



# NGFA

# Newsletter

Volume 60, Number 21, October 9, 2008

## NGFA Task Force Develops Draft Proposal on Compelled Loadout Concept

### ...Recommendation for CBOT Wheat Contract Forwarded to Risk Management Committee...

An NGFA task force met on Oct. 6 in Chicago to develop specific recommendations involving the concept of utilizing “compelled loadout” to enhance convergence in the CBOT wheat futures contract.

The next step is for the 11-member task force’s recommendation to be considered and evaluated by the NGFA’s Risk Management Committee, which tentatively plans to conduct a conference call on the matter during the week of Oct. 13. The task force was comprised of representatives from the NGFA’s Risk Management and Country Elevator Committees, as well as other sectors of the NGFA’s broad membership. [See

*NGFA Newsletter*, Sept. 25, for listing of task force members.]

NGFA Risk Management Committee Chairman Rod Clark, vice president of CGB/Diversified Services, Mt. Vernon, Ind., who chaired the task force, stressed that its work was not intended to reach a conclusion on whether compelled loadout should be recommended by the NGFA to the CME Group and the Commodity Futures Trading Commission (CFTC). Rather, he said, the goal was to develop a package of modifications that are balanced and potentially acceptable to grain hedgers to improve the wheat

#### At-A-Glance

- NGFA task force develops specifics for compelled delivery concept to enhance convergence
- Would apply solely to CBOT wheat futures contract
- NGFA Risk Management Committee to further discuss, evaluate; member input welcome!

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## NGFA Unveils New Information Resource on Grain-Related Court Cases

As a new membership service, the NGFA today announced the availability of a new web-based information resource that contains a digest of grain-related court cases compiled and prepared by the NGFA’s outside legal counsel, Arent Fox LLP, Washington, D.C.

The digest, which references court decisions dating to 1977, provides the names of the parties involved, a summary of the issues involved in each case, the name of the court hearing the case, the citation reference for each case, and the date and a summary of the court’s ruling. A total of 43 court cases currently are summarized on the website.

The website-based information, which will be maintained and updated regularly by Arent Fox, is designed to have broad informational value concerning cases involving both commercial firms and producers. The Arent Fox digest also includes sufficient information identifying the specific courts and cases to enable industry members to access additional information and documentation regarding individual cases. In the future, it is envisioned that, where possible, additional links will be provided so that case-specific documentation (such as the briefs of the parties and the court’s full decision, where available) will be retrievable electronically.

The NGFA for many years has posted on its website the results of Arbitration Decisions rendered through the NGFA’s

Arbitration System for access by members and non-members alike. The new Arent Fox digest of grain-related court cases supplements this information with decisions rendered through the legal jurisprudence system.

Please note that the new digest of grain-related court cases is intended for general informational and educational purposes only – not legal advice. As always, those with specific questions or concerns should consult legal counsel and other experts.

To access the Arent Fox “Summary of Grain Court Cases” [click here](#).

#### What Did You Miss?

The *NGFA Newsletter* is just one of the ways the NGFA keeps members informed about issues affecting their business. Another is the *NGFA E-Alert*, published on weeks when the Newsletter isn’t. Here are a few of the topics covered in the Oct. 3 edition that are not repeated in this Newsletter:

- NGFA Urges Additional Changes to Enhance CBOT Wheat Futures Contract Performance
- More Money for CRP Recipients – But Will They Take It?
- Federal Financial Bailout Plan Includes Extension of Energy Tax Breaks
- USDA Licenses 93.5 Million Bushels of Emergency Storage Thus Far for 2008 Harvest



# Newsletter

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## "Compelled Loadout" continued from page 1

contract's price-discovery and risk-management functions. The decision on whether the NGFA will recommend adoption of compelled loadout will be made following further consideration and input from NGFA-member companies.

The recommendations of the task force, which would apply only to the CBOT wheat futures contract, are as follows:

**D** Adopt demand certificates (compelled loadout) for all delivery locations, both existing locations and the new northwest Ohio, Ohio River and Mississippi River delivery locations proposed by the CME Group. [Note: Approval of the new delivery locations, as well as other aspects of the CME Group proposal, currently is pending at the CFTC.]

**D** An issuer of delivery certificates would have a 24-hour period following the last trading day of each wheat futures contract month to compel loadout (after the contract expires, but before 8 p.m. the following business day). Demand certificates could not be re-tendered for delivery; loadout must occur. Delivery certificates for which loadout is not compelled by the issuer could be re-tendered by the taker against a subsequent contract month, as currently exists.

**D** The maximum amount of loadout that could be compelled would be 15 to 20 percent of each facility's registered loadout capacity. (This percentage would depend upon how many of the newly-proposed delivery locations become regular for delivery. The task force recommended that the CME Group would need to monitor this percentage carefully and potentially adjust it to ensure that the marketplace can

absorb supplies if loadout of the maximum quantity of deliveries was compelled.)

**D** Under compelled delivery, loadout would occur within 60 calendar days, during which time storage charges would be paid by the taker of delivery.

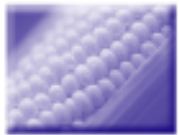
**D** If loadout did not occur within 60 calendar days, accelerated storage charges would be paid by the taker (e.g., an additional 1 cent per bushel per day during the first month following the 60-day loadout period, doubling each subsequent month that loadout is not accomplished).

**D** Milling quality specifications would be applicable to deliveries under compelled loadout, specifically:

- Maximum of 10 percent insect-damaged kernels (IDK)
- Maximum of 1 percent dockage
- 2 parts per million (p.p.m.) vomitoxin, with 3 p.p.m. maximum deliverable at a discount

These quality specifications would provide a higher quality, more merchantable product for the taker when compelled to load out. They would be applicable only when the issuer compelled loadout. Current quality specifications still would apply when the taker initiates loadout.

**NGFA Member Input Welcome!** All NGFA-member companies are invited to provide input on the recommendations; please e-mail comments to NGFA Director of Marketing/Treasurer Todd Kemp at [tkemp@ngfa.org](mailto:tkemp@ngfa.org).



# Biotechnology

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## USDA's APHIS Releases Major Revision Governing Biotech Approvals

The U.S. Department of Agriculture (USDA) this week proposed changes to rules governing the Animal and Plant Health Inspection Agency's (APHIS) regulation of biotechnology-enhanced traits.

Under the biotechnology "coordinated regulatory framework" utilized by the U.S. government, APHIS regulates the plant (including field trials and interstate shipments involving biotech-enhanced plants), while the Environmental Protection Agency regulates biotech plant pesticidal-protein traits and the Food and Drug Administration regulates food and feed safety associated with biotech-enhanced events.

In making the announcement, APHIS Administrator Cindy Smith noted that "this is the most comprehensive review and

revision of our biotechnology regulations since they were first developed in 1987." Of key importance to the grain, feed and processing industry, these regulations cover the importation, interstate movement and environmental release of certain genetically modified organisms. The proposed rules represent the next step in a process that began following a 2003 White House Office of Science and Technology Policy directive ordering that the regulations be updated.

The revisions, which are detailed and wide-ranging, are intended to meet the current and future demands of the technology and the global marketplace through a new permitting process, expanding and clarifying the scope of the regulations, strengthening compliance and enforcement actions, and codify-

(Continued on page 3)





**"Biotech Approvals" continued from page 1**

ing a policy governing the low-level, unintentional release of unauthorized biotech traits.

The proposed changes – summarized in the accompanying table – will be reviewed extensively by the NGFA’s Biotechnology Committee, with comments to be submitted to the agency by the Nov. 24 deadline. In addition to soliciting written comments, APHIS announced it would conduct three public meetings to gather input on the proposed rule:

**Oct. 28, 4 to 7 p.m., Davis Calif.:** Walter A. Buehler Alumni & Visitors Center, Alpha Gamma Rho Hall, University of California.

**Oct. 30, 4 to 7 p.m., Kansas City, Mo.:** Hilton Kansas City Airport, Shawnee Room A, 8801 NW 112<sup>th</sup> St.

**Nov. 13, 4 to 7 p.m., Riverdale, Md. (a Washington D.C., suburb):** USDA Riverside, Oklahoma City Memorial Conference Room, 4700 River Road.

## Major Proposed Revisions

Issue	Current Regulation	Proposed Changes
<i>Scope</i>	Regulate certain genetically engineered (GE) plants, GE nonplant, nonvertebrate organisms that could pose a plant pest or noxious weed risk.	Expanded more explicit statement detailing the APHIS administrator’s responsibility to determine additional GE organisms that are covered.
<i>Notification</i>	One part of the two-tiered system whereby the notification provides an expedited process for those GE plants considered to be a low risk and that the agency has regulated in the past.	Eliminate the notification process and replace with a multi-category permitting system.
<i>Permitting</i>	Required for all GE organisms not eligible for the notification process.	Expanded permitting process to include multiple categories that group GE organisms that share similar plant pest and noxious weed risks together. The two primary factors that determine groupings are the ability of the unmodified recipient plant species to persist in the wild and the potential of the engineered trait to cause harm injury or damage. Each GE organism would be rated in the two factors from low to severe risk, and then placed in the appropriate category that determines the level of regulatory oversight needed for the organism.
<i>Compliance, Enforcement and Remedial Action</i>	General authority to ensure compliance and remediate when someone fails.	Details obligations of compliance and verification techniques available to APHIS. Requires permit holders to establish and maintain records related to their permit and authority for APHIS to review those records. Outlines potential consequences of non-compliance, including denial of future permits, revocation, destruction and penalties.
<i>Low-Level Presence (LLP)</i>	No explicit regulatory provision for the LLP of a regulated article in commercial crops, food, feed or seed. General policy was outlined in March 2007.	Proposes incorporating the March 2007 policy statement on LLP into the APHIS regulations. The policy includes the establishment of criteria that APHIS would use to determine that a LLP would not be cause for some type of remedial action. The criteria are safety-based and would be consulted for a domestic occurrence (such as an escape from field testing) or if detected at a low-level in an imported shipment.

**Regulating Plant-Made Pharmaceuticals:** APHIS proposed little change concerning the regulation of food and feed crops for producing pharmaceutical and industrial products – a high-priority issue for the grain, feed and processing industry. The NGFA repeatedly has warned regulatory officials that these types of GE organisms represent a significant potential threat to the food and feed chain if contamination were to occur, and has supported greater regulatory oversight and restriction of the use and transportation of these products. While APHIS said it

“considered whether to continue to issue environmental release permits for GE plants engineered to produce” plant-made pharmaceutical and industrial products if the plant species used “is the same as, or sexually compatible with, a species commonly used for food or feed,” the agency concluded it could “continue to effectively minimize the risks” utilizing “the same level of oversight as current permits” for most of these GE plants. This will be a key area for NGFA’s review in developing comments on the APHIS proposal.



## FDA to Sample Domestic Milk-Replacer Products for Melamine

### ...Agency Currently Retains Previous 10 P.P.M. Safety Level for Animal Feed, Pet Food...

U.S. Food and Drug Administration (FDA) officials, in an Oct. 8 conference call with the NGFA and Pet Food Institute (PFI), said the agency plans to collect and test domestic samples of milk-replacer products intended for livestock and pet food for the presence of melamine and melamine-related compounds.

The sampling and testing of milk replacers and some complete feeds containing milk products is to be phased in as part of an ongoing FDA assignment to its field inspectors. The agency thus far has collected more than 1,000 samples of milk-based human food products for testing in the aftermath of the most recent melamine-contamination incident involving Chinese-manufactured infant formula, non-dairy creamers, candies and energy drinks. Following the 2007 melamine contamination incidents involving imported Chinese wheat gluten and rice protein concentrate, FDA imposed an import alert against all imports of Chinese vegetable proteins – which has remained in effect. FDA officials also told the NGFA that checks of import manifests have not detected any milk-replacer products imported from China. FDA also banned, prior to the latest incident, all imports of infant formula from China, but has detected melamine in imported Chinese-manufactured energy drinks, candy, coffee and milk tea products sold predominantly in ethnic Chinese retail markets in the United States.

**Melamine Safety Levels:** FDA officials told the NGFA that the agency, at least for the time being, plans to retain the same limits on the presence of melamine and melamine-related compounds in animal feed and pet food that were developed as part of a safety and risk assessment conducted following the 2007 contamination incidents. For food-producing animals, FDA officials told the NGFA that the presence of melamine and melamine-related compounds at levels of 10 parts per million (10 p.p.m.) or less in animal feed do not pose public or animal health concerns.

For wet pet food products (80 percent moisture/20 percent dry matter), FDA said the presence of melamine and melamine-related compounds at levels of 30 p.p.m. or less do not pose a health concern to cats or dogs. During the 2007 incidents, FDA said it requested that products be

recalled if they contained greater than 50 p.p.m. in animal feed for food-producing animals, and at levels exceeding 10 p.p.m. for wet pet food products. Wet pet food products containing 10 to 33 p.p.m. of melamine and melamine-related compounds were subject to Class III recall; while wet pet food containing 33 to 100 p.p.m. was subject to Class II recalls and those products containing more than 100 p.p.m. were classified as Class I recalls.

#### At-A-Glance

- FDA to sample, test U.S.-manufactured milk replacers used in pet food, livestock feed for melamine, melamine-related compounds
- FDA currently plans to retain 10 parts per million (p.p.m.) safety level for melamine, melamine-related compounds in animal feed, pet food
- FDA establishes 2.5 p.p.m. safety level for melamine in human food, except infant formula
- New Elisa Test Kit Available for Detecting Melamine in Food Products

For dry pet food products (12 percent moisture/88 percent dry matter) containing more than 440 p.p.m. were subject to a Class I recall, while those containing 145 to 440 p.p.m. were Class II and less than 145 p.p.m. were Class III.

For human food products, other than infant formula, FDA said its interim safety and risk assessment concluded that levels of melamine and

melamine-related compounds at levels less than 2.5 p.p.m. do not raise public health concerns. This level assumes what FDA called a “worst-case scenario” in which 50 percent of the diet is contaminated at this level, and applies a 10-fold safety factor to the tolerable daily intake to account for any uncertainties. For infant formula, FDA said it was unable to establish any level of melamine and melamine-related compounds that do not raise public health concerns, in large part because of “gaps in our scientific knowledge about the toxicity of melamine and its analogues in infants.”

**New Elisa Test Kit Available for Detecting Melamine in Dairy Products:** In a related matter, Romer Labs, Washington, Mo., announced the availability of an ELISA test kit for detecting melamine in food products. The test – known as “AgraQuant®” Melamine Sensitive immunoassay – reportedly has been validated to detect melamine in dairy products and dry milk powder. The sensitivity level is extremely low – 0.1 to 5 mg/kg for milk, yogurt and yogurt drinks, and 0.5 to 25 mg/kg for milk powder.

**More Information Available:** Members receiving the *NGFA Newsletter* electronically may [click here](#) to access the FDA notice announcing its interim safety and risk assessment for human food. [Click here](#) to access a fact sheet produced by the International Food Information Council Foundation concerning melamine as a contaminant in food.





## NGFA Reminds Industry of FDA Policies for Aflatoxin, Fumonisin

Given stressful weather conditions in several parts of the country this crop-growing season, the NGFA is providing the following reminder about the U.S. Food and Drug Administration's (FDA) action levels for aflatoxin in corn, as well as its regulatory draft guidance for fumonisin.

**Aflatoxin:** FDA's current aflatoxin action levels, based upon intended use, are as follows:

### FDA Aflatoxin Action Levels

Aflatoxin Level	Commodities and Species
<i>(in parts per billion)</i>	
20 p.p.b.:	For corn, peanut products, cottonseed meal and other animal feeds and feed ingredients intended for dairy animals; for animal species or uses not specified below, or when the intended use is not known.
20 p.p.b.:	For corn, peanut products and other animal feeds and feed ingredients, but excluding cottonseed meal, intended for immature animals.
100 p.p.b.:	For corn and peanut products intended for breeding beef cattle, breeding swine or mature poultry (e.g., laying hens).
200 p.p.b.:	For corn and peanut products intended for finishing swine (100 pounds or more).
300 p.p.b.:	For cottonseed meal intended for beef cattle, swine or poultry (regardless of age or breeding status).
300 p.p.b.:	For corn and peanut products intended for finishing beef cattle (e.g., feedlot cattle).

Importantly, with respect to aflatoxin and other toxins and contaminants, FDA generally does **not** permit blending with uncontaminated commodities to reduce the level of contaminants in the resulting mixture to levels acceptable for use in human food or animal feed; the resulting mixture is deemed by FDA to be adulterated within the meaning of the federal Food, Drug and Cosmetic Act. However, on occasion, FDA has relaxed this "no-blending" policy in response to widespread outbreaks of aflatoxin (as occurred in 1988) or in response to state-specific requests to address local outbreaks (as occurred with the states of Iowa and Missouri in 2005, and Missouri in 1993). FDA said that as of today (Oct. 9) no such requests have been received thus far this year.

Further, it is important to note that FDA technically does **not** consider mixing of corn containing a level of aflatoxin **up to** the action level that is allowed for a given species to be a violation of its no-blending policy. For example, since corn containing aflatoxin of up to 300 p.p.b. that is intended to be fed to mature beef cattle is in compliance with FDA's action level for that species, technically **any corn containing less than 300 p.p.b.** can be mixed and fed to that particular species without violating FDA's no-blending policy. By contrast, mixing corn containing up to 200 p.p.b. with corn with less than 20 p.p.b. so as to reduce the level of aflatoxin in the resulting mixture to 50 p.p.b. so it could be fed to laying hens **does** represent a violation of the no-blending policy, since a 100 p.p.b. aflatoxin action level applies to mature poultry.

**Fumonisin:** For fumonisin, FDA on Nov. 9, 2001 issued "final

guidance" containing recommended maximum levels that the agency "considers adequate to protect human and animal health, and that are achievable in human foods and animal feeds with the use of good agricultural and good manufacturing practices." Importantly, FDA's guidance does **not** constitute action levels or enforceable regulatory limits. But the agency stated that fumonisins have been linked to "a variety of adverse health effects in livestock and experimental animals."

### At-A-Glance

- Crop conditions in some areas warrant vigilance for mycotoxins
- FDA action levels for aflatoxin and 'no-blending' policy remain in effect
- FDA's 2001 guidance for fumonisins remains in effect

For corn and corn products intended for **human food**, the FDA-recommended maximum levels for total fumonisins ( $FB_1$ ,  $FB_2$  and  $FB_3$ ) are shown in Table 1. For **animal feeds**, FDA-recommended maximum levels for total fumonisins are shown in Table 2.

### FDA Guidance for Fumonisin

Product	Total Fumonisin ( $FB_1 + FB_2 + FB_3$ ) parts per million
Degermed dry milled corn products (e.g., flaking grits, corn grits, corn meal, corn flour with fat content of < 2.25%, dry weight basis)	2 p.p.m.
Whole or partially degermed dry milled corn products (e.g. flaking grits, corn grits, corn meal, corn flour with fat content of $\geq 2.25\%$ dry weight basis)	4 p.p.m.
Dry milled corn bran	4 p.p.m.
Cleaned corn intended for masa production	4 p.p.m.
Cleaned corn intended for popcorn	3 p.p.m.

Corn and Corn By-Products Intended For:	Total Fumonisin ( $FB_1 + FB_2 + FB_3$ ) parts per million (ppm)
Equids and Rabbits	5 p.p.m. (no more than 20% of diet)**
Swine and Catfish	20 p.p.m. (no more than 50% of diet)**
Breeding Ruminants, Breeding Poultry and Breeding Mink*	30 p.p.m. (no more than 50% of diet)**
Ruminants three months of age or older being raised for slaughter; Mink being raised for pelt production	60 p.p.m. (no more than 50% of diet)**
Poultry being raised for slaughter	100 p.p.m. (no more than 50% of diet)**
All other species or classes of livestock and pet animals	10 p.p.m. (no more than 50% of diet)**

\* Includes lactating dairy cattle and hens laying eggs for human consumption  
\*\* Dry weight basis





## NGFA Issues Statement on Notices Distributed to Grain Buyers in Midwest

The NGFA on Oct. 3 was made aware by several member companies and an Affiliated State and Regional Grain and Feed Association that an entity or entities are distributing notices to buyers in Iowa, Nebraska and perhaps elsewhere that they do not intend to deliver soybeans against existing contracts.

The notice includes a reference to NGFA Grain Trade Rule 28, Failure to Perform. The NGFA also has been made aware that inquiries about the notice have been submitted to the Iowa Attorney General's Office, given the alleged widespread distribution.

Electronic communications containing a copy of the notices were distributed widely by NGFA-member State and Regional Grain and Feed Associations in the area, including the Agribusiness Association of Iowa, Nebraska Grain and Feed Association, and South Dakota Grain and Feed Association, as well as the Iowa and Nebraska Co-op Councils.

Buyers may wish to consult with competent legal counsel if they receive any notices they believe are suspicious.

## U.S. Supreme Court Hears Another Arbitration-Related Case

The U.S. Supreme Court on Oct. 6 heard oral arguments in yet another arbitration-related case to be considered in recent years by the High Court.

The latest case – concerning complicated procedural and federal-state jurisdictional issues – was one of the first scheduled for oral argument during the court's new session that began this week. In *Betty Vaden v. Discover Bank, et al.*, (Case No. 07-773), the court is considering the extent of federal court jurisdiction to enforce arbitration agreements under state law. The case involves interpretation of the Federal Arbitration Act and an application of federal preemption principles, which are based upon the doctrine of federal law trumping inconsistent state laws or regulations.

**Background of Case:** The dispute in this case began in 2003 when Discover sued Betty Vaden in state court for alleged nonpayment of her credit card debt. Vaden countersued alleging breach of contract and challenging the legality of interest payments and other fees imposed by Discover. Discover then petitioned a federal appeals court – the U.S. Circuit Court of Appeals for the Fourth Circuit – to compel arbitration of Vaden's counterclaims – raising what attorneys involved in the case describe as "incredibly complicated jurisdiction questions." The case ultimately was remanded to the state court, and then appealed again to the Fourth Circuit, which affirmed the state court's ruling that the federal courts retained jurisdiction to compel arbitration. The six years of litigation to date have been limited to figuring out which court has jurisdiction, with the real issues involved in the dispute yet to be considered by an arbitrator.

**Issues at Stake:** The Supreme Court's decision to hear this case follows a series of similar cases in various

### At-A-Glance

- Case involves complex, largely procedural issues on extent to which federal courts have jurisdiction to enforce arbitration agreements that are based on state law
- Case involves Discover credit card firm and consumer
- Decision, expected in July, potentially could determine how arbitration-related court proceedings are conducted in future

other federal circuit courts that were decided differently. This week's oral argument has been described by those participating as involving "hard-hitting questions" by an "intellectually engaged" court. At stake are issues that are complex and largely procedural – but potentially significant – in how arbitration-related court proceedings are to be conducted in the future. While difficult to predict the outcome, based upon past

decisions it remains more likely than not that the Supreme Court will rule in favor of arbitration, and in support of federal jurisdiction and the Federal Arbitration Act. A decision is expected by July 2009.



## Calendar

**Nov. 5, 2008:** Joint Agroterrorism and Facility Security Committee Task Force  
Hilton Garden Inn O'Hare, Chicago, Ill.

**Dec. 7, 2008:** Country Elevator Committee  
Marriott Renaissance Grand Hotel, St. Louis, Mo.

**Dec. 7-9, 2008:** Country Elevator and Feed Industry Conference & Trade Show  
Marriott Renaissance Grand Hotel, St. Louis, Mo.

**Dec. 9, 2008:** Membership & Marketing Committee  
Marriott Renaissance Grand Hotel, St. Louis, Mo.

**Dec. 9, 2008:** Joint Agroterrorism/Facility Security Committee  
Marriott Renaissance Grand Hotel, St. Louis, Mo.

**Dec. 17, 2008:** NGFA/GEAPS Joint Grain, Grades and Weights Committee  
Kansas City Airport Hilton Hotel, Kansas City, Mo.

**Mar. 29-31, 2009:** 113th Annual Convention  
Westin Swan Hotel, Walt Disney World, Orlando, Fla.









