

Message to licensees:

The South Dakota Public Utilities Commission has learned of a letter recently received by a number of South Dakota grain buyers from the reorganized debtors of VeraSun Energy Corp. The letter, from a law firm in New York, informs the grain buyer they are to repay the reorganized debtors 80 percent of the sales made to VeraSun within the 90 days before the company's bankruptcy filing, which occurred on Oct. 31, 2008. The letter further states the recipient should take action by Sept. 30, 2010, or a lawsuit may be filed. We understand several producers have also received this same letter from the reorganized debtors.

The PUC urges grain buyers who have received such a letter to:

- contact legal counsel for guidance;
- contact other South Dakota grain buyers to determine if their situation is similar to yours. If so, you may wish to consider coordinating efforts and sharing legal counsel; and
- respond to the letter, with the assistance of legal counsel, by the Sept. 30, 2010, deadline.

The National Corn Growers Association has developed a very helpful FAQ guide to this issue. You may access the FAQ on the PUC's Web site at [www.puc.sd.gov/Warehouse/verasun.aspx](http://www.puc.sd.gov/Warehouse/verasun.aspx). If you have not received the letter described above, but you know producers who have, we encourage you to share the information outlined above with them.

If you have questions related to South Dakota's grain warehouse laws, please contact the PUC by e-mail at [pucconsumerinfo@state.sd.us](mailto:pucconsumerinfo@state.sd.us) or by phone at 1-800-332-1782.

Sincerely,

James Mehlhaff, Director  
Grain Warehouse Division  
South Dakota Public Utilities Commission

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Copy for Web page, to be placed at [www.puc.sd.gov/Warehouse/verasun.aspx](http://www.puc.sd.gov/Warehouse/verasun.aspx)

**A Guide to Responding to a Demand for Repayment  
of a Bankruptcy Preference Regarding VeraSun**

Aug. 31, 2010

This briefing paper was prepared by the National Corn Growers Association with information from David A. Lander, Thompson Coburn LLP, St. Louis, Mo.

**THIS INFORMATION IS NOT INTENDED TO BE LEGAL ADVICE. ADDITIONAL CONSULTATION WITH YOUR ATTORNEY IS ENCOURAGED.**

**What should I do about a letter addressed to me that says I received a preference from VeraSun and that I must repay it?**

The best thing to do is to PROMPTLY determine whether the letter is correct or whether you have defenses. If you have good defenses it is wise to respond to the letter and assert those defenses. If you do not respond to the letter it is likely a lawsuit will be filed against you in Wilmington, Del., where the bankruptcy was filed, and you will incur expenses, even if you are successful in winning the suit or convincing the plaintiff to drop the suit before trial. If you have good defenses, usually the least expensive way of disposing of the demand is by a carefully written response to the demand.

**How do I know if I have defenses?**

Unfortunately these demands are often made without checking into the accuracy of the information or the likelihood of defenses and so you must make this determination. Key issues are:

1. Determine whether the facts stated in the letter are accurate. Is that the correct amount that you received within the 90-day period prior to the filing of the bankruptcy and is the date of the receipt correct? If you received less than the amount demanded during the 90-day period then that is your first defense to the extra amount claimed.

2. Determine whether the payment received was in the “ordinary course of business.” This is the primary defense you need to evaluate. If the payment was made within the terms of the contract or if the payment was received on the same schedule as prior payments, then this may provide a good defense. Likewise, if the payment was received within terms that are routine in the industry, that may provide a defense.

3. Other possible defenses include the fact that you shipped grain to the debtor after you received this payment and were not paid for that grain, or if the debtor was not insolvent at the time of the payment or if the payment did not come from the debtor. All of these are pretty technical defenses and there is a great deal of law on these issues so it is likely you will need a lawyer who is experienced in defending preferences to help with this analysis and perhaps in drafting the response.

If you have confidence in a lawyer who is experienced in preference defenses, then you should contact that lawyer and hire them as soon as possible.

NCGA and the South Dakota Corn Growers organization have a lawyer who is willing to talk with you on the telephone and help you understand preference law. He will not become your lawyer unless and until you hire him and that is your decision, but he can discuss the general principles of preference law with you. He has significant experience with agricultural law issues and with preference law. Contact: David A. Lander, Thompson Coburn LLP, St. Louis, Mo., Telephone: (314) 552-6067