

THE WASHINGTON PUBLIC POLICY AGENDA:

WHAT'S AT STAKE FOR THE GRAIN, FEED AND PROCESSING INDUSTRY?

Presentation by Marc L. Fleischaker
to the National Grain and Feed Association

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Good Morning. It is an absolute delight to be with you this morning. And that is not merely because we are in Maui, although that is delightful in and of itself. But for me, it was a real treat when Kendell and Todd called and asked if I would make a few remarks at the Convention this morning. My journey with this organization has been a long and consistently positive experience for me --- and I hope for the Association as well. I first worked on a matter with the NGFA 33 years ago, when my boss and mentor Earl Kintner and I reviewed some antitrust questions that were a little "beyond" the expertise of the solo practitioner then representing the Association as outside counsel. I was less than one year away from making partner in my 50-lawyer law firm. Fortunately, I didn't totally screw up the assignment, and not only did I make partner the following year (and the law firm grew to 350 lawyers), I started a three decade plus sojourn with an organization that has been very unusual in Washington for its consistency and integrity throughout those many years. This industry has been critical in making sure that the world is well and safely fed, and it gives me a good feeling inside to think that perhaps I've had a small role in helping make sure that is true. And I hope that we're not finished yet! The next few years promise continued turbulence, and our organization will have a critical role in helping to assure the world's food supply. I very much look forward to being part of that.

I have one more "admission" to make at the outset. I am a registered Democrat. I'm probably best described as a conservative or moderate Democrat. It was family tradition and the Democrats' commitment to social welfare (particularly civil rights) that caught my fancy and made me a "D" rather than an "R." Yes, I've supported plenty of Republicans over the years with no regret. But I also voted for our current President, and am not quite as discouraged about his performance as some people on both the right and the left. Now, however, he's had a year to learn the job, and we're beginning to see if he is going to be able to translate his theoretical views into a positive performance. I certainly have my own criticisms so far, and you will hear some. But don't expect unremitted Obama-bashing from me. I still believe that from a sociological standpoint, his election was a history-making moment for our country, a country that continues to show the world that we are a people to be idolized and envied. His performance as President, however, cannot be measured as a sociological experiment, and it sure hasn't

been an unqualified success up to now. By the end of his term or terms, President Obama will have disappointed just as many liberals as President Clinton did during his two terms. I am going to discuss with you today some of my thoughts about the Obama Presidency, where it seems to be headed, and how that will impact the grain, feed and processing industry. I am not looking for a job in the Administration, so whether you agree or disagree with me, I hope you will conclude that I've given an honest appraisal.

In addition to his own abilities to give a speech (yes, perhaps using a teleprompter) and manage a campaign (perhaps one of the best in history), Mr. Obama's election was in large measure a reaction to the perceived failings of the Bush Administration. Apart from the Iraq War, the key moment in the campaign was when the economy came to a crushing crash, Senator McCain suspended his campaign, and Senator Obama showed strong leadership in public and in the White House meeting to discuss whether there should be a "bail-out" for AIG and the major banks. From that moment, there was little doubt who would win the Presidency. Obama proved to the country that he could support the Republican Administration when, in his view, it made sense, and that he would do what he could to rescue the country from economic free-fall. McCain proved to the country that while he is a great American, with an unparalleled resume, he was not up to the task of leadership that was demanded at that moment. When one thinks about these two men in the abstract, and perhaps since the election, that conclusion seems very counter-intuitive. But it was true at the time, and gave Mr. Obama the momentum to win the election rather decisively.

After the election, unfortunately, Rahm Emanuel's dictum to "Never let a good crisis go to waste," seems to have been the primary motivational and organizational force in putting together the Administration and developing its initial priorities, most prominently a total revamp of the health care system. The 60 Democrats in the Senate turned out to be a curse rather than a blessing. Historians say that numerous Presidents come into office with a hubris that convinces them that they can accomplish things that are simply not feasible. President Obama was no exception, and the perceived arrogance and overreaching have not served him well in the first 13 plus months of his Presidency. Of course, much of the same thing happened to both Presidents Clinton and Reagan.

But our current President has yet to show that he can recover like those two did. And President Obama's fealty to the labor unions that helped elect him has already had negative implications for his overall agenda, as well as the agenda that directly affects this industry. Unfortunately for people who would like to see the President succeed, this has helped to define him as a traditional liberal or even a "leftist," even though when he came into office many people saw in Obama what they wanted to see --- whether a liberal, moderate, or "pragmatist." The more recent definitions of Obama as a "Chicago politician," a "European socialist," or "another Jimmy Carter" are certainly less flattering, and largely the President's own fault.

The major test for President Obama over the next six months is whether he can respond effectively to the concerns of the American people. He appears to be making some baby steps in that direction with his apparently sincere efforts to promote bipartisanship, and a slimmed down stimulus package, otherwise known as a "jobs bill."

He is not being helped, however, by the leadership in either the House or the Senate, and the Republicans are reluctant to let him off the ropes, unless they perceive the need to do so for their own image and political resuscitation. Elected officials tend to fear for their own survival, and the President's political standing is only secondary to their own. So it's going to take strength, perseverance, and compromise for the President to turn it around and have a successful Presidency. Right now it's anyone's guess as to whether he has and can demonstrate those qualities.

Before discussing some specific policy issues that face the country and this industry, I am going to take the liberty of making some comments about this industry, which I see as somewhat schizophrenic. We think of ourselves as the ultimate capitalists and supporters of a free market. And we often are. But at the same time, very few industries are more propped up and affected by government support, whether it is general farm supports, export promotion efforts, development of inland waterways, ethanol subsidies, or a heavily regulated railroad industry. There is certainly nothing wrong with our wanting to have it both ways, although we do have to be somewhat concerned about our credibility. But I believe that the bigger message is this: nobody is 100 percent pure in their political perspectives and desires. We should all remember that, both when criticizing others and defending ourselves. Each argument needs to be addressed on its own merits. No group is better than the National Grain and Feed Association in doing so, and that strong issue by issue analysis needs to continue for us to maintain and enhance our effectiveness in Washington.

I am now going to briefly address a "Top Ten" of the legislative and administrative issues that our industry faces. By the time I'm finished, you'll probably wonder how I can say I'm a Democrat. But just remember, I'm just as entitled to my own schizophrenia as you are!

Number 10. Proposed Limits on Arbitration -- When Earl Kintner spoke at a national convention 25 years ago, he described our arbitration system as "the crown jewel of the Association." I believe that this continues to be the case. I can truly say that it is the best private dispute resolution system that I have seen, and your insistence that it retain its efficiency, cost-effectiveness, and integrity should be a matter of pride and is to be applauded. Yes, arbitration is under attack in Washington. Have there been abuses of private arbitration systems, whether by the securities industry or others seeking to take advantage of consumers? Of course. But let's not throw the baby out with the bathwater. The Federal Arbitration Act, which encourages private arbitration, has been enormously successful in reducing unnecessary court cases, and the Supreme Court has been consistently supportive of arbitration to resolve disputes. Nevertheless, some in Congress are seeking to reduce mandatory arbitration not only in consumer and employment disputes, but also in agricultural disputes as well. I believe that this industry can forestall these assaults on a system that has proven so beneficial, but we need to monitor and defend our arbitration system aggressively. It is a bedrock foundation for the continued success of trading in this industry, both on a domestic and worldwide basis. We should vow to do whatever we need to do in order to defend it from assault by the trial lawyers and unions who believe that they would fare better in front of judges.

Number 9. Infrastructure Improvements -- The President has, in my opinion largely justifiably, taken many hits over the so-called stimulus package approved early in his term with no Republican support. My criticism is not, however, about whether a package was appropriate. My criticism is that it has resulted in more government than private industry jobs. While teacher and police jobs are obviously important and it is great that many have been saved, they are not stimulative. Rather, I believe that the money should have been more targeted to infrastructure projects that are clearly necessary. Certainly, some money has gone to road improvements. And even the Brooklyn Bridge is being renovated! And last month the President announced loan guarantees for building two new nuclear plants -- a very welcome if somewhat slow endorsement of a much-needed energy source. This industry can benefit significantly from waterway infrastructure improvements, which need to be a vital part of the mix. In that context, I believe that we should support infrastructure spending, and I believe that the Administration will ratchet up its efforts in this regard. Many people would suggest that we as a country cannot afford not to make these improvements, and this is one case in which additional government spending can help this industry.

Number 8. Corporate Spending on Political Campaigns -- In its "Citizens United v. FEC" decision earlier this year, the Supreme Court held that there is a First Amendment right to make independent campaign expenditures without limitation. As a result, limits on spending of this type in the 30 days before elections were struck down. My liberal friends, joined by the President in his State of the Union address, railed against this Supreme Court decision. While I agree that one can quibble with the basic premise that a corporation should be treated like a "natural person" in analyzing its constitutional rights, and that we should be reluctant to give non-U.S. based companies the same rights as U.S.-based companies (just as we should be reluctant to do the same for non-U.S. citizens) I believe that the impacts of this decision will be less than anticipated, and as a consequence that a legislative "fix" to the decision is not likely to occur. How many of your companies will spend thousands of dollars to try to affect an election, and then be answerable to your stockholders or owners about how the money was spent? While the decision expands the speech options for companies, labor unions and non-profits such as trade associations, I don't believe that many companies will add significantly to the spending that they already do, and if they increase their spending, why should we be concerned about it provided that their source of the money is clearly and accurately disclosed? So, at the end of the day, this is one debate that I doubt will impact in this industry, or on the body politic as a whole. By the way, this decision does not affect the ability to give directly to politicians, so I would continue to encourage you to contribute to the NGFA PAC so that can be used to help federal politicians sympathetic to this industry.

Number 7. Food and Drug Administration -- The FDA is the first of the Washington regulatory areas that I will mention. Like others, however, I believe that we are seeing in full the over-reaction of what some people saw as a less than zealous Bush Administration. This is true in agencies such as the FDA and the EPA (not to mention OSHA which I will address separately). Regulators who have been out of power and frustrated for the eight years of the Bush Administration are seeking to reinstate activist agendas at the agencies themselves, and with respect to their legislative proposals. A

renewed "emphasis" on food and feed safety will keep the industry on defense in the halls of Congress as well as the FDA. The new Commissioner, Dr. Margaret "Peggy" Hamburg, has raided warehouses and seized allegedly unsafe products ranging from cheese to dietary supplements to hand sanitizers to restaurant food. The number of enforcement actions and inspections is definitely on the rise. Message for those of you with feed mills: keep them clean, keep good records, and be ready for an inspection. You can get through it, but the likelihood of seeing an FDA inspector has definitely gone up.

Number 6. Antitrust -- The new antitrust enforcement officials at both the Department of Justice and the Federal Trade Commission came into office having concluded that the Bush Administration was too lenient in permitting mergers, and not aggressive enough in enforcing traditional antitrust violations involving price fixing, bid rigging and general business collusion. The prior Administration did not bring a single monopolization case during its eight year tenure apart from some merger investigations. (By the way, the Obama Administration has yet to bring one either.) Some in Congress are encouraging action against Monsanto to aid farmers allegedly squeezed by monopolistic practices. (Private litigation has already started.) There is a major investigation that has a goal of restricting the pharmaceutical companies from paying generic drug companies to delay the introduction of generic drugs. Trade associations are now a particular target of conspiracies to restrain trade, although not the only one. Trade associations tend to be easy targets since the first requirement of a Sherman Act violation -- a combination or conspiracy -- is always present when industry competitors meet and discuss issues. Hence, there is a real need to make sure that our associations are operated properly and able to withstand antitrust scrutiny. I am happy to report to you today that your association has always been sensitive to these issues, and I am very confident that we can and will extend our record of never having been challenged in an antitrust case. Restrictions on marketing biotech products are high on the enforcers' agenda, and the festering concern that some have about high concentration in agricultural markets will receive a great deal of attention. There will be more "second requests" in mergers, involving time consuming and expensive document reviews. The inappropriate use of a dominant market position also gets particular attention, and the FTC is currently challenging Intel in that regard. I give credit to the Antitrust Division for looking closely at various activities of Google, even though their Chairman, Eric Schmidt, was a big Obama supporter. Antitrust investigations and cases grind slowly, so we're just beginning to see the fruits of the newer activism at these agencies. But a caution to everyone is in order: review your contracts, review your document retention policies, review your meetings with competitors, and make sure that you have competent counsel. This is a major area for renewed emphasis.

Number 5. Energy/ Climate Change. I sure don't have to tell you about the focus that President Obama, both in his campaign and since, has placed on climate change and energy conservation. It may be somewhat foolhardy to place these two topics together, although they tend to be lumped into one discussion. My sense is that they will be treated differently by this Administration. In the energy development and conservation area, the President took a step in what I believe is the right direction two weeks ago by announcing loan guarantees for the development of two new nuclear power plants.

These will be the first nuclear plants built in over three decades. Of course, it's about 50 plants short of what is necessary, but it is a start. On the other hand, the Administration remains pretty committed up to now to opposition to off-shore drilling for oil and Vice President Gore has a long history of being negative to coal. My guess is that this will be the next Administration priority to lose steam. While the federal government may not support much development itself, the development will happen. The new Virginia governor is moving in that direction and Virginia won't be the last state to do so. Regarding climate change, I would be very surprised if the President retreated significantly from what he has requested, but I would be equally surprised if he gets much for his efforts. The so-called "Cap and Trade" proposals are in the deep freezer, and would need the new nuclear power to break loose in the foreseeable future. I still believe we will see health care legislation before cap and trade legislation. Yes, keep your vigilance. No, don't sell your facilities because you believe that cap and trade is going to pass.

Number 4. International Trade. This is another issue that was unduly influenced by the trade unions during the campaign. But I believe that it is also another area in which President Obama will be more realistic and pro-free trade than Candidate Obama. Clearly, the NGFA needs to take an aggressive free trade stance. This is in both the public interest and the industry's interest. The new U.S. Trade Representative, Ron Kirk, former Mayor of Dallas, has repeatedly asserted that we need to challenge foreign non-tariff barriers ranging from discriminatory labeling, to health-related inspection requirements, to technical standards that operate as barriers to imports. Of course, we need to be very careful about losing challenges at the World Trade Organization, and encouraging retaliatory treatment by foreign governments. My sense is that President Obama will ultimately come down in the traditional way on most trade issues, and support free trade. The risk if he does not that the world-wide recession will be exacerbated is simply too great. One area in which we continue to see aggressive U.S. action through the Justice Department and Securities and Enforcement Commission is active enforcement of the Foreign Corrupt Practices Act. Both agencies have specialists devoted to this area, and it is a money-making proposition for the U.S. government. The grain industry operates around the world, including in many countries without traditional U.S. values. It is imperative to review your practices in foreign countries, and monitor the agents that are acting on your behalf. Corporate internal investigations and audits to assure FCPA compliance are becoming increasingly commonplace, and for a good reason. These are extremely time consuming and expensive cases to defend and to settle, and you can count on the ratcheting up of activity started in the Bush Administration to continue in the Obama Administration.

Number 3. Biosafety Protocol. Up to now, I have not see any change in approach from the Bush Administration to the Obama Administration in their reactions to the Cartagena Protocol, or their general treatment of biotech products. There seems to be a strong, pro-export philosophy, and while I anticipated that there might be a move to ask the Senate to approve the international biotech treaty, I have not seen any evidence that this is likely to happen. Consequently, our focus continues to be on the negotiations among the countries that have signed on to the treaty, and how those negotiations will treat the transporters of biotech products vis-a-vis the biotech companies themselves.

This continues to be a major focus for NAEGA, which has done a fantastic job leading the International Grain Trade Coalition. We continue to negotiate liability and redress issues with both the international community and the biotech companies themselves. Great progress has been made. Our goal is to assure the continued viability of international trade without risking colossal liability that would bring trade to a virtual standstill. I do not expect that the Obama Administration will participate actively or importantly in affecting this one way or the other. But you can be sure that your industry trade representatives are doing so.

Number 2. OSHA. I want to start my discussion of OSHA by saying how proud the grain, feed and processing industry should be of its incredible work, and ultimate success, in reducing fires and explosions in this industry. The past 20 years proved without a doubt the good faith, sincerity and good corporate citizenship of this industry. OSHA actually understands this remarkable record and uses it as an exemplar of the positive impacts of the OSHA regulations. While we can debate whether or not the cause of the outstanding industry performance is government regulation or industry recognition or some combination of the two, this industry can and should trumpet its history as a badge of pride. For that reason, and the paucity of fires, explosions and resulting injuries and deaths in this industry, it is stunning that OSHA would consider re-regulating the very industry that has proven to be so successful. Yes, portions of the industry are not covered by the current grain handling standard, and consideration should be given to voluntary compliance. But this industry should be used by OSHA as a demonstration of how there can be success, and it should be viewed by OSHA as a partner. The idea that the standards would be toughened in certain ways, and that the success that has been achieved might be put at risk, is untenable. I am very hopeful that this will not happen. We are at the start of a lengthy regulatory process that is likely to take at least 18 months and probably longer. During this process, we not only need to monitor OSHA and Congress and encourage them to accept the success that we've had, we also need to make sure that our own operations continue to perform well. I strongly urge you make sure not only that you are in compliance with the regulations, but also that you conduct regular audits, review your facilities to see if regulatory compliance is appropriate even when not required, and keep your facilities clean and maintained. That will be the best evidence as we move through this regulatory process that additional, onerous regulations do not need to be placed on this industry. One serious explosion in a single company can undermine years of hard work by the industry as a whole. Be aware that OSHA will be increasing its inspections, and placing special emphasis in this area. In this era of fiscal austerity and budget freezes, the Administration has actually proposed an increase in OSHA's budget of 2.7 percent, to \$573 million. More money will be used for enforcement; less for voluntary compliance programs. There will be 42,250 inspections in fiscal year 2011, with new employees conducting 15% of those. And OSHA wants to expedite its rulemaking process, with 20 new full time employees working on that. So even with our previous success, we can take nothing for granted, and I know you won't.

Number 1. Card Check. I listed Card Check as Number 1 because it is potentially the most significant pro-union, anti-business proposal that will come out of this Administration and this Congress. Card check is the ability of unions to force a facility to unionize based on the signing of pledge cards, rather than via an open election.

The trade unions believe that the President has not repaid them for all of their electoral support, and are pushing hard. On the other hand, Hilda Solis, the Labor Secretary, was quite a big payback all by herself! Regarding Card Check (which has already been passed by the House but most certainly won't be passed by the Senate this year, if ever) Secretary Solis has said explicitly that it should be passed in order to facilitate unionization. Her rationale is that the middle class has shrunk and that unionization will help increase the standard of living for many Americans, so we need to make it easier for unionization drives to succeed. (Regardless of whether Card Check passes, the Labor Department needs to be watched carefully in its everyday activities given this bias.) To me, the most amazing statistic that has been published in the past year is that there are now more union members that work for government than work for private industry. The uncontrollable cost increases in government, largely tied to pension and retirement policies, are in part the result of this unionization. Now perhaps that reflects that the unions have done a good job for their members. But unlike governments, private industry has to compete. And it is no longer 1920. Businesses usually treat their employees well because they need to in order to compete successfully. Card Check is not needed. I don't think it will pass in its current form, but I do believe that the pressure will stay on and vigilance is essential.

I do not think that the length of the list I just went through will surprise you. And I clearly did not cover everything. But at the end of the day (and the end of the speech), I remain an optimist. This industry has proven itself over and over again. This trade association has proven itself over and over again. The business ability that has made the U.S. the envy of the world, and the integrity that has made this industry and this trade association the envy of Washington, will come through again. When this association's convention is held again in 33 years (2043), I sure don't expect to be there. But I do expect that that this industry will continue to be leading the world in assuring a sustainable and healthy world-wide food supply. It is up to all of us in this room to make sure that is the case, and I know you are up to the challenge. Let's make sure it happens.

Thank you.