



National Grain and Feed Association

Issues & Actions

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NGFA Advises House Ag Committee on Draft Futures Anti-Speculation Bill

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[Editor's Note: This publication keeps you – as a stakeholder in the NGFA – informed about issues being addressed and actions being taken to serve your business interests. NGFA members are encouraged to contact the NGFA office to provide input, ask questions and raise additional issues you believe should be addressed by your Association.]

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The NGFA on Feb. 5 notified the House Agriculture Committee that it strongly supports provisions in what at that time was a draft bill authored by Chairman Collin Peterson, D-Minn., that would enhance market transparency and expand reporting requirements for non-traditional participants in agricultural futures markets.

But in doing so, the NGFA also voiced concerns over the draft bill's attempt to precisely define what constitutes a "bona-fide" hedge, which would be used to determine which entities are eligible for exemptions from speculative position limits in futures trading. Further, the association expressed misgivings about the draft bill's provisions that would create an agricultural advisory group that would meet annually to develop recommendations for the CFTC on setting speculative position limits, and raised cautions over provisions that would require all over-the-counter (OTC) transactions to be cleared through regulated futures exchanges. *[Editor's Note: Peterson subsequently modified both of these provisions when formally introducing the bill (H.R. 977.)*

The NGFA's statement reiterated its long-standing concern – dating back three years – that the influx of investment capital, particularly in the CME Group's CBOT wheat futures contract, has contributed to a "disconnect" between cash and futures prices, making it difficult and costly for traditional grain hedgers to utilize the soft wheat futures contract and contributing to historically wide wheat basis levels. The NGFA told the House Agriculture Committee that, combined with mounting margin calls that accompanied volatile and rapidly increasing futures prices last spring and summer, these factors have reduced the ability of grain elevators to offer a broad range of cash grain marketing tools to producers.

The House Agriculture Committee on Feb. 4 completed two days of hearings on draft legislation authored by Peterson that would tighten federal regulation of speculative trading activity. Among other things, Peterson's draft bill would: 1) impose federal speculative position limits on all commodities (this would not affect enumerated agricultural commodities traded on futures exchanges, for which position limits already exist); 2) require the Commodity Futures Trading Commission (CFTC) to disaggregate and report monthly data submitted by index funds and other passive investors in futures markets, and report on those positions relative to so-called "bona-fide" hedgers; and 3) require the CFTC to define and classify index traders and swaps dealers for purposes of establishing routine, detailed reporting requirements. Peterson's draft bill also would require that virtually all new over-the-counter (OTC) products be cleared on a regulated exchange, and stipulate that existing OTC products be reported to the CFTC. These OTC provisions are targeted particularly at financial swaps and other credit derivatives.

The NGFA commended the draft bill's provisions requiring detailed reporting and disaggregation of data to enable market participants to determine the extent of involvement of index traders and swap dealers in agricultural futures markets. It said such a requirement would bring added clarity and transparency to agricultural futures markets, and assist market participants in determining whether market activity is based primarily on investment strategies or true supply/demand fundamentals. The NGFA suggested that Congress also provide guidance to the CFTC on additional futures market participants whose trading activities may be for non-traditional purposes, and consider requiring them to submit similar reports to the agency.

But the NGFA expressed significant concerns about the draft bill's provisions that would statutorily define the complex concept of "bona-fide" hedges, saying doing so would be "fraught with risk." In this regard, the NGFA said it supported the draft bill's intent to distinguish between traditional hedgers who use futures contracts for price discovery and to hedge their price and inventory risks versus newer, non-traditional entities using futures as part of investment portfolios. "For some time, we have made the case that investment capital's participation in agricultural futures markets has artificially inflated futures prices, skewed basis relationships and – especially in the CBOT wheat contract – eroded the utility of futures markets for traditional participants," the NGFA said. "But we fear that a strict construction (of what constitutes a 'bona-fide' hedge) could unintentionally ensnare legitimate hedgers, and at the least could have a constrictive effect on the development of hedging strategies that benefit agricultural producers," the NGFA said.

As an alternative, the NGFA recommended that Congress provide guidance to the CFTC on parameters of a "bona-fide" hedge. But it encouraged Congress to allow the agency to develop and administer the definition.

Concerning the draft bill's proposal to create an agricultural speculative position limit advisory committee, the NGFA said the current method of determining speculative position limits for grains and oilseed futures contracts is transparent, allows for input from affected market participants and generally works well. A broad

advisory group might not have sufficient expertise with individual agricultural futures contracts to be effective, the NGFA said. *[Editor's Note: Peterson subsequently changed this provision to require that the CFTC conduct an annual public meeting to solicit advice on speculative position limits, rather than create an advisory committee.]*

The NGFA also cautioned that the draft bill's provision that would require clearing nearly all OTC's through futures exchanges may be impractical, given the customized, differentiated nature of such products. The NGFA's statement noted that several grain buyers and processors have structured a range of OTC products that undergird and complement their cash grain contracts with producers and other customers. "We are not aware that these useful OTC agricultural products, which provide tailored marketing opportunities to producers and other customers, have experienced the same problems as credit default swaps and other financial derivatives," the NGFA said.

The NGFA suggested that an alternative approach might be for Congress to require reporting of OTC participants and/or transactions to the CFTC and public. *[Editor's Note: Peterson subsequently changed this provision to provide an alternative to clearing OTC transactions on-exchange; as introduced, the bill would allow OTC transactions to be reported to the CFTC with reporting parties required to demonstrate their financial integrity and the CFTC empowered to set net capital requirements for such entities.]*

U.S. Producer, Agribusiness Groups Convey Risk-Based Principles to Congress on Food/Feed Safety Legislation

The NGFA joined with 10 other national agricultural producer and agribusiness organizations on Jan. 23 in conveying a set of risk-based principles to Congress that the groups believe should guide any action on food and feed safety legislation.

The document was authored principally by the NGFA and American Farm Bureau Federation (AFBF), with input from a diverse array of other agricultural-based groups. Cosigning the document with the NGFA and AFBF were the Animal Health Institute, National Association of State Departments of Agriculture, National Oilseed Processors Association, North American Millers Association, Pet Food Institute, Produce Marketing Association, United Fresh Produce Association, USA Rice Federation and Western Growers Association.

The four-page document, which mirrors many of the concepts outlined in the Bush administration's 2007 Food Protection Plan, outlines the following core principles that should be incorporated into any food and feed safety legislation:

◆ **Require FDA regulation and inspections to be based upon**

science and risk. The groups advised that decisions on whether to promulgate additional regulations or inspections of FDA-regulated products should be based upon a scientific risk assessment and prudent risk-management decision-making. FDA should develop or modernize current good manufacturing practice regulations if justified based upon risk.

◆ **Authorize FDA to recognize or accredit independent third parties.** The groups concur with FDA's proposal that legislation should authorize the agency to accredit highly qualified and truly independent third parties – including other federal, state and private-sector entities – that could be used on a voluntary basis by firms to conduct inspections or audits for imported or domestic FDA-regulated products, and that FDA be allowed to consider such audits as one of many factors in determining the agency's inspection priorities. But the groups also urged that Congress legislatively stipulate that FDA utilize public rulemaking to determine the criteria to be used to determine whether third parties are eligible for accreditation, and to prioritize accreditation of third parties to those performing inspections of facilities handling or manufacturing higher-risk prod-

ucts. The groups also encouraged Congress to require that FDA use public rulemaking to determine the standards (e.g., CGMPs) to be used by accredited third-party certifiers when inspecting or auditing facilities.

- ▶ **Link expedited entry of “high-risk” imported products to adoption of product safety programs.** The groups recommended that legislation include a provision that would allow for expedited entry of imported products determined to be “low risk” by FDA through scientific risk assessment. Import product categories determined by FDA to be “high risk” through scientific risk assessment also should be permitted expedited entry into the United States provided the foreign exporter adopts and implements a product safety program to minimize the potential for hazards to human or animal health. In determining risk, the groups said FDA should take into account, among other things, such factors as the type of commodity, its intended use, the compliance history of the foreign supplier, and the food and feed safety procedures in effect in the foreign country.
- ▶ **Authorize certification of “high-risk” imports.** The organizations recommended that legislation authorize FDA to work with foreign countries and suppliers to certify that “high-risk” imports (such as those subject to FDA import alerts) comply with U.S. food/feed safety standards.
- ▶ **Establish science- and risk-based inspection approaches for imported and domestic products.** The groups recommended that legislation require FDA to utilize World Trade Organization-compliant procedures when developing inspection approaches

to both domestic and imported products.

- ▶ **Expand research and diagnostic laboratory capacity.** The organizations encouraged Congress to accelerate the expansion of U.S. lab capacity and research on enhanced testing capabilities for detecting hazards that may adversely affect human or animal health.
- ▶ **Modernize and harmonize U.S. government computer systems.** The groups recommended that Congress finance improvements to the U.S. government’s computer systems to allow agencies (such as FDA and the U.S. Department of Homeland Security’s Customs and Border Protection) to more seamlessly share commercial product information and inspection data to facilitate imports and inspections.
- ▶ **Expand education and training of inspectors.** The organizations encouraged Congress to require expanded education and training of agricultural border inspectors to detect plant and animal diseases and pests.

The 11 organizations also urged Congress to fund enhancements to FDA’s food- and feed-safety-related activities through public tax dollars, rather than imposing Draconian user fees on the industry. Further, the groups said that any legislative requirement that food or feed facilities update their Bioterrorism Act registration with FDA should be predicated upon FDA making improvements in the registration process, and that such updates not be subject to user fees. Finally, the groups strongly opposed any restrictions on U.S. ports of entry for imported products.

Final Arguments Submitted by Shippers in STB Small Rail Rate Court Case

A broad consortium of shipper organizations, including the NGFA, on Jan. 21 filed a final rebuttal brief with a U.S. appellate court in a case in which both railroads and shippers are challenging the federal Surface Transportation Board’s (STB) final rules regarding procedures for handling small rail rate cases – those involving rate-relief claims of less than \$5 million.

Congress directed the STB to establish a simplified and expedited method for resolving comparatively smaller freight rail rate challenges when passing the Interstate Commerce Commission Termination Act in 1995. Specifically, a portion of that law directed the STB “to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full-SAC (stand-alone rate case which can be extremely expensive) presentation is too costly, given the value of the case.” Subsequent rules developed by the STB ostensibly to implement this provision of the law have resulted in very few rate cases being filed. Despite numerous attempts by shipper groups to have the

agency reconsider its rules, it wasn’t until 2007 that the STB finally issued revised rules. Those rules now are the subject of this court case.

The shipper groups’ brief, filed with the U.S. Court of Appeals for the District of Columbia Circuit, in essence argue that the STB’s final rules still are too restrictive and prevent broad ranges of potential small rate disputes from gaining access to the agency for consideration for relief. By and large, the cost to bring a rail rate case still is not reasonably related to the potential payoff across the majority of rail movements for small shipments, the shipper groups contend. The shippers ask the court to remand the final regulations back to the STB for reconsideration on these grounds.

It is expected that the appellate court will order oral arguments in the case within the next three months, with a final decision expected by mid-2009.

NGFA, Others Urge USDA to Delay Deregulation of Ethanol Biotech Corn Trait

The NGFA on Jan. 20 joined with the North American Export Grain Association (NAEGA) and North American Millers Association (NAMA) in urging the U.S. Department of Agriculture to suspend its consideration of a proposal to deregulate a biotechnology-enhanced corn trait designed to enhance ethanol production until more information is available on its effects on food and feed.

The statement was submitted in response to the USDA Animal and Plant Health Inspection Service's (APHIS) consideration of a petition from Syngenta Seeds Inc., Research Triangle Park, N.C., to deregulate its biotech corn Event 3272 that produces a microbial enzyme—alpha amylase—in the corn endosperm to increase ethanol production. The biotech ethanol corn trait has been undergoing field testing under an APHIS permit since 2002, after the agency determined that it did not present a risk of introducing plant pests or being disseminated further under conditions specified in the permit.

The NGFA, NAEGA and NAMA told APHIS that while the biotech corn variety “promises to be a useful technology for ethanol production, there are several outstanding questions concerning the effects on corn milling, feed-quality attributes and food processing.” But the groups said there is inadequate scientific data or documentation available in the public docket to permit evaluation of these potential impacts on food and feed functionality in the event the trait becomes commingled inadvertently in the commodity corn stream. As such, the groups said, there is an unresolved question as to whether Event 3272 is functionally equivalent to other corn or has the potential to become a plant pest. Further, they said, the lack of publicly available information makes it “impossible” to determine whether the closed-loop channeling system proposed by Syngenta for handling this ethanol biotech corn is sufficient.

“To date, Syngenta has only agreed to provide what data it has generated to those companies and organizations that agree to be bound by the restrictions of confidential disclosure agreements,” the three major organizations told APHIS. “As such, there is no basic stakeholder understanding if the existing data are sufficient or if the proposed management programs...are appropriate” for the ethanol corn trait to be deregulated.

The organizations noted that potential differences in the functionality of Event 3272 compared to other corn—if such differences exist—could pose negative, costly consequences to a range of products, including ready-to-eat cereals, snack foods, blended corn products used for international food aid, and livestock and poultry feed if the ethanol corn event is not adequately characterized and controlled. The unknown effects also could negatively affect U.S. exports, and result in increased capital costs for processing facilities, and necessitate expensive testing throughout the grain-handling and processing system, the NGFA, NAEGA and NAMA said. In addition, they noted, any subsequent establishment of regulatory and commercial restrictions on U.S. corn exports could occur unless adequate assessment and risk mitigation is in place.

“Given the uncertainty and lack of publicly available information regarding the risk assessment and risk management associated with (this ethanol biotech corn) application, deregulation of this product should occur only after the potential for this corn event to be a plant pest can be assessed accurately by the U.S. government in consultations with relevant industry stakeholders,” the NGFA, NAEGA and NAMA wrote. “In addition, other U.S. government agencies responsible for assessing the legal standards should be consulted and rule prior to deregulation of this product.”