



October 2018 Newsletter

In This Issue:

- Department “Advisory” Concerning Food Facility Registration
- MGFA Meeting With MDA to Discuss Indemnity Fund For Minnesota
- NGFA Urges FMCSA To Adjust Commercial Trucking Capacity Rules
- Railroad Congestion Stops Grain Crossings at Mexican Border
- Soybean Damage Eligible For Crop Insurance Quality Adjustments
- NDSU Offers Soybean Drying Advice
- Mark Your Calendar For The MGFA “Grain Convention” 2019
- MN/DOT Seeks Applicants for Minnesota Rail Service Improvement Program Grant Funding
- Harvest Safety Tips
- MGFA Sustaining Member Spotlight – VAA, LLC
- NGFA Asks IRS to Clarify Deduction for Agribusinesses in Proposed Rule Implementing Section 199A
- OSHA Clarifies Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing

Department “Advisory” Concerning Food Facility Registration

It was brought to our attention by the Minnesota Department of Agriculture, that Registrar Corp out of Hampton VA, (<https://www.registrarcorp.com/fda-food/registration/>) is using some pretty aggressive techniques to get businesses to use their services for the biennial Bioterrorism Act registration process. We have been told that for \$195 Registrar Corp will mail you a Certificate of Registration issued by Registrar Corp but you may not actually be registered with FDA. In this Bioterrorism Act reregistration year, there may be a number entities looking to make a buck by offering reregistration services. The reminder for you is that Bioterrorism Act registration and/or reregistration is free and can be done over the internet at <https://www.fda.gov/Food/GuidanceRegulation/FoodFacilityRegistration/ucm324780.htm>.

2018 Food Facility Biennial Registration Renewal - October 1, 2018 12:01AM through December 31, 2018 12:59PM. Section 415 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) [21 U.S.C. § 350d] requires food facilities that are required to register with FDA, to renew such registrations during the period beginning on October 1 and ending on December 31 of each even-numbered year.

The **Public Health Security and Bioterrorism Preparedness and Response Act of 2002** (the Bioterrorism Act) directs the Food and Drug Administration (FDA), as the food regulatory agency of the Department of Health and Human Services, to take steps to protect the public from a threatened or actual terrorist attack on the U.S. food supply and other food-related emergencies.

To carry out certain provisions of the Bioterrorism Act, FDA established regulations requiring that:

- Food facilities register with FDA, and
- FDA be given advance notice on shipments of imported food.

These regulations became effective on **December 12, 2003**.

The **FDA Food Safety Modernization Act (FSMA)**, enacted on January 4, 2011, amended section 415 of the Federal Food, Drug, and Cosmetic Act (FD&C Act), in relevant part, to require that facilities engaged in manufacturing, processing, packing, or holding food for consumption in the United States submit additional registration information to FDA, including an assurance that FDA will be permitted to inspect the facility at the times and in the manner permitted by the FD&C Act. Section 415 of the FD&C Act, as amended by FSMA, also requires food facilities required to register with FDA to renew such registrations every other year, and provides FDA with authority to suspend the registration of a food facility in certain circumstances.

MGFA Meeting With MDA to Discuss Indemnity Fund For Minnesota

The recent fallout from the Ashby Farmers' Cooperative Elevator, coupled with recent memories of an elevator failure in Porter MN, has prompted the Minnesota Department of Agriculture to seriously consider the implementation of a grain indemnity fund and the possibility of increasing grain bond requirements for grain buyers and storage facilities. As a result, the MDA has created a "Grain Advisory Group", bringing together our association and others impacted by this "proposed legislation", to discuss its merits and other considerations and options. The MDA will be convening this meeting of the Grain Advisory Group on **Thursday, October 25**. An indemnity fund is generally used to cover contract sales, which are not covered by a grain storage bond or buyer bond and with the obvious beneficiary being the producer. If you would like to join the MGFA staff in this discussion, just let us know and we can share more meeting details. Stay tuned!

NGFA Urges FMCSA To Adjust Commercial Trucking Capacity Rules

The National Grain and Feed Association (NGFA) outlined priorities to alleviate trucking capacity constraints and improve efficiency within the motor carrier industry in a statement submitted Oct. 10 to the U.S. Department of Transportation's Federal Motor Carrier Safety Administration's (FMCSA) regarding its hours-of-service rules for commercial motor carriers.

In its comments, NGFA said its primary concern for the agricultural industry is the "significantly constrained commercial trucking capacity," particularly the shortage of available truck drivers, and urged the agency to explore ways to modify its hours-of-service rules to ameliorate the situation.

"Given the diverse range of agricultural products handled by NGFA-member companies and the disqualification of non-processed products for the agricultural exemption to the hours-of-services rules, many grain, feed and processing facilities find the agricultural exemption to be of moderate to limited benefit for their particular operations," the NGFA said. "While NGFA is appreciative of FMCSA's efforts to clarify the administration of the agricultural exemption, NGFA has found the short-haul exemption to have broader application for the grain, feed and processing sector."

The NGFA urged FMCSA to consider the following recommendations when developing its final rules:

1. **Truck Driving Capacity Constraints:** NGFA's primary overarching concern is the restricted truck driving capacity that has led to limited service and higher freight rates. NGFA is supportive of proposals that would alleviate trucking capacity constraints and promote efficiency.
2. **Short-Haul Driver Exemptions:** To promote consistency and simplify the rules, all short-haul drivers should have a minimum exemption radius of 150 air-miles and a maximum 14-hour work day.

3. **Pilot Program for Short-Haul Drivers:** FMCSA should implement a pilot program for short-haul drivers that provides an expanded exemption radius of 300 air-miles. In coordination with Congress, a pilot program could provide valuable data about the merits of potentially expanding the exemption radius for other commercial truck drivers.
 4. **Year-Round Agricultural Exemption:** To ensure the agricultural exemption to the hours-of-service rules is available all year in all states, FMCSA and Congress should work together to make the exemption year-round.
 5. **Under-21 Driver Pilot Program:** FMCSA should continue its work to implement and expand a pilot program that allows qualified drivers under the age of 21 to operate a CMV across state lines. A shortage of CMV drivers is a significant challenge that the trucking industry and its customers (like NGFA member companies) believe will continue for the foreseeable future. FMCSA should continue to review potential regulatory changes that could help commercial motor carriers recruit and retain qualified and safe drivers.
 6. **Interstate Weight Limit:** The maximum loaded weight of a CMV is an important component of resolving the severe trucking capacity challenge. Increasing the maximum weight limit for interstate movements to achieve greater harmony with state weight limits would help alleviate truck-capacity constraints. CMV designs and safety technology, including brake systems, have progressed greatly since the 80,000-pound federal weight limit went into effect in 1982. "We encourage FMCSA to work with Congress to increase the interstate highway weight limit to help facilitate the efficient movement of freight by CMVs," the NGFA said.
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Railroad Congestion Stops Grain Crossings at Mexican Border

Citing congestion across the Mexican rail network, Union Pacific Railroad (UP) and BNSF Railways (BNSF) recently issued embargoes for grain, oilseeds, and other traffic interchanging with Mexican carriers along the Texas-Mexico border. UP announced slow interchanges with Kansas City Southern de Mexico (KCSM) have created severe congestion at the UP/KCSM interchange at Laredo, TX. Subsequently, it placed an embargo on southbound traffic through the congested area for intermodal, automotive, fuel, wheat, and corn traffic. Citing congestion at these crossings, BNSF announced an embargo on all grain, soybeans, dried distillers grain, soybean meal, and corn syrup destined for interchange with Mexican railroad, Ferromex (FXE), at Eagle Pass and El Paso, TX. We now understand that the BN is currently being allowed one unit train/day at these interchanges versus the four/day usually crossing through these corridors.

Soybean Damage Eligible For Crop Insurance Quality Adjustments

In response to reports of weather-induced damage to portions of this year's U.S. soybean crop, the U.S. Department of Agriculture's Risk Management Agency (RMA) has issued a new Fact Sheet to help affected producers more fully understand the process for filing quality adjustment claims for soybean damage under the federal crop insurance program.

To be eligible for quality adjustment payments, soybeans must grade sample grade or worse. Kernel damage exceeding 8 percent damage is one of the factors that causes soybeans to be sample grade. As referenced in the Fact Sheet, producers should file a notice of loss with their insurance agent within 72 hours of initial discovery of the damage.

According to the U.S. Standards for Soybeans, damaged kernels are defined as: "Soybeans and pieces of soybean that are badly ground-damaged, badly weather-damaged, diseased...mold-damaged...or otherwise materially damaged."

The RMA fact sheet notes that soybeans qualifying for a quality adjustment also may qualify for a "zero market value" if "there are no buyers willing to purchase the damaged production." RMA advises that the approved crop insurance provider, along with the insured producer, is required to perform "due diligence" to find a market or salvage market for the damaged production. RMA's fact sheet also states that approved insurance providers can obtain representative samples from the producers' fields or work with the producer to harvest representative samples from each field to be submitted for quality determinations.

NDSU Offers Soybean Drying Advice

A challenging soybean harvest is creating many questions related to storage and drying, according to Ken Hellevang, agricultural engineer with the North Dakota State University Extension Service.

Soybeans at 11 percent moisture have similar storage characteristics to wheat or corn at about 13.5 percent moisture, so 16% moisture soybeans might be expected to store similar to about 19% moisture corn. It is important to be able to aerate the soybeans to keep them cool.

The amount of natural air drying that will occur in late October and early November is limited. The equilibrium moisture content of soybeans for air at 40 degrees and 70 percent relative humidity is about 12 percent, so drying of soybeans above 12 percent would be expected with this air condition. However, the drying rate will be slow at typical in-bin drying airflow rates. An airflow rate of 1 cubic foot per minute per bushel (cfm/bu.) is expected to dry 18 percent moisture soybeans in about 60 days. With an airflow rate of 1.5 cfm/bu the drying time is reduced to about 40 days. The drying time for 16% moisture soybean is slightly less. The drying time of 16% moisture soybeans is about 50 days.

Adding supplemental heat to raise the air temperature by 3 to 5 degrees will permit drying the soybeans to about 11 percent moisture in about 40 to 45 days. Increasing the airflow rate proportionally reduces the drying time.

The moisture holding capacity of air is reduced at lower air temperatures. As average air temperatures approach 35 degrees, natural air drying becomes inefficient and not economical. Adding heat would cause the beans on the bottom of the bin to be dried to a lower moisture content and it would increase drying speed only slightly. Cool the soybeans to between 20 and 30 degrees for winter storage and complete drying in the spring. Hellevang recommends starting drying in the spring when outdoor temperatures are averaging about 40 degrees.

Increasing the airflow rate will increase the drying speed. However, the fan horsepower required to achieve the higher airflow rate becomes excessive unless the grain depth is very shallow. For a soybean depth of 22 feet, each 1,000 bushels of soybeans will require about 1.0 horsepower of fan. To achieve an airflow rate of 1.25 cfm/bu will require about 1.6 horsepower per thousand bushels and an airflow rate of 1.5 cfm/bu will need about 2.5 horsepower per thousand bushel.

The type of fan greatly affects the airflow provided per horsepower, so use a fan selection software program such as the one developed by the University of Minnesota. It is available on the NDSU grain drying and storage Web site. To find the website, do an internet search for NDSU grain drying and storage.

Soybeans can be dried in a high-temperature dryer, but the plenum temperature needs to be limited to minimize damage to the beans. Refer to the manufacturer's recommendations for maximum drying temperature. Typically the maximum drying temperature for nonfood soybeans is about 130 degrees. Even at that temperature, some skins and beans will be cracked.

One study found that with a dryer temperature of 130 degrees, 50 to 90 percent of the skins were cracked and 20 to 70 percent of the beans were cracked. Another study found that 30 percent of the seed coats were cracked if the drying air relative humidity was 30 percent. Roughly with each 20 degree increase in drying temperature, the air relative humidity is reduced to one-half. Air at 50 degrees and 80 percent relative humidity will have a relative humidity of about 40 percent when heated to 70 degrees. Monitor the soybean seeds coming from the dryer and manage the dryer temperature based on the amount of damage occurring.

There is a risk of fires when drying soybeans. Soybean pods and other trash can accumulate in the dryer and become combustible. Assure that there is not an accumulation of trash in the dryer that becomes combustible. Also, assure that the soybean continue to flow in all sections of the dryer. Monitor the dryer continuously to limit fire potential. Clean the dryer frequently to reduce the potential for debris becoming combustible.

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Mark Your Calendar For The MGFA “Grain Convention” 2019

The 112th Annual Convention and Industry Trade Show is scheduled for March 4-6 at the Double Tree by Hilton, Bloomington! The event will feature a return to the traditional arrangement for hospitality suites, an expanded educational agenda, a unique spouse program, an interesting pre-convention tour, additional valuable networking opportunities, a one-day Silent Auction in support of the MGFA scholarship program, more concentrated trade show hours and a chance to bid farewell to long time Executive Director Bob Zelenka at a reception being held in his honor on the evening of March 5. Convention details are due out soon so mark the date on your calendar, let your guys, board members and wives know about it and stay tuned! Thanks!

MN/DOT Seeks Applicants for Minnesota Rail Service Improvement Program Grant Funding

Railroad companies, rail users, cities and counties can apply for grant funding to improve freight rail service that supports economic development through the Minnesota Department of Transportation’s 2018 Minnesota Rail Service Improvement Program. Applications are due Nov. 16.

This is the first time MN/DOT is offering a competitive solicitation for grants for economic development. The \$1 million in general obligation bonds were approved during the 2017 legislative session. MN/DOT may provide additional funding for projects. Examples of eligible projects include railroad tracks, roadbeds, turnouts, bridges, buildings and fixed loading/unloading equipment.

“This type of funding is crucial to businesses in the state that depend on rail transportation,” said Peter Dahlberg, program manager in the Office of Freight and Commercial Vehicle Operations. “Many times small railroads and businesses lack the capital to make necessary improvements on their own. This funding helps the smaller railroads and shippers continue to provide competitive options and efficient movement of goods.”

Applications are available online at www.mndot.gov/ofrw/railroad/mrsi.html. A MN/DOT project selection team will review and score eligible applications. Award recipients will be notified once selections are made.

For questions about the application, contact Dahlberg at Peter.Dahlberg@state.mn.us. For more information on the application or the Minnesota Rail Service Program, go to www.mndot.gov/ofrw/railroad/mrsi.html.

Harvest Safety Tips

Preparing Bins for Harvest

In this current National Grain and Feed Association “Safety Tips” sheet series, appropriate methods for bin entry are outlined for grain handling facilities preparing for fall harvest. The guide can be accessed as a pdf at www.ngfa.org/issues/focusonsafety/ in the Training & Education-Safety Tips section. Please use and share it as you please.

NGFA Training Video Bin Entry Safety

Join NGFA Manager of Education, Training and Regulatory Affairs Jim Seibert to brush up on the basic safety precautions and equipment needed to enter a grain bin. This short video (found at vimeo.com/291776802),

funded by the National Grain and Feed Foundation, breaks down each step of the process to ensure managers and employees don't miss a step and stay safe every day.

More safety resources:

Don't forget to review the "**Grain and Feed Industry Hazard Information**" one-pager, which can be found at www.ngfa.org/issues/focusonsafety/ in the OSHA and NGFA Alliance section, created through the NGFA-OSHA Alliance for "Safe + Sound Week."

More information about NGFA's safety programs can be found on the NGFA Safety page (www.ngfa.org/issues/focusonsafety/) or by contacting Jim Seibert, manager of regulatory affairs, education and training; or Jess McCluer, vice president of safety and regulatory affairs.

MGFA Sustaining Member Spotlight – VAA, LLC

The company's roots were established in August 1978 as Van Sickle Allen & Associates, Inc. by Founders, Dick Van Sickle and Chuck Allen. After working for a construction company the two decided to open their own firm. Dick and Chuck also owned 50% of Grain Facility Design (GFD) – a sister company specializing in planning and mergers for grain and feed facilities. The two firms collectively had 10 employees – Van Sickle Allen & Associates providing structural engineering for commercial and agribusiness projects while GFD established its reputation in the agricultural industry.

Growing relationships with contractors and architects kept Van Sickle Allen & Associates busy while and diligent efforts helped propel GFD into the agricultural spotlight. Although work was relatively steady, GFD was dissolved in 1990 to merge with Van Sickle Allen & Associates to maximize engineering and design efforts. The firm converted to VAA, LLC in 2007. Their commitment to offering architects, owners and design build contractor's a genuine partnership to help accomplish their business objectives remains unchanged. The work VAA performs is beyond the project. It is about helping the people they work with through development of client relationships.

Their work is fueled by their foundation and team commitment to VAA's Vision and Values. The nine interchangeable phrases created by the six words of their vision statement not only represent who they are, it embodies their business philosophy and client relationships. This vision aligns with the values that drive VAA - integrity, excellence, service and relationships. **We are proud to count VAA, LLC as one of our valuable sustaining sponsors, providing the additional support necessary for MGFA to continue to be an effective representative of the grain elevator and feed mill industry. Thank You!**

NGFA Asks IRS to Clarify Deduction for Agribusinesses in Proposed Rule Implementing Section 199A

In a letter submitted on Oct. 1 to the Internal Revenue Service (IRS), the NGFA recommended that the agency clarify a recently proposed rule to ensure agribusiness firms like grain elevators, feed manufacturers and grain processors qualify for the pass-through deduction under Section 199A of the tax code.

Earlier this year, the NGFA and other stakeholders raised considerable concerns about how an initial version of Section 199A of the tax code – included during the waning hours of congressional consideration of the Tax Cuts and Jobs Act of 2017 – would influence producer marketing decisions. Congress responded by including stakeholder-driven provisions to fix the so-called "grain glitch" in the omnibus spending bill signed into law on March 23. The legislative solution achieved NGFA's objective to replicate to the maximum extent possible tax benefits to cooperatives and producers under the previous Section 199, while at the same time preserving a competitive marketplace.

On Aug. 16, the IRS published a proposed rule to implement certain provisions of Section 199A. While the proposal has no impact on the legislative action taken in March, it does contain a provision regarding the

deduction for qualified business income under Section 199A that the NGFA believes should be clarified or revised.

The IRS-proposed rule would not affect taxpayers and entities organized as C corporations. However, it could be interpreted as excluding other entities – such as individuals, partnerships, sole proprietorships, S corporations and LLCs whose owners are individuals – that are defined by the IRS as “dealing in commodities” from deducting 20 percent of qualified business income from their taxes under Section 199A.

The NGFA noted in its statement to the IRS that the proposed rule could deny some agribusiness firms like grain elevators, feed manufacturers and grain processors the pass-through deduction under Section 199A.

“The intent of Section 199A is to provide a reduction in the tax rates for a trade or business, the income of which is a return on invested capital,” wrote Larry Callahan, chief financial officer at Demeter LP, Fowler, Ind., and chair of NGFA’s Finance and Administration Committee. “The NGFA believes it was the clear intent of Congress that activities such as buying, selling, handling, processing and performing other value-added functions on physical commodities as part of the U.S. food and feed value chain reflect such a return on capital and should be eligible for the Section 199A deduction.”

The NGFA urged the IRS to revise the proposed rule to clarify that a trade or business is not considered to be engaged in the performance of services that consist of investing, trading or dealing in commodities – as defined in the tax code – if it regularly takes physical possession of the commodity as part of the ordinary course of its trade or business. In addition, the NGFA argued that businesses that take physical possession of the commodity should not be treated as a “specified services trade or business” that would be ineligible for the deduction if they hedge their risk with respect to the underlying commodity as part of the ordinary course of its trade or business.

“Such a clarification would be consistent with the hedging exception that the proposed regulations provide in the case of trading in securities, partnership interests, or commodities,” the NGFA letter notes.

The NGFA will continue to work closely with Senate staff members who were involved in the Section 199A legislative correction effort as well as the IRS to ensure that regulations are accurate, complete and consistent with the legislative solution. The NGFA also is scheduled to testify about its concerns and recommendations on this aspect of the proposed rule at an IRS public meeting scheduled for Oct. 16 in Washington.

Source: NGFA Newsletter

OSHA Clarifies Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing

In an Oct. 11 memorandum (found here www.osha.gov/laws-regs/standardinterpretations/2018-10-11), the Occupational Safety and Health Administration clarified the agency’s position on workplace safety incentive programs and post-incident drug testing. There had been some confusion since the publication of 29 C.F.R. § 1904.35 in May 2016 (the publication can be found at www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.35). OSHA had added a provision that prohibited employers from retaliating against employees for reporting work-related injuries or illnesses. In addition, in the preamble to the final rule, OSHA discussed how the rule could apply to actions taken under workplace safety incentive programs and post-incident drug testing policies. This led some facilities to consider doing away with their employee safety incentive programs.

In the new memorandum, OSHA clarified that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing. In fact, OSHA goes on to state that proper employee safety incentive programs can be an important tool to promoting workplace safety and health. The agency encourages programs that reward workers for reporting near-misses or hazards and encourages employee involvement in a safety and health management system.

However, OSHA reminded employers that any programs they implement that are focused on reducing the number of workplace injuries and illnesses must not be implemented in a manner that discourages employees from reporting workplace injuries and illnesses. The employer should take adequate precautions to ensure that employees feel free to report any injury or illness. Employers are encouraged to take positive steps to create a workplace culture that emphasizes safety, rather than just reducing their facilities' injury and illness rates. To do this, OSHA said employers should consider several program elements, such as:

- an incentive program that rewards employees for identifying unsafe conditions in the workplace;
- a training program for all employees to reinforce their reporting rights and responsibilities and emphasizes the employer's non-retaliation policy; and
- a mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

In addition, OSHA clarified that most instances of workplace drug testing are permissible under § 1904.35(b)(1)(iv). Examples of permissible drug testing include:

- random drug testing;
- drug testing that is unrelated to the reporting of a work-related injury or illness;
- drug testing under a state workers' compensation law;
- drug testing under other federal laws, such as a U.S. Department of Transportation rule; and
- drug testing used to evaluate the root cause of a workplace incident that harmed, or could have harmed, employees. OSHA advises that if the employer chooses to use drug testing to investigate an incident, it should test all employees whose conduct could have contributed to the incident, not just the employees who reported the injuries.

As a result of this memorandum, companies should evaluate their own employee safety incentive programs. OSHA's complete memorandum can be viewed here: <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>.

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