

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,	)	RULE AND REGULATION NO. 195
on its own motion, seeking to	)	
amend Title 291, Chapter 8, Grain	)	
Warehouse Rules and Regulations,	)	ORDER RELEASING SECOND SET OF
to adopt rules in accordance with	)	RULES, SEEKING COMMENT, AND
Nebraska Legislative Bill 183	)	NOTICE OF HEARING
[2015] and clarify provisions	)	
regarding in-store transfer	)	
notices.	)	Entered: February 9, 2016

BY THE COMMISSION:

O P I N I O N   A N D   F I N D I N G S

The Nebraska Public Service Commission (Commission) opened this proceeding to amend Title 291, Chapter 8, Grain Warehouse Rules and Regulations, to adopt rules in accordance with Nebraska Legislative Bill 183 passed in 2015 by the Nebraska Legislature and relating to in-store transfer notices.

The Commission released a first set of proposed rules and requested comments from interested parties. Comments were timely received from the Nebraska Cooperative Council (Coop Council) and the Nebraska Grain and Feed Association (Association). Based upon the comments received, revisions to the proposed rules have been made and a Second Set of Proposed Rules and Regulations attached hereto as Appendix A is released for comment.

Changes made to the first set of proposed rules and regulations, originally released on November 17, 2015, include additional language and changes to Rule 003.05A7 consistent with the comments from the Coop Council. Language regarding the warehouse security was removed from the same section and additional language from Neb. Rev. Stat § 75-905(2) and the definition of producer was added to the rule. Additionally, the requirement that the warning be on the face of the receipt was removed to allow more flexibility, but maintains the requirement a minimum of 8 point font be utilized.

The Association also requested further terms be defined in the rules. We clarify that there are currently thirty-three (33) defined terms in the rules, including the terms suggested by the Association. The proposed rule only reprinted the sections of the rules with proposed changes, therefore all other definitions contained in the rules would remain as currently written.

Accordingly, the Commission releases a second set of proposed rules, which are set forth in Appendix A, incorporated herein by reference.

Comments on the proposed rules as amended shall be filed by interested parties on or before **3:00 p.m., March 18, 2016**. Parties filing comments should file one original with five (5) paper copies and one (1)

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

RULE AND REGULATION NO. 195

PAGE 2

electronic copy in Word format emailed to terri.fritz@nebraska.gov and nichole.mulcahy@nebraska.gov.

The Commission finds that this matter should be set for hearing on **Tuesday, March 29, 2016, at 1:30 p.m.** in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska.

If auxiliary aids or reasonable accommodations are needed for attendance at the meeting, please call the Commission at (402) 471-3101. For people with hearing/speech impairments, please call the Commission at (402) 471-0213 (TDD) or the Nebraska Relay System at (800) 833-7352 (TDD) or (800) 833-0920 (Voice). Advance notice of at least seven days is needed when requesting an interpreter.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a second set of proposed rules are released for comment, interested parties shall file comments on or before **3:00 p.m., March 18, 2016**. Parties filing comments should file one original with five (5) paper copies and one (1) electronic copy in Word format emailed to terri.fritz@nebraska.gov and nichole.mulcahy@nebraska.gov.

IT IS FURTHER ORDERED that this matter be set for hearing on, **Tuesday, March 29, 2016, at 1:30 p.m.** in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska.

MADE AND ENTERED at Lincoln, Nebraska, this 9<sup>th</sup> day of February, 2016.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*Gerald L. Vop*  
*Crystal L. Linder*  
*Reel Johnson*

*Tim Schram*  
Chairman

ATTEST:

*Jeddy L. Peltz*  
Executive Director

//s//Frank E. Landis  
//s//Tim Schram

APPENDIX A

Amendments to Nebraska Administrative Code, Title 291, Chapter 8, Grain Warehouse Rules and Regulations.

**MAKE THE FOLLOWING CHANGES TO SECTION 001:**

001 GENERAL:

001.01 Definitions: As used in Chapter 8 unless the context otherwise requires:

001.01J Grain Dealer: Any person, other than a feeder or custom feeder of livestock or poultry or a grain warehouse licensed under the Grain Warehouse Act or located in Nebraska and licensed under the United States Warehouse Act that does not buy, sell, or transport grain other than grain that is received at its licensed warehouse facilities, who (a) buys grain from ~~its owner or the~~ producer within this state for purposes of selling such grain, ~~(b) transports grain into this state for purposes of selling such grain,~~ or (eb) acts as an employee or agent of a buyer or seller for purposes of collective bargaining in the marketing of grain.

**MAKE THE FOLLOWING CHANGES TO SECTION 002:**

002 PUBLIC GRAIN WAREHOUSES:

002.04F Additional Financial Requirements: In addition to the reviewed fiscal year-end financial statement required by Section 88-528 and to detect noncompliance with financial requirements established by the Commission pursuant to Section 88-530, the Commission shall, for good cause shown as determined by considering the criteria set forth below, require (1) a verified report of the total grain inventory or (2) an audited financial statement. A verified report of grain inventory or audited financial statement shall be prepared in accordance with generally accepted accounting principles ~~generally accepted in the United States~~ by a person or firm which holds a permit granted by the Nebraska State Board of Public Accountancy.

002.07 Records and Filing Requirements: Each warehouseman shall maintain at a place of business accurate, complete, and current records of all grain handled by the warehouse. The required records shall include, but are not limited to, the following:

002.07I In-Store Transfer Notice: ~~An in-store transfer notices shall be prima facie evidence of a valid operates to transfer warehouse-owned ownership interest of grain physically stored in the warehouse by a warehouse licensee, to a person in satisfaction of a direct delivery obligation and the grain remains in the warehouse. for purposes of warehouse security protection and any other protections afforded by the Warehouse Act or Commission rules and regulations. To be considered a valid in-store transfer notice, proper documentation must be issued pursuant to Neb. Rev. Stat. Section 88-543(1)(b). An in-~~

store transfer notice shall contain the following information and be filed in numerical order:

002.07I1 Be Pre-numbered.

002.07I2 Name of the warehouse.

002.07I3 Name of the ~~owner~~ producer.

002.07I4 Commodity and quantity.

002.07I5 Be signed and dated by the warehouseman.

002.07I6 A statement that ~~t~~title to the grain stored in the warehouse passes from the warehouseman licensee to the person with the direct delivery obligation ~~owner~~ upon execution of the in-store transfer notice in satisfaction of the direct delivery obligation.

MAKE THE FOLLOWING CHANGES TO SECTION 003.02:

003 GRAIN DEALERS:

003.02 License Application Requirements:

003.02A Form: All applications for a grain dealer license shall be submitted on the form prescribed by the Commission, incorporated herein at the end of the chapter and labeled as Attachment 14 (new form).

~~003.02B Vehicle Registration: Each grain dealer or applicant shall register with the Commission each motor vehicle to be used by the licensee for transporting grain.~~

003.02CB Determining Volume of Business for New Applicant: A new applicant may obtain a license on the basis of an estimate of the volume of business the applicant expects to do during the term of the license for which the application is made. When a first year applicant obtains a license on the basis of an estimate of its purchases for the year, and the licensee, in fact, buys an amount of grain equal to or more than the initial estimate, the licensee shall revise the estimate and immediately furnish sufficient additional security to cover the additional projected purchases.

003.02DC Background Check: All applications for a grain dealer license shall include the primary party. Such primary party shall be subject to fingerprinting and a check of his or her criminal history record information maintained by the Federal Bureau of Investigation through the Nebraska State Patrol: (1) If the applicant is not an individual, the chief executive officer, president, or general manager; or (2) if the applicant is an individual, the individual. If the primary party has been subject to a check of his or her criminal history record information pursuant to this section on a prior application, he or she is not subject to another such check upon a subsequent application. If a primary party has been subject to a check of his or her criminal history record

information pursuant to another law, the Commission may waive such requirement. A primary party shall furnish to the Nebraska State Patrol a full set of fingerprints to enable a criminal background investigation to be conducted. The primary party (1) may be fingerprinted at a Nebraska State Patrol office, or (2) may request a fingerprint card from the Commission. If a primary party is fingerprinted at a county sheriff's office or a local police department, the primary party shall send the completed fingerprint card to the Nebraska State Patrol, c/o/ Criminal Records & Identification, P.O. Box 94907, Lincoln, Nebraska, 68509-4907. The primary party shall request that the Nebraska State Patrol submit the fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The primary party shall pay the actual cost, if any, of the fingerprinting and check of his or her criminal history record information. The primary party shall authorize release of the national criminal history record check to the Commission. The criminal history record information check shall be completed within ninety (90) days after the date the application for a license is received in the Commission's office, and if not, the application shall be returned to the applicant. The Commission shall deny a dealer license to any applicant whose primary party has been convicted of a felony financial crime.

003.02ED Application Fees: ~~003.02ED1 Application Fee:~~ All applications for license will include a fee as set by Neb. Rev. Stat. Section 75-903 ~~(1997)~~. Any application fees paid will be non-refundable should the applicant withdraw the application or be unable to meet all licensing requirements within one (1) year from the date of application.

003.02E2 Registration Fee: A registration fee, as set forth in Neb. Rev. Stat. Section 75-903 (Reissue of 1996) will be paid for each vehicle registered as a part of the grain dealer application.

003.02F Commercial License Plates: Each vehicle used by a grain dealer, licensed under the provisions of Section 003, shall be equipped with a commercial license plate as registered with the Department of Motor Vehicles, except that a grain dealer who resides in another state shall license the vehicles according to the laws of the grain dealer's state of residence. The number of the commercial license shall be submitted to the Commission on the application for license.

003.02GE Term of License: A grain dealer license shall expire at midnight on the following March 31, June 30, September 30, or December 31.

**MAKE THE FOLLOWING CHANGES TO SECTION 003.03:**

003.03 Financial Requirements: Each grain dealer or applicant shall submit a reviewed or audited level fiscal year-end financial statement prepared by an independent certified public accounting firm, accountant or independent public accountant. The independent public accountant shall hold a permit granted by the Nebraska State Board of Public Accountancy. If licensing as an individual, the financial statement shall be prepared in accordance with Other Comprehensive Basis of

Accountancy for a personal financial statement, using historical cost and accrual basis of accounting. If licensing as a partnership, corporation, or limited liability company, the financial statement must be prepared in accordance with generally accepted accounting principles generally accepted in the United States. If an applicant for a grain dealer license is a wholly owned subsidiary of a parent company and such a financial statement is not prepared for the subsidiary, the parent company shall submit its reviewed or audited fiscal year-end financial statement and shall execute an unconditional guarantee agreement as prescribed by the Commission. The financial statement shall include, but is not limited to, the following:

003.03A Statement of income (Profit and Loss)

003.03B Balance sheet

003.03C Statement of cash flows

003.03D Statement of proprietor's capital or retained earnings.

003.03E The volume and dollar value of grain dealer purchases the licensee made in Nebraska during the fiscal year. If the volume and dollar value of the grain purchases is not reported, the grain dealer shall file the maximum grain dealer security as required by the Grain Dealer Act.

003.03F This section applies to all licensees who hold both a warehouse and dealer license. The volume and dollar value of transactions in which direct delivery grain is exchanged for a post-direct delivery storage position and the post-direct delivery storage position is not created by an in-store transfer on the same date as the delivery of the direct delivery grain.

003.03F1 The value shall be calculated as set forth in Section 003.04A1.

003.03F2 The statement shall specifically show:

003.03F2a The total volume and dollar value of the direct delivery grain exchanged for a post-direct delivery storage position,

003.03F2b The total volume and dollar value of the direct delivery grain exchanged for a post-direct delivery storage position created by an in-store transfer on the same date as the delivery of the direct delivery grain, and

003.03F2c The net volume and dollar value of the direct delivery grain exchanged for a post-direct delivery storage position that will be used for calculation of the grain dealer security as set forth in Section 3.04.

003.03G The accounting firm's accountant's certification, assurances, opinions, and comments and the notes with respect to the financial statement.

003.03H Net Worth: Each grain dealer or applicant shall demonstrate and maintain a minimum allowable net worth of \$10,000 to obtain and maintain a license.

003.03I Working Capital: Each grain dealer or applicant shall demonstrate and maintain a working capital ratio (current liabilities to allowable current assets) of not less than 1 to 1. Applicants or licensees who fail to meet this requirement shall provide additional data sufficient to satisfy the Commission that additional operating capital can be obtained to meet the requirement.

003.03J For purposes of determining whether an applicant or grain dealer meets financial requirements, the following shall apply unless waived by the Commission. In addition to those listed in this section, items may be disallowed, in whole or in part, depending upon the individual circumstances of the grain dealer or applicant:

003.03J1 Physical Assets:

~~003.03J1a Depreciable assets not covered by insurance are disallowed.~~

003.03J1ab Personal assets, including but not limited to residences, household items, recreational items, restricted retirement accounts and vehicles, are disallowed, net of debt on each asset.

003.03J1be Other assets that are not itemized are disallowed.

003.03J1cd Appraised valuations of assets not substantiated by a satisfactory appraisal are disallowed. An applicant or licensee may submit a valuation of assets by competent appraisal to the Commission for inclusion in computing net worth. If a valuation of assets is submitted and satisfies Commission requirements, no more than seventy percent (70%) of appraised value over book value of the assets may be used in determining compliance with net worth requirements. Acceptance of an appraisal is subject to the following:

003.03J1cd(1) The appraisal must be prepared by an independent certified appraiser.

003.03J1cd(2) The appraisal must be prepared on market, income, and cost approaches.

003.03J1cd(3) A one to one working capital ratio must be maintained.

~~003.03J1cd(4) Any value claimed over the insured value will be disallowed.~~

003.03JH1cd(45) Appraisals will only be allowed for three (3) years following the date of the appraisal.

MAKE THE FOLLOWING CHANGES TO SECTION 003.04:

003.04 Grain Dealer Security Requirements: A grain dealer applicant shall file security which may be a bond issued by a corporate surety company and payable to the Commission, an irrevocable letter of credit, or a certificate of deposit, subject to approval of the Commission for the benefit of any producer persons doing business with the grain dealer who files a valid claim arising from a sale to the grain dealer. The security shall be furnished on the condition that the licensee will pay for any grain purchased upon demand, not later than fifteen (15) thirty ~~(30)~~ days after taking possession of the grain purchased. The liability of the surety shall cover purchases ~~and sales made or arranged~~ by the grain dealer during the time the bond is in force.

003.04A Amount: The security shall be in the amount of the greater of \$35,000 or seven percent (7%) of grain purchases and exchanges by the applicant, in the preceding license year or as reported in the fiscal year-end financial statement, not to exceed \$300,000. For purposes of calculating the security, grain purchases and exchanges do not include in-store purchases by a warehouse, or grain that passes title at the time of delivery.

003.04A1 Amounts used in the calculation of the security shall include the net volume and dollar value of the direct delivery grain exchanged for a post-direct delivery storage position valued on the date delivery is made.

003.04A2 Amounts used in the calculation of the security shall not include any transactions in which direct delivery grain is exchanged for a post-direct delivery storage position and the post-direct delivery storage position is created by an in-store transfer on the same date as the delivery of the direct delivery grain.

003.04E The grain dealer security shall provide security for direct delivery grain until any post-direct delivery storage position is created for a period not to exceed fifteen (15) ~~thirty (30)~~ days after the date of the last shipment of the contract.

003.04F No seller shall have recourse to the grain dealer's security unless the seller:



003.04F1 Demands payment from the grain dealer within fifteen (15) ~~thirty (30)~~ days after the date of the last shipment of any contract;

003.04F2 Negotiates any negotiable instrument issued as payment for grain by the grain dealer within fifteen (15) ~~thirty (30)~~ days after its issuance; and

003.04F3 Notifies the Commission within fifteen (15) ~~thirty (30)~~ days after any apparent loss to be covered under the terms of the grain dealer's security.

~~003.05 Issuance: Upon review of all required documents, the Commission shall issue the following:~~

~~003.05A Grain dealer license.~~

~~003.05B Grain dealer truck registration and plate for each vehicle registered with the Commission as a part of the license application.~~

~~003.05B1 Plate Requirement: Each grain dealer plate shall be affixed on the front of the vehicle to which it is assigned, in close proximity to the commercial plate.~~

~~003.05B2 Registration Requirement: The registration for each truck shall be carried in the cab of the vehicle to which it is assigned.~~

MAKE THE FOLLOWING CHANGES TO SECTION 003.06:

003.065 Records Requirements: Each grain dealer shall maintain, at its place of business, accounts of each transaction conducted under its license. The records shall be subject to inspection by the Commission and must include, but are not limited to, the following:

003.065A Receipts: Each grain dealer, upon taking possession of grain from a seller, shall issue a writing, in the form of a receipt, contract, bill of lading or other written communication(s) to the seller, or its agent, that includes, but is not necessarily limited to, the following:

003.065A1 The date the grain dealer or its agent took possession of the seller's grain.

003.065A2 The name and address of the buyer.

003.065A3 The name of the seller.

003.065A4 The name of the agent of the buyer.

003.065A5 The kind of grain delivered to the buyer.

003.065A6 The approximate quantity of grain delivered to the buyer.

003.065A7 The following provisions~~warning~~ shall be printed on the ~~face of a~~ receipt in eight point type or larger:

~~"WARNING TO SELLER: You will have no recourse to the grain dealer's security posted with the Nebraska Public Service Commission (NPSC) unless you are a Nebraska producer and you: (1) demand payment from the grain dealer within fifteen (15) thirty (30) days after the date of the last shipment of any contract; and, (2) cash any check or draft negotiate any negotiable instrument issued as payment for your grain by the grain dealer within fifteen (15) thirty (30) days after its issuance; and, (3) notify the Nebraska Public Service Commission NPSC, PO Box 94927, Lincoln, NE 68509-4927, within fifteen (15) thirty (30) days if a check or draft is returned unpaid after an apparent loss. The grain dealer's security shall provide security for direct delivery grain until a post-direct delivery storage position is created for a period not to exceed fifteen (15) days after date of the last shipment of grain. You will have no recourse to the grain warehouseman's security posted with the NPSC unless you have secured a post-direct delivery storage position within fifteen (15) thirty (30) days after the last shipment of any contract. Direct delivery of grain may affect the eligibility of the grain for participation in federal price support programs."~~

Nebraska Law defines a producer as the owner, tenant, or operator of land in this state who has an interest in and receives all or part of the proceeds from the sale of grain produced on that land.

003.06A8 All receipts, contracts, bills of lading or other written communications shall be pre-numbered and copies shall be maintained in numeric order.

003.065B Checks issued as payment for grain.

003.065C Contracts issued for grain purchases ~~or sales~~ in Nebraska.

003.065D Retention: Each grain dealer shall, unless otherwise authorized by the Commission, maintain the required records for not less than five (5) year(s).

Renumber the remaining sections accordingly.