

## **Grain Indemnity Fund: Background on the Formation of the Texas Grain Producers Indemnity Board and Future of the Program**

### **Introduction & Background**

In 2011, the Texas Legislature passed House Bill 1840, creating the Texas Grain Producers Indemnity Board (the “Board”). TEXAS AG CODE, CHAPTER 41, SUBCHAPTER I. Following crop years riddled with erratic grain prices, financial failures throughout the industry, and farmers often left without any recourse, several states took steps to offer more robust financial protections for grain producers. The Texas legislature created the Texas Grain Producers Indemnity Board (the “Board”) in order “to indemnify grain producers for economic hardships in the event that a grain buyer is unable to pay the grain producer for the grain producer's grain.” TEX. AG CODE §41.202.

The legislation set forth a Board structure and provided a framework for a state-wide producer funded indemnification program. Generally speaking, Subchapter I designed a program where, in the event of a qualified grain buyer failure leaving grain producers unpaid for delivered grain, grain producers could file a claim with the Board to seek recovery of a portion of the money that the producer should have received from the grain buyer.

### **The Referendum**

While the creation of the Board could be accomplished based on the statutory language alone, the program’s operation was subject to approval by the state’s grain producers in a state-wide referendum. TEX. AG CODE §41.212. The producer referendum occurred between

November 19, 2012 and December 7, 2012. [Press Release, Commissioner Staples Announces Statewide Grain Producer Referendum to Establish Grain Indemnity Fund (Nov. 14, 2012), *available at* [www.texasagriculture.gov](http://www.texasagriculture.gov).] Any producer who had sold grain in the previous 36 months was eligible to vote. Each producer was allowed one vote, and a landowner was required to have a crop-share lease to be considered a “producer.” TEX. AG CODE §§41.201, 41.212. The producers acquired a ballot at their county Texas A&M AgriLife Extension office, and the ballot had to be timely mailed to the Texas Department of Agriculture to be counted.

Approval of the grain indemnity fund program, and the maximum assessment proposed by the Board, required an affirmative vote of two-thirds of those producers voting. TEX. AG CODE §§41.212, 41.031. Following the appropriate canvassing procedures, Texas Department of Agriculture officials determined that the referendum did not receive the requisite two-thirds vote. [Press Release, Texas Grain Producers Elect to Not Establish Statewide Grain Indemnity Fund (Jan. 2, 2013), *available at* [www.texasagriculture.gov](http://www.texasagriculture.gov).] Therefore, as of the date of this writing, the Texas Grain Indemnity Fund, while authorized by statute, is not a program in operation. Because the Board could elect to hold subsequent referendums, this paper will provide a broad overview of the current statutory structure.

### **The Board**

Under Subchapter I, the Board consists of nine members who are all appointed by the Texas Commissioner of Agriculture. Ag Code §41.204. However, the Board is a quasi-independent entity, and is not a part of any official division of the Texas Department of Agriculture. Five of the nine members will be one representative from each of the following five organizations: Corn

Producers Association of Texas, Texas Wheat Producers Association, Texas Grain Sorghum Association, Texas Soybean Association, and the Texas Farm Bureau. *Id.* The remaining four members shall be appointed by the Commissioner to represent the following groups: one representative of the Texas Agricultural Cooperative Council; one representative of the Texas Grain & Feed Association; one representative of the non-warehouse grain-buying industry; and one member with expertise in production agriculture financing. *Id.* Board member terms are 2 year terms; each member may serve a maximum of 3 terms, or 6 years on the Board. *Id.* The duties and powers of the Board are set out in detail in Texas Ag Code Section 41.205.

### **The Program – Assessments**

The indemnity fund program was created to indemnify grain producers in the event of a qualifying financial failure of a grain buyer, leaving grain producers unpaid. TEX. AG CODE §41.202. The funding mechanism for the program is producer assessments. TEX. AG CODE §§41.205, 41.207. Under Subchapter I, following the approval of the maximum assessment rate<sup>1</sup>, producers pay an assessment on grain sold via grain buyer collection of the applicable assessment amount from the final sales price of grain prior to issuing the final payment to the producer. TEX. AG CODE §41.206. Grain buyers are required to submit assessments on a quarterly basis; the assessments are submitted directly to the Board. TEX. AG CODE §41.206(b). The assessments will be deducted at the first point of sale. The first point-of-sale buyers will deduct and remit the assessment. The buyers will be compensated through an administration fee for costs associated with collecting the assessment

set by the Board. TEX. AG CODE §41.206(C). Assessments deposited into the indemnity fund will not be a part of the Texas General Fund. TEX. AG CODE §41.207.

### **The Program – Claims**

The motivation for the legislative enactment creating the Board was what appeared to be an increase in financial failures of grain buyers and little to no recourse for grain producers. Therefore, Subchapter I created a mechanism for grain producers to seek recovery for a portion of the funds that should have been received from the grain buyer the producer delivered grain to. TEX. AG CODE §§41.208, 41.209. Subchapter I requires that a grain buyer suffer a “financial failure” before a grain producer is eligible to file a claim. TEX. AG CODE §41.208. A “financial failure” occurs where a grain buyer (A) files for federal bankruptcy protection; (B) becomes the subject of an involuntary bankruptcy proceeding; (C) is found to be insolvent by a court or a state or federal licensing agency; (D) is ordered by a court having jurisdiction to pay a judgment to a grain producer; or (E) loses its public warehouse license under: (i) the United States Warehouse Act (7 U.S.C. Section 241 et seq.); or (ii) Chapter 14. TEX. AG CODE §§41.201(2), (3).

Subchapter I further requires that the grain buyer suffering the financial failure has failed to pay the grain producer for delivered grain. TEX. AG CODE §41.208. Once these events have occurred, a grain producer may file a claim with the Board, demonstrating that grain was delivered but not paid for and showing the terms the producer and buyer had previously agreed to regarding the sale of grain. TEX. AG CODE §41.208.

Upon receipt of producer claims, the Board reviews each claim and determines

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<sup>1</sup> The proposed maximum assessment rate in the 2012 referendum was 0.6% of the final sales price of grain.

whether the claim should be awarded any compensation<sup>2</sup>, and if so, the amount of the award. TEX. AG CODE §41.209. For successful claims, the maximum indemnity payment allowed by the statute is 90% of the amount of the value of the grain on the date of the financial failure, or 90% of the contracted price of grain. TEX. AG CODE §41.209(b). In other words, the fund would mitigate up to 90% of the financial losses suffered by producers of corn, sorghum, soybean and wheat if grain buyers failed to pay for grain due to bankruptcy and insolvency. Following payment of a claim, the Board has subrogation rights against the grain buyer or any other entity that may later issue payment for the grain that was subject of the producer's claim directly to the producer. TEX. AG CODE §41.210. Under the Board's proposed rules, mentioned below, issued in the Fall of 2012, once the fund balance reaches an amount that will adequately cover the producer's risk, as determined by the Board, the Board will initiate a program to refund assessments on a "first in – first out" basis. Producers that receive a refund under the program

will continue to have indemnity fund protection if they continue to participate.

### **Proposed Rules**

Pursuant to Subchapter I, the Board worked diligently to draft proposed rules to further define and direct the program's operation. These proposed rules were available for review prior to the 2012 producer referendum. However, because the referendum was not approved by two-thirds of those producers voting, the rules are still in the draft stage. The Board is faced with determining whether and how the 2012 rule draft may change in anticipation of a future referendum.

### **Future of the Program**

At the time of this writing, the future of the program is uncertain. The Grain Producers Indemnity Board members must grapple with whether the program is still needed; i.e., are the factors that led to the 2011 legislation still characterizing the grain industry in Texas, and therefore, grain producers need an additional safety net to protect against grain buyer financial failures? If the answer to that question is yes, the Board must then determine what changes are needed to the statutory language, to the proposed administrative rules, or to the referendum promotional materials in order to begin an operational program.

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<sup>2</sup> The Board may deny a grain producer's claim in whole or in part:

- (1) if the grain producer has failed to pay assessments for the current growing season under Section 41.206;
  - (2) if the applicable grain buyer has a history of failure to collect assessments as required by Section 41.206;
  - (3) if the documentation submitted by the grain producer in support of the grain producer's claim is incomplete, false, or fraudulent;
  - (4) to prevent the grain producer from recovering from multiple payments an amount greater than the amount the grain producer lost due to the financial failure of a grain buyer or to the grain buyer's refusal, failure, or inability to deliver to the grain producer grain held by the grain buyer as a bailment, including:
    - a. payments made by the Board;
    - b. payments made from a grain warehouse operator's bond;
    - c. payments ordered by a bankruptcy court; or
    - d. a recovery under a state or federal crop insurance policy or program; or
  - (5) if documentation submitted by the grain producer demonstrates that deferred payment on sold grain was beyond normal and customary practices.
- TEX. AG CODE §41.209(f).