom feeders, Purchasers for feed or seed, Producer owned cooperatives purchasing only from members

License fee: \$66 - \$488 (graduated fee based on purchases) Dealer must also be current on indemnity fund participation fee

Minimum Net Worth – Class I - \$75,000, Class II - \$37,500

Security Amount – 2x amount of any deficiency of net worth

Financial filings: Annual CPA reviewed or audited financial statement

Prompt payment: Yes. Upon demand and no later than 30 days after delivery. Prepared checks to be delivered within 5 days if producer has not taken possession.

Missouri

Licensure required: Yes

Exemptions: Buyers who purchase only from dealers except livestock feeders who purchase less than 50,000 bu/yr from producers or processors who purchase less than 50,000 bu/yr from producers provided all purchases are cash transactions

License fee: 1-time application fee of \$25, \$40 (initial and annual)

Minimum Net Worth – 5% of value of annual grain purchases

Security Amount – greater of 2% of previous year purchases or \$50,000 (\$600,000 max) plus any additional in amount of net worth deficiency. Dealer with sufficient net worth may be approved for minimum \$50,000.

Financial filings: Annual CPA reviewed or audited financial statement

Prompt payment: Yes. Upon demand and no later than 30 days after delivery unless otherwise specified by contract.

Kansas

Licensure required: No. Kansas does not regulate grain dealers.

Colorado

Licensure required: Yes

Exemptions: Commodity handlers include all entities purchasing or acquiring title in or possession of grain from any owner as a warehouseman, feeder or processor, or as a commission agent for any buying or selling entity. Livestock feeders purchasing for own use are exempt.

License fee: \$150 (initial and annual renewal) plus \$50-\$750 graduated inspection fee based on value of annual purchase.

Minimum Net Worth – No statutory standard. Dept. of Agriculture to determine if applicant is financially reliable and sufficient character.

Security Amount – greater of 2% of previous year purchases or \$10,000 (\$1 million max)

Financial filings: Annual CPA reviewed or audited financial statement

Prompt payment: Nothing statutory

Wyoming

Licensure required: No licensure required for grain buyers unless any warehouse regulations apply. Grain dealing is not a separate regulated activity

Exemptions: Buyers who purchase only from dealers except livestock feeders or any buyer who purchase less than \$30,000 of grain / yr from producers

License fee: none

Minimum Net Worth – none

Security Amount – none apart from any applicable warehouse security

Financial filings: none apart from any applicable warehouse requirements

Prompt payment: No. Wyoming law creates a statutory preferred priority lien in favor of a seller on the raw commodity, proceeds from the resale of the commodity or the proceeds of the sale of products processed from the commodity.

South Dakota

Licensure required: Yes

Exemptions: Buyers who purchase less than \$300,000 worth of grain from producers, buyers who only occasionally and incidentally resell grain

License fee: \$275 (initial and annual renewal) Fee is waived if licensee is a licensed warehouse

Minimum Net Worth – Class A - \$100,000, Class B – Positive net worth

Security amount – Class A - \$50,000 to \$500,000 (graduated based on value of purchases) plus incremental amount for purchases in excess of \$10 million
Class B - \$50,000 to \$100,000 (graduated based on value of purchases)

Financial filings: Financial statement prepared by CPA or other authorized 3rd party

Prompt payment: Yes, on demand or 30 days unless other payment terms specified by contract

Occupational Board Reform Act Analysis:

Assumptions underlying the creation of the occupational regulation:

The original regulation of what are referred to today as grain dealers appear to respond to a need as articulated by subdivision (4)(c) of §88-948 of the Occupational Board Reform Act:

“(4)(c) If the need is to protect consumers against potential damages from failure by providers to complete a contract fully or up to standards, the likely recommendation will be to require providers to be bonded.”

While grain sellers’ exposure to risks of doing business with fraudulent or insolvent grain dealers in the marketplace exists, the purpose, scope and intended beneficiaries of grain dealer regulation and bonding in the state have evolved over time. The Grain Dealer Act was first put in place by enactment of LB 389 in 1985. The Act replaced and significantly modified what were referred to as the grain buyers and sellers provisions of the state grain laws. LB 389 was brought at the request of the Public Service Commission in the wake of two significant grain dealer failures in the previous year. During the hearing on LB 389, PSC Commissioner Eric Rasmussen described changes in the industry that precipitated the reforms proposed in the bill.

“These laws were first conceived into law to protect elevators from truckers roaming the countryside buying grain for resale to feedlots throughout the country. The thought was to license these truckers and provide a bond for bad checks during the shortest period of time possible for the checks to clear the bank. If it did not clearly clear, the bond would be adequate to cover the bad check. Next, the grain buyer and seller without trucks conceived a method to operate under this law with a very low bond, and extremely high risk. The commission and the Legislature had to respond and raise the bonding requirements on different occasions in order to offset these new entries into the business. Now we have a new approach with truckers going into the country purchasing grain from farmers. These sellers in most part were not knowledgeable of the bond protection or the need for an active accounting of sales transactions in order to keep sales current with day-to-day payments.”

This testimony suggests historically, grain dealing was largely an activity carried out by independent truck owners (including farmers who utilized their own trucks to engage in grain dealing as a secondary business), or by trucking companies, who purchased grain in truckload quantities as cash transactions. Prior to LB 389, security requirements were thought sufficient to indemnify warehouse sellers for the relatively limited quantities of grain involved in dealer transactions. The security obligations were intended to mitigate warehouse exposure to a financial risk that could in turn have implications for owners of warehouse stored grain if the ability of a warehouse licensee to meet storage or payment obligations to warehouse depositors were eroded due to failed business dealings with grain dealers.

At the time LB 389 was considered, grain dealing entities that purchased and aggregated large amounts of grain and who subcontracted trucking services to physically transport the grain, often requiring multiple deliveries over time, were increasingly prevalent. Furthermore, such transactions were increasingly conducted under deferred payment contracts¹. Grain dealing entities also increasingly purchased grain directly from producers and loaded the grain at the farm premises

¹ Deferred payment contracts are arrangements whereby a grower or other owner delivers grain to (and transfers title to) a buyer but defers payment or settlement of other terms until long after delivery (often for tax advantages of deferring income to the next year). The grower/ owner has effectively abdicated their cash seller status and do not satisfy the statutory criteria for recourse to the dealer security – they assume the status of voluntary but unsecured creditors of the dealer. While there are advantages to deferred payment contracts, this is a riskier method of marketing that has not been indemnified by the Grain Dealer Act since 1985.

transferring the risk exposure to grain producers. These changes created the potential for dealers to accumulate very large payment obligations before a grain dealer's default or potential default became apparent and for which the required dealer security was inadequate to meaningfully indemnify. In the two dealer failures in the year preceding the introduction of LB 389, sellers had recovered only 1.3% and 5% of the value of the grain they had sold to dealers.

Since enactment of LB 389, only cash sellers of grain, those who demand payment more or less simultaneous with the transfer of title to the grain and who timely report lack of payment or dishonored payment, are eligible to claim against the grain dealer security required as a condition of licensure.

The Grain Dealer Act was amended by LB 735 in 2003 to require that grain warehouses who engage in direct delivery transactions, whereby grain is directed for delivery from a producer to a third location, to also be licensed as a grain dealer. Previously, all licensed warehouses were expressly excluded from the definition. (see Appendix A)

The Act was further amended by LB 183 in 2015 to further limit beneficiaries of the grain dealer security to producers rather than any owner of grain selling to a dealer. In effect, licensure is required only when a dealer is a first purchaser of grain from a producer. Also, the obligations of the grain dealer security required as a condition of licensure was amended to expressly exclude coverage of losses due to failure of a dealer to meet its delivery obligations to purchasers².

Occupational board statement of efficacy:

- A. Please provide a brief description of the benefits of the occupational regulation.

Protection of Nebraska grain producers' assets who sell grain other than to a licensed grain warehouse.

- B. Please provide a brief description of potential harm should the occupational regulation be discontinued.

If no longer regulated, both out-of-state and in-state grain dealers could buy grain from Nebraska Producers and not pay for the grain. Nebraska producers would have no financial protection from dealers that act in bad faith and would need to pursue legal recourse on their own with no intervention from the State.

² Claimants in this category are those who forward contract for the delivery of the grain by a dealer at some point in the future. If the dealer defaults, the purchaser risks recovery of any advance payments for the grain as well as market risks to acquire replacement grain. There is ambiguity whether it was ever the intent of the Legislature to indemnify this risk although the Act prior to LB 183 arguably did not preclude it. Following failure of Peirce Grain in 2014, a purchaser for the first time successfully brought a claim against the dealer bond when the Supreme Court allowed the claim to stand despite the PSC having earlier denied it. That claim roughly doubled the amount of allowed claims against the bond, diluting the recovery by growers not paid for the grain they sold to the dealer.

Occupational regulation in relation to Occupational Board Reform Act policy:

§84-946 of the Occupational Board Reform Act (OBRA) declares a policy of the state of Nebraska to protect the fundamental right of an individual to pursue a lawful occupation. To assist committees in assessing current occupational regulations for purposes of OBRA, the current regulation is assessed by the following series of questions.

Do the policy justifications/need for regulation identified when the occupational regulation was enacted remain valid?

The exposure of producer sellers of grain to financial risks of doing business with fraudulent, incompetent or insolvent grain dealers remain. Historical occurrences of grain dealer thefts and defaults on payment obligations suggest this exposure would likely be more frequent and producer losses would be more pronounced without the policy of limiting participation in the market to those who can demonstrate financial soundness and financial responsibility. While regulation cannot guarantee against dealer defaults occurring, the regulatory oversight helps preclude more financially marginal and unethical actors from entering the market than might otherwise occur.

The PSC reports 45 out of 119 (38%) current grain dealer licensees are out-of-state entities and the percentage of out-of-state participation is stable. Private legal recourse for Nebraska producers is even further complicated if a defaulting dealer is out-of-state. This heavy participation in the Nebraska market by out-of-state entities further suggests value in monitoring activities of entities whose commercial reputations are less known locally.

What potential costs or consequences to the consuming public or society at large might arise due to poor quality of services provided by, or unethical conduct of, persons subject to the occupational regulation?

Grain dealer defaults have the potential to cause serious financial losses to Nebraska grain producers and wider economic repercussions for rural communities where producers live and do business. Absent the ability of producers to seek recovery of losses through administrative processes of the PSC, producers' sole recourse is to pursue more difficult and expensive legal actions to protect their interests, often at a disadvantage to other creditors.

Does the occupational regulation use the least restrictive regulation necessary to achieve the public welfare interests served by the regulation?

In the context of the Occupational Board Reform Act, the perceived public welfare need is to protect consumers against financial exposure to risks that a dealer fails to complete contracts fully or up to standard. The requirement for bonding/security corresponds to what the Act recommends as the least restrictive regulation for such need. The minimal requirements for net worth and other financial soundness standards to participate in the market are reasonable, and licensure serves the function of certifying to the public that the entity met these conditions.

Does the occupational regulation have a disproportionate impact on active duty military, veterans or spouses, immigrants with work authorizations, low income or unemployed workers, or people with criminal records?

Nebraska is unique among surrounding states by requiring applicants to submit to a criminal background check. However, only applicants previously convicted of a felony financial offense are disqualified and it is not believed this restriction is inconsistent with the policy objectives of the Grain Dealer Act or in conflict with the purposes of the Occupational Board Reform Act.

Is there information to indicate harm to competition and/or availability of services provided by persons subject to the occupational regulation?

In the past, there had been heavy participation in grain dealing by individuals as sole proprietors often as a means to monetize grain transport assets they owned to supplement income or as a full time occupation. Data regarding dealer characteristics provided by the PSC on page 3 indicates that currently, only 1 dealer is a sole proprietor out of 119 active licensees. Costs of licensure, i.e. the costs of professional services to satisfy financial information filings and the premiums for required bonding/security could be a barrier to individual entrepreneurs entering the marketplace. However, the scale of grain industry purchases and shipments today may have bypassed the utility of traditional sole proprietor services. Grain dealing is today almost exclusively carried out by grain dealer businesses who have the capacity and reach to aggregate large volumes of grain purchases and sales and who contract with trucking companies with capacity to fulfill delivery.

Is the occupational regulation enforced only against individuals selling goods or performing services contemplated in the regulatory act?

The Act is intended to apply to those who take title or possession of grain for the purpose of reselling the grain. There are no goods or services provided other than the commercial obligation of paying for grain. We do not believe the policies of the Occupational Board Reform Act on this question are implicated by grain dealer occupational regulations.

It is important to observe that Nebraska, like many other states, has greatly narrowed the breadth of grain dealing activity that is subject to regulation, now requiring licensure and bonding only for dealers who are first purchasers of grain from producers and only requiring dealers to indemnify cash transactions. In part this is due to the impracticality of private sector surety providers being able or willing to write bond coverage in amounts to meaningfully indemnify all payment and delivery obligations conceivably accumulated by dealers. Because of the practical limits on the dollar amount of bonding/security coverage available to dealers, the Legislature has limited financial responsibility to only cover cash purchases from producers. Additionally, this narrowing of regulated activity to exclude dealer transactions with processors and other end users suggests a greater ability of these business entities to assess the reliability of dealers they do business with and

to avoid or absorb risk. Additionally, the Act specifically excludes grain buying activity of warehouses and livestock feeders. Absent directly purchasing from grain producers, there is still conceivably a wide range of grain dealing activity that could be engaged in by entrepreneurs without triggering Grain Dealer Act regulations at all.

Agriculture Committee Findings & Recommendations

The Committee does not see a need to eliminate or modify existing regulations due to inconsistency with the policy of the Occupational Board Reform Act at this time.

The committee has received little to suggest that there is a shortage of grain dealer service providers or that existing regulations diminish competition. Additionally, any suggestion to lessen or eliminate grain dealer requirements to advance OBRA objectives would require further study and industry consultation. Our inquiry, including a public hearing, suggests that existing bonding requirements are somewhat inadequate to meaningfully indemnify those doing business with grain dealers at the scale of grain dealer obligations that occur today. Additionally, the committee received testimony suggesting a need to address ambiguity regarding applicability of the Grain Dealer Act with respect to organic marketing.

Appendix Items

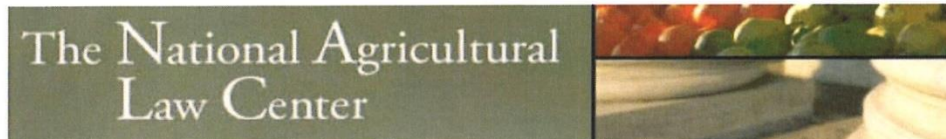
A. Regulation of Warehouses as Grain Dealers

Although warehouse licensees also buy grain from producers for purpose of resale, they have historically been exempt from licensure as a grain dealer. Grain delivered to, or title transferred to, a grain warehouse licensee had historically been presumed to have been deposited in licensed warehouse facilities where the value of a producer's grain is secured by the warehouse bond and the Public Service Commission's first lien for the benefit of grain owners and storers on grain assets on hand when a warehouse is seized by the Public Service Commission upon pending insolvency. Payment for previously stored grain sold to a warehouse, or grain sold upon deposit at the warehouse, is not secured by the warehouse bond and grain assets. However, a seller reverts to the position of a storer/owner of grain if the sale occurred within 5 days prior to PSC intervention.

Beginning in 2005 with enactment of LB 439, grain warehouses who take title to grain in direct delivery transactions are required to maintain a separate dealer license and security. The Grain Warehouse Act defines direct delivery as *"grain bought, sold or transported in the name of the warehouse licensee other than grain deposited in the warehouse's licensed facilities."* Direct delivery is an industry innovation whereby the warehouse licensee meets an obligation to deliver grain sold to a purchaser by arranging with a producer to deliver the grain directly from the farm to the warehouse's purchaser rather than the grain being first deposited in the warehouse. While title to the grain transfers upon leaving the producer's premises, the transaction creates a statutory obligation, as well as a private contractual obligation, of the warehouse to transfer title to an equivalent amount of warehouse owned grain stored in the warehouse facility or an immediate or future payment obligation of the grain warehouse to the producer.

Because warehouses act as a grain dealer in direct delivery transactions, the warehouse is required to obtain a license as a grain dealer and maintain grain dealer security in the amount of a percentage of the value of the grain transported via directly delivery in the previous year. The calculation of the bond amount excludes the value of any grain for which the warehouse exchanges title to warehouse stored grain to the producer on the same date the producer's grain is direct delivered to the third party.

Warehouses who do not engage in direct delivery transactions remain exempt from licensure as a grain dealer.



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State Regulation of Grain Sales & Storage

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In order to protect growers and prevent failure of entities, many states regulate grain warehouses and grain dealers. In most states, a “grain dealer” is a person or entity involved in buying, receiving or exchanging grain from the grower. Generally speaking, an interaction with a grain dealer involves a transfer of ownership (title) to that dealer.

On the other hand, warehouses are normally involved in the storage of grain. Under most states’ definitions, ownership is maintained by the grower, rather than being transferred to the warehouse. Depending on the entity with whom the warehouse is licensed, a warehouse can be regulated by either state or federal governments. Federally, this would fall under the United States Warehouse Act, which is enforced by the Farm Service Agency.¹

¹ For more information on federal licensing of grain warehouses, visit the FSA website:
<http://www.fsa.usda.gov/FSA/webapp?area=home&subject=coop&topic=was-ua>

In order for grain dealers and grain warehouses to operate within their boundaries, many states have enacted various requirements. The requirements vary greatly from state to state and include requirements and penalties such as licensing, bonding, auditing, statutory liens and civil or criminal sanctions. As of December 31, 2014, thirty-four states have some form of regulations addressing the operation of grain dealers, while thirty states have similar regulations for warehouses.

Licensing

This is one of the most common forms of state regulation. For states with this statutory requirement, the warehouse or grain dealer must obtain a license from the state before beginning operations. In order to obtain this license, many states also mandate an auditing process, fees, financial statements or other requirements.

**Statutory Licensing
Requirements**
Grain Dealers = 31 States
Warehouses = 29 States

Bonding

Various states require that a warehouse file some amount of a bond with the state that can be drawn upon in case of a default. The amount of the bond varies among the states and is typically either a per bushel rate or a set amount.

**Statutory Bonding
Requirements**
Grain Dealers = 30 States
Warehouses = 26 States

Auditing

This provision allows representatives of the state government to examine records, warehouses, reports, inventory, financial statements and other various areas of the entity to ensure that the grain dealer or warehouse is operating properly.

Statutory Auditing Requirements
Grain Dealers = 31 States
Warehouses = 28 States

Prompt Payment

These provisions, in place in about twenty percent of the country, help ensures that growers will be paid within a certain period of time after delivery of the grain.

Prompt Payment Requirements
Grain Dealers = 13 States
Warehouses = 10 States

Indemnity Fund

In this statutory scheme, money is paid into an indemnity/general fund. Depending on the state, the entity charged with paying the fee may be the producer, the warehouse, the grain dealer or some combination of the three. Eligibility to claim funds varies among states, but typically occurs when payment is not made for delivered grain, or if the grain dealer or warehouse becomes insolvent.

Statutory Indemnity Fund Requirements
Grain Dealers = 11 States
Warehouses = 13 States

Failure/Liquidation

In some states, when an entity is discovered to be insolvent the state will take charge of the property, liquidate, and collect grain assets. These

Requirements for Failure or Liquidation
Grain Dealers = 11 States
Warehouses = 19 States

assets are then typically deposited into a trust from which growers may file claims to collect losses.

Penalties

Many states have penalties- civil, criminal, or both- that may be levied against grain dealers or warehouses violating provisions of the state code. These penalties can range from a small fine up to and including imprisonment.

Civil or Criminal Penalty Provisions

Grain Dealers = 31 States
Warehouses = 29 States

No Requirements

As described in the pages above, many states have chosen to pass laws regulating grain dealers and grain warehouses. However, many others have not. In these remaining states, warehouses may be licensed on the federal level, or they may not be licensed at all. As there are no federal requirements for grain dealers, unless the state chooses to regulate, no requirements are in place.

No State Regulatory Authority

Grain Dealers = 16 States
Warehouses = 20 States

For more information about statutory requirements relevant to grain dealers and warehouses, the National Agricultural Law Center has compiled a guide listing specific citations for each of the requirements listed above. That guide is freely available at <http://nationalaglawcenter.org/state-compilations/grainsalesstorage/>.